

63308-2

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NO. 63308-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARIO ABRAHAM HERNANDEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY ROBERTS

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Is RCW 9A.36.045, the drive-by shooting statute, unconstitutionally vague?

2. When an element of an offense includes use of a firearm, does it violate double jeopardy to impose a firearm enhancement? Since the filing of appellant's opening brief, the Supreme Court has held that imposition of the enhancement does not violate double jeopardy.

3. The defendant sought to call as a witness his cousin, Playboys gang member Hector Hernandez. Recognizing that Hector could not be compelled to testify against himself, defense counsel sought to limit Hector's testimony to just what he saw and heard at the scene of the shooting. Did the trial court abuse its discretion in agreeing with Hector's counsel that Hector would be subjected to cross-examination regarding issues that would likely incriminate himself?

4. Is a conviction for attempted residential burglary a proper predicate offense to base a charge of first-degree unlawful possession of a firearm?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged in count I with Assault in the First Degree, with a firearm enhancement; in count II with Drive-by Shooting; and in count III with Unlawful Possession of a Firearm in the First Degree. CP 8-9. All the charges arose out of a gang shooting that occurred on June 14, 2008. On February 13, 2009, a jury found the defendant guilty as charged. CP 110-13. The defendant received a standard range sentence of 129 months, plus a 60-month firearm enhancement. CP 131-39.

**2. SUBSTANTIVE FACTS**

On June 14, 2008, a shooting occurred at the Union 76 convenience store/gas station located on 320th Avenue South in Federal Way. 6RP<sup>1</sup> 26-27. The shooting was captured on video--albeit of very poor quality. See Exhibit 8. Exhibit 8 is a CD-Rom

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--1/21/09, 2RP--1/26/09, 3RP--1/28/09 (volume I), 4RP--1/28/09 (volume II), 5RP--2/2/09, 6RP--2/3/09, 7RP--2/4/09, 8RP--2/5/09, 9RP--2/9/09, 10RP--2/10/09, 11RP--2/11/09, 12RP--2/12/09, 13RP--2/13/09, 14RP--3/17/09, and 15RP--4/3/09.

that contains footage from the store's eight video cameras.

6RP 27, 29. The shooting involved two groups of people, some members of each group were confirmed gang members.

Jesus Parda Talamantes is a member of the South Side Locos sect of the Surenos street gang, a gang whose roots originated in the prison system. 7RP 103. Jesus started in a gang at the age of 13 in order to obtain respect from others. 7RP 103-04. According to Jesus, in gang life, if someone disrespects you, you must confront them immediately. 7RP 107. If a member of your gang is disrespected, your "hood" is disrespected and any one of your gang can respond. 7RP 111. To become a gang member, you have to earn it, "show people what you are made of." 7RP 112.

On June 14th, Jesus picked up a number of his family members and friends to go to a Quinceanera, or sweet 15 party. 7RP 117. The group consisted of around a dozen persons travelling in three cars. 7RP 118-22. The group included, among others, the victim, Edwin Sibaja, his brother, Israel Sibaja, Fabian

Moreno (aka Tigrillo), Rafael Andrade, Luciana (Israel's girlfriend) and Nabal Naranjo (Edwin's girlfriend).<sup>2</sup> Id.

The group stopped at the 76 station to buy some beer. 7RP 122. Jesus, Edwin, Israel, along with some others from the group, entered the store. 7RP 124-34. Inside the store were some members of the Playboys, a rival street gang, with a Playboy rabbit as their gang symbol. 7RP 110, 124-26. This rival group included the defendant (referred to as the "tall white guy"), a person Jesus knew as Fathead (Serafin Gutierrez) and a person described as the "little skinny guy," later identified as Hector Hernandez. 7RP 125-26, 128, 133-34.

Seventeen-year-old Edwin Sibaja is from Los Angeles, has lived in Washington for four years, and professes not to be a member of a street gang, although he knows that some of his friends are members of gangs. 9RP 133-34. When Edwin entered the store, he said "what's up" to the defendant, a person he knew from having spent time in juvenile detention together. 9RP 136-37.

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<sup>2</sup> For clarity sake, persons will be referred to by their first names. Some witnesses share the same last name, and the last names of persons present are not known. For help in reading the transcript, the State has attached an appendix that lists many of the persons referred to in the transcripts, along with their gang moniker. The list does not include every name referred to, but the list should help in following the sometimes confusing testimony. See Appendix A.

The defendant replied back "what's up." 9RP 136. Hector, seeing the exchange, then began to flash gang signs at the group.

9RP 137. All three of the defendant's group then began to say disparaging things to Edwin and his friends. 8RP 153-54. As Hector and Serafin were going out the door (the defendant had left the store moments earlier), Hector pulled his shirt down and flashed a Playboy tattoo on his chest. 7RP 146; 8RP 155-56; 9RP 137.

Once outside the store, Serafin, Hector and the defendant flashed more gang signs at Edwin's group, and Hector called Israel Sibaja a bitch. 9RP 138-39. Israel, who was drunk, became angry and started walking towards the three who were now standing next to Serafin's car parked at the gas pump. 8RP 145, 158; 9RP 139; 10RP 196. Edwin believed the group was flashing gang signs because they saw him talking with the defendant and thought he was talking smack. 9RP 140. During this time, the defendant was observed getting in Serafin's car and then quickly getting back out. 9RP 152. The defendant testified that he was retrieving his gun. 10RP 207.

