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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

BAUER,

Petitioner.

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

RESPONSE TO MOTION FOR REVIEW

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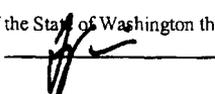
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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The response is filed by Kitsap County Deputy Prosecuting Attorney Jeremy A. Morris.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals' decision in *State v. Bauer*, __ Wn.App. __, 940 P.3d 1227 (No. 43511-0-II, March 8, 2013), a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles, held that the trial court did not err in denying the Defendant's Knapstad Motion to Dismiss when the State had alleged sufficient facts for a jury to find the Defendant guilty of the charged offense. The question presented is thus whether this Court should decline to accept review because none of the criteria set forth in RAP 13.5(b) are met, because:

1. the Court of Appeals has not committed an obvious error that would render further proceedings useless;
2. the Court of Appeals has not committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act; and

3. the Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by the Supreme Court?

IV. 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 denied the Defendant's motion to dismiss the assault charge.² The Defendant then sought interlocutory review, which the Court of Appeals granted. The Court of Appeals, however, ultimately rejected the Defendant's claim and affirmed the trial court's denial of the motion to dismiss. The Defendant then filed the present petition.

B. FACTS

In response to the *Knapstad* motion below, the State filed numerous police reports and interview summaries which were incorporated into the State's response. See CP 50, 70-133. Generally speaking those materials outlined the basic facts of the case as follows.

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.

On February 22, 2012, nine year-old T.G.J.C. took a .45 caliber H&K semi-automatic handgun to Armin Jahr Elementary School in Bremerton. CP 70. Near the end of the school day, T.G.J.C. reached into his backpack where the gun was located and the weapon fired, striking a fellow student named A.K-B. The child was critically injured and suffered life threatening injuries. CP 70, 73.

The investigation revealed that the weekend prior to the shooting T.G.J.C. and one of his sisters had stayed at the home of Bauer and Jamie Chaffin (aka Jamie Passmore). CP 70, 76. Ms. Chaffin is the biologic mother of T.G.J.C. and his two sisters, although Ms. Chaffin does not have custody of any of the children. Mr. Bauer is Ms. Chaffin's boyfriend. T.G.J.C. obtained the firearm used in the school shooting from the home of Bauer and Chaffin. CP 71.

T.G.J.C., his sisters, and other witnesses were interviewed and described that there were numerous unsecured firearms in various locations in Mr. Bauer's home. The children described that in the downstairs bedroom there are several handguns and a shotgun, and another handgun was kept next to a computer in the downstairs living room. CP 71, 108, 112, 115. Yet another firearm was kept in the glove box of Mr. Bauer's car. CP 71, 108, 112, 115. The children all described that Mr. Bauer and Ms. Chaffin had told them that all of the weapons were loaded. CP 71, 108, 112, 115.

Although there is a bedroom on the top floor that is available to T.G.J.C. and his sisters when they visit, the children all described that when they visit the home they sleep downstairs, either in the bedroom or in the downstairs living room. CP 127. On the weekend preceding the shooting, T.G.J.C. and his sister P.E.C. stayed at the Bauer residence. CP 126. During this visit the children slept downstairs in the bedroom and in the family room. CP 125-26, 128. As usual, the firearms were left out during their visit. CP 126, 130. The children also described that they have free access to the downstairs portion of the residence when they visit and that there are no rules regarding their ability to go downstairs. CP 71, 109, 111, 115.

With respect to the firearm used in the shooting at Armin Jahr Elementary, T.G.J.C. described that the weapon was sitting on top of a dresser in the downstairs bedroom and that he put the firearm into his backpack as he was preparing to leave the Bauer residence and return to the home of his uncle (who has custody of the children) on Monday. CP 71, 116.

After the shooting law enforcement went to the Bauer residence and located a loaded 9mm firearm next to the computer in the downstairs family room. CP 71. A loaded shotgun was also found in the downstairs bedroom. CP 71. Ammunition was also recovered from the downstairs bedroom. An unloaded 9mm firearm was also found in the glove box of Mr. Bauer's car.

CP 71. The Detectives spoke to Bauer who said he was unaware that the T.G.J.C. had taken the firearm. CP 90. Bauer acknowledged that he was aware that during the weekend in question T.G.J.C. had gone into the Honda and taken money from the glove box without permission. CP 90. Bauer acknowledged that he was informed of this on Sunday (well before T.G.J.C. left the home on Monday with the firearm). CP 90.

