FILED
SUPREME COURT
STATE OF WASHINGTON
1/9/2019 12:39 PM
BY SUSAN L. CARLSON
CLERK

SUPREME COURT NO. 96674-5
COA NO. 76656-2-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HAYDEN CEPA,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George F. Appel, Judge

PETITION FOR REVIEW (CORRECTED)

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A. IDENTITY OF PETITIONER

Hayden Cepa asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Cepa requests review of the decision in State v. Hayden Cepa, Court of Appeals No. 76656-2-I (slip op. filed Nov. 26, 2018), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the evidence is insufficient to convict for drive-by shooting because the State failed to prove the discharge of a firearm (1) endangered a specific person or (2) created a substantial risk of death or serious physical injury?

D. STATEMENT OF THE CASE

One early morning, Cepa shot a rifle into the air in two different locations while his aunt drove him around in a car. 1RP 85-87, 98-100; Ex. 85 (recording of police interview); Ex. 84 at 3, 6, 11 (transcript of recorded police interview). He was not in a gang. Ex. 84 at 12-13. As he told police, he was just being "stupid" by engaging in a "dick measuring contest." Ex. 84 at 10, 12-13. The State charged Hayden Cepa with two counts of drive-by shooting. CP 116. Count 1 involved an incident in

Arlington. 1RP[1] 14-15, 300. Count 2 involved an incident in Marysville. 1RP 14-15, 300.

Rita Wilson, residing in the Smokey Point neighborhood of Arlington, heard gunshots in the early morning, which she thought came from the direction of the Arlington Municipal Airport. 1RP 85-88. At 5:11 a.m., a police officer received the dispatch report of shots fired and patrolled the neighborhood but found nothing unusual. 1RP 91-93, 96. It is quiet at that hour, with little pedestrian or vehicle traffic. 1RP 95. Arlington resident Brandon McClure later noticed a bullet had gone through his garage door. 1RP 189-92; Ex. 80 (map).

Marysville resident Kitty Broughton-Polonis lived in a suburban neighborhood. 1RP 97. She heard a gunshot at 5:20 a.m. 1RP 98-100. Joshua Zitnik lived nearby. 1RP 165-66; Ex. 87 (map). He woke up to the sound of gunshots outside his house. 1RP 168. Surveillance footage from home a security camera showed a vehicle driving by with gunshot fire coming from the passenger window. 1RP 158-59, 172-74; Ex. 86 (video).

Detective Craig Bartl found four spent shell casings in the street and one casing in the driveway in front of the residence. 1RP 123, 129;

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[1] The verbatim report of proceedings is referenced as follows: 1RP - three consecutively paginated volumes consisting of 2/13/17, 2/14/17, 2/15/17; 2RP - 3/7/17.

Ex. 79 (map). From Zitnik's video footage, it appeared the shots were fired at a 45-degree angle. 1RP 156-57; Ex. 81-83, 86. Bartl did not know where a bullet would have come down. 1RP 159. No bullets were found in Maryville. 1RP 155. The lack of report of anyone finding a bullet on their property indicated the rifle was fired at a high enough angle that it went over the nearby houses. 1RP 160. Officers did not inspect all the houses in the neighborhoods behind the immediate neighborhood, but no one reported finding a bullet in Marysville. 1RP 161. The Marysville address is outside the downtown area. 1PP 213.

Police tracked down the registered owner of the vehicle shown in the surveillance video, who turned out to be Carolyn Cepa. 1RP 111-17. Police located the vehicle located at her address in Marysville. 1RP. 136. Carolyn told police that Hayden Cepa, her nephew, was at the residence. 1RP 138. Hayden Cepa was detained. 1RP 139-40. He smelled of intoxicants. 1RP 153. Cepa admitted to the detective that he discharged his firearm in two locations. Ex. 84 at 3, 6. He explained that he left the house with his Aunt Carolyn, taking his rifle and unloaded magazine with him. Id. at 3-4. He brought the rifle to shoot it, figuring they would be in a rural area. Id. at 5. There was no intended destination, but they did not leave town. Id.

The first time he fired into the ground, testing it out, as the gun was new. Id. at 6-7, 9. The first or second time he may have fired from the vehicle. Id. at 7. He believed he stepped out of the vehicle and shot the second time. Id. at 10. He thought he did not fire near houses. Id. at 10. He did not remember shooting out of the vehicle in a neighborhood but acknowledged that if video footage showed Carolyn's car in a neighborhood with a gun shooting out the widow, it would be him doing the shooting. Id. at 11.

