

**No. 341071**

---

**COURT OF APPEALS**  
**OF THE STATE OF WASHINGTON**  
**DIVISION III**

---

**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**ANTHONY RENE VASQUEZ,**

**Appellant.**

---

**BRIEF OF RESPONDENT**

---

**GARTH DANO**  
**PROSECUTING ATTORNEY**

**Kevin J. McCrae – WSBA #43087**  
**Deputy Prosecuting Attorney**  
**Attorneys for Respondent**

**PO BOX 37**  
**EPHRATA WA 98823**  
**(509)754-2011**

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii-vi
<b>I. ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
1. The information failed to inform the defendant of all critical elements of the crime.....	1
2. There was insufficient evidence for the crime of drive-by shooting.....	1
3. The crimes of premeditated murder one and murder one by extreme indifference are incompatible, and one should be dismissed.....	1
4. The court improperly added the firearm enhancement to Mr. Vasquez’s life sentence.....	1
<b>II. ISSUES RELATED TO ASSIGNMENTS OF ERROR ....</b>	<b>1</b>
1. Is the name of a victim a critical element of drive-by shooting? .....	1
2. Was there sufficient evidence to conclude someone besides Juan Garcia was endangered by Anthony Vasquez’s actions?.....	1
3. Was there sufficient evidence to conclude that Anthony Vasquez shot Juan Garcia in the immediate area of the vehicle that brought Vasquez and the gun to the scene?.....	1
4. Are the crimes of premediated murder one and murder one by extreme indifference incompatible, or have a greater/lesser relationship, and if either of these are the case, what is the proper remedy for a conviction on both?.....	1

TABLE OF CONTENTS (continued)

	<u>Page</u>
5. What is the proper sentence when the defendant is convicted of aggravated murder with a life sentence and a firearm enhancement?.....	2
<b>III. STATEMENT OF THE CASE .....</b>	<b>2</b>
<b>IV. ARGUMENT .....</b>	<b>3</b>
<b>A. The information for count 6 was sufficient.....</b>	<b>3</b>
<b>B. There was sufficient evidence for the charge of drive-by shooting and the drive-by shooting aggravator.....</b>	<b>6</b>
<i>1. The victims were endangered .....</i>	<i>6</i>
<i>2. Mr. Vasquez was in the immediate area of the vehicle that brought him and the gun to the scene ....</i>	<i>7</i>
<i>a. The use of "immediate area" in case law and statute.....</i>	<i>8</i>
<i>b. Framework for Analysis.....</i>	<i>11</i>
<i>c. Application of Framework.....</i>	<i>13</i>
<i>d. Out of Jurisdiction Cases.....</i>	<i>14</i>
<b>C. Premeditated Murder One and Murder One by extreme indifference are not repugnant to one another, although they may be considered to have a greater/lesser included relationship. ....</b>	<b>16</b>
<b>D. Firearm Enhancement on a Life Sentence.....</b>	<b>20</b>
<b>V. CONCLUSION.....</b>	<b>22</b>

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>STATE CASES</u>	
<i>In re Pers. Restraint of Bowman</i> , 162 Wn.2d 325, 172 P.3d 681 (2007).....	5
<i>Rho. Co. v. Dep't of Revenue</i> , 113 Wn.2d 561, 782 P.2d 986 (1989).....	8
<i>S. Hill Sewer Dist. v. Pierce County</i> , 22 Wn. App. 738, 591 P.2d 877 (1979).....	9
<i>Sahalee Country Club v. Bd. of Tax Appeals</i> , 108 Wn.2d 26, 735 P.2d 1320 (1987).....	9
<i>Sears v. Hartford Acci. &amp; Indem. Co.</i> , 50 Wn.2d 443, 313 P.3d 347 (1957).....	9
<i>State v. Anderson</i> , 96 Wn.2d 739, 638 P.2d 1205 (1982).....	17
<i>State v. Chapman</i> , 78 Wn.2d 160, 469 P.2d 883 (1970).....	4
<i>State v. Combs</i> , 156 Wn. App. 502, 232 P.3d 1179 (2010).....	11
<i>State v. Craven</i> . 67 Wn. App. 921, 841 P.2d 774 (1992) .....	9
<i>State v. Dunbar</i> , 117 W.2d 587, 817 P.2d 1360 (1991).....	17, 18
<i>State v. Greathouse</i> , 113 Wn. App. 889, 56 P.3d 569 (2002).....	4
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<i>State v. Johnston</i> , 100 Wn. App. 126, 996 P.2d 629 (2000).....	4
<i>State v. Mitchell</i> , 29 Wn.2d 468, 188 P.2d 88 (1947).....	19, 20

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
 <u>STATE CASES</u>	
<i>State v. Ng</i> , 110 Wn.2d 32, 750 P.2d 632 (1988) .....	17
<i>State v. Ohlson</i> , 162 Wn.2d 1, 168 P.3d 1273 (2007).....	8
<i>State v. Pastrana</i> , 94 Wn. App. 463, 972 P.2d 557 (1999).....	5, 7, 11, 17
<i>State v. Patterson</i> , 112 Wn.2d 731, 774 P.2d 10 (1989).....	9
<i>State v. Pittman</i> , 185 Wn. App. 614, 341 P.3d 1024 (2015).....	4
<i>State v. Plano</i> , 67 Wn. App. 674, 838 P.2d 1145 (1992).....	4
<i>State v. Rodgers</i> , 146 Wn.2d 55, 43 P.3d 1 (2002).....	8, 15
<i>State v. Turner</i> , 169 Wn.2d 448, 238 P.3d 461 (2010).....	18
<i>State v. Zigan</i> , 166 Wn. App. 597, 270 P.3d 625 (2012).....	11, 14
<i>Sunderland Servs. v. Pasco</i> , 127 Wn.2d 782, 903 P.2d 986 (1995).....	8
<i>Wood v. May</i> , 73 Wn.2d 307, 438 P.2d 587 (1968).....	9
<i>Young v. Ferrellgas, L.P.</i> , 106 Wn. App. 524, 21 P.3d 334 (2001).....	9
 <u>FEDERAL CASES AND OTHER JURISDICTIONS</u>	
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) .....	6

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
 <u>FEDERAL CASES AND OTHER JURISDICTIONS</u>	
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) .....	6
<i>Minn. Stat. § 609.66, subd. le</i> .....	14
<i>State v. Brown</i> , 796 N.W.2d 169 (Minn. Ct. App. 2011) .....	15
<i>State v. Lewis</i> , 638 N.W.2d 788 (Minn. Ct. App. 2002).....	14, 16
<i>State v. Richardson</i> , 2010 Minn. App. Unpub. LEXIS 674 (Minn. Ct. App. 2010)(Unpublished) .....	15, 16
<i>State v. Smith</i> , 2007 Minn. App. Unpub. LEXIS 850 (Minn. Ct. App. 2011) (Unpublished) .....	15
 <u>STATUTES AND OTHER AUTHORITIES</u>	
Laws of 2012 c153 § 20.....	10
RCW 9.94A.533(3)(e) .....	20
RCW 9.94A.533(3)(g) .....	20
RCW 9.94A.535 (3)(t).....	11
RCW 9A.08.010.....	17
RCW 9A.32.030(1)(b) .....	17
RCW 9A.36.045.....	6, 14
RCW 10.95.020 .....	14

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
<u>STATUTES AND OTHER AUTHORITIES</u>	
RCW 10.95.020(7).....	6
RCW 15.24.010(16).....	10
RCW 18.135.065(2).....	10
RCW 35.86A.080(3).....	10
RCW 69.50.101(d).....	10
U.S. CONST. amend. XIV.....	6
WASH. CONST, art. I, § 3.....	6

## **I. ASSIGNMENTS OF ERROR**

1. The information failed to inform the defendant of all critical elements of the crime.
2. There was insufficient evidence for the crime of drive-by shooting.
3. The crimes of premeditated murder one and murder one by extreme indifference are incompatible, and one should be dismissed.
4. The court improperly added the firearm enhancement to Mr. Vasquez's life sentence.