With Edwin's group nearing the car the defendant had arrived in, and with both sides now taunting each other, Israel punched Serafin. 8RP 164; 9RP 151. According to Jesus, this

would have been a sign of disrespect to Serafin and his gang that would need an immediate response. 8RP 120-21. Serafin punched Israel back, knocking him to the ground. 8RP 166-67; 9RP 151. At the same time, one of the three, Hector, Serafin or the defendant, was heard threatening "187," which means murder, that they "want you out, dead." 7RP 154-55.

As the fight started, Edwin tried to grab Israel and pull him away. 9RP 151. However, as Edwin approached his brother, the defendant, who was standing at the back of Serafin's car, shot Edwin in the abdomen.<sup>3</sup> 9RP 154, 156. Just before the shot was fired, Jesus heard someone say something about someone having a gun. 8RP 76, 107.

After firing the first shot, there was a pause as people began to scatter, at which time the defendant began firing again, firing until his clip was empty. 9RP 163; 11RP 106. The defendant was firing from the area next to Serafin's car and the gas pumps. 10RP 18.

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<sup>3</sup> Edwin was later transported to Harborview Medical Center where he underwent emergency surgery. 8RP 15; 9RP 170. The operating physician testified that Edwin was very lucky, if the bullet had struck him an inch in another direction, he could have suffered severe consequences. 8RP 19. As it was, the bullet could not be removed and is currently lodged in Edwin's upper buttocks. 8RP 25. Edwin has complained of numbness in his leg, likely the result of permanent sensory nerve damage. 8RP 22.

He was aiming at the area of the storefront.<sup>4</sup> 10RP 20. After firing all the rounds in his gun, the defendant, Hector and Serafin fled from the scene. 8RP 114; 9RP 75.

Before the first shot, while Israel and Serafin were engaged in a fight, Fabian Moreno and Hector also went at it--challenging each other to a fight. 9RP 65-66. Fabian testified that it was then that he heard the first shot and saw the defendant shooting the gun. 9RP 71, 84. After the first shot, the defendant and Hector went to pick Serafin up from the ground, at which point Fabian started to run across the lot. 9RP 72, 83-84. That's when the defendant started shooting again, with Fabian believing the defendant was shooting at him. 9RP 83.

Officers arrived within three to four minutes and found 15 to 20 Hispanic males and females present. 7RP 9. The defendant had fled the scene in Serafin's car. 7RP 11. No weapons were found at the scene. 7RP 12. Edwin was on the ground in front of the store, holding his stomach, with a single gunshot wound to the abdomen. 7RP 13, 16. Officers patted Edwin down, no weapons were discovered. 7RP 20; 9RP 167.

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<sup>4</sup> Although nobody was struck, one bullet travelled through the front glass of the store, approximately 15 feet from the front door. 6RP 43-44, 46.

Officers found five .22 shell casings and one unfired .22 cartridge. 10RP 39-40. All of the casings and the cartridge were .22 caliber Remington brand. 10RP 121, 140. A forensic firearm examiner testified that in firing an automatic, a jam can occur, requiring the shooter to pull the slide back ejecting the unfired cartridge. 10RP 138. It was determined that all of the casings were fired from the same gun. 10RP 129.

All the witnesses in Edwin's party testified that nobody in their party had a gun. 7RP 161; 8RP 195; 9RP 75, 133. No independent witness observed anyone other than the defendant with a gun. 6RP 25-49; 7RP 59-60; 10RP 79. No physical evidence from the scene showed that there was any other weapon present or fired except for the defendant's gun. 7RP 11-12, 20; 10RP 39-40, 121, 129, 140. The video does not show any other person firing a weapon or holding a weapon. Exhibit 8.

The defendant, who grew up in East LA, testified that although he pretends to be in a gang, he really is not. 10RP 173-74. He claimed that he created a fake gang called the Outlaws, and that he uses this as pretense to obtain respect and to keep himself from having to join a gang like the Playboys, that he admits Hector belongs. 10RP 174-76; 11RP 178.

The defendant claimed that a month before this shooting, he and a gangster friend, Falco, were walking along when an unknown person drove past them "mad-dogging" them (staring them down). 10RP 189-91; 11RP 197. He says that when he put up his hands to ask what the person's problem was, the person fired a shot at them. 10RP 189-91; 11RP 197. From that day on he started carrying a gun, even though he admitted he knew it was illegal for him to possess a firearm. 10RP 192; 11RP 160-61.

On the day of this shooting, the defendant had the gun with him when he was picked up by Serafin, Hector and a female, Teresa Lasley, to go to a party. 10RP 194. When they arrived at the 76 station, the defendant placed the gun under the seat of Serafin's car before going inside. 10RP 196-99.

The defendant said that once inside the store, he grabbed a hotdog and ate it while standing in line waiting to pay. 10RP 200. He claims he tried to greet Edwin, but that Edwin did not respond to him. 10RP 201. He left before paying for the hotdog because the line was long and his "homegirl" was in the front of the line and would pay for it. 10RP 203-05.

