

34768-1-III

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

BRIEF OF PETITIONER

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered Conclusion of Law 1 (“Jameison is not legally responsible for the death of Mr. Eduardo Villagomez since he did not fire the fatal bullet. As such Count 1 (First Degree Murder and First Degree Manslaughter) are dismissed”). CP 159.
2. The trial court erred when it entered Conclusion of Law 2 (“The proper unit of prosecution for Drive by Shooting is the number of bullets fired. Therefore the court dismisses all but two counts of Drive by Shooting”). CP 160.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when it failed to take into account precedent of this Court that holds that a person may be charged and convicted as an accomplice to first degree murder by extreme indifference?
2. Whether the trial court failed to draw all rational inferences in favor of the State in ruling that Mr. Jameison was not legally responsible for the death of the victim, when one such rational inference is that Mr. Jameison agreed with others to hold a gun fight in a crowded parking lot?
3. Whether the unit of prosecution for drive-by shooting is per-person-endangered, rather than per-bullet-fired, where the unit of prosecution for an analogous statute, reckless endangerment, has been interpreted by the Supreme Court to be per-person-endangered?

III. STATEMENT OF THE CASE

1. Substantive Facts.

On January 18, 2016, a group of 500-600 young adults gathered at the Palomino Club (hereinafter “Club”) celebrating Martin Luther King Day in Spokane. CP 157 (Finding of Fact 1). The defendant, Lashawn

Jameison, and the two co-defendants, Bates and Williams, were in attendance. CP 157 (Finding of Fact 2).

Bates and Williams engaged in a verbal altercation outside the Club, in Mr. Jameison's presence. CP 158 (Findings of Fact 6 and 7). Thereafter, Williams jumped over a metal fence and armed himself with a handgun from a car parked in an adjacent parking lot. CP 158 (Finding of Fact 8). Bates decided he would fight with Williams because he "does not back down" from a fight as long as it is fair. CP 158 (Finding of Fact 10). Both Bates and Jameison then returned to the car in which they arrived at the club, a Camry, and both armed themselves. CP 158 (Findings of Fact 3 and 11). Jameison took a position by the vehicle parked directly behind Bates' car, a Chrysler, and Bates positioned himself next to a power pole between the Camry and the Chrysler. CP 158 (Findings of Fact 12 and 13). Bates and Williams then "square[d] off" while many people were walking to their cars on the street where Bates' car was parked, or in the parking lot in which Williams stood; other people were gathered at the front of the club, and in the club's parking area. CP 158-159 (Findings of Fact 15 and 16).

Williams moved behind the rear driver's side door of a car that had pulled into the lot, driven by a friend of his, and shot his gun one time. CP 158-159 (Findings of Fact 14 and 17). Eduardo Villagomez, who was walking on the street and was not involved in the altercation, was struck by

the bullet, dropped to the roadway behind Bates, and was run over by an unsuspecting driver. CP 159 (Finding of Fact 17). Mr. Villagomez died. CP 159 (Finding of Fact 17).

Both Jameison and Bates hid behind the Chrysler. CP 159 (Finding of Fact 18). Jameison stood up and fired two shots towards Williams; Williams returned fire (possibly two additional shots), jumped into the vehicle driven by his friend, and the vehicle drove away. CP 159 (Findings of Fact 19 and 20). Bates and Jameison stood up and fired additional rounds toward the vehicle occupied by Williams. CP 159 (Finding of Fact 21).

A number of other people were in close proximity to the gunfight, either on the street or in the parking lot where Williams was located. CP 159 (Finding of Fact 22). Jameison and Bates left in Bates' car unscathed. CP 159 (Finding of Fact 23).

2. Procedural Facts.

On February 22, 2016, the defendant was charged by information in Spokane County Superior Court with one count of first degree murder by extreme indifference, under a theory of accomplice liability, and, in the alternative, first degree manslaughter, also under a theory of accomplice liability. CP 1-4. Additionally, he was charged with fourteen counts of drive-by shooting. CP 1-4. The defendant moved to dismiss the charges pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), arguing

that as a matter of law, the State was unable to prove the charges. CP 27-86. The State responded to the *Knapstad* motion and the defendant replied. CP 87-96, 97-132.