## **II. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Is the name of a victim a critical element of drive-by shooting?
2. Was there sufficient evidence to conclude someone besides Juan Garcia was endangered by Anthony Vasquez's actions?
3. Was there sufficient evidence to conclude that Anthony Vasquez shot Juan Garcia in the immediate area of the vehicle that brought Vasquez and the gun to the scene?
4. Are the crimes of premeditated murder one and murder one by extreme indifference incompatible, or have a greater/lesser relationship, and if either of these are the case, what is the proper remedy for a conviction on both?

5. What is the proper sentence when the defendant is convicted of aggravated murder with a life sentence and a firearm enhancement?

### **III. STATEMENT OF THE CASE**

For the most part the State agrees with the Statement of the Case as outlined by the appellant, Mr. Vazquez. The State adds the following facts.

Detective Ryan Green measured from the location of Anthony Vasquez's truck as described by Mr. Godden to the location the shooter was standing and measured the distance as roughly 63 feet. CP 987. An overhead view of the gas station where the homicide took place was admitted as exhibit 4. The victim's car can be seen pulling up in the parking lot, with one headlight to the side of the building, and one shielding from the building, showing that the driver's seat is aligned with the west side of the building. Ex. 8. A small fenced area is on the side of the building. Ex. 4. Mr. Vasquez got out of the truck and stood behind the fence for a brief period of time. CP<sup>1</sup> 677-78. He then went around the corner and shot Mr. Garcia. The video (Ex. 8) shows a vehicle shaped like Mr. Vasquez's truck pull up a minute and 16 seconds before the shooting. See CP 1302.

---

<sup>1</sup> All RP references are to the report of proceedings prepared by Tom Bartunek.

In the video Mr. Vasquez is seen starting to run back towards his truck after shooting Mr. Garcia at time 18:43:32.<sup>2</sup> Ms. Harrison can be seen looking at Mr. Vasquez's vehicle at time 18:43:47. She testified that when she looked the blue truck Mr. Vasquez got into it was already driving away "really fast." RP 620-21.

#### IV. ARGUMENT

##### A. The information for count 6 was sufficient.

The defendant argues that the State's failure to name a specific victim in count 6 renders the information deficient.

However, a specific victim is not required to charge a count of drive-by shooting.

An information is constitutionally defective if it fails to list the essential elements of a crime. The essential elements of a crime are those "whose specification is necessary to establish the very illegality of the behavior' charged." Requiring the State to list the essential elements in the information protects the defendant's right to notice of the nature of the criminal accusation guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. Due to the constitutional nature of the challenge to the sufficiency of an information, we review de novo claims that it omitted essential elements of a charged crime.

In a challenge to the sufficiency of an information, we must first decide whether the allegedly missing element is, in fact, an essential element. If so, and where the defendant challenges, as here, the sufficiency of the information for the first time on appeal, we must then liberally construe the

---

<sup>2</sup> The video time was a bit off from real world time.

language of the charging document in favor of validity. Liberal construction requires that we determine whether “the necessary elements appear in any form, or by fair construction, on the face of the document and, if so,” whether “the defendant [can] show he or she was actually prejudiced by the unartful language.

*State v. Pittman*, 185 Wn. App. 614, 618-19, 341 P.3d 1024 (2015)

(Internal citations omitted). Here the name of a victim is not an essential element of drive-by shooting.

The name of a specific victim is not generally an element of a crime. “Plano has failed to persuade this court that the name of the alleged victim is a statutory element of the crime of assault in the fourth degree. Likewise, there does not appear to be any common law authority for the proposition that the name of the victim of an assault is an essential element.” *State v. Plano*, 67 Wn. App. 674, 679-80, 838 P.2d 1145 (1992); *See Also State v. Greathouse*, 113 Wn. App. 889, 901-02, 56 P.3d 569 (2002) (Name of victim not an essential element of theft); *State v. Johnston*, 100 Wn. App. 126, 996 P.2d 629 (2000) (Murder 2); *State v. Chapman*, 78 Wn.2d 160, 469 P.2d 883 (1970) (Assault)<sup>3</sup>.

---

<sup>3</sup> Formerly, in the prosecution of offenses involving injuries to the person, it was necessary to set forth in the indictment the name of the person injured with strictness, and slight variances. If the names were not *idem sonans*, were held fatal. But the modern rule is to treat the question as one of identity, and if the offense is otherwise described with sufficient certainty to identify the act, to hold the variance immaterial, unless the misnomer actually misleads the defendant.

In *In re Pers. Restraint of Bowman*, 162 Wn.2d 325, 332, 172 P.3d 681 (2007), the court was analyzing whether drive-by shooting could be used as a predicate offense for the crime of felony murder. In doing so they held that “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 requires only that reckless conduct creates a risk that a person might be injured.” If a person conducts a drive-by shooting in an urban area the State may prove the fact that a person was endangered by showing through circumstantial evidence there were people in the area where the shots were fired towards, such as identifying housing or stores during business hours. The State is never required to name a victim for the crime of drive-by shooting.

While the State is never required to name a victim for the crime of drive-by shooting, the State can charge for multiple victims if multiple people are endangered. *State v. Pastrana*, 94 Wn. App. 463, 478, 972 P.2d 557 (1999). Here the State charged for each person in the victim’s car, and for the general public that was endangered. Both are appropriate under the drive-by shooting statute. If Mr. Vasquez was truly confused he could have easily brought a motion for a bill of particulars. He did not.

**B. There was sufficient evidence for the charge of drive-by shooting and the drive-by shooting aggravator.**

The legal standard for courts reviewing the sufficiency of evidence issues is well established. The State bears the burden of proving all the elements of an offense 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. To determine if sufficient evidence supports a conviction, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (some emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The State agrees that the sufficiency analysis for the crime of drive-by shooting, RCW 9A.36.045, would be the same as for the murder one aggravator, RCW 10.95.020(7), as the language is the same in the two statutes.

***1. The victims were endangered.***

Mr. Vasquez argues that because he hit his target and no one else was injured there is insufficient evidence to establish the victims were endangered. This ignores the fact that life is unpredictable, particularly with firearms in fast moving situations with multiple actors. Drive-by

shooting requires that a person be subject to a substantial risk of death, not that they actually be killed or injured.

Ms. Harrison was putting something in her purse when Mr. Vasquez came up with the gun. Juan Garcia saw him and told her to “go, babe.” RP 620. In Ex. 8 the car moves just after the shot was fired. If Ms. Harrison had moved slightly faster the vehicle would have been moving and Mr. Vasquez’s aim could have been thrown off. Or the bullet could have passed through Mr. Garcia’s head and struck one of the other passengers, or Mr. Vasquez could have slipped right before he fired instead of right after and his aim would have been off. These are not merely speculative dangers. Firing a shotgun slug into a car endangers all of the passengers, and those in the immediate area. *See Pastrana, supra*. While Mr. Vasquez in this case managed to hit what he was aiming at and the bullet remained in Mr. Garcia’s head, the jury was entitled to conclude there was a substantial danger. Either of those things might not have happened and the slug might have hit someone else.

**2. *Mr. Vasquez was in the immediate area of the vehicle that brought him and the gun to the scene.***

When terms are undefined by statute the court looks to existing law, ordinary usage and the general purpose of the statute. *Pastrana*, 94 Wn. App. at 474. Under ordinary usage, usage in existing law and under

the general purpose of the statute, it is clear that about 20 yards on one piece of property around a corner of a building is still in the immediate area.

It is clear from how the term immediate area is used in common parlance, statutes and case law that “immediate area” is not precisely defined, nor is it limited to line of sight. Obviously 60 feet on the same property is different than the two blocks that the court found did not meet the definition in *State v. Rodgers*, 146 Wn.2d 55, 43 P.3d 1 (2002).

*a. The use of “immediate area” in case law and statute.*

In *State v. Ohlson*, 162 Wn.2d 1, 6, 168 P.3d 1273 (2007), an officer drove around in the immediate area looking for a suspect. Clearly he drove farther than 60 feet, and if line of sight was required for the immediate area there would be no need to drive around looking for someone.

