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No. 63308-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARIO ABRAHAM HERNANDEZ,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Mario Hernandez was convicted of the crime of "drive-by shooting," but he did not shoot a gun from within a motor vehicle, or from the proximity of a vehicle that he had just exited. Instead, although Hernandez drove a car to the scene of the crime, he parked the car, exited, entered a convenience store, ate a hot dog, engaged in conversation, returned to the parking lot and observed an altercation taking place before he shot a gun. Because the State did not prove that a nexus existed between Hernandez's use of a car and his use of a gun, as required, the drive-by statute is unconstitutionally vague as applied to his case and the conviction must be reversed.

In addition, the trial court abused its discretion in permitting a vital defense witness to invoke his Fifth Amendment privilege and refuse to answer any relevant question; the firearm enhancement applied to the first degree assault conviction violated principles of double jeopardy; and the State did not prove Hernandez had a prior "serious offense" for purposes of the first degree unlawful possession of a firearm conviction.

B. ASSIGNMENTS OF ERROR

1. The drive-by shooting statute is unconstitutionally void for vagueness as applied to Hernandez's conduct.

2. The trial court abused its discretion in allowing a vital defense witness to invoke his Fifth Amendment privilege and refuse to answer any relevant question.

3. The court's imposition of a consecutive firearm enhancement for possession of a single firearm in a single incident violates double jeopardy principles where possession of a firearm was an element of the underlying offense.

4. The State did not prove Hernandez had a prior "serious offense" for purposes of the first degree unlawful possession of a firearm charge.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A statute is void for vagueness as applied to a defendant's conduct, if persons of ordinary intelligence must guess at its meaning and differ as to its application. The drive-by shooting statute requires a nexus between the use of a car and the use of a gun. A person of ordinary intelligence would not understand that the required nexus exists where Hernandez shot a gun from outside a car several minutes after he exited the car, walked away

from it, and engaged in unrelated activities. Is the statute void for vagueness as applied to his case?

2. Based on the Washington Supreme Court's grant of review in several cases, should this Court reconsider its ruling that double jeopardy does not bar multiple punishments for the same act of possessing a single firearm on a single occasion used to accomplish a single objective?

3. Did the trial court abuse its discretion in excusing a vital defense witness from testifying, where the witness could have answered some relevant questions without incriminating himself?

4. Did the State prove Hernandez had a prior "serious offense" for purposes of the first degree unlawful possession of a firearm charge, where the Legislature did not intend that the crime of attempted residential burglary qualify as a "serious offense"?

D. STATEMENT OF THE CASE

Mario Hernandez was charged and convicted following a jury trial of one count of first degree assault, RCW 9A.36.011(1)(a), while armed with a firearm; one count of drive-by shooting, RCW 9A.36.045; and one count of unlawful possession of a firearm in the first degree, RCW 9.41.040(1). CP 8-9, 131.

The charges arose out of an incident that occurred on June 14, 2008. That evening, Hernandez, his cousin Hector Hernandez,¹ and their friends Serafin Gutierrez and Teresa, decided to go to a party. 2/10/09RP 194-95. They stopped at a gas station and Circle K convenience store on the way in order to buy some snacks. 2/10/09RP 195, 199-200. Inside the store, Hernandez recognized an acquaintance, Edwin Sibaja, whom he had known some years earlier when the two were in juvenile detention together. 2/10/09RP 200-02. The two men were on friendly terms and greeted each other. 2/09/09RP 137, 147; 2/10/09RP 200-02.

Edwin² had come to the store with a large group of 15 people, who were also on their way to a party. 2/04/09RP 117-21. That group had arrived in three separate cars. 2/04/09RP 122. Among Edwin's group was Jesus Parada, a member of the Southside Locos gang. 2/04/09RP 103. Both Hector and Gutierrez are members of a different gang, the "Playboys," but Hernandez is not a member of any gang. 2/02/09RP 125; 2/04/09RP 129-33, 135; 2/10/09RP 174. Edwin also is not a gang member. 2/09/09RP 134.

¹ Because Mario Hernandez and Hector Hernandez share the same last name, Hector will be referred to by his first name throughout this brief.