After the interview, police recovered an unloaded Ruger AR rifle from the residence. 1RP 141, 152. A forensic expert on firearms opined the fired cartridge cases came from the firearm obtained from Cepa's residence and the bullet could have come from that firearm. 1RP 268-69.

A jury found Cepa guilty of drive-by shooting in count 2 (Maryville) and the lesser offense of unlawful discharge in count 1 (Arlington). CP 55-57.

On appeal, Cepa argued the evidence was insufficient to convict for drive-by shooting on count 2. The Court of Appeals affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS WARRANTED BECAUSE WHETHER THE DRIVE-BY SHOOTING STATUTE REQUIRES PROOF THAT A SPECIFIC PERSON BE ENDANGERED IS AN ISSUE OF PUBLIC INTEREST AND THE COURT OF APPEALS' INTERPRETATION CONFLICTS WITH SUPREME COURT PRECEDENT.

This case involves an issue of statutory interpretation: whether the offense of drive-by shooting requires that a specific person be endangered. The evidence is insufficient to show Cepa endangered "another person" as that phrase is used in the statute defining the offense of drive-by shooting. RCW 9A.36.045(1). The Court of Appeals' contrary decision conflicts with the Supreme Court's decision in State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005), which analyzed what the phrase "another person" meant in the analogous reckless endangerment statute. In the alternative, the evidence is insufficient to show the firearm discharge created a substantial risk of death or serious physical injury. Review is warranted because the Court of Appeals decision conflicts with Graham and is an issue of substantial public importance. RAP 13.4(b)(1), (4).

a. Basic principles in the sufficiency of evidence analysis.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const.

art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). "To determine whether the State has produced sufficient evidence to prove each element of the offense, we must begin by interpreting the underlying criminal statute." State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). "In determining the elements of a statutorily defined crime, principles of statutory construction require the court to give effect to all statutory language if possible." State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). "Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process." State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980).

b. The State failed to prove that "another person" was put at risk.

"A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which

creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge." RCW 9A.36.045(1).

"The enactment of the reckless endangerment ('drive-by-shooting') statute in 1989 was a response to the 'drug-related crimes of violence by members of youth gangs engaged in illegal drug sales." State v. Rivera, 85 Wn. App. 296, 300-01, 932 P.2d 701 (1997) (quoting 1989 Final Legislative Report, 2SHB 1793, at 118). "The Legislature found that random shootings from automobiles was particularly disturbing: '[I]ncreased trafficking in illegal drugs has increased the likelihood of 'drive-by shootings.' It is the intent of the legislature . . . to categorize such reckless and criminal activity into a separate crime and to provide for an appropriate punishment.'" Id. at 301 (quoting Laws of 1989, ch. 271, § 108, p. 1278).

The charge of drive-by shooting in Cepa's case is an awkward fit. It is an example of prosecutorial overreach. Cepa's conduct has nothing to do with the evil that the legislature intended to combat. Cepa was not a gang member and was not involved in drug activity. He did not shoot at anyone in connection with gang or drug activity. In fact, he did not target anyone. He stupidly discharged a firearm into the air from a vehicle. Still,

the plain language of the statute does not require involvement in gang or drug activity in order to convict someone of drive-by shooting. The animating intent behind the law, however, should inspire caution in determining whether Cepa's conduct is the type of criminal action the legislature meant to capture in enacting the drive-by shooting statute.

The key to this sufficiency of evidence analysis is the meaning of the phrase "another person" in the statute. The risk must be posed to an actual, specific person, not a theoretical person. The State failed to prove that the firearm discharge created a substantial risk of injury and death to a specific person. For this reason, the evidence is insufficient to convict Cepa of this crime.

The legislature had not defined the term "another person" and no appellate court has defined the term in the drive-by shooting statute. RCW 9A.36.045(1). Under the plain language rule, courts may look to related statutes. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The Supreme Court has determined the meaning of "another person" in the closely related statute defining the crime of reckless endangerment. State v. Graham, 153 Wn.2d 400, 405-08, 103 P.3d 1238 (2005). RCW 9A.36.050(1) provides "[a] person is guilty of reckless endangerment when he or she recklessly engages in conduct not

amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person."