With regard to the charges of extreme indifference murder the defendant argued during the motion argument:

There's no legitimate argument that can be made that Mr. Jameison's actions caused – directly caused, which is what is required under legal causation, being the direct cause, cause the death of the victim.

...

And never in the history of Washington jurisprudence, not once – and I spent hours looking – *has a court found that an individual can be held liable for the death of another person under the extreme indifference prong of the murder statute when the defendant did not fire the bullet that struck and killed the victim. Never.*

6/30/16 RP 15 (emphasis added).

[T]he video depicts that Mr. Jameison never even raised his weapon until after the victim had already been shot and killed. So quite frankly, your Honor, it doesn't matter how many shots he fired. He can't be said to have legally caused the death of this person.

6/30/16 RP 16.

The State addressed this argument, by stating:

With regards to the elements of the charge of murder in the first degree in this case, *causation begins before shots were ever fired. The State's evidence is going to show at trial, and definitely in the light most favorable to the State shows that these defendants worked as accomplices in creating this reckless endangerment, for they agreed, after the initial*

conflict in The Palamino Club, to resolve this with violence. They went outside to do that.

...

[C]ausation in this matter, especially in the light most favorable to the State, started when everyone had the intent to leave that club, engage in this reckless conduct, and because of the amount of people there, it was so extreme and indifferent to human life that we get to this situation when one of those accomplices ended up killing Mr. Villagomez.

6/30/16 RP 29-30 (emphasis added).¹

From the above facts, the trial court entered Conclusions of Law 1 and 2 that, “Jameison is not legally responsible for the death of Mr. Eduardo Villagomez since he did not fire the fatal bullet,”² and “the proper unit of

¹ The State also addressed its theory of accomplice liability in its brief in response to the defendant’s *Knapstad* motion, CP 6, and in the motion to reconsider, CP 140-142, and the defendant was charged as an actor or an *accomplice* to extreme indifference murder and first degree manslaughter. CP 1.

² During the Court’s oral ruling on the *Knapstad* motion, the Honorable Michael Price ruled:

Here, the Court is absolutely satisfied that Mr. Jameison’s conduct does not meet the elements of this offense. While the State can argue that by firing his gun one or two times, Mr. Jameison demonstrated an extreme indifference to human life, and/or a grave risk of death to any person, *there is no dispute that nothing whatever that Mr. Jameison did caused the death of Mr. Villagomez, who was mortally wounded before Mr. Jameison fired a single shot. And we know, without dispute, that the shot which killed Mr. Villagomez was fired by Mr. Williams, not Mr. Jameison.* There is no dispute.

prosecution for Drive By Shooting is the number of bullets fired.”³ CP 159-60. (Conclusions of Law 1 and 2). From these conclusions, the Court ordered dismissal of count 1, first degree murder by extreme indifference and first degree manslaughter, charged in the alternative, and all but two counts of drive-by shooting. CP 159-60. (Conclusions of Law 1 and 2).

Knapstad clearly mandates that the charge of first degree murder against Mr. Jameison should be dismissed...

6/30/16 RP 47 (emphasis added).

Mr. Villagomez was not only shot before Mr. Jameison fired his weapon; he had been run over by a fleeing citizen, again before Mr. Jameison fired any shots whatsoever. *There is no dispute that Mr. Jameison did not shoot the victim and did not run over the victim.* He is clearly not responsible for the victim’s death. He could not be. *All of the actions that were taken that caused Mr. Villagomez’s death occurred before Mr. Jameison did anything at all.*

Now under any theory, whether there is a dispute in the club or in a parking lot, under any theory, there is simply no way that a charge of first-degree manslaughter is supported here. Again, Mr. Jameison had nothing whatever to do with the sad death of Mr. Villagomez.

6/30/16 RP 48 (emphasis added).

³ During the court’s oral ruling on the *Knapstad* motion, the court ruled:

But having read it again, I’m satisfied that it’s appropriate to dismiss 12 of the 14 counts of drive-by shooting without prejudice. I’m satisfied *Bowman* tells the Court the question is how many times Mr. Jameison engaged in the alleged reckless conduct, not how many citizens were there.

