

NO. 38660-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

AUGUSTUS M. OAKLEY, Appellant.

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COURT OF APPEALS
DIVISION II
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APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the defense motion to dismiss the attempted drive-by shooting charge due to insufficient evidence.
2. The trial court erred by convicting Mr. Oakley of attempted drive-by shooting without sufficient evidence.
3. The trial court's imposition of firearm enhancements on the second-degree assault convictions violated double jeopardy.
4. The trial court erred by ordering restitution for damages unrelated to the criminal convictions.
5. The trial court erred by finding that the damages were "causally related" to the criminal convictions.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State failed to provide sufficient evidence to support the conviction for attempted drive-by where the evidence showed that the gun did not "discharge" and could not "discharge."
2. The imposition of firearm enhancements for the three second degree assault convictions, which were charged as assault with a

deadly weapon, violated the constitutional prohibitions on double jeopardy.

3. The trial court abused its discretion in ordering restitution for damages that were not caused by the actions of which Mr. Oakley was convicted.

III. STATEMENT OF THE CASE

On April 15, 2007, around 9 p.m., brothers Isaiah and Steven Lynn¹ were having a heated discussion on the phone with their friend, Richard Taylor. RP6 579, 647; RP8 1067. They were arguing over a gun (not the one allegedly used in this incident) police had found in a vehicle the four were in together. RP8 1067. Steven testified that he was angry at Mr. Oakley for putting the gun under his seat and that Mr. Oakley was angry with him for telling the police that the gun was his. RP8 1067. He challenged Mr. Oakley and Mr. Taylor to come over to fight. RP8 1067.

When Mr. Taylor and Mr. Oakley arrived in the car, Steven approached and ordered Mr. Oakley to come out.² RP8 1071. Christopher

¹ Because there are three witnesses with the last name “Lynn,” counsel will refer to them by their first names.

² Christopher Lynn said that before this, his brothers and Mr. Oakley and Mr. Taylor talked together in the driveway and then Mr. Oakley and Mr. Taylor

said that all three of the Lynns were 20-30 feet away from Mr. Oakley.

RP6 746. Steven testified that he was three feet away. RP8 1074.

Steven testified that Mr. Oakley got out of the car, then pulled a rifle from inside his coat, pointing it at Steven. RP8 1076, 1078. Steven said he heard the gun being cocked, and then turned to run. RP8 1085. Christopher heard Isaiah yell, "gun" and then Isaiah and Steven ran past him. RP6 653-54. Christopher said he saw Mr. Oakley holding a gun, a spark and the sound of the gun jamming, and then he, too, ran. RP6 654. Steven said as he ran he looked back and saw the gun buck upward, spark, and it "splattered all in the air." RP8 1088, 1090. Steven said he heard a noise, but different from gunfire. RP8 1092.

Christopher said Mr. Oakley pointed the gun in the air. RP6 655. Christopher was certain that no bullet was discharged from the weapon. RP6 656. Christopher said the gun was pointed toward them. RP6 748.

When Christopher arrived back at the house, Isaiah and Steven were again on the phone on the front porch of the Lynn home. RP6 658. Mr. Taylor and Mr. Oakley returned to the house and the boys began to yell at each other. RP6 670, 673; RP8 1097.

walked back to their car, parked a block away with the Lynn brothers following them. RP6 648, 650.

Suddenly, Isaiah hit Mr. Taylor and the two began to scuffle. RP6 674. Soon, Christopher and Mr. Oakley also became involved and the fight escalated. RP6 675; RP8 1099. Christopher testified that after Mr. Taylor and Mr. Oakley were knocked down, the two boys got up and ran back to their car. RP6 676, 693. Steven said the fight broke up when a neighbor came out of his house with a bat or a gun. RP8 1100-1101.

A few minutes later, Mr. Taylor and Mr. Oakley drove down the street slowly. RP6 679. Christopher was the only witness to testify that as they drove by, Mr. Oakley pointed the gun out the window and tried to shoot—the gun again jammed. RP6 679. Steven testified that as they drove down the street, Mr. Oakley merely displayed the gun, but did not fire. RP8 1103, 1105; RP9 1174-75, 1176. Neighbors Richard Cueva, Scott Keith, and Officer Robert Moyer all saw the car drive down the street, but did not see a gun or hear any gunshots. RP6 611; RP8 966, 988, 1045.