In *Sunderland Servs. v. Pasco*, 127 Wn.2d 782, 794, 903 P.2d 986 (1995), the court used the term immediate area as a separate and broader grouping than adjacent properties.

In *Rho Co. v. Dep't of Revenue*, 113 Wn.2d 561, 564, 782 P.2d 986 (1989), immediate area means reasonable commuting area for work.

In *State v. Patterson*, 112 Wn.2d 731, 736-37, 774 P.2d 10 (1989), a car was in the “immediate area” of a fleeing suspect when it was six blocks away.

In *Sahalee Country Club v. Bd. of Tax Appeals*, 108 Wn.2d 26, 36, 735 P.2d 1320 (1987), immediate area refers to various golf courses that were near other golf courses.

In *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968), eight farriers were in business in an “immediate area.”

In *Sears v. Hartford Acci. & Indem. Co.*, 50 Wn.2d 443, 444-45, 313 P.2d 347 (1957), Sears maintained parking lots in the “immediate area” for use of its customers, including one across a street from its store building.

In *Young v. Ferrellgas, L.P.*, 106 Wn. App. 524, 526, 21 P.3d 334 (2001), an on-call employee was required to be in the immediate area of his employer’s business to respond to customer requests.

In *State v. Craven*, 67 Wn. App. 921, 923, 841 P.2d 774 (1992), officers drove around an immediate area looking for a suspect.

In *S. Hill Sewer Dist. v. Pierce County*, 22 Wn. App. 738, 591 P.2d 877 (1979), residents in the “immediate area” of a proposed sewer plant objected to it.

Other statutes also use the term “immediate area.”

RCW 18.135.065(2) (Duties of delegator and delegatee)(repealed by Laws of 2012 c153 § 20): Delegates are prohibited from administering any controlled substance as defined in RCW 69.50.101(d), any experimental drug, and any cancer chemotherapy agent unless a delegator is physically present in the *immediate area* where the drug is administered. This statute could easily be considered to be satisfied by a delegator in an adjacent office.

RCW 35.86A.080(3) (New off-street parking facilities): “...the city council shall first determine that the proposed parking facility will promote the circulation of traffic or the more convenient or efficient use by the public of streets or public facilities in the *immediate area* than would exist if the proposed parking facility were not provided,...” When the issue is parking garages or lots, clearly lots in the same block would be in “the immediate area” as contemplated by this statute.

RCW 15.24.010(16) (Washington Apple Commission—Definitions): “Ship” means to load apples into a conveyance for transport, except apples being moved from the orchard where grown to a packing house or warehouse within the *immediate area*

of production. Under this statute immediate area might well encompass facilities within a few miles.

While the above case law and statutes do not precisely answer the question of what immediate area means in the context of the drive-by shooting law, it is clear the definition is context dependent, and going around a corner does not take one out of the “immediate area.”

*b. Framework for Analysis.*

While Washington courts have not precisely defined the parameters of “immediate area” as it relates to the crime and aggravator of drive-by shooting, they have dealt with terms in other statutes that similarly require subjective evaluation. *State v. Zigan*, 166 Wn. App. 597, 270 P.3d 625 (2012), and *State v. Combs*, 156 Wn. App. 502, 232 P.3d 1179 (2010), deal with the rapid recidivism aggravator found in RCW 9.94A.535(3)(t). “The defendant committed the current offense shortly after being released from incarceration.” The term “shortly after”, like the term “immediate area” may mean somewhat different things depending on the context in which it is applied.

*Combs* and *Pastrana* suggest a framework for courts analyzing sufficiency of evidence regarding statutes with terms requiring subjective evaluation. First the court looked to the gravamen of the offense. In the

rapid recidivism context that was disrespect for the law. The court then identified factors that helped it evaluate whether the evidence fit the crime or aggravator described. In the rapid recidivism context these factors included the time between release and commission of the crime, the similarity of the current crime to the past crime that was the reason for the previous incarceration, and the level of premeditation engaged in during the current crime.

In the drive-by shooting context the gravamen of the crime appears to be the danger of the rapid strike and withdraw capabilities provided by a vehicle in the course of a shooting. Factors the court may consider would be the distance between the vehicle and the shooter, whether the intent to shoot was formed inside the vehicle, the time between the shooter leaving the vehicle and the shooting, any obstacles between the vehicle and the shooter, the significance of such obstacles, whether the events occurred on one parcel of property, the directness of the route taken from the vehicle to the site of the shooting, the centrality of the vehicle to the criminal scheme, whether the vehicle was used to escape the area of the shooting, and the time between the shooting and the return to the vehicle. There may perhaps be other factors involved as well.

*c. Application of Framework.*

Applying these factors to this case shows that it is clear that this was a drive-by shooting as contemplated in the statute. There was approximately 60 feet between where the blue pickup was parked and where Vasquez stood and fired the gun. The intent to commit the shooting was clearly formed inside the vehicle. Vasquez was out of the car for approximately one minute prior to the shooting. He hid behind a small fence and had to go around one corner of the building to get to the shooting position. He was on the same piece of property the entire time. He quickly went straight back to the car after the shooting and drove off. The car was central to the execution and quick getaway of the criminal scheme. The fact that he went around a corner of the building may be material to the analysis, but is not determinative. Indeed, had Mr. Vasquez fired into the driver's side of Ms. Harrison's car he would have been in the line of site of his own vehicle. It would be absurd to say that moving from one side of a vehicle to another takes one out of the immediate area, which is the conclusion Mr. Vasquez seems to be advocating for. In football inside the 20 yard line is referred to as "the red zone" because it is in the immediate area of the goal line. It took less than 15 seconds for Mr. Vasquez to cover the distance between the place of the shooting and his vehicle, get into his vehicle with a fairly awkward

shotgun and start driving away. To borrow a popular internet meme, one does not simply egress an immediate area in less than 15 seconds.<sup>4</sup> Both common and legal usage support the jury's reasonable conclusion that Mr. Vasquez was in the immediate area of the blue truck when he fired into Nancy Harrison's vehicle. "No reasonable person could believe that the circumstances presented here constitute anything other than" the immediate area of the motor vehicle. *See Zigan*, 166 Wn. App at 605.

*d. Out of Jurisdiction Cases.*

The most similar statute from another state is Minn. Stat. § 609.66, subd. 1e, which reads "Whoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building is guilty of a felony..." The "just exited" language is similar in quality to the immediate area language of RCW 9A.36.045 and 10.95.020. There have been at least four cases interpreting the just exited language.

In *State v. Lewis*, 638 N.W.2d 788 (Minn. Ct. App. 2002), the shooter pulled into a parking lot, ran over to a basketball court and began firing. The court found that the firing having begun within a minute or two of exiting the vehicle was sufficient to support the drive-by shooting charge.

---

<sup>4</sup> See <https://memegenerator.net/One-Does-Not-Caption> (Last visited August 30, 2017).

In *State v. Richardson*, 2010 Minn. App. Unpub. LEXIS 674 (Minn. Ct. App. 2010) (Unpublished)<sup>5</sup>, the defendant walked and/or ran approximately 788 feet to the scene of the shooting, moving directly to the target vehicle, and opened fire. The *Richardson* court applied a factors test, similar to the one proposed above. Specifically the court looked at the directness of the approach, the speed of the approach, whether the intent was formed prior to exiting the vehicle, intervening events between the exit of the vehicle, the time taken between the vehicle exit and the shooting and the fact that there was an immediate return to the vehicle, and concluded that the facts supported the drive-by shooting charge.

*State v. Brown*, 796 N.W.2d 169 (Minn. Ct. App. 2011), is very similar to *State v. Rodgers*, 146 Wn.2d 55, 43 P.3d 1 (2002). In *Brown* the evidence showed several blocks and several minutes elapsed between the exit from the vehicle and the shooting. The court rejected the charge.

In *State v. Smith*, 2007 Minn. App. Unpub. LEXIS 850 (Minn. Ct. App. 2011) (Unpublished), the exact amount of time

---

<sup>5</sup> Unpublished Minnesota cases cited pursuant to GR 14.1(b) and Minn. Stat. § 480A.08 Subd 3(5), copies attached.

was unclear. The court also focused on the fact that the intent to shoot may not have been formed prior to the exit of the vehicle.

