

NO. 88559-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL *hjh*

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS L. BAUER,

Appellant.

ON DISCRETIOANRY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 43511-0-II
Superior Court No. 12-1-00290-6

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Bauer's *Knapstad* motion when, viewing the evidence in a light most favorable to the State, a reasonable jury could find all the elements of the charged offense beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Douglas Bauer was charged by information filed in Kitsap County Superior Court with assault in the third degree and, unlawful possession of a firearm. CP 1. Bauer then filed a motion to dismiss pursuant to *State v. Knapstad*¹ and a motion to dismiss based on a vagueness claim. CP 29, 38. The trial court ultimately denied the Defendant's motion to dismiss the assault charge.² The Defendant then filed a motion for discretionary review, which the Court of Appeals granted. The Court of Appeals, however, ultimately affirmed the trial court's denial of the *Knapstad* motion. *State v. Bauer*, 174 Wn.App. 59, 295 P.3d 1227 (2013).

B. FACTS

The facts of the present case were adequately summarized in the State's previous brief. *See*, State's Response to Motion for Review, pages 2-5; CP 50, 70-133.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING BAUER'S KNAPSTAD MOTION BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A REASONABLE JURY COULD FIND ALL THE ELEMENTS OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

Bauer argues that the trial court erred in denying his *Knapstad* motion regarding the charge of assault in the third degree. This claim is without merit because the evidence was sufficient to constitute a prima facie showing that Bauer negligently caused bodily harm to another by means of weapon. As this is all that is required, the trial court properly denied the *Knapstad* motion.

1. The trial court's denial of Bauer's Knapstad motion was consistent with well-settled Washington law.

A trial court may dismiss the charge if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. *State v. Knapstad*, 107 Wn.2d 346, 349, 729 P.2d 48 (1986); CrR 8.3(c). When addressing such a motion a trial court: (1) shall view all evidence and the reasonable inferences drawn therefrom in the light most favorable to the prosecution; (2) may not weigh conflicting statements;

¹ *State v. Knapstad*, 107 Wn.2d 347, 729 P.2d 48 (1986).

² The trial court granted Bauer's motion to dismiss the firearm charge. CP 139.

and (3) may not base its decision on witness credibility. CrR 8.3(c)(3); *Knapstad*, 107 Wn.2d at 353.

In the present case the charge of assault in the third degree requires the State to prove that the Defendant, “with criminal negligence, caused bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.” RCW 9A.36.031(1)(d).

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act (in this case, bodily harm to another person by means of a weapon) may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation. *See* RCW 9A.08.010(d). “Bodily harm” means physical pain or injury, illness, or an impairment of physical condition. RCW 9A.04.110.

Although “criminal negligence” and “bodily harm” are statutorily defined, the word “cause” is not statutorily defined. The word “cause,” however, is routinely used in criminal law and statutes and numerous other criminal statutes use the word “cause.”³

³ *See, e.g.*, Murder in the first degree RCW 9A.32.030 (“With premeditated intent to cause the death of another person, he or she causes the death of such person or a third person”); Murder in the second degree RCW 9A.32.050 (“With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person”); Manslaughter in the first degree RCW 9A.32.060 (He or she “recklessly causes

Furthermore, it is well settled under Washington law that when a statute uses the word “cause” the applicable meaning is “proximate cause.” For instance, in a recent case the Court of Appeals explained that:

The legislature provided in 1975 that “[t]he provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the constitution and statutes of this state, shall supplement all penal statutes of this state.” LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.04.060, codified at RCW 9A.04.060. In so providing, the legislature both ratified the judicial practice of supplying common law definitions to statutes and affirmatively defined the elements of criminal statutes as containing common law definitions.

...

The criminal law, both common law and statutory, has long imposed criminal liability for conduct that causes a particular result. When crimes are defined to require both conduct and a specified result of that conduct, the defendant’s conduct generally must be the “legal” or “proximate” cause of the result.

