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

STATE OF WASHINGTON, PETITIONER

v.

LASHAWN DOUXSHAE JAMEISON, RESPONDENT

ON DISCRETIONARY REVIEW
FROM THE SUPERIOR COURT OF SPOKANE COUNTY

PETITIONER'S REPLY BRIEF

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I. STATEMENT OF THE CASE

Some inaccurate statements of the substantive facts presented by Mr. Jameison require correction. First, defendant alleges that the facts demonstrate that he “retreated and separated himself from Mr. Bates” after he and Bates retrieved their guns. Resp’t Br. at 4; CP 158. To the contrary, the trial court found “Jameison takes up position by the Chrysler 300.” While perhaps one inference may be that Jameison “retreated and separated” himself from Bates, that is not included in the court’s findings, and is not an inference that may be drawn when viewing the evidence in the light most favorable to the State, as a court must do when hearing a *Knapstad* motion.

Second, the defendant alleges that he was “crouched in fear” behind the Chrysler car. Resp’t Br. at 4. None of the lower court’s findings of fact support this allegation, other than, potentially, Finding of Fact 18, which states, “Jameison ducks behind the Chrysler.” CP 159. Defendant’s citation to the trial court’s oral ruling, RP 43-44, is inapt because the trial court did not incorporate its oral ruling into its written findings, and, in any event, it never orally found Mr. Jameison was “crouched in fear.” This is a mischaracterization of the evidence and the trial court’s findings.

Third, the defendant cites to the disposition of co-defendant Williams' case; Williams eventually pleaded guilty to second-degree murder. This fact is outside the record and should not be considered by this Court.

II. ARGUMENT IN REPLY

A. ACCOMPLICE LIABILITY FOR EXTREME INDIFFERENCE MURDER AND MANSLAUGHTER BOTH REQUIRE GENERAL KNOWLEDGE OF THE CHARGED CRIME.

As previously argued by the State, this Court has held that one may be an accomplice to extreme indifference murder. *State v. Guzman*, 98 Wn. App. 638, 990 P.2d 464 (1999). In *Guzman*, the defendant, like Mr. Jameison here, argued that “a person cannot be convicted as an accomplice to murder by extreme indifference because he could not ‘know’ he was committing a non-intent crime.” *Id.* at 645. However, this Court previously dispensed with that argument and distinguished Mr. Guzman’s case from *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991), in which our Supreme Court held that a person cannot be convicted of *attempted* extreme indifference murder. *Guzman*, 98 Wn. App. at 646. In so holding, this Court stated, “although the crime of murder by extreme indifference requires a death, it does not require a specific intent of death. Instead, the fact need show merely that Mr. Guzman knew that his actions, along with Mr. Madeira’s actions were extremely dangerous, and yet he was indifferent

to the consequences. *Id.* citing *State v. Barstad*, 93 Wn. App. 553, 564, 970 P.2d 324, *review denied*, 137 Wn.2d 1037, 980 P.2d 1284 (1999). Here, the defendant's effort to conflate the law of attempt with the law of accomplice liability was flatly rejected by this Court in *Guzman*.

Washington courts have consistently held that the accomplice liability statute, RCW 9A.08.020 requires only general knowledge of the charged crime. *State v. Roberts*, 142 Wn.2d 471, 512, 14 P.3d 713 (2000) (long-standing rule that an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of that specific crime); *State v. Sweet*, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999) (it is not necessary for an accomplice to have specific knowledge of every element of the principal's crime); *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991). Accordingly, an accomplice to a crime need not share the same mens rea as the principle. *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003).

The defendant also argues that *Roberts, supra*; *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000); and *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001), all cases post-dating *Guzman*, narrowed the scope of accomplice liability in Washington, Resp't Br. at 12, and therefore, *Guzman* is no longer good law. This contention is directly contradicted by the Supreme Court's holding in *Berube*, which post-dates those three decisions.

In *Berube*, the Court addressed accomplice liability for extreme indifference murder in a different context – homicide by abuse.

RCW 9A.32.055(1) defines this crime as follows:

A person is guilty of homicide by abuse if, *under circumstances manifesting an extreme indifference to human life*, the person causes the death of a child ... and the person has previously engaged in a pattern or practice of assault or torture of said child...

(emphasis added).