While the Minnesota cases are somewhat limited in applicability because the statutory language focuses on time rather than distance, to some extent time and distance are interchangeable, and Minnesota uses the same types of tests that Washington courts have used in evaluating similar statutes. Vasquez clearly falls on the *Lewis/Richardson* side of the divide. In the light most favorable to the State there is clear evidence of intent to do the shooting before he got out of the car. Vasquez was out of the car approximately one minute before the shooting, he took a fairly direct route to the shooting, hiding briefly behind a fence, and the distance involved was short, approximately 60 feet. He returned immediately to the vehicle and sped off.

**C. Premeditated Murder One and Murder One by extreme indifference are not repugnant to one another, although they may be considered to have a greater/lesser included relationship.**

Assuming, for the sake of argument, that the jury verdicts of premeditated aggravated murder and murder one by extreme indifference are inconsistent, the result is to give effect to the

inconsistent verdict, and the premeditated murder one verdict would stand. “Where the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count.” *State v. Ng*, 110 Wn.2d 32, 47, 750 P.2d 632 (1988). The same reasoning would apply to inconsistent convictions.

However, premeditated murder one and murder one by extreme indifference are not inconsistent, any more than premeditated murder one and manslaughter are inconsistent. Murder one by extreme indifference is evidenced by an extreme form of recklessness. *Pastrana*, 94 Wn. App. at 475, citing *State v. Dunbar*, 117 Wn.2d 587, 593-94, 817 P.2d 1360 (1991). If a person acts intentionally they are also said to act recklessly. RCW 9A.08.010. If there is a conflict, it is one of the greater crime of premeditated murder and the lesser of extreme indifference. *See State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (*Anderson II*) (When extreme indifference murder prong did not apply to facts the State on retrial could not proceed on greater offense of premeditated murder, but could proceed on lesser of murder 2 or manslaughter). “[W]e construe RCW 9A.32.030(1)(b)

to require an aggravated form of recklessness which falls below a specific intent to kill.” *Dunbar*, 117 Wn.2d at 593. A literal reading of the phrase “Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person” would encompass an intentional killing. The appropriate remedy for a conviction of a lesser and greater crime would be to strike the lesser included. *See State v. Turner*, 169 Wn.2d 448, 455, 238 P.3d 461 (2010).

The prototypical murder by extreme indifference fact pattern would be randomly shooting into a crowd and killing someone. It may be the evidence shows that the defendant both shot into a crowd and targeted a particular member of that crowd. It may be that the State wants to allow the jury to decide which of the two occurred. In this case that is what happened, although the ‘crowd’ was three people in a car. Thus it is certainly possible for evidence to support both prongs. The State is entitled to charge two crimes where the jury may find evidence for both, even if double jeopardy would prevent a conviction on both. In that case the remedy is to vacate the lesser crime.

*State v. Mitchell*, 29 Wn.2d 468, 484, 188 P.2d 88 (1947), supports the State's position. In that case the defendant shot a doctor alone in his office and took some belongings. The State charged the defendant with murder one under all three prongs (premeditated, what is now extreme indifference and felony murder based on robbery). The jury returned a general verdict of guilty on murder one, without specifying the prong. The court found that there was insufficient evidence for the extreme indifference prong because no one else but the doctor was endangered, and because of the general verdict, reversed the conviction, even though there was sufficient evidence on the premeditated and felony murder prongs.

This case is substantially different. First there were other people endangered, particularly Nancy Harrison and her son in the car. If Mr. Vasquez was just blasting into the car without targeting a particular person he would be guilty of murder one by extreme indifference. There was sufficient evidence to support this. On the other hand, if he particularly targeted a particular individual, he was guilty of premeditated murder one. There is also sufficient evidence to support this.

If the court were to find that *Mitchell* controlled, and hold that evidence of an intentional killing is a defense to an extreme indifference killing, then the result would be to vacate the extreme indifference conviction and retain the premeditated murder conviction. *Mitchell* noted there was sufficient evidence for premeditated murder, but because of the general verdict the court could not tell which prong the jury had convicted on and had to reverse. In this case there was a special inquiry, and the jury found the murder was intentional. If an intentional murder negates an extreme indifference murder, the solution, according to *Mitchell*, is to vacate the extreme indifference conviction.

**D. Firearm Enhancement on a Life Sentence.**

This issue is a result of statutes that are logically inconsistent in this particular circumstance, although the issue is entirely academic. RCW 9.94A.533(3)(e) states “Notwithstanding any other provision of law, 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.” 9.94A.533(3)(g) states “If the standard sentence range under this section exceeds the statutory

maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.” Mr. Vasquez’s mandatory minimum and maximum sentence is life. Under this language Mr. Vasquez should technically be sentenced to life minus five years, with a five year firearm enhancement added on to bring his sentence back to life.

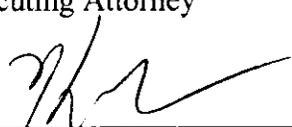
However, because no one can determine what exactly life minus five years would be, this makes an administratively impossible sentence. The State and trial court made their best guess at resolving this incontinency in the statute by sentencing to life plus five years. If the appellate court wants a different solution the State will, of course, comply. However, the issue is completely academic and any opinion on the subject will be advisory. There is no actual, practical relief the court can provide. It is clear that Mr. Vasquez is to spend the rest of his life in custody, however that is calculated.

## V. CONCLUSION

The information informed Mr. Vasquez of all essential elements of the crime of drive-by shooting. There was also sufficient evidence that the facts in this case met the elements of drive-by shooting. If there is a conflict between premeditated and extreme indifference murder the proper action is to dismiss the extreme indifference murder. Finally Mr. Vasquez is sentenced to life. Exactly what to do with the firearm enhancement in that situation is basically a moot issue beyond documenting it exists. The trial court should be affirmed.

Dated this 31<sup>st</sup> day of August 2017.

GARTH DANO  
Prosecuting Attorney

By: 

Kevin J. McCrae – WSBA #43087  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
kmccrae@grantcountywa.gov



Positive  
As of: Jan 14, 2016

**State of Minnesota, Respondent, vs. Ramon D. Smith, Appellant.**

**A06-500**

**COURT OF APPEALS OF MINNESOTA**

*2007 Minn. App. Unpub. LEXIS 850*

**August 21, 2007, Filed**

**NOTICE:** THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

**SUBSEQUENT HISTORY:** Appeal after remand at *State v. Smith, 2009 Minn. App. Unpub. LEXIS 579 (2009)*

**PRIOR HISTORY:** [\*1]

Dakota County District Court File No. KX-04-003218. Hon. Timothy J. McManus.

**DISPOSITION:** Affirmed in part, vacated in part, and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The Dakota County District Court, Minnesota, convicted defendant of aiding and abetting attempted first-degree murder (drive-by shooting); aiding and abetting attempted second-degree murder; aiding and abetting drive-by shooting; second-degree assault with a dangerous weapon; and fleeing police. He was sentenced to 180 months for attempted first-degree murder and one year and one day for fleeing, to be served concurrently. Defendant appealed.

**OVERVIEW:** On review, defendant argued, inter alia, that his convictions of aiding and abetting attempted first-degree murder (drive-by shooting) and drive-by shooting were not supported by sufficient evidence, and

the district court abused its discretion by admitting testimony about his alleged gang ties. The appellate court agreed that the evidence was insufficient to sustain the convictions involving the element of a drive-by shooting as the record was silent as to the amount of time that elapsed between defendant's exit from the vehicle and his firing shots at another vehicle. The victim's testimony regarding his concerns about defendant's "threats" did violate the district court's pretrial ruling precluding the State from referring to defendant's alleged gang ties. As defendant drove a vehicle without its headlights at night, refused to pull over or stop, and increased his speed after the officer activated his squad car's lights and siren, the evidence was sufficient to prove that defendant fled from police under *Minn. Stat. § 609.487, subd. 1 (2004)*.