² Also present at the scene was Edwin's brother, Israel Sibaja. Because Edwin and Israel share the same last name, they will be referred to by their first names throughout this brief.

Tensions arose between the two groups inside the store and spilled out into the parking lot outside. Inside the store, Gutierrez and Parada exchanged threatening looks. 2/04/09RP 136-37. Hector directed threatening looks at everyone in Edwin's group and, as he was leaving the store, flashed his gang tattoo at the group. 2/04/09RP 147. Outside, Fabian Moreno, a member of Edwin's group, flashed a gang sign. 2/04/09RP 148-49; 2/10/09RP 206. Members of the two groups exchanged insults with each other. 2/05/09RP 159, 163-64; 2/09/09RP 138; 2/10/09RP 205-06; 2/11/09RP 67.

Hernandez, Gutierrez, Hector and Teresa exited the store and made their way to their car. 2/11/09RP 15. Everyone in the other group followed them and surrounded them. 2/05/09RP 163-64; 2/09/09RP 19-20, 139; 2/10/09RP 207; 2/11/09RP 16. Israel, angered by an insult that Gutierrez had said to him, approached Gutierrez and punched him in the face. 2/05/09RP 163-66. He knew that if he started fighting, other people in his group would probably join the fight to assist him. 2/09/09RP 21. Gutierrez punched him back and Israel fell to the ground. 2/05/09RP 167; 2/10/09RP 213.

When Hernandez saw the other group approaching, he grabbed the gun he had stashed in the car, for protection. 2/10/09RP 207. He had started to carry a gun about one month previously, for self-protection, after he was shot at in a random drive-by shooting one day as he was walking down the street. 2/10/09RP 189-92. As Gutierrez and Israel fought, Hernandez and Gutierrez heard someone in the other group say, "Just shoot him." 2/10/09RP 209-10; 2/11/09RP 18-19, 130-31. This made Hernandez think someone in the other group had a gun. Hernandez saw Edwin, who was standing next to Israel, reach to his waist and pull out a gun. 2/10/09RP 214; 2/11/09RP 132. Gutierrez also saw Edwin pull out something that looked like a gun. 2/11/09RP 18-19. Hernandez saw Edwin point the gun at Gutierrez's head and fire. 2/10/09RP 215-16. Gutierrez heard a shot fired and felt his head jerk and burn as a bullet grazed his head. 2/11/09RP 19-20, 32. Hernandez then saw Edwin point the gun at him, at which point Hernandez shot Edwin in the abdomen. 2/10/09RP 217. Hernandez felt he had no choice but to shoot Edwin, as Edwin was pointing a gun at him and he was surrounded by everyone in Edwin's group. 2/10/09RP 99; 2/11/09RP 171-72. He was not trying to kill Edwin. 2/11/09RP 142-43.

Hernandez then reached to help Gutierrez, who had fallen down. 2/11/09RP 35, 103-04. At that point, Hernandez saw Moreno run toward him and he let go of Gutierrez and fired his gun in the air several times. He aimed at the sky and did not intend to hit anyone. 2/11/09RP 106.

Hernandez, Hector and Gutierrez then got in their car and drove away. 2/11/09RP 106. They went to Gutierrez's house, where his mother treated his head wound. 2/11/09RP 31, 83, 110-11.

The facts are discussed more fully in the relevant argument sections below.

E. ARGUMENT

1. THE DRIVE-BY SHOOTING STATUTE IS VOID FOR VAGUENESS AS APPLIED TO HERNANDEZ'S CONDUCT, AS THERE WAS NO NEXUS BETWEEN HIS USE OF A CAR AND HIS USE OF A GUN

Hernandez was charged and convicted of one count of drive-by shooting, RCW 9A.36.045. CP 8-9, 131. The charge pertained to Hernandez's actions after shooting Edwin, when he fired his gun in the air several times after seeing Fabian Moreno run toward him. 2/11/09RP 106.

The drive-by shooting statute requires a nexus between the use of a car and the use of a gun. State v. Locklear, 105 Wn. App.