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW BECAUSE THE COURT OF APPEAL'S DECISION BECAUSE NONE OF THE CONSIDERATION GOVERNING ACCEPTANCE OF REVIEW APPLY AS THE COURT OF APPEALS' OPINION WAS CONSISTENT WITH WELL-ESTABLISHED WASHINGTON LAW.

1. None of the considerations governing acceptance of review set forth in RAP 13.5(b) support acceptance of review.

RAP 13.5(b) sets forth the considerations governing this Court's acceptance of review:

(b) Considerations Governing Acceptance of Review. Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:

(1) if the Court of Appeals has committed an obvious error which would render further proceedings useless; or

(2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or

(3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or

administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

This Court should decline to accept review because none of these considerations supports acceptance of review. Specifically, the Defendant has failed to show obvious or probable error (or a departure from the accepted and usual course of judicial proceedings). Rather, as outlined below, the Court of Appeals' opinion was consistent with well settled Washington law.

2. *The trial court did not err in denying the Defendant's Knapstad motion because, viewing the evidence in a light most favorable to the State, the facts would establish a prima facie case of guilt.*

The Defendant's claim in the present case is that the trial court erred in failing to grant his *Knapstad* motion regarding the charge of assault in the third degree. App.'s Pet at page 8-15.

When addressing a *Knapstad* 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; 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 is Assault in the Third Degree which will require 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); WPIC 10.04.³

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 statutes.⁴ 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 summarized the analysis in this area and began by looking at “the basic tenets of our own criminal law and to the provisions of the Washington

³ “Bodily harm” means physical pain or injury, illness, or an impairment of physical condition. RCW 9A.04.110.

⁴ For instance, the crime of Manslaughter in the Second Degree exactly parallels the crime of Assault in the Third Degree with the sole exception being that manslaughter requires “death” as opposed to “bodily harm by means of a weapon.” Specifically, a person is guilty of manslaughter in the second degree when, “with criminal negligence, he causes the death of another person.” RCW 9A.32.070. Numerous other criminal statutes use the word “cause.” 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 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”).

criminal code.” *State v Christman*, 160 Wn.App. 741, 752 (2011). The Court then stated:

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.

Christman, 160 Wn. App. at 752-53, 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 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 752-54.⁵

In addressing the term "cause" in criminal cases, the Washington courts have explained there are two parts to the 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 concerns "but for" causation, "events the act produced in a direct unbroken sequence which

⁵ 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 required result. 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 (2005), quoting *State v. Rivas*, 126 Wn.2d 443, 453 ("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 short, 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.

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 624.⁶ Most importantly (with respect to the *Knapstad* motion), 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 the Defendant was a “cause in fact,” the State must also prove that there has been no intervening or superseding act which would act to terminate the Defendant’s liability.⁷ These concepts are well established under Washington law. For instance, 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*,

⁶ 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.” 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.

⁷ 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 actual tests imposed, however, have remained constant.

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). The “pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.” *Wilbert v. Metropolitan Park Dist. of Tacoma*, 90 Wn.App. 304, 308, 950 P.2d 522 (1998); *McLeod v. Grant Cy. Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953); *Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975); *Hansen v. Friend*, 118 Wn.2d 476, 483-84, 824 P.2d 483. Whether the general field of danger should have been anticipated by a defendant is normally an issue for the jury; it can be decided as a matter of law only where reasonable minds cannot differ. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989); *Rikstad v. Holmberg*, 76 Wn.2d 265, 270, 456 P.2d 355 (1969).

Given the law and the jury instructions that would apply to the present case, the State will need to prove that the Defendant 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 need to show the following:

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.

That “but for” the Defendant’s act or omission the bodily harm would not have occurred.⁸

⁸ The Washington Pattern instructions, for instance, explain that,

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 25.02. And further,

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.]

WPIC 25.03.

These instructions, and the concepts included within them, have 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, the 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); *State v. Fateley*, 18 Wn.App. 99, 104–05, 566 P.2d 959 (1977).

Similarly, in *State v. Perez-Cervantes*, 141 Wn.2d 468 (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. *Perez-Cervantes*, 141 Wn.2d at 473. This Supreme Court affirmed, and noted that the instruction “was a standard jury instruction.” *Id.* 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. *Id.* 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).

