IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AUGUSTUS M. OAKLEY, Appellant.	No. 38660-7-II UNPUBLISHED OPINION

Penoyar, C.J. — Augustus Martel Oakley appeals three second degree assault convictions and an attempted drive-by shooting conviction. He argues that (1) insufficient evidence supported the attempted drive-by shooting conviction because his gun failed to discharge; (2) the imposition of firearm enhancements on his assault convictions violated his right to be free from double jeopardy; and (3) the trial court erred by ordering restitution because the damages were unrelated to his convictions. Oakley also raises a number of challenges in his statement of additional grounds (SAG).[1] We affirm Oakley's attempted drive-by shooting conviction and the imposition of firearm enhancements for his assault convictions, but we reverse and remand to the trial court to vacate the portion of the restitution order that applies to Oakley.

FACTS

On the night of April 15, 2007, Stephen Lynn received a phone call informing him that Oakley was upset at him for "snitch[ing]" about an incident that had occurred earlier in the month. 8 Report of Proceedings (RP) at 1067. Stephen[2] invited Oakley to come fight him. About fifteen

[1] RAP 10.10.

[2] Because there are multiple witnesses from the Lynn family, we refer to the Lynns by their first names.

minutes later, Richard Taylor and Oakley arrived in Oakley's distinctively loud car and parked a block away from the Lynns' residence.

Stephen and his older brothers, Isaiah and Christopher, approached the car. Stephen told Oakley to get out of the car and fight. Oakley got out of the car and pulled a gun. Stephen testified that he heard Oakley "cock" the gun and saw the gun go "up in the air" as though Oakley could not control it. 8 RP at 1076, 1088. He heard the gun make a noise "like it backfired" and saw black and orange "dust" come out of the gun. 8 RP at 1090. Christopher testified that he saw a spark at the end of the gun barrel and heard a "crackling sound" as though the gun had jammed. 6 RP at 654. Robert Moyer, the Lynns' neighbor and a law enforcement officer, heard a noise similar to a firecracker or a car backfiring around the same time that the incident took place. The three Lynn brothers turned and ran back to their house.

Taylor and Oakley followed the Lynns to their yard where fisticuffs ensued. After a couple of minutes, the fight broke up, and Oakley and Taylor returned to the car. At this point, several neighbors and the Lynn parents had emerged from their houses. Oakley and Taylor drove back by the Lynns' house. Four witnesses testified that they saw a gun or a stick-like object protruding out the window as the car drove past. Three of the witnesses saw Oakley holding the gun. Christopher testified that when Oakley "tried to shoot again," he heard the same "cracking sound" as before. 6 RP at 679. Police did not find bullets or shell casings at the scene.

Minutes after the police received a call about the incident, another call came in regarding an incident that occurred about three blocks from the Lynns' house. Neighbors saw and heard a loud older car with two passengers drive towards a gate at the end of the street[3] and then reverse

[3] The Lynns lived in a gated community.

back down the street. The car pulled into Ross Dejong's driveway, and Dejong and his neighbors heard a loud crash. The car drove away through an open gate. Dejong's vehicle and garage door suffered damage.

At about 9:30 pm, police located Oakley's car at Taylor's house. There were two men in the car, both in their late teens to early twenties. Both attempted to flee. One suspect escaped, but police took Taylor into custody. Police impounded Oakley's car.

A search of Oakley's car revealed an SKS rifle. Two cartridges were jammed facing each other in the SKS's chamber. A firearms expert testified that the rifle would not fire with the cartridges in that configuration. The expert tested the rifle and concluded that it was operable when the cartridges were loaded properly.

The State charged Oakley with three counts of first degree assault and one count of drive-by shooting. The jury convicted Oakley of lesser included crimes—three counts of second degree assault and one count of attempted drive-by shooting. The jury also returned three special verdicts finding that Oakley was armed with a firearm during each of the assaults. Accordingly, the trial court imposed a firearm enhancement on each of his three assault convictions. The trial court entered a restitution order stating that Oakley and Taylor were jointly and severally responsible for $3,872.28 in damages to Dejong's vehicle and garage door.