In that context, the Supreme Court stated that where the defendant was “aware of [her co-defendant’s] severe physical abusive behavior toward [the child], and even put [the child] into positions where [her co-defendant] would assault him, she knew her actions promoted the abuse and she encouraged the abusive behavior.” *Berube*, 150 Wn.2d at 512. The Court reiterated that an accomplice need not be aware of the exact elements of the crime, but that, “as long as the defendant engaged in conduct that is ‘the crime’ the defendant may be found guilty” as an accomplice. *Id.* at 509, 512, citing *Roberts*, 142 Wn.2d at 512-513 and *Sweet*, 138 Wn.2d at 479.

As in *Berube*, Mr. Jameison encouraged Mr. Williams’s behavior by agreeing¹ to fight in a crowded parking lot, by arming himself, and by

¹ As previously argued, the State’s theory of the case is that the defendant did not overtly agree to fight as Mr. Williams and Mr. Bates did, but his actions, in taking up arms, and taking up a fighting position near Mr. Bates manifested his agreement to fight and his encouragement of the gunfight.

taking up a fighting position. Any reasonable person would be aware that exchanging gunfire in a crowded parking lot would be conduct manifesting an extreme indifference to another person or persons. And, because *Berube* post-dates *Roberts*, *Cronin*, and *Stein*, those cases should not be taken to stand for the principle suggested by the defendant – that one cannot be convicted as an accomplice of a crime if that crime requires a mens rea less than knowledge. Rather, as an accomplice, the defendant must have knowledge that his actions will promote or facilitate conduct that under the circumstances manifests an extreme indifference to human life.

In that regard, other Washington courts have since determined that a person may be convicted as an accomplice to extreme difference murder. In *State v. Tolbert*, 194 Wn. App. 1030, 2016 WL 3338228 (2016),² an unpublished opinion from Division One, the defendant attempted to make an argument similar to that made by Mr. Jameison here:

Tolbert argues that a jury could not convict him of accomplice liability because that would require it to find that he had knowledge of Mee’s crime. Tolbert argues that because the State charged Mee with first degree murder by extreme indifference, a crime that does not require proof of specific intent to murder Mr. Steele, it is logically impossible for Tolbert to have the knowledge that producing

² Under GR 14.1, a party may cite to an unpublished decision of the Court of Appeals filed on or after March 1, 2013. Unpublished opinions of the Court of Appeals have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

the gun from the garage would facilitate that murder, as required for accomplice liability.

Id. at *5.

Division One rejected that argument, relying on *Guzman* for the proposition that the State only needed to prove that the defendant knew that his actions along with the actions of the principle were extremely dangerous and yet he was indifferent to the consequences. *Id.* at *6.

Likewise, Division One has also determined that a person may be an accomplice to manslaughter. In *State v. Williams*, an unreported decision³ from Division One, the defendant was charged as an accomplice to the first degree manslaughter of his adopted child. 191 Wn. App. 1048, 2015 WL 9274250 (2015). In *Williams*, the defendant's wife forced the child to spend nine hours outside in cold, rainy weather, while inadequately clothed. *Id.* at *1. This was part of a regime of punishment engaged in by both the defendant and his wife, resulting in the child's loss of body mass and which placed the child at a severe risk of hypothermia. *Id.*

On the date of the child's death, Mr. Williams went to work. *Id.* at *3. Three hours later, his wife sent the child outside wearing sweatpants and a long sleeved shirt. *Id.* Later that evening, it began to rain and became cold.

³ Under GR 14.1, a party may cite to an unpublished decision of the Court of Appeals filed on or after March 1, 2013. Unpublished opinions of the Court of Appeals have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

Id. The wife told the child to do exercises to keep warm. *Id.* Although Williams' wife left dry clothes outside, the child removed her clothing until she was naked. *Id.* Shortly after midnight, one of the Williams' other children saw the victim laying naked, face down in the grass. *Id.* Despite Mrs. William's attempts to revive the child, as well as the attempts made by Mr. Williams after he was notified of the child's condition and returned from work, the child died at the hospital. *Id.*

Upon these facts, Mr. Williams was charged as an accomplice to first degree manslaughter. A person commits the crime of first degree manslaughter when he or she recklessly causes "or was an accomplice to another who recklessly causes 'the death of another person.'" *Id.* at *3; RCW 9A.32.060(1)(a). A person "acts recklessly" when he or she knows of and disregards a substantial risk that a death may occur and his or her disregard of such substantial risk is a gross deviation from the conduct a reasonable person would exercise in the same situation. *Williams* at *3; RCW 9A.08.010(1)(c).