The next issue will be whether the acts of T.G.J.C. worked to “supersede” the defendant’s liability. With regard to this issue the question will be whether, in the exercise of ordinary care, the Defendant 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. 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 the Defendant should have reasonably anticipated that this could happen, then the acts of T.G.J.C. do not “supersede” the Defendant’s acts and the Defendant’s liability is not terminated.

Viewing the evidence in a light most favorable to the State, the evidence will show that by placing multiple firearms, ammunition, and a 9 year-old child in close proximity 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. Furthermore, “but for” the Defendant placing the multiple firearms, ammunition, and a 9

year-old child in close proximity, the shooting of A.B. would not have occurred.

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 the Defendant should have reasonably anticipated. Thus the act of T.G.J.C. cannot work to “supersede” the Defendant’s liability.

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). App.’s Br. at 20-21. Bauer’s arguments, however, are without merit as a fair reading of *Chester* simply does not lead to the conclusion that *Chester* in 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*, __ Wn.App. __, 940 P.3d at 1235. 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*, __ Wn.App. __, 940 P.3d at 1235, citing *Berube*, 150 Wn.2d at 510, 79 P.3d 1144;

Christman, 160 Wash.App. at 750–54, 249 P.3d 680; *McDonald*, 90 Wn.App. at 612–16, 953 P.2d 470. In addition, as Bauer’s actions were sufficient to qualify even if “cause” means “to be the cause of, to bring about, to induce or to compel.” *Bauer*, __ Wn.App. __, 295 P.3d at 1235.

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

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

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.

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 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

word "acted" includes, where relevant, "omitted to act."); WPIC 25.02, 25.03.

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

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.

evidence demonstrates no “affirmative act” is without merit.¹²

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 since, 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.

Given all of these facts, the trial court did not err in denying the Defendant’s *Knapstad* motion. The Motion for Discretionary Review, therefore, should be denied.

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. The Supreme 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 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 the Defendant’s culpability.

3. ***The trial court did not err in denying the Defendant's motion to dismiss based on vagueness because the Defendant failed to meet his heavy burden of proving that the statute is unconstitutional beyond a reasonable doubt.***

The trial court properly denied the Defendant's motion to dismiss based on vagueness because the Defendant failed to meet his heavy burden of proving that the statute is unconstitutional beyond a reasonable doubt.

A criminal prohibition is void for vagueness under the due process clause if it "fails either (1) to define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited or (2) to provide ascertainable standards of guilt to protect against arbitrary enforcement." *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Courts are to presume that a statute is constitutional, and "the party asserting a vagueness challenge bears the heavy burden of proving the statute's unconstitutionality beyond a reasonable doubt." *State v. Evans*, 164 Wn.App. 629, 638, 265 P.3d 179 (Div. II, 2011), *citing State v. Allenbach*, 136 Wn.App. 95, 100–01, 147 P.3d 644 (2006). "[T]he presumption in favor of a law's constitutionality should be overcome only in exceptional cases." *Evans*, 136 Wn.App. at 638, *quoting Eze*, 111 Wn.2d at 28. In addition, a statute "employing words with a well-settled common law meaning, generally will be sustained against a charge of vagueness." *State v. Christman*, 160 Wn.App. 741, 758, 249 P.3d 680 (2011).

As outlined above, Washington Courts have repeatedly explained that when a criminal statute utilizes the word “cause” or words with similar meanings, the relevant inquiry is the well-defined legal concept of proximate cause. In short, given the “well-settled common law meaning” of the word “cause,” the statute in the present case must “be sustained against a charge of vagueness.” *Christman*, 160 Wn.App. at 758. The Motion for Discretionary Review, therefore, should be denied.

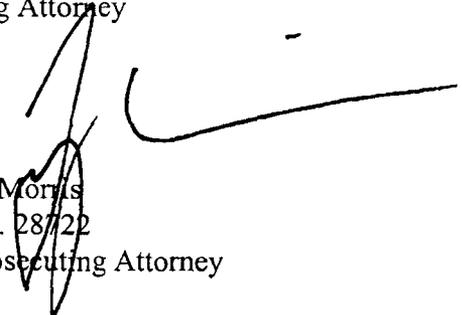
VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Bauer’s motion for review.

DATED April 5, 2013.

Respectfully submitted,

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DOCUMENT 1

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Attached, please find the State's "Response to Motion for Review" in the case of State v Douglas Bauer, No. 885591.

Sincerely,

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