**OUTCOME:** The convictions involving the element of a drive-by shooting were vacated and remanded to the district court for resentencing on the remaining convictions.

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview Governments > Legislation > Interpretation*  
[HN1] The appellate court reviews a question of law or statutory interpretation de novo.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Elements***

[HN2] First-degree murder from a drive-by shooting is defined as the causing of the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit a drive-by shooting. *Minn. Stat. § 609.185(a)(3)* (2004). A drive-by shooting is defined as occurring when whoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building. *Minn. Stat. § 609.66, subd. 1e(a)* (2004).

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence***

[HN3] Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the district court abused its discretion and that appellant was thereby prejudiced.

***Criminal Law & Procedure > Accusatory Instruments > Complaints > General Overview***

***Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview***

[HN4] An offense punishable by less than life imprisonment may be prosecuted by indictment or by a complaint. *Minn. R. Crim. P. 17.01*.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Fleeing & Eluding > Elements***

[HN5] Minnesota law defines "flee" as to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle. *Minn. Stat. § 609.487, subd. 1* (2004).

**COUNSEL:** For Respondent: Lori Swanson, Attorney General, St. Paul, MN; and James C. Backstrom, Dakota County Attorney, Lawrence F. Clark, Assistant County Attorney, Hastings, MN.

For Appellant: John M. Stuart, State Public Defender, Lydia Villalva Lijo, Assistant Public Defender, Minneapolis, MN.

**JUDGES:** Considered and decided by Dietzen, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

**OPINION BY: HALBROOKS**

**OPINION**

**UNPUBLISHED OPINION**

**HALBROOKS, Judge**

Appellant was convicted of aiding and abetting attempted first-degree murder (drive-by shooting); aiding and abetting attempted second-degree murder; aiding and abetting drive-by shooting; second-degree assault with a dangerous weapon; and fleeing police in a motor vehicle. Appellant argues that his convictions of aiding and abetting attempted first-degree murder (drive-by shooting) and drive-by shooting must be vacated because there is insufficient evidence to prove that he had "just exited" a vehicle and that the district court abused its discretion by admitting testimony about appellant's alleged gang ties. Appellant makes additional arguments [\*2] in his pro se supplemental brief. Because the district court did not abuse its discretion by admitting testimony about appellant's alleged gang ties, we affirm in part. But because we conclude that the evidence is insufficient to sustain the convictions involving the element of a drive-by shooting, we vacate those convictions and remand to the district court for resentencing on the remaining convictions.

**FACTS**

Appellant Ramon D. Smith was with two friends in a Ford Explorer on the evening of October 7, 2004. When they stopped for gas at the Oasis Market in Burnsville, they encountered Derrick Tallman, who asked one of appellant's friends if he wanted to buy some marijuana. While the friend declined, he said that he would ask someone who was with him. When Tallman learned that the other individual was interested, Tallman walked to his nearby apartment to get the marijuana. He returned to the convenience store, riding as a passenger in a minivan driven by a friend. The minivan parked alongside the Explorer.

Appellant then got out of the Explorer and approached Tallman's open window. Tallman was holding a bag of marijuana. Appellant had a digital scale and wanted to weigh the marijuana, [\*3] but Tallman objected. In response, appellant grabbed the bag of marijuana, placed a handgun against Tallman's right temple, and demanded his money and jewelry. Tallman told appellant to go ahead and shoot. As the minivan driver placed the vehicle in reverse and then accelerated rapidly, Tallman heard several gunshots. The minivan then crashed into a nearby tree.

Several people at the scene called 911 to report the incident. As Burnsville Police Officer Daniel M. Anderson was responding to the call, he saw a green Ford Explorer leaving the area. Officer Anderson followed the

Explorer, eventually turning on his car's lights and siren. When the vehicle stopped, appellant bolted from the vehicle and ran down a hill into a pond. Officer Anderson drew his gun and ordered appellant to come out. After several warnings, appellant emerged and surrendered. Officer Anderson handcuffed and searched him.

Nine rounds of .32 caliber ammunition were found in appellant's pocket. In the Explorer, officers found a case and instructions for a .32 caliber Beretta semiautomatic handgun and a digital scale. A .32 caliber Beretta Tomcat handgun was later found in the pond about 50 feet from the place where appellant [\*4] had entered the water. The gun had one live round in the chamber and one live round in the clip. Subsequent ballistics tests confirmed that the rounds fired at the minivan had been fired from that gun. On the grass near where appellant entered the pond, an apartment maintenance worker later found a small bag of a substance determined to be marijuana.

Five cartridge casings of .32 caliber ammunition were found on the Oasis Market parking lot near a skid mark from the minivan's path. The minivan's back window was shattered and a bullet that was consistent with the type of ammunition fired from the gun was imbedded in the dashboard. The minivan's right rear tire had a puncture that was consistent with a bullet hole. Swabs taken from appellant's hands that were tested showed a microscopic particle of gunshot residue.

Appellant was charged with second-degree assault with a dangerous weapon under *Minn. Stat. § 609.222, subd. 1* (2004) and fleeing a police officer in a motor vehicle under *Minn. Stat. § 609.487, subd. 3* (2004). The state subsequently amended the complaint to include: aiding and abetting attempted first-degree murder (drive-by shooting) under *Minn. Stat. § 609.185(a)(3)* (2004); [\*5] aiding and abetting second-degree murder under *Minn. Stat. § 609.19, subd. 1(1)* (2004); and aiding and abetting drive-by shooting under *Minn. Stat. § 609.66, subd. 1e(b)* (2004). The amendment also altered the second-degree-assault charge to charge appellant with aiding and abetting under *Minn. Stat. § 609.05* (2004). The jury convicted appellant of all charges. The district court sentenced appellant to 180 months in prison for attempted first-degree murder (drive-by shooting) and one year and one day for fleeing a police officer, to be served concurrently. This appeal follows.

## DECISION

### I.

Appellant argues that the evidence is insufficient to support the convictions of aiding and abetting attempted first-degree murder (drive-by shooting) and drive-by

shooting because he had not "just exited" the Explorer before shots were fired. The state contends that the verdict should be affirmed because the incident lasted a very short time and because the Explorer was used to facilitate appellant's presence at and escape from the scene. [HN1] We review a question of law or statutory interpretation de novo. *State v. Coauette*, 601 N.W.2d 443, 445 (Minn. App. 1999), review denied (Minn. Dec. 14, 1999).

[HN2] First-degree [\*6] murder from a drive-by shooting is defined as the causing of "the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . a drive-by shooting." *Minn. Stat. § 609.185(a)(3)* (2004). A drive-by shooting is defined as occurring when "[w]hoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building." *Minn. Stat. § 609.66, subd. 1e(a)* (2004).

Both parties cite *State v. Lewis*, 638 N.W.2d 788 (Minn. App. 2002), review denied (Minn. Apr. 16, 2002), in support of their arguments. In *Lewis*, this court addressed the time element involved in a drive-by-shooting charge, affirming the underlying conviction. *Lewis*, 638 N.W.2d at 790, 793. On review, we stated that, based on the testimony of three eyewitnesses, "[t]he record amply supports the jury's finding that Lewis drove up to the park, jumped out of a brown mini-van, ran to the occupied basketball court and began shooting within one to two minutes from the time he exited the mini-van." *Id.* at 791. "He then retreated to the vehicle and drove away." *Id.* We noted that "[t]he statute does not define [\*7] the phrase 'having just exited from the motor vehicle.'" *Id.* (quoting *Minn. Stat. § 609.66, subd. 1e*). But we determined that "the meaning of the phrase is clear and requires no interpretation." *Id.* Hence, we construed the phrase "having just exited a motor vehicle" as requiring "the immediate action of shooting following the exiting from an automobile." *Id.*

Here, the only testimony regarding the time element came from Tallman. No one else from either vehicle testified. Tallman testified that appellant got out of the Explorer and approached the minivan's open passenger window where Tallman was seated. The following exchange occurred on direct-examination:

Q. Were you still seated in there?

A. Yes.

Q. Where did you have the marijuana?

A. In my hand.

Q. What did you do when he walked up to your window?

A. Pulled out the weed.

Q. Did you say anything to him?

A. I said, what's up. . . .

Q. Did he say something back to you, then?

A. Um, I'm [not] sure. Like, what you working with, or I don't know, something like that.

Q. So something was said, you are just not sure?

A. Yeah.

Q. What is the next thing that happened?

A. He pulls out a scale.

Q. Okay.

A. And tries to put it on something, which--like [\*8] the window, the window comes out of the door.

Q. Okay.

A. But it won't stay on there, so it was kind of--I was kind of thinking, like, why is he--you know what I'm saying?

. . . .