6/30/16 RP 53.

The order of dismissal was entered by the court on August 22, 2016. CP 157-60. Along with the order of dismissal, the court also filed a letter to the parties indicating that while both parties' proposed findings were accurate, the State's proposed findings of fact and conclusions of law "ma[d]e clear [the court's] opinion that Mr. Jameison was not legally responsible for the death of Mr. Villagomez in that he did not fire the fatal bullet [and] that a proper unit of prosecution in a drive-by shooting case is the number of bullets fired, rather than potential victims who may in the line of fire." CP 156. The trial court also denied the State's motion to reconsider the orders of dismissal by order dated August 24, 2016. CP 166-68.

On December 8, 2016, and subsequent to this Court granting discretionary review of the above decisions, the trial court held a pre-trial conference in this matter. At that hearing, defense counsel requested the trial court clarify its August 22, 2016 dismissal orders:

And I don't know if you had the opportunity to review the order from Commission Wasson on discretionary review... As you are aware then from reading that, the state's argument on appeal has been that this court ruled as a matter of law that charges of murder in the first degree by extreme indifference as accomplice liability as a matter of law cannot go forward, because you cannot have accomplice liability murder. That was never argued. That wasn't this court's ruling in my opinion. Certainly was never argued in that fashion from Mr. Jameison. And so I'm asking this – I'm motion this court today asking for a clarifying order as to what this court's ruling actually was.

It's our position, Your Honor, that as – from the briefing you saw, that that's in no way, shape or form what this court ordered, and I'll submit to this court that if that is what this court ordered that I think it's very likely that this matter will be overturned, because I don't believe that's the status of the case law. I believe what this court ordered was that under the – under the facts, that they didn't have the facts to support this case... And then if they're making a ruling based upon an incorrect finding by this court, we're going to be right back in the same position a year from now, and we're going to be – I'm going to be bringing the exact same *Knapstad* motion... So I guess what I'm trying to do, Your Honor, is circumvent that a little bit, cut down on the time and get to the heart of the actual issue so he [sic] we're not wasting time.

12/8/16 RP 4-5.

Although the trial court recognized its “hands are tied pursuant to the rules until such time that they tell me I can take another look at this or they ask me for clarification,” it indicated that perhaps it should have written its own order, but declined to make a commentary about what it “did or did not mean in [its] decision.” 12/8/16 RP 7.

IV. ARGUMENT

A defendant may “move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.” CrR 8.3(c). These motions are generally referred to as *Knapstad* motions. *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). Subsequent to *Knapstad*, the Supreme Court adopted a court rule outlining the procedures to be employed for such motions to dismiss. *See* CrR 8.3(c)(1). This process

is essentially a criminal summary judgment procedure “to avoid a ‘trial when all the material facts are not genuinely in issue and could not legally support a judgment of guilt.’” *State v. Freigang*, 115 Wn. App. 496, 501, 61 P.3d 343 (2002) (quoting *Knapstad*, 107 Wn.2d at 356). The trial court “shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt.” CrR 8.3(c)(3). However, in *Knapstad* motions, the Court does not pass judgment on the facts. *Freigang*, 115 Wn. App. at 502. A *Knapstad* motion should be denied if, construing all inferences in the light most favorable to the State, any reasonable jury could find the defendant guilty of the crime. *Knapstad*, 107 Wn.2d at 353.

Standard of Review.

A trial court’s decision to dismiss a criminal prosecution under *Knapstad* or CrR 8.3(c) is reviewed by an appellate court de novo and, in its review, the court views all facts and all reasonable inferences in the light most favorable to the State. *See State v. Bauer*, 180 Wn.2d 929, 935, 329 P.2d 67 (2014); *State v. O’Meara*, 143 Wn. App. 638, 642, 180 P.3d 196 (2008). An appellate court will uphold the trial court’s dismissal of a charge pursuant to *Knapstad* if no rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. *State v. Snedden*, 112 Wn. App. 122, 127, 47 P.3d 184 (2002).

A. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT MR. “JAMEISON IS NOT LEGALLY RESPONSIBLE FOR THE DEATH” OF THE VICTIM “SINCE HE DID NOT FIRE THE FATAL BULLET” WHERE THE DEFENDANT WAS CHARGED AS AN ACCOMPLICE TO FIRST DEGREE MURDER BY EXTREME INDIFFERENCE.