In the subsequent search of the scene, not a single shell casing or bullet was found. RP4 243, RP5 386, 448.

Later in the evening of April 15, 2007, a loud older vehicle was seen driving down the street in a gated community six blocks away from the Lynns' neighborhood. RP5 479; RP6 626, 628. While turning around, the car backed into another car, damaging it and the garage of that

residence. RP6 630-31. As the car drove from the neighborhood, the passenger tossed out a small object, which later turned out to be an un-fired bullet. RP9 1269, 1276. One un-fired round of a caliber matching the SKS rifle was recovered from the scene of this accident. RP5 396.

Around 9:30 p.m., Mr. Taylor was observed driving up to his home in Mr. Oakley's car, with one unidentified passenger. RP5 525, 526; RP6 563, 574. When approached by police, both occupants fled. RP5 534, 536. Mr. Taylor hid in the garaged and was subsequently arrested. RP5 536-37. The passenger was not found or identified. RP5 543. An SKS semi-automatic rifle was found much later in the trunk of Mr. Oakley's car. RP4 315, 322, 333. When found, this rifle was inoperable because two rounds were jammed in the chamber. RP5 352, 363. Three live rounds for a rifle were also found inside the car. RP4 326, 329.

The State's firearms expert, Edward Robinson, testified that when a cartridge has become lodged sideways in the chamber, that would stop new cartridges from loading and the weapon could not fire. RP7 840-41. In this circumstance, an observer might hear a metal click, but there would not be anything to see—no flash. RP7 857-58. If a gun is successfully fired, cartridges are ejected. RP7 869.

The jury convicted Mr. Oakley on the lesser-included charges of second degree assault (three counts) and attempted drive-by shooting. CP

92, 93, 94, 95. The jury also returned three special verdicts, finding that during the assaults, Mr. Oakley was armed with a firearm. CP 96, 97, 98. Mr. Oakley had no prior criminal history, CP 99, and he was sentenced to 22 months on each assault, plus 36 months on each for a firearm enhancement, and 23.25 months for the attempted drive-by. CP 108. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR ATTEMPTED DRIVE-BY WHERE THE EVIDENCE SHOWED THAT THE GUN DID NOT “DISCHARGE” AND COULD NOT “DISCHARGE.”

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State charged Mr. Oakley with drive-by shooting and the jury returned a verdict on the lesser-included offense of attempted drive-by shooting. CP 2, 95. The defense made a half-time motion to dismiss the

drive-by shooting charge, as well as the instruction on attempted drive-by shooting, based on the lack of evidence of a “substantial step” and lack of evidence of “discharge.” RP9 1339. Although she initially agreed with the defense, the trial judge ultimately denied the motion to dismiss and allowed the charges to go to the jury. RP10 1379-80.

RCW 9A.36.045(1) provides:

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.

“Discharge” is not defined in the statute. The jury was instructed that: “A person commits the crime of attempted drive-by shooting when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.” CP 72. “A substantial step is conduct ‘strongly corroborative of the actor's criminal purpose.’” *State v. Sivins*, 138 Wn.App. 52, 63, 155 P.3d 982 (2007) (quoting *State v. Aumick*, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995)).

When a statute does not define a nontechnical word, the court may use dictionaries. *State v. Pacheco*, 125 Wash.2d 150, 154, 882 P.2d 183 (1994). The dictionary definition of “deliver” as applied to a firearm is: “to deliver a charge or load;” “to go off or fire, as a firearm or missile;”

“the act of firing a weapon, as an arrow by drawing and releasing the string of the bow, or a gun by exploding the charge of powder.”

Dictionary.com Unabridged (v 1.1). Random House, Inc.,
<http://dictionary.reference.com/browse/discharge> (accessed: September 14, 2009).

In this case, the State argued that the jury could find there was a drive-by shooting either when the gun jammed during the initial confrontation beside the car, or when the gun jammed when the car drove down the street. RP11 1539, 1540, 1548. The witness testimony was consistent that a bullet was never actually fired either in the initial confrontation beside the car or when the car drove down the street. RP6 611, 656, 679; RP8 966, 988, 1088, 1045, 1090, 1103. The physical evidence confirmed this—no casings or bullets were found at the scene. RP4 243; RP5 386, 448. Viewing the evidence in the light most favorable to the State, the most any witness testified to was that the gun was “cocked,” jammed and “sparked” and “splattered all in the air” during the initial confrontation. RP6 654, RP8 1088, 1090.