ANALYSIS

I. Insufficient Evidence

Oakley argues that there was insufficient evidence to support his attempted drive-by shooting conviction because the gun could not and did not discharge. We disagree.

Evidence is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore,* 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). We interpret all reasonable inferences in the State's favor. *State v. Hosier,* 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga,* 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu,* 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

RCW 9A.36.045(1) defines the crime of drive-by shooting:

> 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.

"A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). A substantial step is "conduct strongly corroborative of the actor's criminal purpose." *State v. Aumick*, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995).

We find that there was sufficient evidence to convict Oakley of attempted drive-by shooting. Oakley took a substantial step towards committing a drive-by shooting when he pointed a gun at the Lynns from the vehicle and attempted to fire it. Several witnesses observed

the gun protruding from the car window as the car drove past the Lynns' house and identified Oakley as the individual holding the gun. Christopher heard a "cracking sound" like the sound of a gun jamming when Oakley "tried to shoot again." 6 RP at 679. The firearms expert stated that the gun was operable if loaded correctly. Thus, although the gun did not discharge, there was sufficient evidence for a jury to convict Oakley of attempted drive-by shooting beyond a reasonable doubt.

II. Firearm Enhancements

Oakley argues that the three firearm enhancements added to his second degree assault sentences constituted double jeopardy because firearm use was an element of the underlying assault offenses. He acknowledges that we have previously rejected double jeopardy challenges to firearm enhancements, but maintains that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), support his position. We disagree.

Our Supreme Court recently issued a unanimous opinion holding that the imposition of a firearm enhancement does not violate double jeopardy when firearm use is an element of the underlying offense. *State v. Kelley*, 168 Wn.2d 72, 84, 226 P.3d 773 (2010). In *Kelley*, the defendant appealed the firearm enhancements on his second degree assault conviction. 168 Wn.2d at 75. He argued that *Apprendi, Blakely*, and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), required sentencing factors to be treated like elements under the *Blockburger*[4] test. *Kelley*, 168 Wn.2d at 80.

[4] Under the *Blockburger* test, "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."

Our Supreme Court disagreed, stating that the legislature clearly intended to impose multiple punishments in Kelley's case. *Kelley*, 168 Wn.2d at 78. The court noted that the statute that authorizes firearm enhancements unambiguously states, with clearly stated exceptions, that firearm enhancements are mandatory. *Kelley*, 168 Wn.2d at 79 (quoting RCW 9.94A.533(3)(e), (f)). The use of a firearm was an element of second degree assault at the time the legislature enacted the enhancement provisions and the legislature did not exempt this crime from the statute's reach. *See Kelley*, 168 Wn.2d at 79. Additionally, the court noted that *Apprendi, Blakely*, and *Ring* all involve the right to a jury trial and do not concern double jeopardy. *Kelley*, 168 Wn.2d at 81-82. Thus, under *Kelley*, imposing firearm enhancements on Oakley's second degree assault convictions is not a violation of his right to be free from double jeopardy.

III. Restitution

Oakley argues that the trial court erred when it ordered him to pay restitution for damages caused by uncharged acts. We agree.

A trial court derives its authority to order restitution from statute rather than any inherent power. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). We review a trial court's authority to order restitution under the statute de novo. *State v. Edelman*, 97 Wn. App. 161, 165, 984 P.2d 421 (1999). But "[w]hen the particular type of restitution in question is authorized by statute, imposition of restitution is generally within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Davison*, 116 Wn.2d at 919.

A trial court has authority to order restitution under RCW 9.94A.753(5), which reads in relevant part: "Restitution shall be ordered whenever the offender is convicted of an offense

---

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

which results in injury to any person or damage to or loss of property." "[R]estitution is appropriate so long as there is a causal connection between the crime and the injuries for which compensation is sought. *State v. Enstone*, 89 Wn. App. 882, 886, 951 P.2d 309 (1998). "A causal connection exists when, 'but for' the offense committed, the loss or damages would not have occurred." *Enstone*, 89 Wn. App. at 886 (quoting *State v. Hunotte*, 69 Wn. App. 670, 676, 851 P.2d 694 (1993)). The trial court cannot impose restitution based on a defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. *State v. Woods*, 90 Wn. App. 904, 907-08, 953 P.2d 834 (1998) (quoting *State v. Miszak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993)).