The trial court incorrectly determined that a person cannot be liable as an accomplice to first degree extreme indifference murder where he or she does “not fire the fatal bullet.” As a result, the court dismissed the charge of first degree murder by extreme indifference. This determination was in error, and should be reversed such that the State may proceed to trial on this charge.⁴

The question presented under the facts here is whether, as a matter of law, no rational trier of fact could convict Mr. Jameison of extreme indifference murder (or first degree manslaughter) as an accomplice.⁵ The

⁴ As well as on the alternative charge of first degree manslaughter as an accomplice, also discussed below.

⁵ Defendant apparently disagrees with the State’s assessment of the issue presented. 12/8/16 RP 4-5. Ultimately, it is irrelevant whether the defendant agrees with the State’s issue presented because in engaging in de novo review, this Court determines whether any rational trier of fact could impose criminal liability under these circumstances. The State would submit that the principle of collateral estoppel will preclude relitigation of this issue at the trial court once this Court has made a determination of the issue on its merits. In order for collateral estoppel to apply, (1) the issue in the prior adjudication must be identical to the issue subsequently presented for review, (2) the prior adjudication must be a final judgment on the merits, (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication and (4) barring relitigation will not work an injustice on the party against whom the doctrine is applied. *See e.g., State v. Harrison*, 148 Wn.2d 550, 61 P.3d 1104 (2003).

conclusion of law reached by the trial court that Mr. Jameison “is not legally responsible for the death of Mr. Eduardo Villagomez since he did not fire the fatal bullet” expressly precludes the use of an accomplice liability theory in this or in any other extreme indifference murder committed by multiple actors in which one actor used a gun. The trial court’s holding is legally incorrect because it conflicts with this Court’s precedent in *State v. Guzman*, 98 Wn. App. 638, 990 P.2d 464 (1999). The trial court’s ruling is also procedurally incorrect because the trial court failed to comply with *Knapstad* and CrR 8.3 when it did not afford the State the benefit of all reasonable inferences in light of the evidence before it, which would include the reasonable and rational inference that Jameison and his co-defendants agreed to hold a gun fight in a crowded parking lot before the fatal shot was fired.

The trial court’s ruling was both legally and procedurally incorrect.

First degree murder by extreme indifference occurs when a person, under circumstances manifesting an extreme indifference to human life, engages in conduct which creates a grave risk of death to any person, and thereby causes the death of another person. RCW 9A.32.030(1)(b). The crime of extreme indifference murder existed at common law, and encompassed killings characterized not by malice to a particular victim, but

by “any evil design in general; the dictate of a wicked, depraved⁶ and malignant heart.” 4 Sir William Blackstone, Commentaries on the Laws of England, 198 (1st ed. 1769). The mens rea of murder by extreme indifference is aggravated recklessness, which requires greater culpability than ordinary recklessness or more than mere disregard for the safety of others. *State v. Dunbar*, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991); *State v. Barstad*, 93 Wn. App. 553, 561-62, 970 P.2d 324 (1999). To prove that the defendant acted with extreme indifference to human life, the State must prove that the defendant acted without regard to human life in general, as opposed to acting without regard to the life of a specific victim. *State v. Pettus*, 89 Wn. App. 688, 694, 951 P.2d 284 (1998), *abrogated on other grounds by State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005); *State v. Pastrana*, 94 Wn. App. 463, 473, 972 P.2d 557 (1999), *abrogated on other grounds by State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005).

Manslaughter in the first degree occurs when a person recklessly causes the death of another person. RCW 9A.32.060(1)(a). “Recklessly” means, for purposes of defining manslaughter, that a person knew of and disregarded a substantial risk that a homicide may occur. *State v. Gamble*,

⁶ As noted in *State v. Dunbar*, legislative history indicates the Legislature substituted the term extreme indifference for the term “evincing a depraved mind.” 117 Wn.2d at 593.

154 Wn.2d 457, 114 P.3d 646 (2005). “Although the boundary is not exact, [extreme indifference murder requires] an aggravated or extreme form of recklessness which sets the crime apart from first degree manslaughter.” *State v. Dunbar*, 117 Wn.2d at 594..

