

63308-2

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No. 63308-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MARIO ABRAHAM HERNANDEZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

THE DRIVE-BY SHOOTING STATUTE IS  
UNCONSTITUTIONALLY VAGUE AS APPLIED TO  
MR. HERNANDEZ'S CONDUCT

The State does not dispute that Mr. Hernandez's conduct does not fall within the common understanding of the statutory term "drive-by shooting." See RCW 9A.36.045. The ordinary meaning of "drive-by" is "carried out from a moving vehicle." Merriam-Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary/drive-by>. Although Mr. Hernandez was transported to the scene in a car, he did not shoot the gun, or form an intent to shoot the gun, until after he had parked the car, exited, entered a store, eaten a hot dog and waited in line, engaged in conversation, exited the store, waited for his friends and then returned to the car. He did not commit a "drive-by" shooting, as that term is commonly understood.

The State also does not dispute that in State v. Locklear, 105 Wn. App. 555, 560, 20 P.3d 993 (2001), this Court held that "RCW 9A.36.045 requires a nexus between the use of a car and the use of a gun." Locklear specifically noted that not only is a spatial nexus required, but also that "a temporal nexus might also be required." Id. at 560 n.8. Here, although Mr. Hernandez was

standing near the car when he shot the gun, the presence of the car was merely incidental and did not facilitate the crime. There is an insufficient nexus between the use of a car and the use of a gun. Mr. Hernandez's conduct does not fall squarely within the statute's prohibitions. The statute is therefore unconstitutionally vague as applied to his conduct. See id. at 559 (quoting State v. Smith, 111 Wn.2d 1, 10, 759 P.2d 372 (1988) (statute not unconstitutionally vague as applied if the "defendant's conduct falls squarely within [its] prohibitions.")).

The State contends the presence of the term "drive-by shooting" in the statute is irrelevant, because the term merely provides the name of the crime. SRB at 17 & 17 n.7. To the contrary, the statutory term "drive-by shooting" does more than merely provide the name of the crime—it also describes the crime.

The term "drive-by shooting" is contained within the body of the statute and is not merely a statutory heading:

A person is guilty of **drive-by shooting** when he or she recklessly discharges a firearm as defined in RCW 9A.36.045(1) 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.

RCW 9A.36.045(1) (emphasis added).

The Due Process Clause requires that statutes give people fair warning of what behavior is prohibited. E.g., State v. Reader's Digest Ass'n, Inc., 81 Wn.2d 259, 273, 501 P.2d 290 (1972).

"'Common intelligence' is the test of what is fair warning." Id. As stated, the common understanding of the term "drive-by" is "carried out from a moving vehicle." Merriam-Webster's Online Dictionary, supra. The presence of the term "drive-by shooting" in the statute would indicate to a person of common intelligence that there must be some nexus between the use of a car and the use of a gun.

Although the statute contains additional language further defining the crime, that language is vague as applied because it encompasses conduct that is inconsistent with the ordinary meaning of the term "drive-by shooting." A person of common intelligence would not understand that the term "drive-by shooting" encompasses conduct where the use of a car is only incidental to the crime.

When faced with a vagueness challenge to a statute, the question for the reviewing court is what the Legislature intended. Unzicker v. Kraft Food Ingredients Corp., 203 Ill.2d 64, 94, 783 N.E.2d 1024, 270 Ill.Dec. 724 (2002). "[A] court considers not only

the language used, but also the legislative objective and the evil the statute is designed to remedy." Id.

The State contends the statutory term "drive-by shooting" is of little use in discerning Legislative intent, because the term was not added by the Legislature but by the code reviser subsequent to enactment as part of codification. SRB at 17. But that is not correct. The Legislature specifically added the term "drive-by shooting" to the statute, as a substitute for the term "reckless endangerment in the first degree," when the Legislature amended the statute in 1997. Bowman v. State, 162 Wn.2d 325, 327 n.1, 172 P.3d 681 (2007) (citing Laws of 1997, ch. 338, § 44); see also H.B. Rep. on Engrossed Third Substitute H.B. 3900, 55th Leg., Reg. Sess., at 14 (Wash. 1997) ("Reckless endangerment in the first degree is renamed 'drive-by shooting' and added to the definition of 'violent offense.'").

Moreover, the Legislature originally enacted the statute, which created a separate crime, specifically in an effort to address "drive-by shootings." The Legislature explained its intent in adopting RCW 9A.36.045 as follows:

The legislature finds that increased trafficking in illegal drugs has increased the likelihood of "drive-by shootings." It is the intent of the legislature in sections 102, 109, and 110 of this act to categorize

such reckless and criminal activity into a separate crime and to provide for an appropriate punishment.

Laws of 1989, ch. 271, § 108.

The State contends the Legislature did not intend that the crime of drive-by shooting require a temporal nexus between the use of a car and the use of a gun. SRB at 19. But such an interpretation of the statute would lead to absurd results. "[T]he rule of statutory construction that trumps every other rule," is that the Court should not adopt an interpretation that results in absurd or strained consequences. Davis v. Dep't of Licensing, 137 Wn.2d 957, 971, 977 P.2d 554 (1999).

As this Court recognized in Locklear, requiring a temporal nexus between use of a car and use of a gun avoids absurd results. State v. Locklear, 105 Wn. App. at 560 n.8. Otherwise, a person could be convicted of the crime if, for example, he drove his car to a friend's house, parked it for a week while staying with the friend as an overnight guest, and then, at the end of the week, recklessly fired a gun into the house while standing next to his parked car. Id. The Legislature could not have intended that a person be convicted of the crime of "drive-by shooting" under those circumstances. Id. Similarly, here, the Legislature could not have intended that Mr.

Hernandez be convicted of the crime where use of a car was only incidental to the crime.

B. CONCLUSION

For the reasons stated here and in the opening brief, Mr. Hernandez's conviction for drive-by shooting must be reversed. In addition, for the reasons stated in the opening brief, the trial court abused its discretion in excusing a vital defense witness from testifying and Mr. Hernandez's convictions for first degree assault and drive-by shooting must be reversed and remanded for a new trial. Also, because the State did not prove Hernandez had a prior "serious offense," the first degree unlawful possession of a firearm conviction must be reversed and dismissed.

Respectfully submitted this 13th day of April 2010.

  
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Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> MARIO HERNANDEZ 330121 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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**SIGNED** IN SEATTLE, WASHINGTON THIS 13<sup>TH</sup> DAY OF APRIL, 2010.

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