

NO. 38660-7

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AUGUSTUS M. OAKLEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 07-1-02068-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence for a trier of fact to find defendant guilty of attempted drive-by shooting when defendant took a substantial step toward the crime?
2. Should this court follow well-settled law, and find that the trial court could properly imposed, based upon jury findings, additional time for firearm enhancements pertaining to defendant's assaults in the second degree conviction, even though one of the elements of those offenses required the jury to find the defendant committed the assaults with a deadly weapon?
3. Did the trial court abuse its discretion in ordering restitution when the acts were causally connected to defendant's crime?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Augustus Oakley, on April 17, 2007, with three counts of assault in the first degree, and one count of drive-by shooting. CP 1-3.

The case was called for trial on August 25, 2008, in front of the Honorable Susan Serko. RP 3¹. The court heard pre-trial motions including a CrR 3.5 motion. RP 49-127.

The jury found defendant guilty of three counts of the lesser included offenses of assault in the second degree. RP 1656-58, CP 92-94. The jury also found defendant guilty of the lesser included offense of attempted drive-by shooting. RP 1658, CP 95. The jury also found that defendant was armed with a firearm when he committed all three of the assaults in the second degree. RP 1658-59, CP 96-98.

Sentencing was held on December 12, 2008. RP 1680, CP 102-115. Defendant's sentencing range on the assault charges was 22-29 months and 23.25-30.75 months on the attempted drive-by shooting charge. RP 1675, CP 102-115. All three firearm enhancements carried 36 months. RP 1675, CP 102-115. The court sentenced defendant to the low end of 23.25 months on the attempted drive-by shooting charge and to the low end of 22 months on the assault charges plus the firearm enhancements for a total of 120 months. RP1680, CP 102-115.

Defendant filed this timely appeal. CP 116.

¹ The State will refer to the sequentially paginated volumes of VRPs as "RP" and the single non-sequential VRP as "6/5/08RP."

2. Facts

On April 4, 2007, a car driven by Isaiah Lynn was stopped by police. RP 198, 202. Isaiah's brother, Stephen, was sitting in the front passenger seat. RP 203. Defendant, Augustus Oakley, was in the passenger seat behind Stephen and Richard Taylor was sitting behind Isaiah. RP 203. Isaiah was arrested and search incident to arrest of the vehicle yielded a .357 Smith and Wesson under the front passenger seat. RP 204-5, 208. The gun could only be accessed from the backseat. RP 208. The police first asked Stephen Lynn if the gun was his. RP 1061. Stephen told the officers the gun belonged to defendant. RP 1061-2. Defendant heard this and accused Stephen of being a snitch. RP 1065. When asked if the gun was his, defendant said the gun was his and he didn't care what happened to him. RP 213.

On April 15, 2007, Christopher Lynn heard his brothers on the phone. RP 647. They were getting upset. RP 647. Stephen said that defendant wanted to fight him for being a snitch. RP 1067. Defendant and Taylor arrived in defendant's car which is very loud. RP 1067. Defendant was driving. RP 679, 1075.

When Christopher walked outside, he saw Taylor and defendant. RP 647. Defendant pulled out a gun and cocked it. RP 654, 1076, 1085. The gun was a big, black assault rifle. RP 1078. Defendant tried to fire the gun and it went up in the air and backfired. RP 1088, 1090, 1091. Stephen saw black and orange coming from the gun. RP 1090.

Christopher saw a spark and heard a crackling sound like something had jammed. RP 654, 656. None of the Lynn brothers had a weapon. RP 1073. A physical altercation followed. RP 673-6. Taylor threatened them by saying, "all you guys are dead."

After the physical altercation, defendant and Taylor went back to the vehicle. RP 1099. The vehicle was very loud. RP 679. The vehicle approached with its lights off. RP 679, 781. Taylor was driving and defendant was hanging out of the window with the rifle. RP 1104, 1105, 1173-4. The car slowed down. RP 1173. Defendant reached out his arm, tried to shoot again and the gun jammed again. RP 679, 781, 1215. The gun was pointed at them. RP 748, 1139.

On April 15, 2007, around 9:20 p.m., officers were dispatched to a report of a drive-by shooting. RP 423, 470. Officers looked for shell casings in the area of the Lynn residence but could not find any. RP 242, 386, 448.