Once outside, the defendant wanted to talk with Edwin, but when he got to Serafin's car, he looked back to find that both

groups of people were confronting each other saying "fuck you," and "you ain't shit," to each other. 10RP 204-05. The defendant then climbed into Serafin's car and retrieved his gun. 10RP 207.

The defendant claims that a member of Edwin's group confronted him, wanting to go "one-on-one." 10RP 208. He claims he then heard someone in Edwin's group say to just shoot him. 10RP 208-10. The defendant then walked to the back of Serafin's car where he observed Israel punch Serafin and Serafin punch Israel, knocking him to the ground. 10RP 212-14. He asserts that Edwin then pulled out a gun, pointed it at Serafin's head, and pulled the trigger. 10RP 214-16. The defendant claims he responded by aiming his gun at Edwin and pulling the trigger. 10RP 216. However, the safety was on so the gun did not fire. 10RP 217. Edwin, according to the defendant, then aimed his weapon at him, at which point the defendant released the safety on his gun and fired twice at Edwin. 10RP 217.

After these first two shots, everyone began to scatter. 11RP 101. The defendant then moved to the back of Serafin's car because his gun jammed. 11RP 101. He ejected the bullet and then went to pick Serafin up off the ground. 11RP 102-03. He

claimed that someone started running towards him so he began firing his gun until he ran out of ammunition. 11RP 103-06.

The three then fled, with Serafin driving. 11RP 106-07. The defendant claims that he and Hector told Serafin that they had thrown the gun out the window, although he testified that he only said this and that he really threw the gun in the ocean at a later date. 11RP 109, 111.

Serafin Gutierrez testified for the defendant and claimed he is not a member of the Playboys street gang. 11RP 38-39. He claims his Playboy tattoo is not permanent and he only got it because he thought it was cool. 10RP 42-44. Serafin told a similar story as the defendant about getting in a fight with Israel. 10RP 15-18. He says that as he was fighting Israel, he noticed someone appear to pull something out (he did not see a gun) and then heard a boom. 11RP 18-19. He felt his head jerk and felt a burn on the side of his head. 11RP 20. He testified that he then noticed the defendant standing over him firing shots to keep everyone away. 11RP 20. He, Hector and the defendant then fled in the car. 11RP 21.

Serafin admitted that he never called the police. 11RP 33. Instead, the three drove to Tacoma, returned to pick up Teresa

from near the scene of the shooting, then drove to his mother's house to get treatment for his wound.<sup>5</sup> 11RP 21, 51-52.

Additional facts are included in the sections they pertain.

**C. ARGUMENT**

**1. THE DRIVE-BY SHOOTING STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.**

The defendant contends that RCW 9A.36.045, the drive-by shooting statute, is unconstitutionally vague. Specifically, he contends that persons of common intelligence would not know that conduct such as he exhibited was prohibited by the statute, that transporting himself and his gun in a vehicle to a location, then firing that gun within minutes of arriving at that location and within feet of the transporting vehicle does not meet the elements of the crime. The defendant's vagueness challenge must be rejected. The defendant identifies no word or phrase that is vague, and his conduct falls squarely within the core conduct the statute is intended to criminalize.

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<sup>5</sup> Serafin's mother, with prior convictions for providing false information and criminal impersonation, testified that Serafin had a burn mark on the back of his head that she treated by wiping it with a wet rag. 11RP 82-83, 89.

The due process clause of the Fourteenth Amendment requires that statutes provide fair notice of the conduct they proscribe. State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). A statute fails to provide the required notice if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Watson, 160 Wn.2d at 7. As in every case, a "measure of vagueness is inherent in the use of language." Watson, at 7. However, a statute is not unconstitutional if the general area of conduct against which it is directed is made plain. State v. Huff, 111 Wn.2d 923, 928-29, 767 P.2d 572 (1989).

Hernandez has a heavy burden to meet the above standard. A reviewing court will presume a statute is constitutional. Watson, at 11. A party challenging a statute's constitutionality bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt. Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

When assessing vagueness in a case in which First Amendment rights are not involved, a court examines the actual facts in relation to the statutory elements, rather than basing a decision on a set of hypothetical facts not before the court. City of

Bremerton v. Spears, 134 Wn.2d 141, 949 P.2d 347 (1998). A statute is not unconstitutionally vague if the defendant's conduct falls squarely within its prohibitions. State v. Smith, 111 Wn.2d 1, 759 P.2d 372 (1988).

RCW 9A.36.045, titled "drive-by shooting," provides in pertinent part as follows:

(1) 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.

(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.

RCW 9A.36.045.<sup>6</sup>

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<sup>6</sup> Prior to 1997, there was no statute titled "drive-by shooting." Instead, drive-by shooting was covered under the reckless endangerment statute, specifically, reckless endangerment in the first degree. See former RCW 9A.36.045. In 1997, the legislature substituted "drive-by shooting" for "reckless endangerment in the first degree." Laws of 1997, ch. 338, § 44. The two statutes contain the exact same elements and thus are legally the same crime, albeit with different titles. See Bowman v. State, 162 Wn.2d 325, 327, 172 P.3d 681 (2007). There is now only one degree of "reckless endangerment," a gross misdemeanor (see RCW 9A.36.050) and "drive-by shooting," a class B felony that replaced in title only reckless endangerment in the first degree under the same statutory provision--RCW 9A.36.045.