555, 560, 20 P.3d 993 (2001), aff'd on other grounds, State v. Rodgers, 146 Wn.2d 55, 43 P.3d 1 (2002). A person of ordinary intelligence would not know without guessing that the required nexus exists in this case. Hernandez did not fire the gun from within the car or immediately after exiting the car. Although he was standing near the car when he fired the gun, the presence of the car was merely incidental and did not facilitate the commission of the crime. Because a person of ordinary intelligence would not understand that Hernandez's actions amounted to "drive-by" shooting, the statute is unconstitutionally vague as applied to his case.

a. A penal statute is void for vagueness as applied, if a person of ordinary intelligence would not understand without guessing that the statute applies to the defendant's conduct. Under the Due Process Clauses of the Fourteenth Amendment and the Washington Constitution³, a penal statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide

³ The Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Article 1, section 3 of the Washington Constitution provides, "No person shall be deprived of life, liberty, or property, without due process of law."

ascertainable standards of guilt to protect against arbitrary and subjective enforcement. City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Const. art. 1, § 3; U.S. Const. amend. 14. "Under this doctrine, "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."" American Legion Post #149 v. Washington State Dept. of Health, 164 Wn.2d 570, 612, 192 P.3d 306 (2008) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed. 462 (1984) (quoting Connally v. Gen. Constr. Co., 269 U.S. 386, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926))).

A vagueness challenge to a statute that does not implicate First Amendment rights must be considered in light of the facts of the specific case before the court. American Legion Post #149, 164 Wn.2d at 612. The statute must be tested by inspecting the actual conduct of the party who challenges the statute. Id. In determining whether the statute is sufficiently definite, "the provision in question must be considered within the context of the entire enactment and the language used must be 'afforded a

sensible, meaningful, and practical interpretation." Id. at 613 (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

"The statute is not unconstitutionally vague if the 'defendant's conduct falls squarely within [its] prohibitions.'" Locklear, 105 Wn. App. at 559 (quoting State v. Smith, 111 Wn.2d 1, 10, 759 P.2d 372 (1988)).

b. The statute is impermissibly vague as applied to Hernandez's case, as a person of ordinary intelligence would not understand his conduct amounted to "drive-by" shooting, where he did not shoot from within the car or immediately after exiting the car. The drive-by shooting statute provides:

(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9A.36.010 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; see also CP 83, 85 (jury instructions).

The drive-by shooting statute requires a nexus between the use of a car and the use of a gun. Locklear, 105 Wn. App. at 560. In Locklear, this Court explained that a person of ordinary intelligence would understand that the required nexus exists when a person fires a gun from inside a car. Locklear, 105 Wn. App. at 560. The statute provides that a person commits the felony "when he or she recklessly discharges a firearm . . . and the discharge is . . . from a motor vehicle." RCW 9A.36.045(1). Further, RCW 9A.36.045(2) permits the trier of fact to infer recklessness when a person "unlawfully discharges a firearm from a moving motor vehicle[.]"

Locklear also explained that a person of ordinary intelligence would understand 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, 105 Wn. App. at 560. RCW 9A.36.045(1) provides that a person commits the felony "when he or she recklessly discharges a firearm . . . and the discharge is . . . from the immediate area of a motor vehicle that was used to transport the shooter or the firearm . . . to the scene of the discharge."

But Locklear does not support the conclusion that a person of ordinary intelligence would understand that the required nexus exists in a case such as this, where the shooter is transported to the scene, parks the car, exits, enters a store, and then returns to the parking lot several minutes later and shoots a gun while standing outside the car.

Locklear explained that the required nexus between the use of a gun and the use of a car includes both a spatial and temporal component. Locklear, 105 Wn. App. at 560 & 560 n.8. In Locklear, the spatial component was not met where the defendant was transported to the scene in a car, exited the car, walked two blocks, and fired a gun at an occupied house. Id. at 556. Similarly, here, the temporal component is not met where the defendant was transported to the scene in a car, parked the car, exited, entered a store, ate a hot dog and waited in line, engaged in conversation, exited the store, waited for his friends, and then returned to the car and shot a gun while standing outside the car in the parking lot. Further, Hernandez did not form an intent to shoot the gun until after the altercation began in the parking lot, well after Hernandez arrived in the car. 2/11/09RP 155. The presence of the car was only incidental to the crime. A person of ordinary intelligence would

not understand, without guessing, that Hernandez's actions amounted to "drive-by" shooting.