Q. So after he brought out the scale, did you say something or do something?

A. Yeah. I was like why--why do we need a scale?

Q. What did he say?

A. He said, so we can weigh it. I said it weighs--it weighs right. It's over, if anything.

Q. Okay. What's the next thing that happened?

A. He snatches it, snatches the bag of weed.

Q. Where did he snatch it from?

A. My hand.

Q. And what happened after that?

A. He kind of like stumbled back and pulled the gun out . . . .

. . . .

Q. What did he do with the gun?

A. He put it to my head.

Q. Was it actually touching your head?

A. Yes.

. . . .

Q. Did either one of you say something?

A. Um, he said he wanted my jewelry and money.

. . . .

Q. What did you say? A. I told him no.

. . . .

Q. Was there more conversation?

A. No.

Q. What happened?

A. Um, we put it in reverse and tried to drive, and we hit a tree.

. . . .

Q. What was happening, or was there anything happening as you were driving away, trying to drive away?

A. Yes. Gunshots, gunfire.

In contrast to *Lewis*, where [\*9] three independent eyewitnesses testified similarly as to the sequence of events and the timing of the shots after the defendant got out of the vehicle, this record is silent as to the amount of time that elapsed between appellant's exit from the Explorer and his firing shots at the minivan. But it is certain that an aborted drug sale occurred between the two. While it is not clear from this record whether or not appellant got out of the Explorer with the intent to shoot Tallman or decided to shoot once he interacted with him, the evidence does not support the drive-by-shooting element of "just exiting" the vehicle. Therefore, we conclude that the convictions of aiding and abetting attempted first-degree murder (drive-by shooting) and drive-by shooting must be vacated. On remand, the district court should resentence appellant based on his other convictions.

## II.

Appellant argues that the district court abused its discretion by permitting Tallman to testify that he was

afraid of appellant and appellant's associates. Before trial, the district court addressed appellant's motion to preclude the state from referring to appellant's alleged gang ties. The district court ruled that the reference [\*10] would only be admissible if appellant "opened the door" or the evidence was introduced other than in the state's case-in-chief. [HN3] "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

On direct examination, Tallman testified in response to the prosecutor's examination that he and appellant were in the same room at the jail and had a conversation in which appellant advised Tallman, when asked about the events in the minivan, "to just be quiet, and we'll--we'll both go home."

Q. All right. Were you ever threatened?

A. Um, yeah. Yeah, but--Yeah.

Q. Okay. In what way?

A. It's like little threats like, I don't know. I don't know how to explain it really.

Q. Were there any comments made about your mother or your family?

A. Yes.

[APPELLANT'S COUNSEL]: Objection. Your Honor, leading.

THE COURT: Overruled. You may answer.

....

Q. Is that by [appellant] again?

A. Yes.

Q. What did he say?

A. I can't really remember the [\*11] exact words, but something about where my mom lives.

Q. And how did you understand that?

A. I took it real bad.

....

Q. How did you understand what he was saying to you? What did it mean?

A. Like--Like he'll find where I live.

Q. Okay. Did you take that as a threat?

A. Yes.

Q. And is that in the same conversation about you testifying in this case?

A. Yes.

....

Q. Did [appellant] say anything about knowing where your mom lived?

A. Yes.

Q. Did he know the address?

A. I don't know. I don't know. Anybody can find it out.

When his memory was refreshed with a jail report, Tallman remembered that appellant knew his mother's address.

Appellant's attorney on cross-examination asked Tallman whether appellant "made a threat to you and told you he knew where your mother lived" while Tallman and appellant were in jail. Tallman testified that no one had threatened or harmed him or his mother in the past year.

On redirect, appellant testified.

Q. ....

First of all, are you afraid of [appellant] and what he might do as a result of you testifying?

A. Not so much, not so much that.

Q. Okay.

A. I just want to have no problems with my mom basically.

Q. Let me reask the question.

Are you afraid of [appellant] [\*12] not only because of him but because of people he associates with?

[APPELLANT'S ATTORNEY]: Objection, Your Honor. Leading.

THE COURT: Overruled. You may answer.

A. The people he associates with.

Based on our review of the record, we do not agree that Tallman's testimony regarding his concerns about appellant's "threats" violated the district court's pretrial ruling. The exchanges with Tallman by both counsel on this topic were relatively brief and, more importantly, did not produce a clear statement that appellant had any gang affiliation. We therefore conclude that the district court acted within its discretion by its rulings.

### III.

In his pro se supplemental brief, appellant makes several arguments for the first time on appeal. He contends that a new trial is necessary because the charge of aiding and abetting attempted first-degree murder in the amended complaint required a grand-jury indictment. [HN4] An offense punishable by less than life imprisonment may be prosecuted by indictment or by a complaint. *Minn. R. Crim. P. 17.01*. Because an attempted-first-degree-murder conviction does not carry a sentence of life imprisonment, a grand-jury indictment was not necessary.

Appellant also alleges [\*13] that Tallman gave perjured testimony. Tallman's testimony differed from his original story to the police. Tallman's testimony was often inconsistent, and both attorneys commented to the jury on his credibility. But we leave credibility determinations to the jury. *State v. Kramer, 668 N.W.2d 32, 37 (Minn. App. 2003), review denied (Minn. Nov. 18, 2003)*.

Appellant further claims that he left the scene but did not flee from the police. [HN5] Minnesota law defines "flee" as "to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle." *Minn. Stat. § 609.487, subd. 1 (2004)*. Here, appellant drove a vehicle without its headlights at night, refused to pull over or stop, and increased his speed after Officer Anderson activated his squad car's lights and siren. The evidence is sufficient to prove that appellant fled from police.

Finally, appellant argues that he had ineffective assistance of counsel, claiming, among other reasons, that his counsel convinced him not to testify. But appellant was properly questioned on [\*14] the record to confirm his decision not to testify. The record does not support appellant's claims.

**Affirmed in part, vacated in part, and remanded.**



Positive  
As of: Jan 14, 2016

**State of Minnesota, Respondent, vs. Robert Deangelo Richardson, Appellant.**

A09-1497

**COURT OF APPEALS OF MINNESOTA**

*2010 Minn. App. Unpub. LEXIS 674*

**July 13, 2010, Filed**

**NOTICE:** THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

**SUBSEQUENT HISTORY:** Review denied by *State v. Richardson*, 2010 Minn. LEXIS 565 (Minn., Sept. 21, 2010)

**PRIOR HISTORY:** [\*1]  
Olmsted County District Court File No. 55-CR-08-8650.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a judgment of the Olmsted County District Court (Minnesota) that convicted him of aiding and abetting a drive-by shooting under *Minn. Stat. § 609.66, subd. 1e(a)* (2008), and *Minn. Stat. § 609.05, subd. 1* (2008), arguing that the evidence was insufficient to support his conviction because it failed to show that the shooting occurred after he and the shooter had "just exited" the vehicle when the shooting occurred.

**OVERVIEW:** Defendant, the shooter, and three other men were riding around when they spotted a vehicle owned by someone with whom the men had an ongoing dispute. The vehicle had been involved in a drive-by shooting two days earlier, and the group had discussed

finding it. The men drove closer to the vehicle and parked. Defendant and the shooter exited their vehicle and approached. While the vehicle was empty, the shooter fired five shots into the vehicle's rear. The pair then returned to their vehicle and fled. On review, the court held that the evidence was sufficient to support defendant's conviction because it showed that the shooter discharged his gun after having "just exited" the vehicle. The phrase "just exited" meant having exited only a moment ago. The record showed that defendant and the shooter traveled a distance of approximately 788 feet, moving directly from their vehicle to the other vehicle and opened fire. Because they exited their vehicle for the sole purpose of shooting at the other and proceeded directly to do just that, the evidence showed that the shooting occurred after defendant "just exited" his vehicle.