Broken down to its elements, the statute provides that (1) the defendant must recklessly discharge a firearm, (2) the discharge must create a substantial risk of death or serious physical injury to another person, and (3) that the discharge was 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. See WPIC 35.31. The statute contains a spatial component or nexus, i.e., the discharge of the firearm must be from the vehicle or the immediate area of the vehicle. State v. Locklear, 105 Wn. App. 555, 560, 20 P.3d 993 (2001), affirmed and remanded by, State v. Rodgers, 146 Wn.2d 55, 43 P.3d 1 (2002). Whatever the extent of this spatial component, the court in Locklear stated that it "includes at its core, the area within a few feet or yards of such motor vehicle." Locklear, 105 Wn. App. at 560.

Locklear was convicted of drive-by shooting on the following facts. Locklear and two other persons armed themselves and drove to a certain area of town where they parked and exited the vehicle. Locklear then walked two blocks and fired a gun at an occupied residence.

Locklear challenged his conviction on vagueness grounds as applied to his conduct. Specifically, he claimed that a person of

common intelligence would have to guess that a person firing a weapon two blocks from the transporting vehicle met the spatial nexus of the statute. Locklear pointed out that neither "immediate area" nor "scene" is defined under the statute that requires the perpetrator fire the gun "either from a motor vehicle or from the *immediate area* of a motor vehicle that was used to transport [him] or the firearm, or both, to the *scene* of the discharge." Locklear, at 556-57 (citing RCW 9A.36.045(1)) (emphasis added).

The Court stated that "[u]ndoubtedly, a person of ordinary intelligence would know without guessing that the required nexus exists when a shooter is transported to the scene in a car, gets out, and fires from within a few feet or yards of the car." Locklear, at 560. At "its core," the Court held, the term "immediate area of a motor vehicle" includes "the area within a few feet or yards of such motor vehicle." Id. "In contrast," the Court held, "a person of ordinary intelligence would not know without guessing whether the required nexus exists when a shooter is transported to the scene in a car, *walks two blocks away*, then fires the gun." Locklear, at 560 (emphasis in original). Thus, the Court found the statute unconstitutionally vague as applied to Locklear's conduct. Locklear, at 561.

Here, the defendant does not identify any particular word or phrase of the statute that he claims is vague.<sup>7</sup> Rather, he merely makes the general claim that a person of common intelligence would not have understood his conduct amounted to a violation of the statute. This assertion is unfounded. The defendant's actions squarely meet every element of the crime, elements that are not vague.

The defendant was in knowing possession of a firearm before he even entered the vehicle. He obtained the gun within a month of the shooting and carried it with him at all times. The vehicle transported the defendant and the gun (only one actually need be transported by the vehicle) to the scene of the discharge. The vehicle was parked in a temporary location at a gas pump and the defendant exited the vehicle for no more than a few minutes, leaving his gun in the vehicle. He returned to the vehicle with the

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<sup>7</sup> The defendant cites only to the dictionary definition of "drive-by," but this is of no utility. Vagueness is determined by analyzing the language and elements of the statute itself. Tingey v. Haisch, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). The term "drive-by" is neither an element of the crime, nor does the term "drive-by" appear anywhere in the statutory language outside the caption for the crime or to provide the name of the crime itself. See Parents Involved In Community Schools v. Seattle School Dist., No. 1, 149 Wn.2d 660, 684, 72 P.3d 151 (2003) ("Headings are added by the code reviser subsequent to enactment, as part of codification...[t]hey are of little use as a guide to the intent of the legislature.") (citing State v. Arndt, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976)).

specific purpose of obtaining his gun from the vehicle. Within feet of the vehicle, the defendant then intentionally fired multiple shots (emptying his clip), endangering a large number of people and sending one bullet through the front glass of the store where many innocent persons were congregated. The defendant then took his gun, jumped into the same vehicle and fled. His actions squarely meet every element of the crime. He, and his firearm, were transported to the scene of the discharge by a vehicle and the shooting occurring within mere feet of that vehicle.

In support of his argument, the defendant cites to a number of Washington cases and cases from other states wherein in each case "the shooter fired from inside the car." Def. br. at 13. These cases are of no relevance. In none of these cases was a vagueness issue raised, and the mere happenstance that the perpetrator in those cases fired shots from inside the car is irrelevant. In no uncertain terms, RCW 9A.36.045 penalizes the firing of a weapon from outside a car.

The defendant also cites to a number of statutes from jurisdictions outside the State of Washington to support his argument. These too are irrelevant for a couple of reasons.

First, like Washington's statute, these statutes use very specific language, with many of the statutes specifically requiring that the perpetrator fire the weapon "from" the vehicle.<sup>8</sup> A few of the statutes cited include a temporal element, a spatial element, or both.<sup>9</sup> Washington's statute does not contain a temporal element. There is no requirement that the perpetrator fire from the vehicle or a vehicle he or she "just exited." Rather, Washington's legislature felt it was sufficient to require only a spatial element--an element clearly met here.

Second, a vagueness challenge is based on the language of the statute. Watson, at 5. Citing statutes from other states, that use different words and phrases than Washington's statute, is irrelevant to a challenge based on the specific language of Washington's statute.