Contrary to Mr. Williams' argument that the evidence was insufficient to convict him as an accomplice to first degree manslaughter, Divison One stated: "We conclude a rational trier of fact could have found that [Mr. Williams] was Carri's accomplice regardless of whether he was present when H.W. developed hypothermia... [Mr. Williams] participated

in conduct that promoted and encouraged Carri's reckless acts that resulted in H.W.'s death." *Id.* at *4. The court concluded that "because [Mr. Williams] participated in the punishment that placed H.W. at severe risk of hypothermia, and he promoted and encouraged Carri's reckless acts that resulted in H.W.'s death, we conclude sufficient evidence supports [Mr. Williams'] manslaughter conviction as an accomplice." *Id.* at *5.

Thus, *Roberts*, *Cronin* and *Stein* do not stand for the proposition advanced by the defendant in his brief, and his argument is unsound. *Roberts* and *Cronin* simply stand for the principle that a defendant must have knowledge of *the* principle's crime, and that knowledge of general criminal activity is insufficient. Indeed, it is still true after *Roberts* and *Cronin*, that an accomplice need not know of all the elements of the crime, nor need share the exact same mens rea of the principle. Although the defendant claims that *Roberts* and *Cronin* have overruled, *sub silencio*, this Court's holding in *Guzman*, defendant has failed to discuss the impact of *Berube* on those cases or on *Guzman*. After *Berube*, it is clear that one person may be held criminally liable as an accomplice for a crime that does not require intent or knowledge, but rather, as here, manifested an extreme indifference to a grave risk to human life. *See also, In re Pers. Restraint Petition Caldellis*, 187 Wn.2d 127, 142, 385 P.3d 127 (2016) (for extreme

indifference murder, the required mens rea is “manifesting an extreme indifference to human life”).

Defendant’s citation to *Stein* is also inapplicable because that case involves criminal conspiracy, a separate basis for establishing criminal liability. “Accomplice liability requires knowledge and a completed crime; conspiracy requires intent and a substantial step toward completion.” *Stein*, 144 Wn.2d at 242. To attempt to compare the two is to compare apples and oranges.

B. DEFENDANT’S RELIANCE ON THE LEGISLATIVE OMISSION OF A PORTION OF THE MODEL PENAL CODE FROM WASHINGTON STATUTE IS MISPLACED.

The defendant claims because the Washington State Legislature chose not to adopt Model Penal Code § 2.06(4), then it must have intended that a person escape criminal liability for complicity in a crime requiring a mental state less than knowledge. Resp’t Br. at 15. The defendant is incorrect.

The Model Penal Code provides, in pertinent part:

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

...

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

MPC § 2.06 (Liability for Conduct of Another; Complicity).

Defendant cites to a hypothetical situation posed in the Model Penal Code and Commentaries § 2.06(4) cmt. 7 at 322, n. 71, (1985) which seems to suggest that the absence of the language in Subsection (4) of the Model Penal Code could prevent criminal complicity for crimes requiring recklessness. This argument is unfounded because Washington’s complicity statute differs from the Model Penal Code in another important respect.

RCW 9A.08.020(3) requires an accomplice to act with *knowledge* that his actions will promote or facilitate the crime. MPC § 2.06(3)(a) requires a heightened burden – that the accomplice has the “*purpose* of promoting or facilitating the commission of the offense.” (Emphasis added.) “Purpose” in this respect means intent, as “the original draft of [Model Penal

Code] Subsection 3 did not confine itself to the case where there was a true purpose to promote or facilitate the offense, but also reached those who, with knowledge that another was committing or had the purpose of committing an offense, knowingly facilitated its commission.” Model Penal Code and Commentaries § 2.06(4) cmt. 6(c) at 314; *see also id.* at 315 n. 49 (indicating that Washington is one of the few states to propose and enact the original MPC provision requiring *knowledge*, rather than the later provision which required *purpose*).

The defendant’s attempt to compare the commentaries to the Model Penal Code to the current issue is misplaced because Washington’s complicity statute materially differs from the Model Penal Code. Therefore, citation to the Model Penal Code is unhelpful, and resort to its commentaries for guidance is not appropriate. It is *Washington* case law, interpreting *Washington’s* complicity statute, that informs this Court’s decision that a person may be an accomplice to an extreme indifference murder. As above, this Court made that determination in *Guzman*, and our Supreme Court made that determination in *Berube*. Those decisions, not a footnote to a comment to the Model Penal Code, control the issue presented here.

C. DEFENDANT’S ARGUMENT THAT HE MAY NOT BE CONVICTED AS AN ACCOMPLICE BECAUSE HE WAS A VICTIM OF MR. WILLIAMS’ CRIME IS UNSOUND.