Robert Moyer lived on Nathan Avenue by the Lynn's. RP 577. He described hearing a loud pop, pop sound. RP 579, 597, 604. Isaiah Lynn told him that shots had been fired. RP 580. When Mr. Moyer looked down the street, he could see a car turn around in the turnabout with its lights out. RP 586. The car slowed down by his residence and the window was rolling down. RP 610. He told everyone around him to take cover. RP 587.

Scott Keith saw the physical altercation. RP 1023-4. Isaiah asked him if he heard the shots. RP 1024. Mr. Keith then heard a really loud, older car. RP 1031, 1034. The car drove toward them with the window rolled down and headlights off. RP 1050.

Christopher Lynn Sr. saw the car come with no lights on. RP 1416. One of his sons said that there was gun. RP 1422. Mr. Lynn saw Taylor driving the car. RP 1425. The passenger window was down and an object was sticking out of the window. RP 1425. His sons told him that, "they tried to shoot us." RP 1429.

Patricia Lynn saw the fight and also saw the car coming at them with no lights on. RP 1391, 1396. One of her sons yelled that he had a gun. RP 1396. Ms. Lynn saw defendant hanging out of the window with a gun. RP 1399. There was a smirk on his face. RP 1400.

Around the same time, another call came out about a related incident a few blocks away. RP 434, 450, 477, 480. The incident involved a damaged vehicle. RP 451. The location was three blocks away from the Lynn residence. RP 263. A Mercury Mariner had sustained damage as well as a garage door as the car was pushed into the garage door. RP 285, 287-88, 479.

Leonard Wheller saw an older vehicle that was very loud and driven by with two males; the passenger was a black male. RP 457-9, 1269. The vehicle was banging against the locked fence trying to get out. RP 1268. The vehicle then went into reverse past his house. RP 1268-9.

The passenger was hanging out of the window and yelling out the window. RP 1269, 1280. Mr. Wheeler only got a glimpse of the driver. RP 413. He was distracted by the bullet that was thrown at him from the vehicle. RP 413. The round that was thrown at Mr. Wheeler hit his chest and was live. RP 415, 1269. Officers were able to locate the rifle round under Mr. Wheeler's vehicle. RP 453, 487-8, 1276. It was a 7.62 mm rifle round. RP 456. The car continued to back down the road, swerving, until it swerved into his neighbor's driveway and hit his neighbor's car. RP 1271. The vehicle then took off toward the gate. RP 1273.

Erin Pozanski described hearing a loud car and then heard the car start reversing. RP 626, 629. She then heard a crash and saw her neighbor's SUV pushed into their garage. RP 630-1. As she watched, the car that hit her neighbor's SUV sped out of the gate. RP 631.

Ross DeJong heard what he thought was a loud motorcycle and then heard a car crash around 9:30 p.m. RP 887-8. When he looked out, he saw severe damage to the back of his car. RP 889. He also saw an older car trying to get out of the gate. RP 889-90.

Shortly after the incident, the vehicle involved was located. RP 291. Two black males were seen in the vehicle. RP 526. Both occupants exited the vehicle. RP 531. Richard Taylor was apprehended but defendant was not. RP 540-1, 544. The vehicle, a Pontiac Grand Am, was registered to defendant. RP 333, 574. A rifle was found in the trunk of the vehicle. RP 315. The rifle was an SKS, semi-automatic rifle. RP

322. Two rounds were in the magazine and two rounds were jammed in the action of the gun. RP 354. The two rounds were jammed facing each other. RP 352. A blue bag was covering the gun. RP 350. A plastic baggie was found on the front passenger floorboard with two live rounds. RP 326. A live round was also found in the weather stripping on the car's window. RP 328.

The gun recovered was a 7.62 x 39 caliber semi-automatic rifle. RP 828. It is known as an SKS. RP 829. The gun itself was operable. RP 834. The bullets wedged in the way they had been when the gun was recovered would not have fired. RP 855-6. A gun jamming like the rifle had jammed is not common. RP 362. However, if the firearm had fired, there would be a flash. RP 857. The guns sound is consistent with the sound of a car backfire or firecrackers. RP 881.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF ATTEMPTED DRIVE-BY SHOOTING WHEN THERE WAS SUFFICIENT EVIDENCE THAT HE TOOK A SUBSTANTIAL STEP TOWARD COMMITTING THE CRIME.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494,

499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1). To constitute a “substantial step,” the conduct must be “strongly corroborative of the actor’s criminal purpose.” *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002); *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978)). Mere preparation to commit a crime is not a substantial step. *Workman*, 90 Wn.2d at 449-50.