The plain language of the drive-by shooting statute mirrors the language of the reckless endangerment statute. The drive-by shooting statute is the same as the reckless endangerment statute with the addition of vehicle involvement. The reckless endangerment statute contemplates that drive-by shooting is a specific type of reckless endangerment, i.e., reckless endangerment that occurs by discharging a firearm from a vehicle or its immediate proximity. RCW 9A.36.045(1); RCW 9A.36.050(1).

The crime of "drive-by shooting" was originally titled "reckless endangerment first degree" and the statutory language of first degree reckless endangerment was identical to the language of the current drive-by shooting statute.[2] Laws of 1989 ch. 271 § 109. The legislature amended the offense of first degree reckless endangerment to a class B felony in 1995 and renamed it "drive-by shooting" in 1997. Laws of 1995 ch. 129 § 8; Laws of 1997 ch. 338 § 44.

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[2] Former RCW 9A.36.045(1) (1989) provided: "(1) A person is guilty of reckless endangerment in the first degree when he or she recklessly discharges a firearm in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge."

Because the language of the reckless endangerment statute contains identical language to the drive-by shooting statute, with each statute requiring that the defendant "create[] a substantial risk of death or serious physical injury to another person," that language should be interpreted in the same manner. "Similar interpretation should result where the language and subject matter of two statutes are similar." Spokane Cty. Health Dist. v. Brockett, 120 Wn.2d 140, 150, 839 P.2d 324 (1992).

In Graham, the Supreme Court considered the unit of prosecution for the reckless endangerment statute. Graham, 153 Wn.2d at 404-05. Determining the unit of prosecution involves examining the statute to glean the legislature's intent in criminalizing the conduct at issue. Id. at 405. The State argued "the legislature intended to criminalize a defendant's reckless endangerment of a particular individual." Id. at 405. The Supreme Court agreed, holding "[i]n light of the plain language of RCW 9A.36.050(1), as well as the nature of reckless endangerment as a crime against the person, . . . the unit of prosecution for the crime of reckless endangerment is each person endangered." Id. at 407-08. "[T]he reckless endangerment statute does not refer to '*any* other person' but refers instead to '*an* other person.'" Id. at 406, n.2 (citing Webster's Third New Int'l Dictionary 89, 75 (1993)).

In support of its conclusion, the Court cited Commonwealth v. Frisbie, 506 Pa. 461, 466, 485 A.2d 1098 (Pa. 1984), which concluded its reckless endangerment statute, in prohibiting conduct jeopardizing "'another person,'" "was written with regard to *an individual person* being placed in danger of death or serious bodily injury, and that a separate offense is committed for each individual person placed in such danger." Graham, 153 Wn.2d at 406. "By prohibiting conduct that recklessly endangers 'another person,' the legislature indicated that the unit of prosecution for reckless endangerment is not the endangering conduct but the particular person placed at risk." Graham, 153 Wn.2d at 410.

The Supreme Court agreed with the Court of Appeals' conclusion. Id. at 406. This is how the Court of Appeals put it: "RCW 9A.36.050(1) does not address creating risk of harm to a group of people or things. A person commits the crime by creating a risk in relation to another person," i.e., "a single person." State v. A.G., 117 Wn. App. 462, 469-70, 72 P.3d 226 (2003), aff'd sub nom. State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005).

Analysis of legislative intent and the meaning of "another person" in the reckless endangerment statute directly translates to corollary language used in the drive-by shooting statute. Like the reckless endangerment statute, the drive-by shooting statute does not require proof

that "any person" was put at risk. Rather, "another person" must be put at risk. The statutory use of "another person" instead of "any person" has specific import. State v. Diaz-Flores, 148 Wn. App. 911, 917, 201 P.3d 1073, review denied, 166 Wn.2d 1017, 210 P.3d 1019 (2009) (comparing voyeurism statute with reckless endangerment statute). "'Any' ... mean[s] 'every' and 'all.'" Id. at 911 (quoting State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991)). Whereas "another" denotes a particular individual. Graham, 153 Wn.2d at 410.

To sustain a drive-by shooting conviction, the evidence must therefore show a particular person was put at substantial risk of death or serious injury. In this regard, compare the drive-by shooting statute to the offense of unlawful discharge of a firearm. Under RCW 9.41.230(1)(b), "[f]or conduct not amounting to a violation of chapter 9A.36 RCW, any person who . . . Willfully discharges any firearm, air gun, or other weapon, or throws any deadly missile in a public place, or in any place where *any person might be endangered* thereby. . . . although no injury results, is guilty of a gross misdemeanor[.]" (emphasis added). The unlawful discharge statute omits the phrase "another person." Instead, it uses the phrase "any person," denoting one can be convicted of that crime without putting any particular person at risk. It is an "elementary rule that where the Legislature uses certain statutory language in one instance, and

different language in another, there is a difference in legislative intent." United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wn.2d 355, 362, 687 P.2d 186 (1984).