**OUTCOME:** The judgment of conviction was affirmed.

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence*

[HN1] When determining the sufficiency of the evidence, an appellate court conducts a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the factfinder to reach the verdict that

it did. The same analysis applies to bench trials and jury trials. The appellate court will not reverse if the factfinder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.

***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Conclusions of Law Governments > Legislation > Interpretation***

[HN2] Whether a statute has been properly construed presents a question of law, reviewed de novo. If a statute is unambiguous, it must be given its plain meaning.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Elements Criminal Law & Procedure > Accessories > Aiding & Abetting***

[HN3] A person is guilty of felony drive-by shooting if while in or having just exited from a motor vehicle, that person recklessly discharges a firearm at or toward another motor vehicle or a building. *Minn. Stat. § 609.66, subd. 1e(a)* (2008). The penalty may be increased if a person violates *Minn. Stat. § 609.66, subd. 1e*, by firing at or toward a person or an occupied building or motor vehicle. *Minn. Stat. § 609.66, subd. 1e(b)* (2008). A defendant is liable for aiding and abetting if he or she intentionally aids, advises, hires, counsels, or conspires with or otherwise procures another person to commit the crime. *Minn. Stat. § 609.05, subd. 1* (2008). The State must prove that the defendant played a knowing role in the crime, but active participation in the overt act that constitutes the substantive offense is not required, and a defendant's presence, companionship, and conduct before and after an offense is committed are relevant circumstances from which the factfinder may infer criminal intent.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Elements***

[HN4] A person is guilty of a drive-by shooting if he or she recklessly discharges a firearm while in or having just exited from a motor vehicle. *Minn. Stat. § 609.66, subd. 1e(a)* (2008). The term "just exited" is not defined in the statute but has been addressed by the courts, which concluded that the phrase "having just exited" means having exited only a moment ago and that the phrase requires the completed act of exiting from a motor vehicle followed closely by the act of shooting. The act of shooting need not be simultaneous with the act of exiting but the act of shooting must immediately follow the act of exiting the vehicle.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Elements***

***Criminal Law & Procedure > Scienter > Recklessness***

[HN5] A person is guilty of drive-by shooting if he or she recklessly discharges a firearm at or toward another vehicle. *Minn. Stat. § 609.66, subd. 1e(a)* (2008). The term "reckless" is not defined in Minnesota's criminal code, but the Minnesota Supreme Court has held that, with respect to felony weapons offenses, a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the element of an offense exists or will result from his conduct. The reckless actor is aware of the risk and disregards it.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Elements***

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Penalties***

[HN6] The drive-by shooting statute, *Minn. Stat. § 609.66, subd. 1e(a)* (2008), clearly contemplates that a person may be guilty of drive-by shooting when discharging a firearm at an unoccupied vehicle. The drive-by shooting statute states that a person who recklessly discharges a firearm at or toward another motor vehicle or a building has committed drive-by shooting and may be sentenced to a prison term of up to three years, or a payment of not more than \$ 6,000, or both. *Minn. Stat. § 609.66, subd. 1e(a)*. The statute goes on to state that a person who violates this subdivision by firing at or toward a person or an occupied building or motor vehicle may be subject to a sentence of up to 10 years, payment of not more than \$ 20,000, or both. *Minn. Stat. § 609.66, subd. 1e(b)*. Reading parts (a) and (b) together, it is clear that a person may be guilty of drive-by shooting by recklessly discharging a firearm at property alone, including an unoccupied motor vehicle.

***Governments > Legislation > Interpretation***

[HN7] Under *Minn. Stat. § 645.16* (2008), every law shall be construed, if possible, to give effect to all its provisions.

**COUNSEL:** For Respondent: Lori Swanson, Attorney General, St. Paul, Minnesota; and Mark A. Ostrem, Olmsted County Attorney, Richard W. Jackson, Jr., Assistant County Attorney, Rochester, Minnesota.

For Appellant: David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota.

**JUDGES:** Considered and decided by Toussaint, Presiding Judge; Hudson, Judge; and Willis, Judge. \*

\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

**OPINION BY:** HUDSON

**OPINION**

**UNPUBLISHED OPINION**

**HUDSON, Judge**

On appeal from his conviction of aiding and abetting a drive-by shooting, appellant argues that the evidence is insufficient to support his conviction. Because appellant and the shooter had "just exited" the vehicle prior to the shooting, and the shooter recklessly discharged a firearm at a vehicle, we affirm.

**FACTS**

During the early morning hours of September 5, 2008, appellant Robert Deangelo Richardson, Ishmael Ewing, and three other men were riding in a Buick Rendezvous (Rendezvous) in Rochester. When the men drove past 1002 Fifth Street Northeast, they saw a green Chevrolet [\*2] Suburban (Suburban), which they knew to be owned by or associated with a family with whom the men had an ongoing dispute. The Suburban had been involved in a shooting two days earlier in which shots were fired from the Suburban toward some of the occupants of the Rendezvous. The men had discussed finding the Suburban or its occupants while driving earlier. After finding the Suburban, the men drove a distance of approximately one and one-half blocks to a curb on Tenth Avenue Northeast, between Second Avenue Northeast and Third Avenue Northeast, and parked.

The other men in the Rendezvous told appellant and Ewing that "it's y'all turn to do something" and handed loaded handguns to Ewing and appellant. Appellant and Ewing then exited the Rendezvous and alternatively walked and ran directly to the Suburban. Ewing approached the Suburban and saw that no one was inside. Ewing then shot his handgun into the rear of the Suburban five times. Appellant stood near Ewing but did not fire any shots because apparently he had difficulty operating his handgun. After shooting into the Suburban, Ewing ran directly back to the Rendezvous, with appellant following closely behind. When both men returned, [\*3] the Rendezvous immediately left the scene.

Appellant was charged with terroristic threats, aiding and abetting a drive-by shooting, possession of a pistol by a person with a prior felony conviction, and

possession of a pistol without a permit. After appellant waived a jury trial, his case was tried before an Olmsted County district court judge. The state dismissed the terroristic-threats charge, and appellant was acquitted of possession of a pistol without a permit. Appellant was found guilty of aiding and abetting a drive-by shooting in violation of *Minn. Stat. §§ 609.66, subd. 1e(a), .05(1)* (2008), and gross-misdemeanor felon in possession of a pistol in violation of *Minn. Stat. § 624.713, subd. 1(10)(i)* (2008).

The district court found that the state proved beyond a reasonable doubt that appellant committed the crime of aiding and abetting a drive-by shooting because appellant and Ewing had just exited the Rendezvous when the shooting occurred, Ewing recklessly discharged a firearm at a motor vehicle, and appellant's actions furthered the commission of the crime committed by Ewing. This appeal follows.

**DECISION**

Appellant argues that the evidence is insufficient to support his conviction [\*4] of aiding and abetting a drive-by shooting because the state did not prove (1) that Ewing discharged his gun after having "just exited" the vehicle and (2) that Ewing discharged his gun recklessly. Appellant argues that the district court erred in its application of the law to the facts. Appellant does not dispute that he aided Ewing, but he claims that Ewing did not commit a drive-by shooting according to the statutory definition of the offense.

[HN1] When determining the sufficiency of the evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the [factfinder] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The same analysis applies to bench trials and jury trials. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998). This court will not reverse if the factfinder, "acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *State v. Lewis*, 638 N.W.2d 788, 791 (Minn. App. 2002), review denied [\*5] 2002 Minn. LEXIS 280 (Minn. Apr. 16, 2002).

[HN2] Whether a statute has been properly construed presents a question of law, reviewed de novo. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). If a statute is unambiguous, it must be given its plain meaning. *State v. Al-Naseer*, 734 N.W.2d 679, 684 (Minn. 2007).