A person is liable as an accomplice to a criminal act if, with knowledge that it will promote or facilitate the commission of the crime for which the person was eventually charged, he or she solicits, commands, encourages, or requests another person to commit the crime or he or she aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3)(a)(i) - (ii); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). The word “aid” means all assistance, whether given by words, acts, encouragement, support or presence. A person who is at the scene and ready to assist by his or her presence is aiding in the commission of the crime; however, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. *See State v. Mancilla*, 197 Wn. App. 631, 391 P.3d 507 (2017). General knowledge of a co-defendant’s substantive crime is sufficient to sustain a conviction under an accomplice theory of liability. *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984).

1. *The trial court's ruling was legally incorrect because this court, and others have held that a person may be convicted as an accomplice to first degree murder by extreme indifference.*

Here, the court's conclusion of law that Mr. Jameison was not legally responsible for Mr. Villagomez' death was legally incorrect because it directly conflicts with precedent of this Court. In *Guzman, supra*, the defendant was the driver of a car in which his co-defendant passenger shot at a small group of people, killing one individual. *Guzman*, 98 Wn. App. at 640. On appeal, the defendant contended that a person could not be convicted as an accomplice of murder by extreme indifference because an accomplice must know that he is assisting the commission of a particular crime. *Id.* at 645. This Court held that, although the crime of murder by extreme indifference requires a death, it does not require the specific intent of death, but rather, the State must prove facts that the defendant knew his actions, along with the principal actor's conduct, was extremely dangerous, and yet he was indifferent to the consequences. *Id.* at 646 (*citing Barstad*, 137 Wn. App. at 554). This Court also rejected the defendant's contention that Mr. Guzman "was not the proximate cause" of the victim's death. *Id.* at 646.

Other cases examining extreme indifference murder also make it clear that a person may be convicted as an accomplice to that crime, assuming the state is able to demonstrate criminal complicity. For instance,

in *Ex Parte Simmons*, 649 So.2d 1282 (Ala. 1994), a prosecution for extreme indifference murder under Alabama law, the State proceeded under an accomplice liability theory where multiple individuals shot firearms from a truck and struck and killed a three year old child. The State conceded it was unable to prove which defendant shot the fatal bullet. *Id.* In affirming the conviction, the court indicated:

[A]ccomplice liability requires only that the accomplice intend to promote or to assist the principal, having knowledge that the principal is engaging in, or is about to engage in, criminal conduct... The mental state required for complicity is the intent to aid the principal in the criminal act or conduct, not the intent of the principal that death occur either intentionally or recklessly. In other words, for a person to be guilty of reckless murder as an accomplice, he need not know or decide whether the principal will act intentionally ... or recklessly ...; rather, the accomplice need only have knowledge that the principal is engaging in reckless conduct and intentionally assist or encourage that conduct with the intent to promote or facilitate its commission.

Id. at 1285; *see also State v. Rivera*, 162 N.H. 182, 27 A.3d 676 (2011) (affirming a conviction where the defendant was an accomplice to second degree murder by extreme indifference).

In the context of manslaughter, which also requires a reckless killing of lesser recklessness than extreme indifference murder, a person may also be convicted as an accomplice. As above, while an accomplice must have actual knowledge that the principle was engaged in the charged crime, an accomplice need not have specific knowledge of every element of the crime;

general knowledge of “the crime” is sufficient. *State v. McChristian*, 158 Wn. App. 392, 400, 241 P.3d 468 (2010). Where the crime of manslaughter is at issue, an accomplice’s promotion or encouragement of the reckless act(s) which result in another’s death is sufficient to sustain a conviction as an accomplice to manslaughter.

For instance, the Texas Court of Criminal Appeals addressed the issue in *Mendez v. State*, 575 S.W.2d 36 (Tex. Crim. App. 1979). In *Mendez*, the defendant and two friends went drinking, armed themselves, and fired several shots at a vehicle. Thereafter, one of the defendant’s companions began shooting randomly at houses. One of these shots killed a homeowner who was asleep in bed. The Texas court held that the defendant was properly convicted of involuntary manslaughter under a complicity theory because the defendant “intentionally solicit[ed] or assist[ed] an individual in committing a reckless act.” *Id.* at 38. *See also, Downey v. State*, 298 Ga. 568, 783 S.E.2d (2016) (If an accomplice was aware of the risk of harm and intended the shooter to fire shots in disregard of that risk, co-defendant accomplice shared common criminal intent with principle defendant).