The uncontroverted evidence was that the gun could not be fired. Both the officer who first examined the SKS rifle and the State’s firearms expert testified that this weapon was incapable of being fired when in the jammed state it was found in. RP5 352, 363; RP7 840-41. The expert

unequivocally testified that a gun in this state could not be fired and the gunpowder would not ignite. RP7 857-58.

Because this gun could not be fired, whatever happened, it was not capable of being “discharged” by its common meaning. Thus, there is insufficient evidence to support a finding that Mr. Oakley took a “substantial step” toward “discharge” of the weapon. Consequently, there is insufficient evidence to support a conviction for attempted drive-by shooting.

ISSUE 2: THE IMPOSITION OF FIREARM ENHANCEMENTS FOR THE THREE SECOND DEGREE ASSAULT CONVICTIONS, WHICH WERE CHARGED AS ASSAULT WITH A DEADLY WEAPON, VIOLATED THE CONSTITUTIONAL PROHIBITIONS ON DOUBLE JEOPARDY.

Mr. Oakley was convicted of three counts of second degree assault while armed with a deadly weapon, namely a rifle. CP 57, 58, 59, 93, 94, 95. By special verdict, the jury again found that Mr. Oakley was “armed with a firearm” when he committed the assaults. CP 96, 97, 98. Mr. Oakley was given three firearm enhancements, one for each second degree assault. CP 105. Because the assault convictions were already based on Mr. Oakley’s possession of a firearm, the sentencing enhancements for firearm possession added to those sentences constituted double jeopardy. This issue was raised in *State v. Kelley*, 146 Wn. App. 370, 189 P.3d 853 (2008), *review granted*, 165 Wn.2d 1027, 203 P.3d 379 (2009), and is

currently pending in the Supreme Court, with oral argument scheduled for October.

The double jeopardy clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Washington’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Wash. Const. art. 1, §9. This Court gives Article 1, Section 9 the same interpretation as the United States Supreme Court gives to the Fifth Amendment. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

To determine if separate prosecutions violate double jeopardy prohibitions, the courts utilize the *Blockburger*, or “same elements” test. *United States v. Dixon*, 509 U.S. 688, 697, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Two offenses are the same offense for purposes of double jeopardy analysis when one offense is necessarily included within the other and, in the prosecution for the greater offense, the defendant could have been convicted of the lesser. *State v. Roybal*, 82 Wn.2d 577, 582, 512 P.2d 718 (1973). Thus, conviction or acquittal on a lesser included offense bars the government from prosecuting the defendant for the greater offense. *Green v. U.S.*, 355 U.S. 184, 190-91, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Likewise, while the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. *State v. Freeman*, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

In *Apprendi* and *Blakely*, the Court clarified the long-standing requirement that any fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt, even if the fact is labeled a “sentencing enhancement” by the legislature. *Blakely v. Washington*, 542 U.S. 296, 306-7, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). “Our decision in *Apprendi* makes clear that “[a]ny possible distinction” between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” *Blakely*, 542 U.S. at 306-7. Accordingly, the Supreme Court treats sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Blakely*, at 306-7.

The Supreme Court has also held that “aggravating factors” that may make a defendant eligible for an exceptional sentence or the death penalty “operate as the functional equivalent of an element of a greater offense.” *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), quoting *Apprendi*, 530 U.S. at 494 n. 19.

The aggravating factors that make a defendant eligible for the death penalty also operate as elements of a greater offense for purposes of

double jeopardy. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111-12, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). In fact, in *Sattazahn*, Justice Scalia, writing for a plurality of the Court, found “no principled reason to distinguish” between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial and what constitutes an offense for purposes of the Fifth Amendment’s Double Jeopardy Clause. 537 U.S. at 111. (“If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that “acquittal” on the offense of “murder plus aggravating circumstance(s).”)

In *State v. Recuenco*, 154 Wn.2d 156, 162-3, 110 P.3d 188 (2005), the Washington Supreme Court held that facts to support a firearm enhancement must be proved to the jury.³ Like the aggravating factors in *Ring*, the additional finding increases the punishment faced by the defendant and so operates as the functional equivalent of an element of a greater offense.