[HN3] A person is guilty of felony drive-by shooting if "while in or having just exited from a motor vehicle,

[that person] recklessly discharges a firearm at or toward another motor vehicle or a building." *Minn. Stat. § 609.66, subd. 1e(a)* (2008). The penalty may be increased if a person violates subdivision 1e "by firing at or toward a person, or an occupied building or motor vehicle." *Id., subd. 1e(b)* (2008). A defendant is liable for aiding and abetting if he or she "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures [another person] to commit the crime." *Minn. Stat. § 609.05, subd. 1* (2008). The state must prove that the defendant played a "knowing role" in the crime. *State v. Ostrem, 535 N.W.2d 916, 924 (Minn. 1995)* (quotation omitted). But "active participation in the overt act that constitutes the substantive offense is not required, and a defendant's presence, companionship, [\*6] and conduct before and after an offense is committed are relevant circumstances from which the [factfinder] may infer criminal intent." *State v. Gates, 615 N.W.2d 331, 337 (Minn. 2000)*, overruled on other grounds by *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*.

***Appellant and Ewing had "just exited" the vehicle before the shooting***

Appellant argues that he and Ewing had not "just exited" the vehicle prior to Ewing shooting at the Suburban and, therefore, they did not commit a drive-by shooting. The district court found that "[t]he drive-by shooting occurred within sufficient geographical and temporal proximity to Ewing and [appellant's] presence in the Buick Rendezvous [such] that . . . the shooting occurred when they had just exited from a motor vehicle."

[HN4] A person is guilty of a drive-by shooting if he or she recklessly discharges a firearm "while in or having just exited from a motor vehicle." *Minn. Stat. § 609.66, subd. 1e(a)*. The term "just exited" is not defined in the statute but was addressed by this court in *State v. Lewis, 638 N.W.2d at 791*. In *Lewis*, this court determined that the defendant had "just exited" his vehicle when he drove to a park, jumped out of his [\*7] vehicle, ran to a basketball court, and began shooting within one or two minutes after exiting the vehicle. *Id. at 791*. This court concluded that "the phrase 'having just exited' means having exited 'only a moment ago,'" and that "[t]he phrase requires the completed act of exiting from a motor vehicle followed closely by the act of shooting." *Id.* The act of shooting need not be simultaneous with the act of exiting, but the act of shooting "must immediately follow the act of exiting" the vehicle. *Id.* The *Lewis* court concluded that the testimony that the defendant ran from his vehicle to the basketball court, opened fire, and returned to his vehicle and drove away was "more than sufficient" to support the drive-by shooting conviction. *Id. at 791-92*.

Appellant argues that the shooting did not "immediately follow" the exit of the vehicle and, therefore, the "just exited" element was not satisfied. Here, appellant and Ewing were not in a vehicle when Ewing shot the Suburban. Instead, appellant and Ewing exited the Rendezvous and walked and ran to the Suburban. The record shows that appellant and Ewing traveled a distance of approximately 788 feet, moving directly from the Rendezvous to the [\*8] Suburban. When they reached the Suburban, Ewing looked in the vehicle, saw that no one was inside, and opened fire.

As in *Lewis*, the shooting here occurred very shortly after the defendants exited their vehicle. Appellant and Ewing left the Rendezvous for the sole purpose of carrying out the shooting. They proceeded directly from their vehicle to the Suburban, opened fire, and returned directly to the Rendezvous. The fact that appellant and Ewing may have walked part of the way to the Suburban, rather than running, does not negate the fact that they exited the vehicle for the sole purpose of shooting at the Suburban and proceeded directly to do just that. Nor does the fact that Ewing looked into the vehicle in anticipation of shooting into it create a significant break in the timeline. The exit from the Rendezvous was followed "very closely" by the act of shooting, and the shooting itself took only a couple of seconds. The pair then immediately ran back to their vehicle, arriving at the Rendezvous within about a minute and a half. We acknowledge that the timeline here is arguably on the outer edges of the "just exited" requirement. Nevertheless, we conclude that the elapsed time frame [\*9] for the entire incident was within the basic time frame sanctioned in *Lewis* and, therefore, we likewise conclude that appellant had "just exited" the vehicle when the shooting occurred. *See Lewis, 638 N.W.2d at 791-92*.

***Ewing, accompanied by appellant, "recklessly" discharged a firearm at another motor vehicle***

Appellant argues that the evidence does not support the finding that Ewing discharged his firearm "recklessly." The district court found that "the discharge of the firearm at the Chevrolet Suburban was reckless or in reckless disregard of the danger it presented to persons and property."

[HN5] A person is guilty of drive-by shooting if he or she recklessly discharges a firearm at or toward another vehicle. *Minn. Stat. § 609.66, subd. 1e(a)*. The term "reckless" is not defined in Minnesota's criminal code. *See Minn. Stat. § 609.02* (2008). But the Minnesota Supreme Court has held that, with respect to felony weapons offenses, "[a] person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the element of an offense exists or will result from his conduct . . . . The reckless actor is aware of the risk

and disregards it." *State v. Engle*, 743 N.W.2d 592, 594 (Minn. 2008) [\*10] (quotation omitted).

[HN6] The drive-by shooting statute clearly contemplates that a person may be guilty of drive-by shooting when discharging a firearm at an unoccupied vehicle. The drive-by shooting statute states that a person who recklessly discharges a firearm "at or toward another motor vehicle or a building" has committed drive-by shooting and may be sentenced to a prison term of up to three years, or a payment of not more than \$ 6,000, or both. *Minn. Stat. § 609.66, subd. 1e(a)*. The statute goes on to state that a "person who violates this subdivision by firing at or toward a person, or an occupied building or motor vehicle" may be subject to a sentence of up to ten years, or payment of not more than \$ 20,000, or both. *Id.*, *subd. 1e(a)*. Reading parts (a) and (b) together, it is clear that a person may be guilty of drive-by shooting by recklessly discharging a firearm at property alone, including an unoccupied motor vehicle. *See* [HN7] *Minn. Stat. § 645.16* ("Every law shall be construed, if possible, to give effect to all its provisions.").

Here, appellant and Ewing both carried firearms, and Ewing shot a handgun five times into a parked Suburban. The Suburban was parked in a fully developed [\*11] and occupied residential neighborhood. At least three residents heard the gunshots from within their homes. One of the residents described the shots as being close to the front of his house. Appellant, Ewing, and the other persons in the immediate vicinity could have been injured when Ewing discharged his firearm. Therefore, the risk of injury to others was substantial, unjustifiable, and consciously ignored by appellant and Ewing. Furthermore, the risk of damage to property was also substantial, unjustifiable, and consciously ignored. Ewing deliberately discharged his firearm directly into the back of the Suburban, causing significant damage to the vehicle. In our view, shooting a handgun at a parked car in a fully developed residential neighborhood constitutes reckless discharge of a firearm.

Viewing the evidence in a light most favorable to the verdict, it is sufficient to support appellant's conviction.

**Affirmed.**

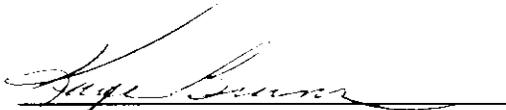
## DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Dennis W. Morgan  
[nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com)

August 31, 2017.

  
Kaye Burns

# GRANT COUNTY PROSECUTOR'S OFFICE

August 31, 2017 - 9:39 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34107-1  
**Appellate Court Case Title:** State of Washington v. Anthony Rene Vasquez  
**Superior Court Case Number:** 13-1-00599-1

### The following documents have been uploaded:

- 341071\_Briefs\_20170831093839D3423312\_4419.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Brief of Respondent.pdf*

### A copy of the uploaded files will be sent to:

- gdano@grantcountywa.gov
- nodblspk@rcabletv.com

### Comments:

---

Sender Name: Kaye Burns - Email: kburns@grantcountywa.gov

**Filing on Behalf of:** Kevin James Mccrae - Email: kmccrae@grantcountywa.gov (Alternate Email: )

Address:

PO Box 37

Ephrata, WA, 98823

Phone: (509) 754-2011 EXT 3905

**Note: The Filing Id is 20170831093839D3423312**