Similarly, if two drivers engage in an unlawful race on a public highway, thus encouraging each other to drive recklessly, both will be guilty of vehicular homicide by reckless driving if one of them strikes and kills a

third person. *See, e.g., State v. Parker*, 60 Wn. App. 719, 806 P.2d 1241 (1991) (in vehicular homicide prosecution where the defendants' conduct was compared to a game of cat-and-mouse in which "one was trying to get away from the other," the court stated that criminal liability may be predicated upon a theory of complicity - "[A]n accomplice must be associated 'with the venture and participate in it as something he wishes to bring about and by his action make it succeed.' Here, [the defendant's contribution to the accident is that of an active participant, not a mere bystander..."); *see also People v. Abbott*, 84 A.D.2d 11, 445 N.Y.S.2d 344 (1981); *Jones v. Commonwealth*, 247 S.W.2d 517 (Ky. 1952).

Another example involving complicity in reckless criminal conduct is *Black v. State*, 103 Ohio St. 434, 133 N.E. 795 (1921), a case in which multiple police officers agreed to test their marksmanship by shooting at a target at the back of a saloon. One of the shots passed through the saloon wall and killed a passerby, although it was undetermined which shot killed the victim. The Ohio Supreme Court ruled that all of the participating officers were criminally responsible for the unintended death:

Where men combine either by express agreement or by actual conduct in the commission of an unlawful act ... [,] each and all of those so participating are held equally liable

for any and all of the proximate results that could naturally and reasonably be anticipated...

Black, 103 Ohio St. at 440.

Here, the trial court's ruling that Mr. Jameison cannot be legally responsible for the death of Mr. Villagomez simply because he did not fire the fatal bullet is incorrect and conflicts with this Court's ruling in *Guzman*, and the reasoning of numerous other jurisdictions which have determined that one may be prosecuted as an accomplice to a crime for which recklessness or extreme recklessness is the required mens rea. It was Mr. Jameison's encouragement, in part, by words or conduct, including taking up arms with his companions, agreeing to fight, assuming a strategic fighting position, and squaring off with Mr. Williams that is at the heart of the State's argument of his complicity in the extreme indifference murder of Mr. Villagomez. The death of the victim was predictable and grew naturally and proximately out of the conduct of all three defendants. But for that conduct, Mr. Williams may not have been encouraged to fire his pistol causing the death of Mr. Villagomez. The court's finding that Mr. Jameison cannot legally be responsible for Mr. Villagomez' death because Mr. Jameison did not fire his weapon until after the victim had been struck by Mr. Williams' bullet, utterly ignores the Mr. Jameison's facilitation of

and complicity in the reckless, criminal conduct by agreeing to hold a gun fight in a crowded parking lot.

2. *The trial court's ruling was procedurally incorrect because it failed to draw all reasonable inferences in favor of the State.*

Even in making findings of fact that while in Mr. Jameison's presence, Mr. Bates and Mr. Williams were involved in an altercation, after which all three men intentionally retrieved firearms and took up fighting positions in a crowded parking lot, the trial court failed to draw *any* reasonable inferences from those findings of fact. The reasonable inference upon which the State relies to prove its prima facie case of extreme indifference murder under an accomplice liability theory is that all three men engaged in an agreement to fight with each other. As with proving criminal intent,⁷ the State is entitled to rely on reasonable inferences and circumstantial evidence in order to prove such an agreement. *See, e.g., State v. D.H.*, 31 Wn. App. 454, 459, 643 P.2d 457 (1982) ("These findings were supported by substantial evidence and permit the *inference* beyond a reasonable doubt that [the defendant] intended to encourage the theft, and now only was ready to assist but actually did assist in its commission...").