Drive-by shooting is defined in RCW 9A.36.045(1). The statute states:

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.

In the instant case, the testimony was sufficient to show that defendant took a substantial step toward the crime of drive-by shooting. Defendant was hanging out of the window of the vehicle as it passed by the victims. RP 679, 781, 1104, 1105, 1173-4, 1399. He had a gun in his hand and it was pointed out of the open window. RP 679, 781, 748, 1139,

1399, 1425. At least one witness testified that defendant attempted to fire the weapon again. RP 679, 781. The fact that it did not fire is exactly what makes the crime an attempted drive-by shooting and not a completed drive-by shooting. While later testimony at trial revealed that the weapon was jammed and the bullet was backwards and could not be fired, there was no testimony provided that defendant knew the gun was inoperable when he attempted to fire it. In fact, the testimony showed that defendant continued to try and fire the gun. RP 679, 781, 1088, 1090, 1091. Defendant took a substantial step toward the crime of drive-by shooting and but-for the gun jamming, it arguably would have been a completed crime. There was sufficient evidence for the jury's verdict.

2. THE WELL -SETTLED RULE THAT A CRIMINAL DEFENDANT IS NOT PLACED IN DOUBLE JEOPARDY BY AN IMPOSITION OF A FIREARM SENTENCE ENHANCEMENT WHEN THE UNDERLYING OFFENSE HAS USE OF A DEADLY WEAPON AS AN ELEMENT IS UNAFFECTED BY **BLAKELY**.

The double jeopardy clause bars multiple punishments for the same offense. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9; *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). When a defendant's act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. *Id.* "If the legislature intended that cumulative punishments can

be imposed for the crimes, double jeopardy is not offended.” *Id.* (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Legislative intent is the foremost consideration. “The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.” *Missouri v. Hunter*, 459 U.S. 359, 386, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (emphasis in the original) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

Here, it is clear that the Legislature intended to impose separate enhancements for each crime committed with a firearm, regardless of whether the crimes involved the same weapon. RCW 9.94A.533(3) provides in part:

(3) The following additional times shall be added to the standard sentence range for felony crimes . . . if the offender or an accomplice was armed with a firearm . . . and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. . . .

. . .

(e) Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory,

shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

(f) The deadly weapon enhancements in this section shall apply to all felony crimes **except** the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony (emphasis added)

The “statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement.” *State v. Huested*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (evaluating the deadly weapon enhancement section of chapter 9.94A RCW, which contains the same language as the firearm enhancement section). Legislative intent is clear as to the purpose and applicability of firearm enhancements.

Washington courts have repeatedly rejected arguments that weapons enhancements violate double jeopardy. *Huested*, 118 Wn. App. at 95 (citing *State v. Claborn*, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981)); *see also State v. Nguyen*, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, 187 P.3d 752 (2008). In *Claborn*, the defendant received separate weapons enhancements for burglary and theft convictions arising from the same event. 95 Wn.2d at 636-38. On appeal, Claborn argued that separate enhancements for the “single act” of being armed with a deadly weapon during the burglary and

theft violated double jeopardy. Noting that burglary and theft have separate elements and that the enhancement statutes did not themselves create criminal offenses, the *Claborn* court held that the enhancements did not create multiple punishment for the same offense.

Courts have also rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. See *State v. Caldwell*, 47 Wn. App. 317, 319, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986); *State v. Harris*, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). These cases make clear that, for purposes of sentence enhancements, “the double jeopardy clause does no more than prevent greater punishment for a single offense than the Legislature intended.” *Caldwell*, 47 Wn. App. at 319 (quoting *Pentland*, 43 Wn. App. at 811-12 (citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983))). That court concluded that the Legislature had clearly expressed its intent that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding the fact that being armed with a deadly weapon was an element of the offense. *Caldwell*, 47 Wn. App. at 320.

In the case before the court, defendant was convicted of three counts of assault in the second degree, and attempted drive-by shooting.

The jury found firearm enhancements on all three assault charges. Thus, defendant's sentence included three firearm enhancements for a total of 108 months of enhancement time added to the standard range. CP 102-115.

Defendant challenges the firearm enhancements he received on his convictions for assault in the second degree, arguing that in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this court must reexamine the well-settled rule that a sentence enhancement imposed for being armed with a firearm does not violate double jeopardy where the use of a deadly weapon is also an element of the offense.