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<sup>8</sup> See e.g., AS § 11.61.190 (criminalizes the discharge of a firearm "from a propelled vehicle"); A.R.S. § 13-1209 (prohibits a person from "intentionally discharging a weapon from a vehicle"); A.C.A § 5-74-107 (criminalizes the act whereby a person "knowingly discharges a firearm from a vehicle"); Ga. Code § 16-5-21(a)(3) (makes illegal the discharging of a firearm "from within a motor vehicle").

<sup>9</sup> See e.g., Minn. Stat. § 609.66(1)(3) (criminalizes the reckless discharge of a firearm "while in or having just exited from a motor vehicle"); Miss. Code § 97-3-109 (criminalizes the reckless discharge of a firearm "while in or on a vehicle"); Neb.Rev.St. § 28-1212.04 (criminalizing the discharge of a firearm "while in or in the proximity of any motor vehicle that such person just exited").

Finally, the defendant seeks to argue the statute is vague based on an element he wants this Court to assume is contained in the statute, but is not. Specifically, the defendant cites to Locklear, and asserts that RCW 9A.36.045 contains a temporal element, that the shooting must occur "immediately after exiting the car." Def. br. at 10. Neither the statutory language, nor the Locklear case, supports this assertion.

The statutory language requires the shooting occur "from the **immediate area** of the motor vehicle." RCW 9A.36.045 (emphasis added). The statute says nothing about the immediacy of firing upon exiting the vehicle.

The Court in Locklear was dealing with the terms "immediate area" and "scene," terms the Court stated created a nexus that was "spatial." Locklear, at 560 n.8. The Court, in an aside, stated, "[w]e note, parenthetically, only, that a temporal nexus might also be required." Id. But no court has held, and the statute on its face does not contain, a temporal element. A court cannot add an element to a statute except as to make it rational and thus constitutional. State v. Enstone, 137 Wn.2d 675, 681-82, 974 P.2d 828 (1999), see also State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) ("The court may not add language to a clear statute,

even if it believes the Legislature intended something else but failed to express it adequately"); State v. Taylor, 97 Wn.2d 724, 728, 649 P.2d 633 (1982) ("This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission").

In any event, the desire to add an element to a crime is not a vagueness issue. The elements of the crime are apparent and clear, and the defendant's conduct falls squarely within the conduct prohibited by the statute. The defendant has failed to prove beyond a reasonable doubt that a person of common intelligence would believe his conduct was not prohibited by the statute.

**2. THE DEFENDANT'S DOUBLE JEOPARDY CLAIM IS GOVERNED BY SUPREME COURT PRECEDENT.**

The defendant asserts that double jeopardy principles are violated by imposition of a firearm enhancement where use of a firearm is an element of the underlying offense. This issue is governed by recent Supreme Court precedent.

The defendant was charged and convicted of first-degree assault pursuant to RCW 9A.36.011(1)(a). CP 8, 113. This provision requires proof that the defendant "assault[ed] another with

a firearm or any deadly weapon." RCW 9A.36.011(1)(a). The jury found that at the time the defendant committed first-degree assault, he was armed with a firearm in violation of RCW 9.94A.533(3). CP 8, 112. The firearm sentence enhancement added 60 months to the defendant's sentence. CP 134.

While there were multiple Court of Appeals decisions finding contrary to the defendant's position,<sup>10</sup> there was no Supreme Court decision on the issue. That has since changed. The Supreme Court has now stated that "[w]e hold that imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm." State v. Kelley, \_\_\_ P.3d \_\_\_, 2010 WL 185947 (Jan. 21, 2010). Thus, the defendant's claim is governed by settled law and must be rejected.

**3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING HECTOR HERNANDEZ HAD A FIFTH AMENDMENT RIGHT NOT TO TESTIFY.**

Under the Fifth Amendment, no person "shall be compelled in any criminal case to be a witness against himself." The

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<sup>10</sup> See e.g., State v. Tessema, 139 Wn. App. 483, 162 P.3d 420 (2007), rev. denied, 163 Wn.2d 1018 (2008); State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), rev. denied, 163 Wn.2d 1053 (2008); State v. Caldwell, 47 Wn. App. 317, 734 P.2d 542, rev. denied, 108 Wn.2d 1018 (1987).

defendant asserts that the trial court abused its discretion when it allowed Hector Hernandez to assert his Fifth Amendment right not to testify. This claim must be rejected. The defendant's trial counsel recognized that Hector possessed a legitimate Fifth Amendment right. His attempt to limit Hector's testimony did not eliminate the right.

**a. Facts Related To Hector's Fifth Amendment Right.**

At the beginning of trial, defense counsel informed the court that he wanted to call Hector Hernandez as a witness, but that Hector's attorneys indicated that Hector would invoke his Fifth Amendment right to remain silent. 1RP 8-9. Defense counsel recognized that Hector had a legitimate Fifth Amendment right, especially in regards to his gang affiliation and activities, but he suggested that he could eliminate the Fifth Amendment issue by having Hector testify only as to what he saw and heard. 1RP 9-10. Counsel did not explain how it was possible for Hector to testify without also having to testify about his actions and gang issues.