Application of this interpretation of the drive-by shooting statute to the facts of Cepa's case shows the evidence is insufficient to convict him of drive-by shooting. The State identified no particular person that was put at substantial risk of death or serious physical injury from the discharge. Instead, its theory, based on the evidence, was that the discharge put the general neighborhood population at risk. 1RP 314, 321-23, 337-39. That is not enough to sustain a conviction for drive-by shooting.

The trial court denied the defense motion to dismiss the charges based on insufficient evidence after the State rested its case. 1RP 272-77, 286-98. In so doing, the trial court considered the Supreme Court's decision in Rich, which held evidence sufficient to support a conviction for reckless endangerment. Rich, 184 Wn.2d at 910. Rich is consistent with Cepa's interpretation. The evidence in that case showed that Rich's driving while intoxicated and speeding in traffic posed a substantial risk of death or serious physical injury to the young child in the front passenger seat. Id. at 900-01, 905, 910. The risk posed to "another person" in that

case was a specific individual. In Cepa's case, there was no substantial risk of death or serious physical injury to a particular person.

The Court of Appeals disagreed with this interpretation of the drive-by shooting statute. It relied on In re Personal Restraint of Bowman, 162 Wn.2d 325, 332, 172 P.3d 681 (2007), which it described as holding "the statute does not require proof of a specific victim." Slip op. at 7. As happens from time to time, the Court of Appeals seized on imprecise language in a decision, misinterpreted its import by taking it out of context, and then elevated the misinterpretation into a holding.

The issue in Bowman was whether the holding of In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) precluded the use of drive-by shooting or reckless endangerment as a predicate for the crime of second degree felony murder. Bowman, 162 Wn.2d at 327. The Supreme Court held it did not, and that drive-by shooting may serve as a predicate offense to felony murder. Id. at 335.

The petitioners in that case argued that under the reasoning of Andress, drive-by shooting, like assault, may not serve as the predicate offense to felony murder because the drive-by shooting is not independent of and will always be "directly linked to the homicide." Id. at 331. In rejecting the argument, the Bowman court explained "[i]t is plain to see that the drive-by shooting statute does not criminalize conduct that causes

bodily injury or fear of such injury. Rather, the statute criminalizes specific *reckless conduct* that is inherently dangerous and creates the risk of causing injury or death." Id. at 332. The Court's focus, then, was on distinguishing between conduct that causes actual injury or fear of injury as opposed to conduct that merely creates a risk of injury. Bowman continued: "Although a drive-by shooting may cause fear of bodily injury, bodily injury, or even death, such a result is not required for conviction. Drive-by shooting does not require a victim; it only requires that reckless conduct creates a risk that a person might be injured." Id.

The Court of Appeals here misinterpreted what Bowman meant in saying "Drive-by shooting does not require a victim." When Bowman referred to "victim" in this context, it meant a person who is actually injured or put in fear of injury. It did not mean that the crime is committed even where no particular person is put at risk of injury. Bowman did not address that distinct question and such an interpretation would squarely conflict with the plain language of the statute.

In Bowman, the Court recognized "first degree reckless endangerment and drive-by shooting are now legally the same crime." Id. at 327 n.1. Given that recognition, the statutory construction of drive-by shooting, formerly first degree reckless endangerment, should be the same as the statutory construction of reckless endangerment, formerly second

degree reckless endangerment. This Court in Graham interpreted the reckless endangerment statute and held criminal liability attaches when a specific person is endangered. Graham, 153 Wn.2d at 406-08, 410. The drive-by shooting statute must be interpreted in the same manner.

The Court of Appeals' contrary interpretation leads to absurd results. If no particular person needs to be put in danger to convict for drive-by shooting, then someone who does not shoot a gun at a particular person but rather shoots a gun into the air in an area where thousands of people live could be guilty of thousands of counts of drive by shooting.[3] In interpreting statutes, "'we presume the legislature did not intend absurd results' and thus avoid them where possible." State v. Weatherwax, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017) (quoting State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010)).