State v. Christman, 160 Wn.App. 741, 752-53, 249 P.3d 680 (2011). (emphasis added), citing 1 Wayne R. Lafave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003). The Court of Appeals in *Christman* then went on to explain that numerous statutes that have “cause” as an element have

the death of another person”); Manslaughter in the second degree RCW 9A.32.070 (“with criminal negligence, he causes the death of another person.”); Vehicular assault RCW 46.61.522 (He or she operates or drives any vehicle “in a reckless manner and causes substantial bodily harm to another”).

been interpreted to actually require a showing of “proximate cause:”

Consistent with this general tenet, murder punishable under the Washington criminal code requires that a defendant's or felony participant's conduct “cause the death” of a person, RCW 9A.32.030(1)(a), .050(1)(a), an element that requires proof of proximate cause. *See, e.g., State v. Little*, 57 Wash.2d 516, 521, 358 P.2d 120 (1961) (causal connection between death and criminal conduct of the accused is one element of the corpus delicti). Homicide by abuse requires proof that a defendant's conduct “caused the death” of a person in a class protected by the statute, RCW 9A.32.055(1), and likewise requires proof of proximate cause. *State v. Berube*, 150 Wash.2d 498, 510, 79 P.3d 1144 (2003). Manslaughter includes conduct recklessly or negligently “causing the death” of a person, RCW 9A.32.060(1)(a), .070(1). It, too, requires proof of proximate cause. *State v. Ramser*, 17 Wash.2d 581, 586, 136 P.2d 1013 (1943).

Christman, 160 Wn. App. at 752-54.

Washington courts have also explained that there are two parts to the causation analysis. The first issue is whether there has been “cause in fact.” *See, e.g., State v. Dennison*, 115 Wn.2d 609, 624, 801 P.2d 193 (1990); *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). “As to cause in fact, tort and criminal situations are exactly alike.” *State v. Dennison*, 115 Wn.2d at 624 n. 15; *State v. McDonald*, 90 Wn.App. 604, 612, 953 P.2d 470 (1998). Cause in fact thus concerns “but for” causation, “events the act produced in a direct unbroken sequence which would not have resulted had the act not occurred.” *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999); *Taggart v. State*,

118 Wash.2d 195, 226, 822 P.2d 243 (1992); *Hartley*, 103 Wn.2d at 778; *Dennison*, 115 Wn.2d at 624.⁴ Simply put, in order to show that a defendant “caused” a particular result the State must first show that “but for” the defendant’s acts or omission, the harm would not have occurred.

Most importantly (at least with respect to the *Knapstad* motion in the present case), this Court has consistently held that “cause in fact is generally left to the jury.” *Dennison*, 115 Wn.2d at 624; *Hartley*, 103 Wn.2d at 778.

In addition to establishing that Bauer was a “cause in fact,” the State must also prove that there has been no intervening or superseding act which would act to terminate Bauer’s liability. This part of the analysis is often reference as the “legal cause” or “proximate cause” portion of the analysis, although the courts have often differed in how they name or denote the various portions of the analysis. The analysis itself, however, has remained constant.

Specifically, decades of Washington common law⁵ on the term “cause” and “proximate cause” explains that if the original negligence of a

⁴ In addition, the “but for” test has been expressly incorporated into the Washington Pattern Jury Instructions. WPIC 25.02, for instance, explains that the State must show that the defendant was a cause “without which the [harm] would not have happened.”