RCW 9.94A.533, the “Hard Time for Armed Crime” initiative, shows the voters’ intent to create exemptions for crimes where possessing

³ The Supreme Court overruled *Recuenco*’s holding that *Blakely* errors cannot be harmless error, but not the application of *Apprendi* and *Blakely* to firearm enhancements. *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006).

or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm. RCW 9.94A.510(3)(f). However, it appears that the voters were unaware of the similar problem of redundant punishment created when a firearm enhancement is added to a crime where the punishment has already been increased due to the necessary element of involvement of a firearm. There is no language showing the intent to punish crimes committed with a firearm again with a firearm enhancement. This is a change from prior law, where the legislative intent to attach two punishments was clear in the language itself. *See State v. Adlington-Kelly*, 95 Wn.2d 917, 924, 631 P.2d 954 (1981).

The “Hard Time for Armed Crime” initiative was passed long before *Apprendi* and *Blakely* reshaped the sentencing landscape. Thus, state law did not view additional findings triggering an increased sentence as implicating the rights to a jury trial, due process of law, or double jeopardy. *Cf., former RCW 9.94A.535*.

Because under *Blakely* and *Apprendi* factual findings that support sentencing enhancements constitute elements of a crime, they also constitute a new, greater offense for purposes of double jeopardy. There is “no principled reason to distinguish” between the statutory elements of the crime—which in this case included possession of a “deadly weapon”—

and the statutory firearm enhancement—which again punishes for the same finding. *See Sattazahn*, 537 U.S. at 111-12 (“The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence not only delimits the boundaries of . . . important constitutional rights, like the Sixth Amendment right to trial by jury, but also provides the foundation for our entire double jeopardy jurisprudence.”)

Division I of this court has previously rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon is an element of the underlying offense. *See e.g. State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), 137 Wn. App. 1, 150 P.3d 643, 2007 Wn. App. LEXIS 102 (2006); *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). Division II has also rejected this claim, but the Supreme Court has accepted review on the case. *State v. Kelley*, 146 Wn. App. 370, 189 P.3d 853 (2008), *review granted*, 165 Wn.2d 1027 (1009). The state Supreme Court addressed this issue under the old firearm enhancement statute, which contained different language, and held there was no double jeopardy violation. *State v. Adlington-Kelly*, 95 Wn.2d 917, 631 P.2d 954 (1981). The state Supreme Court has not yet addressed the affect of *Blakely* and *Apprendi* on this question.

Mr. Oakley's assault charges in this case were elevated to a higher degree by the element of being armed in committing the crime. RCW 9A.36.021(1)(c). Therefore, again elevating the crime for the same underlying act—use of a firearm—violates double jeopardy. This court should reverse and remand with the direction that the firearm enhancements be vacated. *See State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

ISSUE 3: THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING RESTITUTION FOR DAMAGES THAT WERE NOT CAUSED BY THE ACTIONS OF WHICH MR. OAKLEY WAS CONVICTED.

At the restitution hearing, the State asked for an award of \$3,872.28 for damage caused in the uncharged hit and run incident where a parked car was pushed into a garage door. RP15 1687, CP 120-21. Mr. Oakley objected because the damages were unrelated to the convictions in this case. RP15 1687-88. The court ordered the restitution as requested by the State, reasoning that there was a “causal relationship” between the damages and the convictions because the damage was purportedly caused while the defendants were “fleeing” from the crimes. RP15 1691.

The power to impose restitution derives solely from the statute. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). RCW 9.94A.753(5) provides that:

Restitution shall be ordered whenever the offender **is convicted of an offense which results in injury** to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(emphasis added). A court's decision is reviewed for abuse of discretion.

Davison, 116 Wn.2d at 919. A decision is an abuse of discretion when the decision is based on untenable grounds. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999).

The general rule is that restitution may be ordered only for losses incurred as a result of the precise offense charged. Restitution cannot be imposed based on the defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge.

State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993); see also

State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998).

Accordingly, restitution for loss beyond the scope of the crime charged is properly awardable only when the defendant enters into an "express agreement" to make such restitution as part of the plea bargain process.

Miszak, 69 Wn. App. at 429. "In other words, restitution cannot be imposed based on a defendant's 'general scheme' or acts 'connected with'

CERTIFICATE OF SERVICE

I certify that on September ¹⁶ 15, 2009, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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