Attorneys Kevin Donnelly and Lisa Paglisotti represented Hector; Donnelly on the defendant's case, Paglisotti on a pending

possession of a stolen firearm case against Hector. 1RP 11.

Hector's counsel informed the court that they were most concerned with the gang issue and how that could affect his sentencing on the gun charge against Hector. 1RP 13; 2RP 9. Counsel told the court that the gun charge had a strong undercurrent of gang involvement and gang motivation. 2RP 9. Counsel also stated that he was concerned about possible RICO<sup>11</sup> charges involving criminal organizations and conspiracy issues and that it was possible the State could charge Hector with rendering criminal assistance in the other case. 2RP 10. Finally, counsel informed the court that there was a death threat (a "187" threat<sup>12</sup>) made in this case and that Hector could be implicated as the person who made that threat. 2RP 11. After this recitation by Hector's counsel, counsel for the defendant admitted that the gang issue, "it[s] all interwoven." 2RP 13.

The prosecutor stated that if Hector testified, among other things, the State would question Hector about the shooting itself, the events leading up to the shooting, prior incidents between

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<sup>11</sup> RICO stands for the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. § 1961.

<sup>12</sup> See Section B, Statement of the Case, Substantive Facts.

Hector and Edwin's group, his gang affiliation and the gang affiliation of other persons involved. 1RP 12.

The court then heard pretrial testimony from Gang Detective Joe Gagliardi, Edwin Sibaja and the defendant.

Gagliardi testified that Jesus Parda Talamantes is a member of the South Side Locos. 3RP 16. Jesus had previously pled guilty to rendering criminal assistance in the murder of Playboy gang member Jose Moreno. 3RP 17, 59. Gagliardi confirmed that Serafin and Hector are both members of the Playboy gang. 3RP 21, 36-37, 45. Gagliardi confirmed that at a minimum, the defendant associates with these known gang members and Luis Cosgaga-Alvarez, a gang member arrested for a recent murder at Lakota Park (Serafin was present at the time of his arrest). 3RP 33, 36-37, 45.

Gagliardi explained that the term "187" refers to the California homicide code and that it is used as a death threat. 3RP 62. He stated that in this case, Jesus gave a statement indicating that one of the three, Hector, Serafin or the defendant, made a 187 death threat as he was exiting the 76 station. 3RP 62. Jesus believed the threat was related to his prior involvement in the murder of Jose Moreno. 3RP 57. Both Serafin and Hector were

dressed in gang attire at the time of the shooting. 3RP 66. Hector displayed a Playboy tattoo on his chest to Edwin's group and, as Gagliardi explained, this was a challenge. 3RP 72-73. Gagliardi opined that the shooting was gang related. 3RP 109.

At the conclusion of the hearing, defense counsel admitted that the case was gang related and that he expected he would not be able to call Hector just to talk about "what was going on." 3RP 110, 123. The trial court agreed,<sup>13</sup> stating that Hector had reasonable cause to apprehend danger from answering the questions that would be anticipated if he were to testify, and the danger of incrimination is substantial and real. 3RP 124.

**b. Hector's Fifth Amendment Right.**

The Sixth Amendment provides a defendant with the right to compel the testimony of a witness on his behalf. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). However, this right is not absolute. This right is subject to countervailing public interests and conflicting constitutional rights. See United States v. Williams, 205 F.3d 23, 29 (2d. Cir. 2000). As

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<sup>13</sup> At the same time, the court held that the State had not proven that the defendant was an actual member of the Playboys.

pertinent here, for example, "valid assertion of the witness' Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights." State v. Levy, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006) (citing United States v. Goodwin, 625 F.2d 693, 700 (5<sup>th</sup> Cir. 1980)).

The Fifth Amendment declares that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege against self-incrimination includes the right of a witness not to give incriminatory answers in any proceeding--civil or criminal, administrative or judicial. Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

A defendant's Sixth Amendment rights "do not override" the Fifth Amendment rights of a witness. United States v. Whittington, 783 F.2d 1210, 1218 (5<sup>th</sup> Cir. 1986); see also, State v. Parker, 79 Wn.2d 326, 331-32, 485 P.2d 60 (1971); Levy, 156 Wn.2d at 731.

A witness may assert the privilege when he has reasonable cause to apprehend danger from a direct answer. Levy, at 732. The danger must be more than mere speculation, it must be substantial and real. State v. Hobble, 126 Wn.2d 283, 290,

892 P.2d 85 (1995). The assertion of the privilege must be supported by facts which, aided by use of reasonable judicial imagination, show the risk of self-incrimination. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988). If the judge has specialized knowledge of the likely testimony, the judge may allow the witness to refuse to answer all questions. Levy, at 732. Where the witness' disclosure could lead to other evidence which might be used in a criminal prosecution against the witness, the answer need only "furnish a link in the chain of evidence needed to prosecute the witness for a crime." Hobble, 126 Wn.2d at 290.

The determination of whether the privilege can be invoked is not the witness' (although the witness must assert the privilege). The determination of whether the hazards of self-incrimination are genuine, and not merely illusory or false, rests within the sound discretion of the trial court. Hobble, at 290-91.