⁵ As explained previously, the Washington courts and the legislature have ratified the process of supplying common law definitions to statutes and have affirmatively defined the elements of criminal statutes as containing common law definitions. Chavez, 134 Wn.App. at 668; *Christman*, 160 Wn.App. at 752-53; RCW 9A.04.060.

defendant is followed by an unforeseeable independent intervening cause, force, or act of a third person, which is the proximate cause of an injury or event, then the chain of proximate causation is broken. *Qualls v. Golden Arrow Farms*, 47 Wn.2d 599, 288 P.2d 1090 (1955); *Bracy v. Lund*, 197 Wash. 188, 84 P.2d 670 (1938). If the independent intervening cause, force, or act is not reasonably foreseeable, it is deemed to supersede the defendant's original negligence and the defendant's original negligence ceases to be the proximate cause. *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975); *Cook v. Seidenverg*, 36 Wn.2d 256, 217 P.2d 799 (1950); *Estate of Keck By and Through Cabe v. Blair*, 71 Wn.App. 105, 856 P.2d 740 (1993). On the other hand, the chain of proximate causation is not broken when the defendant, in the exercise of ordinary care, should reasonably have anticipated the independent intervening cause, force, or act. *Adamson v. Traylor*, 60 Wn.2d 332, 373 P.2d 961 (1962); *Qualls v. Golden Arrow Farms*, *supra*; *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953); *Gies v. Consolidated Freightways*, 40 Wn.2d 488, 244 P.2d 248 (1952). If there are varying inferences to be derived from the evidence, the range of reasonable anticipation of foreseeability is a question for the jury. *Kennett v. Yates*, 41 Wn.2d 558, 250 P.2d 962 (1952). In short, "If the acts are ... within the ambit of the hazards covered by the duty imposed upon the defendant,

they are foreseeable and do not supersede the defendant's negligence.”
Cramer v. Department of Highways, 73 Wn.App. 516, 870 P.2d 999
(1994).

Thus, in more recent criminal cases, the courts have explained that although contributory negligence does not negate a defendant’s criminal negligence, a defendant may avoid responsibility if the result was caused by a superseding intervening event. *State v. Roggenkamp*, 115 Wn.App. 927, 945 (2003); *State v. Rivas*, 126 Wn.2d 443, 453 (1995). “To be a superseding cause sufficient to relieve a defendant from liability, an intervening act must be one that is not reasonably foreseeable.”
Roggenkamp, 115 Wn.App at 945, citing *Crowe v. Gaston*, 134 Wash.2d 509, 519, 951 P.2d 1118 (1998); *Micro Enhancement International v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 431, 40 P.3d 1206 (2002).

Furthermore, these concepts have been incorporated in several of the pattern jury instructions, which outline these concepts as follows:

WPIC 25.02 Homicide—Proximate Cause—Definition

To constitute [murder][manslaughter][homicide by abuse][or][controlled substance homicide], there must be a causal connection between the criminal conduct of a defendant and the death of a human being such that the defendant's [act][or][omission] was a proximate cause of the resulting death.

The term “proximate cause” means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not

have happened.

[There may be more than one proximate cause of a death].

WPIC 25.03 Conduct of Another

If you are satisfied beyond a reasonable doubt that the [acts][or][omissions] of the defendant were a proximate cause of the death, it is not a defense that the conduct of [the deceased][or][another] may also have been a proximate cause of the death.

[However, if a proximate cause of the death was a new independent intervening act of [the deceased][or][another] which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's acts are superseded by the intervening cause and are not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's [acts][or][omissions] have been committed [or begun].]

[However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede defendant's original acts and defendant's acts are a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.]⁶

These instructions, and the concepts included within them, have

⁶ WPIC 25.02 and 25.03 contain language regarding "death" which obviously will need to be modified in the present case. Washington courts, of course, have explained that in cases involving criminal negligence that causes a particular type result or "wrongful act," the pattern instructions will often need to be modified to address the specific type of injury or result required in the statute. *See, e.g., State v. Peters*, 163 Wn.App. 836 (2011); *See also State v. Harris*, 164 Wn.App. 377, 386-88 (2011) (where court held that the "wrongful act" required "depends on the specific crime charged" and that a proper instruction "must account for the specific risk contemplated under the statute, here great bodily harm and not some unspecified wrongful act."). Thus, in the present case WPIC 25.02 and 25.03 would need to be modified to require *bodily harm* instead of *death*.

been used and approved by Washington courts in a variety of contexts. For example, in *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990), a prosecution for first degree felony murder, this Court held that WPIC 25.02 “properly stated the law and was not unconstitutional.” The Court of Appeals has also specifically approved of WPIC 25.02 and noted that a separate instruction on intervening or superseding causes may be necessary if supported by the evidence. *See, State v. Giedd*, 43 Wn.App. 787, 792-3 (1986), citing *State v. Engstrom*, 79 Wn.2d 469, 487 P.2d 205 (1971) and *State v. Fateley*, 18 Wn.App. 99, 104–05, 566 P.2d 959 (1977).