This argument has been rejected by the Court of Appeals.² In *State v. Nguyen*, 134 Wn. App. 863, 869, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, 187 P.3d 752 (2008), Division I found that "nothing in *Blakely* gives reason to question prior Washington cases holding that double jeopardy is not violated by weapon enhancements even if the use of the weapon is an element of the crime." The court relied on legislative intent in reaching its decision:

[U]nless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm

² This issue is currently before the Washington State Supreme Court, 82111-9. It was argued on October 29, 2009.

enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies.

Nguyen, 134 Wn. App. at 868. This analysis follows the holdings of the United States Supreme Court pointing out that the *Blockburger* test is a tool used to discern legislative intent; when the legislature has made its intent clear, however, then the *Blockburger* test is irrelevant.

Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

Hunter, 459 U.S. at 368.

The Washington Legislature specifically exempted certain crimes from being eligible for enhancement. The Legislature did not include crimes on this list that had use of a deadly weapon as an element of the crime, such as assault in the second degree or robbery in the first degree. RCW 9.94A.533(3)(f). Because the intent of the Legislature is unambiguous in its desire to authorize additional punishment on crimes committed with a firearm, even when such crimes include the use of a

deadly weapon as an element, double jeopardy is not violated. *Nguyen*, 134 Wn. App. at 868.

Division I also rejected the claim that the firearm allegation essentially is duplicative of an element of the crime.

Nguyen's argument is essentially based upon semantics, and he assigns an unsupportable weight to the *Blakely* Court's use of the term "element" to describe sentencing factors. But the meaning of the Court's language in *Blakely* was made clear in *Recuenco*, wherein the Court pointed out that "elements and sentencing factors must be treated the same for Sixth Amendment purposes." Nguyen does not contend his Sixth Amendment rights to a unanimous jury and proof beyond a reasonable doubt were violated.

Nguyen, 134 Wn. App. at 869 (citations omitted). The requirement that sentencing enhancements be presented to the jury was a procedural requirement in that it only altered the method for determining the sentencing enhancement. *Schriro v. Summerlin*, 542 U.S. 348, 354, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). The jury trial guarantee for the sentencing enhancement did not alter the range of conduct that the State could criminalize. *Id.*

In the instant case, the jury made a finding that defendant had been in possession of a firearm during the crimes. Defendant does not contend that his Sixth Amendment rights were violated. As the sentencing enhancements were submitted to the jury, the requirements of *Blakely* were met.

Defendant's argument is not persuasive and has now been rejected by the Court of Appeals. Any legislative redundancy in mandating enhanced sentences for offenses involving the use of a firearm is intentional. Double jeopardy ensures that the punishment is not more than the legislature intended. The legislative intent is clear that because defendant committed assault in the second degree while armed with a firearm, his sentence can be properly enhanced. The jury made the finding that defendant was armed with a firearm. Imposition of additional time for the enhancement does not violate double jeopardy principles or *Blakely*.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DEFENDANT TO PAY RESTITUTION WHEN THE DAMAGE WAS CAUSALLY CONNECTED TO DEFENDANT'S CRIME.

An appellate court reviews restitution orders under the abuse of discretion standard. *State v. Kisor*, 68 Wn. App. 610, 619, 844 P.2d 1038, review denied, 121 Wn.2d 1023, 854 P.2d 1084 (1993). Absent an abuse of discretion, a restitution award will not be disturbed. *State v. Keigan*, 120 Wn. App. 604, 609, 86 P.3d 798 (2004). "An abuse of discretion occurs when the court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Prado*, 144 Wn. App. 227, 249, 181 P.2d 901 (2008) (internal quotation marks and citations omitted).

The court's authority to order restitution is statutory. RCW 9.94A.753(5); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Statutes authorizing restitution are to be broadly construed in order to carry out the Legislative intent of providing restitution. *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). Restitution statutes require defendants to face the consequences of their criminal conduct. *Davison*, 116 Wn. App. at 922. The purpose of restitution statutes is "to promote respect for the law by providing punishment which is just." *Id.* (internal quotation marks and citations omitted). For that reason, these statutes should not be given "an overly technical construction which would permit the defendant to escape from just punishment." *Id.*

Restitution is appropriate when there is a causal connection between the underlying facts of the crime charged and the damages to the victim. *See State v. Coe*, 86 Wn. App. 841, 939 P.2d 715 (1997). In determining whether a causal connection exists, the court employs a 'but for' analysis. *State v. Hunotte*, 69 Wn. App. 670, 676, 851 P.2d 694 (1993). "A causal connection exists when, 'but for' the offense committed, the loss or damages would not have occurred." *State v. Enstone*, 89 Wn. App. 882, 886, 951 P.2d 309 (1998).