The State respectfully requests that this Court, in its de novo review, give

⁷ *See e.g. State v. Goodman*, 150 Wn. App. 774, 83 P.3d 410 (2004) ("criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability"); *Mancilla*, 197 Wn. App. 631 (circumstantial evidence permitted the jury to find the requisite degree of intent).

the State, as the non-moving party below, the benefit of all logical, rational, and reasonable inference that there was an agreement among the three defendants to engaged in a gunfight with one another in the crowded parking lot.

Based upon both legal and procedural errors below, the trial court was incorrect in determining that, as a matter of law, accomplice liability may not be proven where the predicate crime is extreme indifference murder or first degree manslaughter, and the defendant was not the person who fired the fatal bullet. It was error for the trial court to deprive the State of its ability to prove the Mr. Jameison's collusion with Mr. Bates and Mr. Williams to engage in an extremely reckless gunfight which resulted in the unintended death of Mr. Villagomez.

B. THE TRIAL COURT ERRED IN DETERMINING THAT THE UNIT OF PROSECUTION FOR THE CRIME OF DRIVE-BY SHOOTING IS DETERMINED BY THE NUMBER OF BULLETS FIRED, RATHER THAN BY THE NUMBER OF INDIVIDUALS ENDANGERED BY THOSE BULLETS.

The trial court incorrectly determined that the legislature intended the unit of prosecution for the crime of drive-by shooting to be based upon the number of bullets fired, rather than upon the number of individuals directly endangered by the discharge of those bullets.

The meaning of a statute is a question of law reviewed by the court de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11,

43 P.3d 4 (2002). The court’s purpose in construing statutes is to ascertain and carry out the intent of the legislature. *Id.*; *Dep’t of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 961, 275 P.3d 367 (2012). “The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court gives effect to that plain meaning.” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation omitted). 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.” *Id.* (emphasis added).

The crime of drive-by shooting 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.)

Although no Washington court has specifically addressed the language of this statute to determine the unit of prosecution for the crime of drive-by shooting, the trial court’s determination that the unit of prosecution in such cases is based on the number of bullets fired is erroneous in light of the Washington Supreme Court’s determination of the unit of prosecution

for the related crime of reckless endangerment in *State v. Graham*, 153 Wn.2d 400, 103 P.3d 1238 (2005).

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).

The *Graham* court affirmed the Court of Appeals' decision in *State v. A.G.*, 117 Wn. App. 462, 72 P.3d 226 (2003) (published in part), in which Division One of this Court determined that the legislature intended the unit of prosecution for reckless endangerment to be "per victim" rather than per alleged act of reckless conduct. Relying on the statutory interpretation conducted in *State v. Westling*, 145 Wn.2d 607, 40 P.3d 669 (2002) (interpreting the word "any" to mean "all" or "every") and *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003) (analysis of the legislature's use of "a" rather than "any"), the *Graham* court determined that the use of the word "another" in the statutory language rather than the word "any," "clearly predicates guilt on the defendant's risk of creating a risk to a single particular person." *Graham*, 153 Wn.2d at 406, *A.G.*, 117 Wn. App. at 469.

The *Graham* court held both that the Court of Appeals was correct in its interpretation of the "another person" language of the reckless

endangerment statute, and that this interpretation was consistent with the “nature of reckless endangerment.” *Graham*, 153 Wn.2d at 407. Citing *Albrecht v. Maryland*, 658 A.2d 1122 (Md. 1995), the court reasoned that because reckless endangerment is an inchoate crime against a person, “either one step removed (no actual harm) or two steps removed (neither actual harm nor intent to harm)” from consummated crimes such as homicides and assaults, “it would be anomalous to conclude” that a person may be charged for each instance of homicide or assault, but only charged with one count of reckless endangerment where multiple persons have been put at substantial risk. *Graham*, 153 Wn.2d at 407.

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

Additionally, the crime of “drive-by shooting” was originally titled “reckless endangerment first degree”⁸ and the statutory language of first

⁸ (1) A person is guilty of reckless endangerment in the first degree when he or she recklessly discharges a firearm in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or

degree reckless endangerment was identical to the language of the current drive-by shooting statute, with the exception that drive-by shooting is a class B felony and reckless endangerment in the first degree was originally a class C felony. Laws of 1989 c. 271 § 109. The legislature amended the crime of reckless endangerment first degree to a class B felony in 1995 and renamed the offense “drive-by shooting” in 1997. Laws of 1995 c. 129 § 8; Laws of 1997 c. 338 § 44.