This conclusion is supported by Washington case law applying the drive-by shooting statute. In every published case decided on appeal to date, other than Locklear, in which the conviction was reversed, the shooter fired from inside the car. See In re Pers. Restraint of Bowman, 162 Wn.2d 325, 172 P.3d 681 (2007) (defendant fired weapon from a vehicle); State v. Vincent, 131 Wn. App. 147, 150, 120 P.3d 120 (2005) (defendant fired gun from moving vehicle); State v. Gilmer, 96 Wn. App. 875, 879, 981 P.2d 902 (1999) ("As the Bronco pulled up next to the white car, Mr. Gilmer stuck the barrel of the gun out the window of the passenger side of the Bronco, pointed the gun at the white car, and pulled the trigger."); State v. Pastrana, 94 Wn. App. 463, 469, 972 P.2d 557 (1999) ("Pastrana then rolled down the passenger window and fired one shot out the window"); State v. Washington, 64 Wn. App. 118, 121, 822 P.2d 1245 (1992) ("He saw a 'bright flash' from the passenger side window on a light-colored station wagon[;]" passenger testified gun went off accidentally); but see State v. Spencer, 111 Wn. App. 401, 404, 45 P.3d 209 (2002) (gun fired at

home but facts not sufficiently developed in opinion to show whether shots fired from vehicle).

Hernandez is aware of no published Washington case where a person was convicted of "drive-by" shooting for firing a gun from outside a vehicle several minutes after parking the car, exiting, and engaging in unrelated activities.

The conclusion that a person of ordinary intelligence would not understand without guessing that Hernandez's conduct amounted to drive-by shooting finds further support in the ordinary meaning of the term "drive-by" shooting. The statutory name for the crime is "drive-by shooting." RCW 9A.36.045. The ordinary meaning of "drive-by" is "carried out from a moving vehicle."

Merriam-Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary/drive-by>. Thus, in ordinary understanding, "drive-by" does *not* mean carried out from outside a vehicle several minutes after parking the car, exiting, doing some shopping, and then returning to the car.

That a person of ordinary intelligence would not understand that Hernandez's conduct amounted to "drive-by shooting" finds further support in the drive-by shooting statutes in effect in several other states. Those statutes require that the shooter either fire the

gun from inside a vehicle, fire the gun from outside the vehicle *having just exited the vehicle*, or use the motor vehicle to facilitate the crime. See Alaska Stat. § 11.61.190 ("A person commits the crime of misconduct involving weapons in the first degree if the person . . . discharges a firearm from a propelled vehicle"); Arizona Rev. Stat. Ann. § 13-1209 ("A person commits drive-by shooting by intentionally discharging a weapon from a motor vehicle"); Ark. Code Ann. § 5-74-107(b)(1) ("A person commits unlawful discharge of a firearm from a vehicle in the second degree if he or she recklessly discharges a firearm from a vehicle"); Fla. Stat. Ann. § 790.15(2) ("Any occupant of any vehicle who knowingly and willfully discharges any firearm from the vehicle within 1,000 feet of any person commits a felony of the second degree"); Ga. Code Ann. § 16-5-21(a)(3) ("A person commits the offense of aggravated assault when he or she assaults . . . [a] person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons."); La. Rev. Stat. Ann. § 14:37.1 ("Assault by drive-by shooting is an assault committed with a firearm when an offender uses a motor vehicle to facilitate the assault."); Md. Code Ann., Crim. Law § 3-204(a)(2) ("A person may not recklessly . . . discharge a firearm

from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another."); Mich. Comp. Laws Ann. § 750.234a(1) ("[A]n individual who intentionally discharges a firearm from a motor vehicle . . . in such a manner as to endanger the safety of another individual is guilty of a felony"); Minn. Stat. Ann. § 609.66, subd. 1e ("Whoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building is guilty of a felony"); Miss. Code Ann. § 97-3-109(1) ("A person is guilty of drive-by shooting if he attempts, other than for lawful self-defense, to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle."); Mo. Ann. Stat. § 571.030(1)(9) ("A person commits the crime of unlawful use of weapons if he or she knowingly . . . [d]ischarges or shoots a firearm at or from a motor vehicle"); Neb. Rev. Stat. § 28-1212.04 ("Any person . . . who unlawfully, knowingly, and intentionally or recklessly discharges a firearm, while in or in the proximity of any motor vehicle that such person has just exited"); Nev. Rev. Stat. § 202.287 ("A person who is in, on or under a structure or vehicle and who maliciously or