Similarly, in *State v. Perez-Cervantes*, 141 Wn.2d 468, 473, 6 P.3d 1160 (2000), the defendant was charged with murder in the second degree and the trial court instructed the jury regarding proximate cause and intervening cause using WPIC 25.03. This Court affirmed and noted that the instruction “was a standard jury instruction.” *Perez-Cervantes*, 141 Wn.2d at 476 n. 1. The Court also went through several earlier cases regarding proximate cause and mentioned no discrepancies or inconsistencies between those cases and the instruction. *Perez-Cervantes*, 141 Wn.2d at 476-78; *See also, State v. McDonald*, 138 Wn.2d 680, 686 (1999) (where the trial court instructed the jury on proximate cause using WPIC 25.02 and 25.03 and the Supreme Court affirmed).

In short, Washington law is clear that when a statute requires a defendant to cause some particular result, the relevant inquiry is whether the defendant is a proximate cause of the required result.⁷ WPIC's 25.02 and 25.03 accurately outline the law in this regard. Given the law and the jury instructions that would apply to the present case, the State will need to prove that Bauer was criminally negligent and that he caused bodily harm to another person by means of a weapon. Thus, in the present case the State will first need to show the following:

- (1) That the Defendant failed to be aware of a substantial risk that bodily harm to another person by means of a weapon may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation; and
- (2) That "but for" the Defendant's act or omission the bodily harm would not have occurred.

The next issue will be whether the acts of T.G.J.C. worked to "supersede" Bauer's liability. Thus the relevant inquiry will be whether,

⁷ Washington courts have also held that even when a statute does not use the actual word "cause" but instead uses a word similar to "cause," the relevant inquiry is nevertheless whether the defendant was the proximate cause of the result required by statute. For instance, in *State v. Christman* the Court found that the crime of Controlled Substances Homicide (which requires that a defendant deliver a controlled substance that is subsequently used by another "resulting in the death of the user") means that the State must show that the drug was a proximate cause of the death. *See Christman*, 160 Wn.App at 754. Similarly the courts have held that the robbery in the first degree, which requires that a defendant "inflict" bodily injury, requires the State to show that the defendant was the "proximate cause" of the result. *See, State v. Decker*, 127 Wn.App. 427, 430-432, 111 P.3d 286 (2005), *quoting State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995) ("In crimes which are defined to require specific conduct resulting in a specified result, the defendant's conduct must be the 'legal' or 'proximate' cause of the result").).

in the exercise of ordinary care, Bauer should reasonably have anticipated the intervening act. Under the law it is not necessary that the sequence of events or the particular injury be foreseeable; rather, it is only necessary that the bodily harm by means of a weapon fall within the “general field of danger” which the defendant should have reasonably anticipated. WPIC 25.03; *Perez-Cervantes*, 141 Wn.2d at 476 n.1.

Given the law in this regard, the State maintains that the “general field of danger” in the present case was T.G.J.C. “accessing a firearm and harming either himself or someone else.” If Bauer should have reasonably anticipated that this could happen, then the acts of T.G.J.C. do not “supersede” Bauer’s negligence and his liability is not terminated.

Viewing the evidence in a light most favorable to the State, the evidence shows that by placing multiple firearms, ammunition, and an unsupervised 9 year-old child in close proximity Bauer failed to be aware of a substantial risk that bodily harm to another person by means of a weapon may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Furthermore, “but for” Bauer placing the multiple firearms, ammunition, and a 9 year-old child in close proximity, the shooting of A.K-B. would not have occurred. As this issue of cause in fact is

“generally left to the jury,”⁸ the trial court did not err in the present case.