An abuse of discretion is shown when a reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing Sofia v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). While reasonable minds might disagree with a trial court's ruling, that is not the standard. State v. Willis,

151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail here on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court and allowed Hector to assert his Fifth Amendment privilege against self-incrimination. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

Defense counsel recognized that Hector had a valid Fifth Amendment privilege. However, counsel attempted to circumvent Hector's assertion of the privilege by limiting the scope of his questioning to what Hector saw and heard. This was unrealistic. As defense counsel fully admitted, this was a gang case and evidence of gang involvement was going to be admitted.

Hector was a confirmed member of the Playboys street gang. Hector's gang and the gang of at least one person in Edwin's party were rivals. One of Edwin's party (Jesus) was involved in the murder of a member from the Playboys gang. The defendant was an alleged member and/or closely associated with Hector and other members of the Playboys gang. Hector and the defendant are cousins. Hector was not only present during this entire incident, at a minimum, he instigated the incident. Hector's action in instigating and elevating the incident began and included his continual flashing

of gang signs (challenges) and the flashing of his gang tattoo.

Evidence demonstrated, and case law supports the fact, that the flashing of gang signs can be for the purpose of seeking a violent confrontation.<sup>14</sup>

Additionally, either Hector, Serafin or the defendant made a threat to kill by calling out "187." Someone also yelled out, "just shoot him." After the shooting, Hector aided Serafin after Serafin had knocked Israel to the ground. Serafin, Hector and the defendant then fled the scene, the gun was disposed of, and the police were never called by Hector or anyone in his party.

It was inconceivable that Hector's testimony could be limited in such a manner as proposed by defense counsel--essentially that he would elicit only such testimony beneficial to him--and that Hector would not be subject to cross-examination about his gang activities, affiliations, his actions during the incident, and importantly, his bias. In short, the defendant seems to ignore the fact that Hector would be subject to cross-examination.

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<sup>14</sup> Courts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert. State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009). The throwing of signs by rival gang members was an attempt to create a violent confrontation. United States v. Flores, 572 F.3d 1254, 1259 (2009).

Cross-examination is the right of the party against whom the witness is called. Alford v. United States, 282 U.S. 687, 691-92, 51 S. Ct. 218 (1931) (citing The Ottawa, 70 U.S. 268, 271 (1865)). Once a witness testifies on some matters, he or she is then subject to cross examination on questions germane to direct examination. State v. Morgan, 151 Wash. 306, 308-09, 275 P. 717 (1929). This includes facts that may be brought out tending to discredit the witness by showing that his testimony was untrue or biased. Alford, 282 U.S. at 691-92. As the Supreme Court noted, it would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from further inquiries about it. State v. Lougin, 50 Wn. App. 376, 380, 749 P.2d 173 (1988) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). In fact, where a witness attempts to prevent cross-examination by asserting privilege, his entire testimony must be struck. Denham v. Deeds, 954 F.2d 1501, 1503-04 (1992); State v. Pickens, 27 Wn. App. 97, 100-01, 615 P.2d 537, rev. denied, 94 Wn.2d 1021 (1980).

Hector's attorneys were correct, his testimony could potentially subject him to providing evidence of violations of multiple laws, as well as an increased sentence in his other case. Hector faced the real possibility that the 187 death threat could be linked to him and thus he could be charged with harassment. RCW 9A.46.020. Considering Hector was the key instigator in this case, this possibility was real and serious. Rendering criminal assistance was also a real possibility, to either crimes committed by Serafin<sup>15</sup> or the defendant. RCW 9A.76.080; RCW 9A.76.050. Hector also faced the real threat of being found an accomplice to the criminal acts of Serafin and the defendant. RCW 9A.08.020. This does not even include the RICO federal laws Hector's counsel was concerned about, or the possible sentence ramifications on his firearm offense.

Judge Roberts did not abuse her discretion in ruling as she did. While reasonable minds may differ, that is not the standard. The defendant has not shown that no reasonable person would have so ruled.

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<sup>15</sup> Serafin was potentially subject to being charged with assault and harassment.

**4. A PERSON IS GUILTY OF FIRST-DEGREE UNLAWFUL POSSESSION OF A FIREARM IF HE POSSESSES A FIREARM AFTER HAVING BEEN CONVICTED OF ATTEMPTED RESIDENTIAL BURGLARY.**

The defendant contends that his conviction for first-degree unlawful possession of a firearm (UPFA 1) must be reversed because, he claims, a charge of UPFA 1 cannot be predicated on a prior conviction for attempted residential burglary. This claim is not supported by the plain language of the statute and should be rejected.<sup>16</sup>

In 2005, the defendant was convicted of attempted residential burglary. CP 58. In his current trial, the defendant stipulated that he had been so convicted and that he had been informed that he was not eligible to possess a firearm. CP 58. The charge of UPFA 1 was predicated on this prior felony conviction. CP 9.

In pertinent part, a person is guilty of unlawful possession of a firearm in the first degree,

if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by

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<sup>16</sup> The defendant made a motion to dismiss based on this claim at the conclusion of the State's case-in-chief. 10RP 162-63. The court denied the motion. 11RP at 7-10.

reason of insanity in this state or elsewhere of **any serious offense as defined in this chapter**.

RCW 9.41.040(1)(a) (emphasis added).

Within chapter 9.41, "serious offense" is defined in pertinent part as follows:

"Serious offense" means any of the following felonies **or a felony attempt** to commit any of the following felonies, as now existing or hereafter amended: ... Any crime of violence.