wantonly discharges or maliciously or wantonly causes to be discharged a firearm within or from the structure or vehicle"); N.M. Stat. Ann. § 30-3-8(B) ("Shooting at or from a motor vehicle consists of willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another."); N.C. Gen. Stat. Ann. § 14-34.9 ("any person who willfully or wantonly discharges or attempts to discharge a firearm, as a part of a pattern of criminal street gang activity, from within any . . . motor vehicle"); Ohio Rev. Code Ann. § 2923.16(A) ("No person shall knowingly discharge a firearm while in or on a motor vehicle."); Okla. Stat. Ann. tit. 21, § 652 ("Every person who uses any vehicle to facilitate the intentional discharge of any kind of firearm"); Or. Rev. Stat. § 163.707 ("'[D]rive-by shooting' means discharge of a firearm from a motor vehicle while committing or attempting to commit [several enumerated offenses]."); R.I. Gen. Laws § 11-47-61 ("Every person who shall discharge a firearm from a motor vehicle in a manner which creates a substantial risk of death or serious injury"); S.D. Codified Laws § 22-14-21 ("Any person who willfully, knowingly, and illegally discharges a firearm from a moving motor vehicle"); Utah Code Ann. § 76-10-508(1)(a)(i) ("A person may not discharge any kind of dangerous weapon or firearm . . . from an

automobile or other vehicle"); Va. Code Ann. § 18.2-286.1 ("Any person who, while in or on a motor vehicle, intentionally discharges a firearm"); Wis. Stat. Ann. § 941.20(3)(a) ("Whoever intentionally discharges a firearm from a vehicle while on a highway . . . or on a vehicle parking lot that is open to the public").

Hernandez is aware of no statute in any state that defines the crime of drive-by shooting as occurring when the shooter fires a gun from outside a car several minutes after parking the car, exiting, and engaging in unrelated activities.

Because the drive-by statute is void for vagueness as applied to Hernandez's case, his conviction must be reversed.

2. **BECAUSE THE FIREARM ENHANCEMENT IS AN ELEMENT OF FIRST-DEGREE ASSAULT AND ELEVATED THE CHARGE TO A MORE SERIOUS CRIME, THE IMPOSITION OF ADDITIONAL PUNISHMENT IN THE FORM OF A FIREARM ENHANCEMENT VIOLATED DOUBLE JEOPARDY**

Hernandez was convicted and sentenced for one count of first degree assault. The offense was elevated in degree, and consequent punishment, because it was committed while Hernandez used a firearm. CP 8; RCW 9A.36.011(1)(a). Additionally, the prosecution further charged Hernandez with committing the offense while armed with a firearm, and thus

requested another 60 months of prison for the offense based on this added allegation. CP 8. Because double jeopardy principles⁴ prohibit this stacking of punishments based on the same allegation, Hernandez's sentence must be reduced.

In the past, this Court has rejected double jeopardy challenges to charging both a substantive crime involving use of a deadly weapon as an element and a deadly weapon enhancement. See State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), rev. denied, 163 Wn.2d 1053 (2008) (burglary, robbery, assault); State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542, rev. denied, 108 Wn.2d 1018 (1987) (robbery); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605, rev. denied, 106 Wn.2d 1016 (1986) (rape).

⁴ The Double Jeopardy Clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. amend. 5; Const. art. 1, § 9. Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). 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); Gocken, 127 Wn.2d at 100.

But recently, the Washington Supreme Court granted review of two cases raising this very issue, State v. Aguirre⁵ and State v. Kelley.⁶ Accordingly, an authoritative decision addressing this claim should occur in the near future and any such ruling would apply to Hernandez. See State v. Worl, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). Because Hernandez's case is still pending on direct review and not yet final, he would be entitled to receive the benefit from a favorable decision substantially reducing his sentence. See State v. Evans, 154 Wn.2d 438, 443, 114 P.3d 627 (2005).