Finally, viewing the evidence in a light most favorable to the State, the evidence shows that the harm that ultimately occurred was well within the “general field of danger” (namely, that T.G.J.C. could access a weapon and harm either himself or another) that Bauer should have reasonably anticipated. Thus the act of T.G.J.C. cannot work to “supersede” Bauer’s liability.

In sum, the trial court did not err in denying Bauer’s *Knapstad* motion because a reasonable jury could conclude that: (1) but for Bauer’s conduct in putting a child and firearms together, the shooting would not have occurred; and (2) that the harm that ultimately occurred was well within the “general field of danger” that Bauer should have reasonably anticipated.

2. Bauer’s claims regarding the definition of the term “cause” are without merit and were properly rejected by the trial court.

In the present appeal Bauer argues that the term “cause” was somehow limited or defined by the brief mention of that term in *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997). Motion for Discretionary Review 8-10. Bauer’s arguments, however, are without merit as a fair reading of *Chester* simply does not lead to the conclusion that *Chester* in

⁸ *Dennison*, 115 Wn.2d at 624; *Hartley*, 103 Wn.2d at 778.

any way represents a reworking of the well-settled Washington law regarding causation. Rather, as the Court of Appeals noted, the *Chester* court did address “cause” in any detail and it is not clear that the *Chester* court's definition utilizes a different standard than proximate cause. *Bauer*, 174 Wn.App. at 75. Rather, even after *Chester* Washington courts that have reviewed statutes requiring proof that the defendant “caused” a certain result have continued to construe cause to require a showing of proximate cause. *Bauer*, 174 Wn.App. at 75, citing *Berube*, 150 Wn.2d at 510, 79 P.3d 1144; *Christman*, 160 Wn.App. at 750–54, 249 P.3d 680; *McDonald*, 90 Wn.App. at 612–16, 953 P.2d 470

In the present appeal *Bauer* also repeatedly claims that the evidence shows no “affirmative act,” or that there is no evidence that he “affirmatively caused” the ultimate injury. App.’s Br. at 8-18. This argument, however, is without merit as the evidence is sufficient to show that *Bauer* “caused” the injury under Washington law.

As outlined above, Washington law regarding causation is well-settled. The term “affirmative act” is not found in the assault statute nor has *Bauer* cited any case that utilizes that term. Rather, Washington law requires a showing that *Bauer* negligently caused bodily harm by means of a weapon. RCW 9A.36.031(1)(d). In determining whether *Bauer* “caused” the bodily harm, the appropriate analysis is simply: (1) whether

Bauer was a “cause in fact” (under the traditional “but-for” causation analysis); and (2) whether there were any intervening or superseding events which acted to terminate Bauer’s criminal liability. Nothing more. Nothing less.⁹

Furthermore, Bauer’s claim that the evidence shows no “affirmative act” on his part is simply not true. The act of repeatedly leaving multiple firearms, ammunition, and an unsupervised young child together in close proximity is most certainly an affirmative act, and the Court of Appeals properly rejected Bauer’s arguments to the contrary. *Bauer*, 174 Wn.App. at 73-74.

In *Parrilla v. King County*, 138 Wn.App 427, 157 P.3d 879 (2007) the Court of Appeals rejected an “affirmative act” argument similar to the one raised by Bauer in the present case. In *Parrilla*, a King County Bus driver parked the bus he was driving and exited the bus, leaving the engine running while a visibly erratic passenger was still on board the bus. *Parrilla*, 138 Wn. App. at 430. The passenger then got in the driver’s seat and drove the away, crashing into several vehicles including the Parrillas’ car. *Id.* at 431. The Parrillas sued, claiming that “the bus driver should

⁹ Furthermore, the Defendant has cited no authority holding that under the clearly defined definitions of “cause” outlined in the cases and instructions mentioned above that a “passive act” or an omission is insufficient to show “cause,” even if one could fairly characterize the Defendant’s acts in the present case as “passive.” *See e.g.*, RCW 9A.04.090 (stating that the word “acted” includes, where relevant, “omitted to act.”);

have known that his affirmative act of exiting the bus while the engine was running, leaving the visibly erratic [passenger] was on board, exposed the Parrillas to a recognizable high degree of harm from misconduct by [the passenger] which a reasonable person would have taken into account.” *Id* at 433.