The court, when ordering restitution, is not limited by the definition of the crime for which the defendant was convicted. *State v. Landrum*, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992) (discussing RCW 13.40.190) (citing *State v. Seland*, 54 Wn. App. 122, 124, 772 P.2d 534,

review denied, 113 Wn.2d 1011 (1989)). Further, the court noted, “the juvenile court was not precluded from imposing restitution for damages caused by the defendant’s criminal acts simply because the prosecutor could have proceeded to trial on the greater offense or charged additional offenses on the basis of the facts alleged.” *Landrum*, 66 Wn. App. at 800. “Rather than limiting the search for a causal connection, *Landrum* instead broadened the test to include the underlying actual conduct.” *State v. Hiatt*, 154 Wn.2d 560, 564, 115 P.3d 274 (2005).

The State’s burden of proof for establishing causation for restitution purposes is “merely a preponderance of the evidence.” *State v. Thomas*, 138 Wn. App. 78, 83, 155 P.3d 998 (2007). In *Thomas*, the State charged defendant with one count of vehicular assault after a single-car accident in which her passenger sustained serious injuries. *Id.* at 80. The jury did not fill in the vehicular assault verdict form but found defendant guilty of the lesser included crime of DUI. *Id.* at 81. At the restitution hearing, the trial court ordered defendant to pay \$7,429.82 for medical expenses incurred to treat injuries sustained by defendant’s passenger. *Id.* Defendant appealed the restitution order, arguing that the court could not order her to pay the medical expenses when the jury did not convict her of vehicular assault. *Id.* The Court of Appeals affirmed the restitution order, holding that,

The State’s burden of proof for establishing causation for restitution purposes is merely a *preponderance of the evidence*. The jury’s failure to be convinced *beyond a*

reasonable doubt that [defendant's] DUI caused [victim's] injuries is neither a legal nor a factual bar to the trial court finding, at a restitution hearing, that [defendant's] DUI probably caused those same injuries.

Id. at 83 (emphasis in original). The court also noted, “the sentencing court can order the defendant to pay the actual amount of loss caused by the crime to any person damaged; neither the name of the crime nor the named victims limit the award.” *Id.* (emphasis in original).

Defendant was convicted of attempted drive-by shooting. As defendant and his co-defendant were driving away from the house that was the target of the drive-by, they became involved in an accident a few blocks away. Defendant's car was observed trying to get out of a gate at the front of the community, only three blocks from the Lynn residence. RP 263, 1268. The car backed up from the locked fence. RP 1268. They were backing down the road, yelling things out the window and threw a bullet out the window. RP 413, 1268. The car defendant was in then backed into a garage in the neighborhood, severely damaging the garage and a parked car, before defendant exited the neighborhood. RP 631, 889, 1271. This conduct all occurred within a matter of minutes and involved the defendant driving away from the scene of the attempted drive-by as well as getting rid of evidence. There was no break in the chain of events that lead to the damage done to the garage and parked car.

This case differs from the case cited by defendant. In *State v.*

Dauenhauer, the defendant had committed burglary of some storage units and tried to elude police in his vehicle when they responded to the scene. 103 Wn. App. 373, 375, 12 P.3d 661 (2000). The defendant crashed through two fences and crashed into a truck during the police chase. *Id.* Division III of the Court of Appeals ruled that the trial court could not order restitution for the fence and truck because the acts were not part of the burglaries. *Id.* at 379-80.

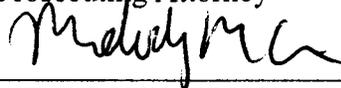
In the instant case, the acts that lead to the damage were a continuation of the attempted drive-by. Defendants were not being pursued by police in the instant case so the State could not have charged an elude as they could have in *Dauenhauer*. In addition, there was no break in the actions between the attempted drive-by and the damage to the neighbor's garage and car. Defendant was trying to dispose of evidence from the attempted drive-by and get out of the community. It was all part of the same act and all part of the same sequence of events. It was casually connected and the trial court did not abuse its discretion in ordering the restitution.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions and sentence entered below.

DATED: January 12, 2010

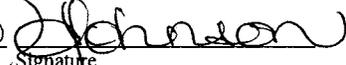
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant ~~and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/12/10 
Date Signature

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DIVISION II