It is now well-established that any fact increasing the maximum penalty that may be imposed upon a criminal defendant

⁵ The Court of Appeals decision in Aguirre was unpublished, but the Supreme Court website lists the issue for which review was granted as, Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a weapon was both an element of the charge and the basis for imposing a deadly weapon sentence enhancement. State v. Aguirre, COA No. 36186-8-II, rev. granted, 165 Wash.2d 1036 (2009), issue statement available at: http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2009Sep. Oral argument was held October 29, 2009.

⁶ State v. Kelley 146 Wn. App. 370, 189 P.3d 853 (2008), rev. granted, 165 Wash.2d 1027 (2009). The Supreme Court website lists the issue for which review was granted as,

Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a firearm was both an element of the charge and the basis for imposing a firearm sentence enhancement.

Available at:

http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2009Sep. Oral argument was also held October 29, 2009.

is akin to an element of an offense. Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 494 n.194, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); see also Ring v. Arizona, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002). The aggravating factor is the functional equivalent of an element and must be charged in the information and proved beyond a reasonable doubt. Recuenco, 163 Wn.2d at 434.

The firearm enhancement imposed pursuant to RCW 9.94A.533 increased Hernandez's sentence over and above the Blakely statutory maximum, i.e., the standard range under the sentencing guidelines, for the crime. Thus, following Blakely, Apprendi, and Recuenco, the enhancement is the functional equivalent of an element of the crime. The prior decisions holding that there is no double jeopardy problem because there is no duplication of elements between the underlying crime and the weapon enhancement no longer hold sway, and the reasoning of Nguyen is no longer dispositive because the Supreme Court has accepted review of cases speaking to the same issue. Thus, Hernandez seeks relief for the double jeopardy violation that

occurred from the stacking of punishments for the same factual elements.

There is no question that Hernandez's first degree assault conviction is the same in fact and in law as the accompanying firearm enhancement. First, each involves the same criminal act. Had Hernandez not used a handgun in the course of the assault, he could not have been convicted of first degree assault. The assault charge expressly predicated the elevation to the first degree on the ground it was committed "with a firearm." CP 8. The charge involves the use of a gun in the course of an assault, and is the same in fact as in law as the firearm enhancement. RCW 9A.36.011(1)(a) (defining first degree assault as occurring when, "with intent to inflict great bodily harm," a person "assaults another with a firearm").

Hernandez's use of a gun both elevated the degree of the crime charged, increasing his standard range sentence, and resulted in the imposition of a firearm enhancement. Hernandez was given an additional 60 months, or 5 years in prison for the firearm enhancement. He was essentially sentenced for using a firearm while armed with a firearm, and he was thus convicted and punished twice for the use of a single weapon. The addition of a

firearm enhancement to Hernandez's conviction placed him twice in jeopardy for the use of a gun and violated the state and federal constitutions. The firearm enhancement must be vacated and his case remanded for resentencing. State v. Gohl, 109 Wn. App. 817, 824, 37 P.3d 293 (2001), rev. denied, 146 Wn.2d 1012 (2002).

3. THE COURT ERRED IN EXCUSING HECTOR FROM TESTIFYING, AS HECTOR COULD CONCEIVABLY HAVE ANSWERED SOME RELEVANT QUESTIONS WITHOUT INCRIMINATING HIMSELF

Prior to trial, defense counsel stated he was planning to call Hector Hernandez as a witness. 1/21/09RP 8-9. Hector's testimony was essential to Hernandez's claim of self-defense, as Hector would testify he saw Edwin pull a gun and fire it at Gutierrez. 1/26/09RP 13. Hector was therefore a vital witness for the defense. Counsel intended to question Hector about what he witnessed during the incident, and would not question him about his possible gang involvement. 1/21/09RP 10.

Hector's attorney appeared and requested that Hector be excused from testifying about his possible gang involvement. 1/26/09RP 16. Hector intended to invoke his Fifth Amendment privilege not to incriminate himself. He was currently charged with possession of a stolen firearm in an unrelated case, and he faced

possible sentence enhancements if it were found that he was a gang member. 1/26/09RP 9-10.