Defendant cites no authority for the proposition that he may not be charged as an accomplice to Mr. Williams’ act of fatally shooting Mr. Villagomez, because he was a victim, not an accomplice. Resp’t Br. at 18. Defendant’s claim that he “cowered” behind a car to protect himself from Mr. Williams’ gunfire is unsupported by the record, and fails to view the evidence presented to the trial court and its findings of fact in the light most favorable to the State.

In that regard, it is true that a person may not be convicted as an accomplice when he or she is the victim of that same crime. RCW 9A.08.020(5)(a). Our Supreme Court recently analyzed this issue in *City of Auburn v. Hedlund*, 165 Wn.2d 645, 201 P.3d 315 (2009). In adhering to the plain language of the statute, which precluded Hedlund (who had assisted another person commit the crime of DUI and was injured as a result) from being convicted as an accomplice to the DUI, the Court stated:

The results of the plain reading of the statute will not be as dire or absurd as the city predicts because accomplices are usually not injured by the very crimes they assist. For example, someone injured helping a bank robber escape (perhaps by gunfire or automobile accident) is not the victim of the robbery and can thus still be charged as an accomplice.

Id. at 653.

Here, the defendant would have this court define “victim” more broadly than the Supreme Court, which used a definition requiring harm. *Id.* at 651. This Court cannot overrule the Supreme Court. However, even if Mr. Jameison were a “victim” of Mr. Williams’ assault, he is not a victim of the crime of extreme indifference murder – the criminal act in which he participated; he was fortunate enough to survive the shootout in the parking lot of the Palomino Club, unlike Mr. Villagomez. Under *Hedlund*, then, he may still be charged as an accomplice to the crime of extreme indifference murder as he was not killed, and hence was not a victim of that specific crime.

D. THE UNIT OF PROSECUTION FOR DRIVE-BY SHOOTING IS THE NUMBER OF INDIVIDUALS ENDANGERED.

Defendant argues that the language of the drive-by shooting statute evidences a legislative intent for the unit of prosecution to be the act of discharge of a firearm, rather than the number of individuals endangered by that discharge.

The crime of drive-by shooting (formerly first degree reckless endangerment) is defined in RCW 9A.36.045:

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.

(Emphasis added.)

The reckless endangerment statute provides:

A person is guilty of reckless endangerment when he or she recklessly engages in conduct *not amounting to drive-by shooting* but that *creates a substantial risk of death or serious physical injury to another person*.

RCW 9A.36.050(1) (emphasis added).

Our high court has interpreted the language of the latter statute to indicate that the unit of prosecution for reckless endangerment is per person endangered. *State v. Graham*, 153 Wn.2d 400, 103 P.3d 1238 (2005). In doing so, the Court analyzed the “another person” language in the reckless endangerment statute. Given that these statutes contain parallel provisions, this Court should interpret the same language in both statutes to mean the same thing. *See, e.g., State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (in determining a provision’s plain meaning, the court looks to the text of the statutory provision in question, as well as “the context of the statute in which that provision is found, *related provisions*, and the statutory scheme as a whole” (emphasis added)).

Contrary to that basic principle of statutory interpretation, Mr. Jameison would have this Court interpret the word “discharge” in the drive-by-shooting statute to mean that it is each *discharge* of the weapon

that serves as the unit of prosecution for drive-by shooting. If that were the language relevant to a unit of prosecution inquiry, then the parallel language of the reckless endangerment statute would be its “engages in conduct not amounting to drive-by shooting” language. While both of these provisions define the prohibited conduct, our Supreme Court did not use the “engages in conduct” language to determine the unit of prosecution for reckless endangerment. Rather, according to the Supreme Court, the relevant language is that which defines the risk of harm to “another person.” *Graham*, 153 Wn.2d at 406.

The defendant cites *State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24 (2004), and *State v. Westling*, 145 Wn.2d 607, 40 P.3d 669 (2002) in support of his argument. The Supreme Court has already compared the statute at issue in *Westling* with the reckless endangerment statute, and found that the use of “any” in the arson statute analyzed in *Westling* holds a different meaning than the use of “another” in the reckless endangerment statute. *Graham*, 153 Wn.2d at 406. Thus, the result in *Westling* was that the unit of prosecution was per-fire-started, rather than the number of buildings or structures endangered, whereas, in *Graham*, the unit of prosecution for reckless endangerment was the number of individuals endangered.

Varnell interpreted the unit of prosecution for crimes charged under the solicitation statute, 9A.28.030. Under the solicitation statute, it is

irrelevant whether the crime is actually committed, but rather, that the defendant *intends* for it to be committed. It is that *intent* which is punished under the statute, rather than any injury or endangerment that results from the action. For this reason, both *Varnell* and *Westling* are distinguishable from the case at hand, and *Graham* controls.