"In criminal cases, fairness dictates that statutes should be literally and strictly construed and that courts should refrain from using possible but strained interpretations." State v. Garcia, 179 Wn.2d 828, 837, 318 P.3d 266 (2014). "Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal

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[3] In closing argument, the prosecutor contended Cepa put "everyone in the neighborhood in Arlington that he fired in and everyone in the neighborhoods surrounding the area of Marysville where he fired that weapon at substantial risk for possible death or serious injury." 1RP 314.

interpretation, we must choose the first option.'" In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)). A strict construction of the drive-by statute requires the interpretation that the risk posed to "another person" means the risk posed to a particular person.

Even assuming the phrase "another person" is susceptible to more than one reasonable interpretation, the rule of lenity requires the court "to adopt the interpretation most favorable to the defendant." State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008). Any ambiguity must be strictly construed against the State. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). "The underlying rationale for the rule of lenity is to place the burden on the legislature to be clear and definite in criminalizing conduct and establishing criminal penalties." Weatherwax, 188 Wn.2d at 155. Under the rule of lenity, the phrase "another person" used in the drive-by shooting statute must be interpreted in Cepa's favor as meaning a particular person. The State failed to prove a particular person was endangered and so failed to prove its case.

c. In the alternative, the State failed to prove the firearm discharge created a substantial risk of death or serious physical injury.

The pattern to-convict instruction used in this case tracks the language of the statute. WPIC 35.31. It required the State to prove "[t]hat the discharge created a substantial risk of death or serious physical injury to another person." CP 72 (Instruction 9). Cepa acknowledges discharging a firearm by shooting into the air rather than at anyone poses a risk. The question, though, is whether that risk was substantial. Under the facts of this case, the firearm discharge did not create a *substantial* risk of death or serious physical injury.

The term "substantial" means "'considerable in amount, value, or worth'" and more than just "having some existence." Rich, 184 Wn.2d at 904-05 (addressing term in reckless endangerment statute) (quoting State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (quoting Webster's Third New Int'l Dictionary 2280 (2002)). Cepa fired his rifle in a residential neighborhood. But he did not fire into anyone's house. He did not fire at ground level. He fired the gun into the sky at a 45-degree angle, such that the bullets would have gone over the houses in the immediate area. 1RP 156, 160. What goes up must come down. The question, though, is where the bullets would have come down. No bullets were ever reported or found in connection with the Marysville discharge. 1RP 155, 161. The forensic expert testified that the bullet from the Ruger used by Cepa travels at 3000 feet per second. 1RP 237. But no testimony

was presented on how far the bullets would have traveled before falling to earth and in what area they would have fallen.[4]

In denying the motion to dismiss the charge based on insufficient evidence, the trial court relied on the notion that the bullets could have come down in a "populated section of Marysville," and that it was not unreasonable to find a person might have been up and outside the house in the early morning. 1RP 289-90, 293-94, 296-97.[5] The problem, though, is that no evidence shows the bullets would have come down in a populated area of Marysville, as opposed to unpopulated farmland or forest. Couple this with the fact that the firearm discharge occurred in the early morning when most people are asleep or otherwise still inside their homes, and the evidence is insufficient to show that the discharge created a substantial risk of death or injury.

The existence of substantial risk of death or serious injury is a factual finding. State v. Austin, 65 Wn. App. 759, 762, 831 P.2d 747 (1992). In determining the sufficiency of evidence, existence of a fact

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[4] The trial court, in denying the motion to dismiss the charges for insufficient evidence, acknowledged "[t]here's no evidence of where those bullets came down." 1RP 289.

[5] The court believed "The way the statute is written, the other person can't simply be a theoretical person." 1RP 287. The trial court said McClure, the Arlington resident, was "not a theoretical person" because he was home at the time the bullet penetrated his garage. 1RP 288, 292. The court did not identify anyone in Marysville in the same manner.

cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). A risk existed. But a substantial risk requires more. It must be considerable. Rich, 184 Wn.2d at 904-05. It is speculation that the risk presented by the discharge here was considerable.

d. The remedy is reversal of the conviction and dismissal with prejudice.

Where insufficient evidence supports conviction, the charge must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Cepa's drive-by shooting conviction must be reversed and the charge dismissed with prejudice because the State failed to prove each element of the charged offense.

F. CONCLUSION

For the reasons stated, Cepa requests that this Court grant review.

DATED this 9th day of January 2019.

Respectfully submitted,

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January 09, 2019 - 12:39 PM

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