Rather than allowing Hector to invoke his Fifth Amendment privilege with regard to questions about his possible gang involvement, however, the court excused Hector from testifying altogether. 2/02/09RP 124. By doing so, the court abused its discretion, as it is conceivable Hector could have answered relevant questions about what he observed that night without incriminating himself.

a. Where a criminal defendant calls a witness in his defense, the court may excuse the witness from testifying only if the court reasonably finds the witness could legitimately refuse to answer any relevant question. Few rights are as fundamental as that of an accused to present witnesses in his own defense. Both the Sixth Amendment⁷ and article 1, section 22 of the Washington Constitution⁸ guarantee a criminal defendant the right to compel the testimony of witnesses. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); Const. art. 1, § 22; U.S. Const. amend. 6. In

⁷ The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

⁸ Article 1, section 22 guarantees that "[i]n all criminal prosecutions the accused shall have the right . . . to have compulsory process to compel the attendance of witnesses in his own behalf."

addition, the right to call witnesses in one's own behalf has long been recognized as essential to due process. Chambers v. Mississippi, 410 U.S. 284, 294, 90 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

As the United States Supreme Court explained, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The right is fundamental to due process, as it encompasses "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Id. This fundamental right is "guarded jealously." State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

Despite the fundamental right to call witnesses, "a valid assertion of the witness' Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights." United States v. Goodwin, 625 F.2d 693, 700 (5th Cir. 1980). The constitutional right not to be a witness or give evidence against oneself includes the right of a witness not to give incriminating answers in any proceeding. Kastigar v. United States, 406 U.S. 441, 445-46, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Further, the

answer need only furnish a link in the chain of evidence needed to prosecute the witness for a crime in order to be incriminating under the Fifth Amendment. Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).

But where a witness invokes the Fifth Amendment privilege, the privilege must be applied narrowly and is applicable only where the witness has "reasonable cause to apprehend danger from a direct answer." Id. A claim of privilege must be supported by facts which, aided by the "use of reasonable judicial imagination," show the risk of self-incrimination. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988). The danger of incrimination must be substantial and real, and not merely speculative. State v. Hobble, 126 Wn.2d 283, 290, 892 P.2d 85 (1995).

Moreover, once the judge determines a witness has a legitimate Fifth Amendment claim, the judge must still determine the proper scope of the privilege. "Although the witness may have a valid claim to the privilege with respect to some questions, the scope of that privilege may not extend to all relevant questions." Goodwin, 625 F.2d at 701. A finding of a valid Fifth Amendment claim "does not normally foreclose all further questions." Id. In general, a claim of privilege may be raised only against specific

questions, and not as a blanket foreclosure of testimony. Lougin, 50 Wn. App. at 381.

A witness may be excused from testifying altogether only if the court reasonably finds that he could legitimately refuse to answer any relevant question. Goodwin, 625 F.2d at 701. Otherwise, "[o]nly as to genuinely threatening questions should his silence [be] sustained." Id. (quoting United States v. Moreno, 536 F.2d 1042, 1049 (5th Cir. 1976)). Such determination is "vested in the trial court to be exercised in its sound discretion under all of the circumstances then present." Lougin, 50 Wn. App. at 382.

b. The court abused its discretion in finding Hector could legitimately refuse to answer any relevant question. Hector's testimony was vital to Hernandez's defense of self-defense or defense of another. Hernandez testified he saw Edwin point a gun at Gutierrez and fire. 2/10/09RP 215-16. Gutierrez's head was grazed by a bullet. 2/11/09RP 19-20, 32. Hernandez testified he then saw Edwin point the gun at him, at which point Hernandez shot Edwin in the abdomen in self-defense. 2/10/09RP 217. Gutierrez also saw Edwin pull out something that looked like a gun. 2/11/09RP 18-19.

Defense counsel asserted that Hector would corroborate Hernandez's and Gutierrez's testimony and testify that he also saw Edwin pull a gun and fire it at Gutierrez. 1/26/09RP 13. Because no other witness saw Edwin with a gun, Hector's testimony was vital to the defense.