E. THE DEFENDANT’S CLAIM THAT NO MORE THAN TWO PEOPLE WERE ENDANGERED IS A QUESTION FOR THE JURY.

Assuming the unit of prosecution is, as *Graham* requires, per person endangered, the defendant asks this Court, without a single citation to the record, or to the court’s findings of fact and conclusions of law, or to the surveillance footage, to find that Mr. Jameison could have, at most, killed or seriously injured only two people. Resp’t Br. at 24. But, in doing so, Mr. Jameison asks this Court to substitute its judgment for the jury, which has not yet been convened. The trial court expressly enumerated the number of nearby individuals, in its Finding of Fact 22. CP 159. It is up to the trier of fact, not this Court, to determine whether one, two, some, or all of those individuals were endangered by Mr. Jameison’s gunfire. After all, in making its findings of fact and conclusions of law, the trial court did not make any finding that only one or two of those persons were actually endangered, but rather dismissed those charges on the basis that, as a matter of law, the unit of prosecution was per bullet rather than per victim. The

record is currently insufficiently developed for this Court to determine that, as a matter of law, only one or two people were endangered by the defendant's actions of shooting two bullets into a crowded parking lot.⁴

F. THE RULE OF LENITY APPLIES TO UNIT OF PROSECUTION INQUIRIES BUT WAS NOT USED BY THE SUPREME COURT TO INTERPRET IDENTICAL STATUTORY LANGUAGE IN *GRAHAM*.

Defendant additionally argues that the rule of lenity requires this Court to construe the drive-by shooting statute in his favor, citing *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015). *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009), is a more appropriate case for this principle, as it involves *both* unit of prosecution and the rule of lenity.

At issue in *Sutherby* was the unit of prosecution for possession of visual or printed depictions of a minor engaged in sexually explicit conduct under former RCW 9.68A.070 and RCW 9.68A.011(2)(2002). The Court stated:

Ultimately, analyzing the unit of prosecution is an issue of statutory construction and legislative intent. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). To determine legislative intent, we look to the plain meaning of the applicable statute, which is derived from the language of the

⁴ For that matter, the defendant's argument that the unit of prosecution must be per-firearm-discharge leads to absurd results. For instance, under the defendant's interpretation, a person could discharge a shotgun one time, but endanger multiple people, as a shotgun fires multiple pellets at one time. Conversely, assuming only one potential victim were present at the time a defendant fired an automatic weapon, the defendant could be charged with multiple counts of drive-by shooting for endangering only one person.

statute. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). We construe statutes to effect their purpose and avoid unlikely or absurd results. *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

If a statute does not clearly and unambiguously identify the unit of prosecution, then we resolve any ambiguity under the rule of lenity to avoid “turning a single transaction into multiple offenses.” *Adel*, 136 Wn.2d at 634-35, 965 P.2d 1072 (quoting *Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955)).

Sutherby, 165 Wn.2d at 878-79.

Interestingly, the Court also acknowledged the application of the rule of lenity to unit of prosecution inquiries in *Graham*. 153 Wn.2d at 405. However, the Court did not ultimately utilize the rule of lenity in interpreting the nearly identical statutory language of the reckless endangerment statute. This is because the Court determined the *plain language* of the statute (as well as the nature of reckless endangerment) evidenced the legislature’s intent to impose multiple sentences where a defendant’s reckless act endangers multiple individuals. *Id.* at 407-08. Therefore, the Court did not resort to the rule of lenity as a principle of statutory construction because it found that the plain language was unambiguous. Similarly, the rule of lenity should not be applied here, to nearly identical language, which prohibits the same conduct, and which only requires the State to prove the additional element that the defendant discharged a firearm (from a 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). Therefore, Mr. Jameison's claim that the rule of lenity requires this Court interpret the statute in his favor fails.

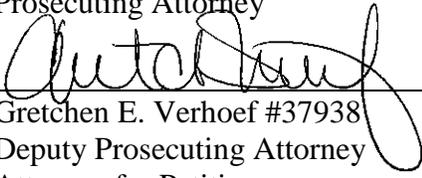
III. CONCLUSION

The State respectfully requests this Court reverse the trial court's rulings dismissing the charges as discussed above. The trial court's decisions to dismiss the first degree murder by extreme indifference and alternatively, manslaughter charges, as well as twelve counts of drive-by shooting were both legally incorrect decisions. The decisions should be reversed with an order to the trial court to allow the State to proceed to trial under the theory presented herein and in its opening brief.

Dated this 22nd day of November, 2017.

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