In addressing these facts, the Court of Appeals held that the facts did not involve a failure to act, but rather demonstrated an affirmative act on the part of the bus driver. *Parrilla*, 138 Wn. App. at 438. Specifically, the Court held that,

In the present case, it is an affirmative act, rather than a failure to act, that is at issue. The bus driver affirmatively acted by leaving [the passenger] alone on board the bus with its engine running.

Parrilla, 138 Wn. App. at 438. The Court also noted that a city bus was a dangerous instrumentality and that the Court thus held that the evidence was sufficient to sustain a negligence claim, stating:

In sum, pursuant to the facts alleged by the Parrillas, an instrumentality uniquely capable of causing severe injuries was left idling and unguarded within easy reach of a severely impaired individual. The bus driver was aware of these circumstances. Assuming the truth of these averments, the bus driver’s affirmative act created a high degree risk of harm through [the passenger’s] misconduct, which a reasonable person would have taken into account.

Parrilla, 138 Wn. App. at 440-41.¹⁰

As in *Parrilla*, the present case does not involve a failure to act. Rather it is Bauer's affirmative acts that are at issue, as the evidence shows that Bauer left several firearms (which are certainly all instrumentalities that are capable of causing severe injuries) unguarded and within easy reach of a nine year old child.¹¹ Thus, pursuant to *Parrilla*, Bauer's claim that the evidence demonstrates no "affirmative act" is without merit.¹²

¹⁰ Bauer cites *Parrilla* for its later discussion of negligent entrustment. App.'s Br. at 15. Bauer, however, notably fails to mention the *Parrilla* Court's holding that the bus driver's act was an "affirmative act."

¹¹ Furthermore, Bauer admitted that he was aware that T.G.J.C. had taken money from the glove box of his car without permission that same weekend and that he had learned of this fact on Sunday, well before T.G.J.C. left the home with the firearm on Monday. CP 90.

¹² In addition to the fact that Bauer's conduct is properly characterized as an "affirmative act," his claims that the relevant inquiry should somehow focus on the fact that T.G.J.C. caused the shooting and that Bauer "never had contact with the victim" and was "miles away from the school" is without merit. First, "[I]t is not necessary that defendant's act should have been the sole cause of the harm[;] ... a contributory cause is sufficient." *State v. Neher*, 52 Wn.App. 298, 301, 759 P.2d 475 (1988) (quoting R. Perkins, Criminal Law, ch. 6, § 9, at 608-09 (1957)), *aff'd*, 112 Wash.2d 347, 771 P.2d 330 (1989). Furthermore, the facts of the present case are similar to *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990) where the court found that the defendant who had set a fire was the proximate cause of the death of responding fireman. In *Leech*, the defendant argued that he was not the proximate cause of the fire and that negligence on the part of the responding fireman was the actual proximate cause of the fireman's death. *Leech*, 112 Wn.2d at 702-03. Both the Court of Appeals and the Supreme Court, however, rejected this argument. This Court, for instance, specifically held that,

We also agree with the Court of Appeals conclusion that the arson fire proximately caused Earhart's death. We find it sufficient to simply note here that the fire fighter's alleged negligence in using his breathing apparatus was not the sole cause of his death. Since his failure to use the apparatus would not have killed him had the defendant not set the arson fire, the defendant's conduct in setting the fire was a proximate cause of Earhart's death.