Although Hector might have had a valid Fifth Amendment claim, the trial court abused its discretion in finding he could legitimately refuse to answer all relevant questions. It is true that some witnesses saw Hector flash what they thought were gang signs and a gang tattoo at members of Edwin's group prior to the shooting. But if questioned at trial about his possible gang involvement, Hector could invoke his Fifth Amendment privilege as to those questions. This would not foreclose all relevant questions. Hector could still be questioned about what he observed during the incident without incriminating himself. The trial court therefore abused its discretion in finding Hector could refuse to testify altogether.

Because the court's error in excusing Hector from testifying violated Hernandez's constitutional right to call witnesses in his defense, this Court may affirm only if the State proves beyond a reasonable doubt that the error was harmless. State v. Levy, 156

Wn.2d 709, 731-32, 132 P.3d 1076 (2006). Due to the importance of Hector's testimony to Hernandez's defense, the State cannot make that showing. Reversal of the convictions is therefore required.

4. THE CONVICTION FOR FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM MUST BE REVERSED, AS HERNANDEZ'S JUVENILE ADJUDICATION FOR ATTEMPTED RESIDENTIAL BURGLARY DOES NOT QUALIFY AS A PREDICATE OFFENSE

After the State rested its case, defense counsel moved to dismiss the charge for first degree unlawful possession of a firearm. 2/10/09RP 162-63; VP 59-65. Counsel argued attempted residential burglary was not a "serious offense" and could not be a predicate offense for first degree unlawful possession of a firearm. 2/11/09RP 7-10; CP 59-65. The court denied the motion. 2/11/09RP 11.

The statute defining the crime of first degree unlawful possession of a firearm provides:

A person, whether an adult or juvenile, is guilty of the crime 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 reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

RCW 9.41.040(1)(a); see also CP 90-91, 94 (jury instructions).

"'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: . . . [a]ny crime of violence"

RCW 9.41.010(16)(a).

Finally, "crime of violence" is defined as:

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

RCW 9.41.010(3)(a).

This Court's objective in construing the statute is to give effect to the Legislature's intent. Dep't of Ecology v. Campbell, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Id. at 9-10. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Id. at 9-12.

Statutory provisions should be harmonized whenever possible.

Emwright v. King County, 96 Wn.2d 538, 543, 637 P.2d 656 (1981).

Where a penal statute is susceptible to two or more reasonable interpretations, under the "rule of lenity," this Court must adopt the interpretation that favors the defendant. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

Here, the statutory language indicates the Legislature did not intend that the crime of *attempted* residential burglary be included within the definition of "serious offense." The completed offense of residential burglary is a Class B offense, not a Class A offense. RCW 9A.52.025(2). Therefore, the crime of *attempted* residential burglary is a Class C offense. RCW 9A.28.020(3)(c).

The unlawful possession of a firearm statute defining crimes of violence lists only completed crimes that are Class B offenses and inchoate crimes that become Class B offenses because the underlying crime is a Class A offense. RCW 9A.9.41.010(3)(a). The statute does not include inchoate offenses that drop the underlying felony from a Class B offense down to a Class C offense, such as the crime of *attempted* residential burglary.

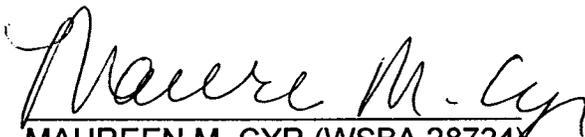
Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the

exclusion of the other. State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Thus, because the Legislature specifically included in the definition of "crime of violence" only inchoate offenses that drop the underlying felony from a Class B to a Class C offense, the Legislature did not intend that the crime of attempted residential burglary be included as a "serious offense."

E. CONCLUSION

The drive-by shooting statute is unconstitutionally vague as applied to Hernandez's conduct and his conviction for drive-by shooting must be reversed and dismissed. The firearm enhancement violated double jeopardy and must be vacated. The trial court abused its discretion in excusing a vital defense witness from testifying and the convictions must be reversed and remanded for a new trial. The State did not prove Hernandez had a prior "serious offense" and the first degree unlawful possession of a firearm conviction must be reversed and dismissed.

Respectfully submitted this 28th day of December 2009.


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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63308-2-I
v.)	
)	
MARIO HERNANDEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF DECEMBER, 2009.

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