RCW 9.41.010(12)(a)<sup>17</sup> (emphasis added).

Thus, under the plain, clear and unambiguous language of the statute, a conviction for an attempt to commit a "crime of violence" can be a predicate offense for a subsequent charge of UPFA 1. Residential burglary is a "crime of violence" under the statute.

"Crime of violence" is defined within the statute as follows:

Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, kidnapping in the second degree, arson in the second degree, assault in the second degree, assault of a child in the second degree, extortion in the first

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<sup>17</sup> This definition, unchanged in content, has been renumbered and now appears at RCW 9.41.010(16)(a). See 2009 c 216 § 1, eff. July 26, 2009.

degree, burglary in the second degree, **residential burglary**, and robbery in the second degree.

RCW 9.41.010(11)(a)<sup>18</sup> (emphasis added).

Statutory interpretation is a question of law reviewed de novo. State v. Hansen, 122 Wn.2d 712, 717, 862 P.2d 117 (1993). There is no need to interpret statutes that are unambiguous. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), cert. denied sub nom., Keller v. Washington, 534 U.S. 1130 (2002). If a statute is clear on its face, a reviewing court must derive its meaning from the plain language of the statute alone. State v. Sullivan, 143 Wn.2d 162, 176, 19 P.3d 1012 (2001). And finally, "[u]nder rules of statutory construction each provision of a statute should be read together (in para materia) with other provisions in order to determine the legislative intent underlying the entire statutory scheme." State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (footnotes omitted), cert. denied, 531 U.S. 984 (2000).

The statute is quite clear, a conviction for a serious offense can serve as a predicate offense for UPFA 1. Serious offense includes a conviction for an attempt to commit a crime of violence.

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<sup>18</sup> This definition, unchanged in content, has been renumbered and now appears at RCW 9.41.010(3)(a). See 2009 c 216 § 1, eff. July 26, 2009

Residential burglary is a crime of violence and thus attempted residential burglary is a serious offense.

The defendant's argument appears to rely solely upon the definition of "crime of violence," while ignoring the definition of "serious offense." He asserts that the enumerated list in the definition of "crime of violence" does not specifically provide that attempted residential burglary, or an attempted class B felony, can be a predicate offense for UPFA 1. In this limited regard the defendant is correct.

If the UPFA 1 statute required that the predicate offense be one of the enumerated crimes within the definition of crime of violence, he would be correct, but the statute does not contain this limitation. Instead, the predicate offense necessary to charge UPFA 1 must be a "serious offense," as that term is defined, and as that term is defined, this includes an attempt to commit a crime of violence. There is no language within the definition of "serious offense" that would limit the application of the word "attempt" to only the commission of class A felonies as the defendant suggests. Rather, the statute provides that "serious offense" means "a felony attempt to commit **any** ... crime of violence." RCW 9.41.010(12)(a). "Any" means "all" and "every." State v. Smith, 117 Wn.2d 263, 271,

814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985). The defendant's interpretation of the statute is simply not supported by the plain language of the statute and must be rejected.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's convictions.

DATED this 9 day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DENNIS J. McCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

# APPENDIX A

## **Name aka list**

- Mario Hernandez, the defendant  
Aka Miklo or Milkweed  
Referred to in testimony as the tall white guy  
Associates with Playboys Street Gang
- Hector Hernandez  
Aka Mr. Snapper  
Playboys Street Gang  
Referred to in testimony as the little skinny guy  
With defendant at time of shooting
- Serafin Gutierrez  
Aka Fathead  
Playboys Street Gang  
Referred to in testimony as the fat guy  
With defendant at time of shooting
- Teresa Lasley  
Girlfriend of Serafin Gutierrez  
With defendant at time of shooting
- Falco  
Gangster friend of the defendant from earlier shooting
- Jose Moreno  
Playboys gang member murdered in earlier incident
- Luis Cosgaga-Alvarez  
Aka Youngster  
Playboys Street Gang  
Arrested for murder in prior incident
- Julio Colin Serrano  
Aka Kartoon  
Playboys Street Gang

Edwin Sibaja  
Shooting victim

Israel Sibaja  
Edwin Sibaja's brother

Luciana  
Israel Sibaja's girlfriend

Fabian Moreno  
Aka Tigrillo  
Friend of Edwin Sibaja

Jesus Parda Talamantes  
Aka Giggles  
Southside Locos Street Gang  
Friend of Edwin Sibaja

Rafael Andrade  
Friend of Edwin Sibaja

Nabel Naranjo  
Edwin Sibaja's girlfriend

Giovanni  
Relative of Edwin Sibaja

Cynthia  
Wife of Giovanni

Arturo  
Aka Cornflakes  
Edwin Israel's cousin

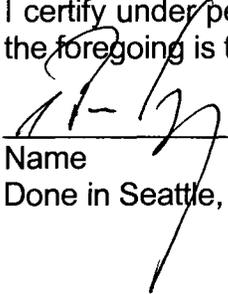
Marcos  
Aka Smokey

Botas  
Rafael Andrade's cousin

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HERNANDEZ, Cause No. 63308-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

03/09/10  
\_\_\_\_\_  
Date

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