Leech, 112 Wn.2d at 705, *citing State v. Leech*, 54 Wn.App. 597, 601, 775 P.2d 463 (1989). As in *Leech*, the defendant in the present case created an extremely dangerous

Finally, Bauer argues that because he did personally harm the victim, he can only be convicted of the crime of assault in the third degree because if he is shown to be an accomplice to the crime pursuant to RCW 9A.08.020. *See*, Motion for Discretionary Review, page 14-15. Bauer's central claim in this regard appears to be that because T.G.J.C. actually fired the gun in the present case he must be viewed as a "principle," and that the State is merely trying to hold Bauer responsible for the acts of another without showing that Bauer was an actual accomplice. This claim is without merit because it ignores the plain language of the assault statute and decades of law regarding proximate cause.

First, RCW 9A.36.031(1)(d) outlines the elements of the charged offense and requires the State to show that Bauer negligently "caused" bodily harm to another by means of a weapon. It does not require the State to show that Bauer personally shot the victim or that Bauer even "assaulted" the victim. Rather, the State must prove that Bauer "caused" the harm, and under Washington law the causation element requires the State to show that Bauer was a proximate cause of the injury. Furthermore, it is well settled that there can be more than one proximate cause of an injury. *See, e.g., State v. Meekins*, 125 Wn.App. 390, 399, 105

condition and is thus responsible for the harm that resulted. While there may also be other causes of that ultimate harm, that fact does not eliminate or negate Bauer's culpability.

P.3d 420 (2005)(“The same harm can have more than one proximate cause”); *Riojas v. Grant County Public Utility Dist.*, 117 Wn.App. 694, 699, 72 P.3d 1093 (2003), *review denied*, 151 Wash.2d 1006, 87 P.3d 1184 (2004); *State v. Leech*, 114 Wn.2d 700, 705, 790 P.2d 160 (1990); *State v. Neher*, 52 Wn.App. 298, 301, 759 P.2d 475 (1988); *Smith v. Acme Paving*, 16 Wn.App. 389, 396, 558 P.2d 811 (1976)(“There may, of course, be more than one proximate cause of an injury”). Thus, the mere fact that T.G.J.C. was a proximate cause in the present case does not preclude a jury from finding that Bauer was also a proximate cause.

Furthermore, the State is not arguing that Bauer should be held responsible for the actions of another pursuant to RCW 9A.08.040. Rather, Bauer is charged because he personally was a “proximate cause” of the victim’s injuries, and thus the evidence is sufficient to prove that Bauer is guilty of the crime of assault in the third degree

In conclusion, Bauer has failed to show that the trial court erred in denying the *Knapstad* motion. Rather, the trial court’s ruling was consistent with well settled Washington law, and viewing the evidence in a light most favorable to the State, the evidence was sufficient to show that Bauer negligently caused bodily harm to another by means of a firearm.¹³

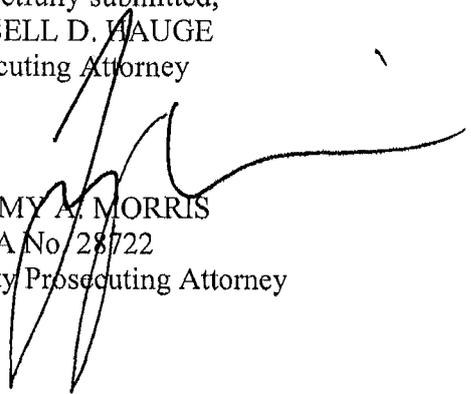
¹³ Finally, as explained in the State’s previous briefing, Bauer’s “vagueness” claims with respect to the word “cause” must be rejected given the “well-settled common law meaning” of that term. *See, Christman*, 160 Wn.App. at 758.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's denial of Bauer's motion to dismiss.

DATED August 8, 2013.

Respectfully submitted,
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Attached, please find the State's "Supplemental Brief of Respondent" in the case of State v Douglas Bauer, No. 88559-1.

Sincerely,

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