Because the language of the reckless endangerment statute contains identical language to the drive-by shooting statute, with each statute requiring the defendant to “create[] a substantial risk of death or serious physical injury to *another* person,” that language should be interpreted in the same manner. Both statutes are found within RCW 9A.36, the chapter of the Washington Criminal Code involving Assault and Physical Harm, crimes against persons. The trial court’s failure to interpret the drive-by shooting statute in harmony with *Graham*’s interpretation of *identical* language found in the reckless endangerment statute grossly departed from

from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge.

(2) A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.

(3) Reckless endangerment in the first degree is a class C felony.

Former RCW 9A.36.045 (1989).

the governing principle of stare decisis, which binds the trial court to follow prior precedential decisions of higher courts. *See e.g., State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (En Banc); *State v. Watkins*, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (“We are bound to follow supreme court precedent even if we may disagree with it”).

At the *Knapstad* hearing, Defendant relied on *State v. Rodgers*, 146 Wn.2d 55, 43 P.3d 1 (2002), and *Bowman v. State*, 162 Wn.2d 325, 172 P.3d 681 (2007), for the proposition that the Supreme Court had already announced that the unit of prosecution for drive-by shooting is “the specific reckless conduct” and the threat to the safety of the public. CP 53-54. The reliance of the defendant and trial court on these cases was misplaced because neither case addresses the unit of prosecution.

The issue in *Rodgers* was simply that of sufficiency of the evidence, i.e., whether the State had proved that the firearm discharged from “the immediate area of a motor vehicle that was used to transport the shooter, firearm, or both to the scene of the discharge,” where the shooter walked two blocks from the vehicle to discharge the firearm at a house. 146 Wn.2d at 61. The court observed in passing that in the court’s view, the legislature aimed the “relatively new statute” at individuals who discharge firearms from or within close proximity to a vehicle presenting a threat to public safety not adequately addressed by other statutes. *Id.* at 62. *Rodgers* does

not address the unit of prosecution for drive-by shooting, and dicta regarding legislative intent in a case that did not call for statutory construction does not bear on the issue presented in this case.

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

Even in *Bowman*, Justice Madsen recognized that “first degree reckless endangerment and drive-by shooting are now legally the same crime.” 162 Wn.2d at 327 n.1. Given that recognition, the statutory construction of drive-by shooting, formerly first degree reckless endangerment, should be the same as the statutory construction of reckless endangerment, formerly second degree reckless endangerment.

Therefore, the State respectfully requests that this Court reverse the trial court’s dismissal of twelve counts of drive-by shooting based on its erroneous determination that “the proper unit of prosecution for Drive By Shooting is the number of bullets fired.” CP 160 (Conclusion of Law 2).

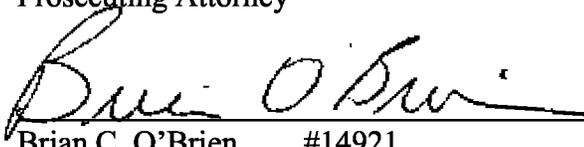
This decision squarely disregards our Supreme Court's ruling in *Graham*, and Division Two's ruling in *A.G.*

V. CONCLUSION

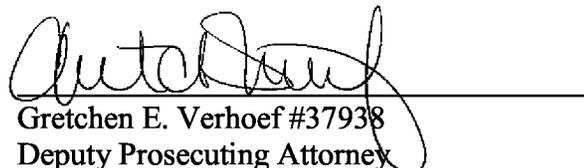
The State respectfully requests this Court reverse the trial court's rulings dismissing the charges as discussed above. The trial court's decisions to dismiss the first degree murder by extreme indifference and alternatively, manslaughter charges, as well as twelve counts of drive-by shooting were both legally incorrect decisions, and, additionally, the court's failure to afford the State all rational inferences pursuant to *Knapstad* and CrR 8.3 was procedurally incorrect. 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.

Dated this 28th day of June, 2017.

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