In *State v. Dauenhauer*, the court vacated a restitution order for damages resulting from uncharged acts. 103 Wn. App. 373, 379-80, 12 P.3d 661 (2000). In that case, Dauenhauer burglarized three storage units. 103 Wn. App. at 375. He drove through two fences and collided with a truck in an attempt to flee a police officer who observed Dauenhauer at the crime scene. *Dauenhauer*, 103 Wn. App. at 375. A jury convicted Dauenhauer of second degree burglary, and the trial court ordered him to pay restitution for damage to the fences and the truck. *Dauenhauer*, 103 Wn. App. at 379. The court determined that the trial court had no statutory authority to order restitution for these damages because they resulted from "Dauenhauer's general scheme or acts merely connected with the burglaries." *Dauenhauer*, 103 Wn. App. at 380.

Here, there was no causal connection between Oakley's charged crimes—the assaults and the attempted drive-by shooting—and the damages to Dejong's vehicle and garage door. Oakley inflicted these damages while he fled the scene of the assaults and attempted drive-by, crimes that he had committed in a different area of the neighborhood. Although Oakley's flight, like the

defendant in *Dauenhauer*, was "connected with" his underlying crimes because he was trying to avoid apprehension when he caused the damages, Oakley did not crash into Dejong's vehicle and garage door as a result of his assaults and attempted drive-by shooting. Because we conclude that there is insufficient causal connection between the charged crimes and the damages, we remand to the trial court to vacate the portion of the restitution order that applies to Oakley.

IV. Statement of Additional Grounds

A. Confrontation Clause

Oakley contends that the State violated his rights to confront witnesses against him because the trial court never heard any testimony from Isaiah Lynn, one of the victims. Oakley is correct that he has the right to confront witnesses who testify against him. U.S. Const. amend. VI; Wash. Const. art. I, § 22. However, Isaiah did not testify against Oakley at trial, and Oakley's SAG does not allege that the trial court admitted any out-of-court statements by Isaiah through other witnesses. Therefore, this argument fails.

B. Firearm Enhancement

Oakley argues that the trial court incorrectly imposed a firearm enhancement on his assault sentences because the rifle could not fire and was therefore not a firearm. He suggests that the malfunctioning gun was a deadly weapon rather than a firearm and argues that his sentence enhancements should be altered to reflect that. The definition of a firearm is not limited to guns capable of being fired during the commission of the crime. *See State v. Faust*, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998). Despite the fact that the SKS was inoperable at the moment of the crime, the trial court appropriately imposed a firearm enhancement.

C. New Evidence

During direct examination, Christopher made statements that differed from those he made in an April 15 statement to police. At trial, Oakley alleged that Christopher revealed several new facts during his direct examination, including: (1) Taylor and Oakley had an unfriendly conversation on the Lynns' lawn before they went to Oakley's car; (2) none of the Lynns were closer to the car then 20 to 30 feet; (3) Christopher saw sparks and heard a crackle after he saw Oakley pull the gun after getting out of the car; (4) Isaiah was on the phone after the Lynns ran back to their house; and (5) neighbors and the Lynns' parents witnessed the fight in the Lynns' yard.

At trial, when the defense questioned Christopher off the record about these allegedly new facts, Christopher apparently said that his trial testimony matched what he told the prosecutor during an earlier interview. Relying on this statement, Oakley argues that the prosecutor violated his CrR 4.7 discovery obligations by failing to disclose these allegedly new facts prior to trial. Alternatively, he argues that if—as the prosecutor claims—Christopher did not disclose these facts during his earlier interview with the prosecutor, Oakley should have been allowed to call the prosecutor as a witness to impeach Christopher's credibility. The trial court noted that none of the allegedly new facts appeared to be inconsistent with Christopher's April 15 statement to police. The trial court thus denied Oakley's motion for a mistrial, noting that the defense could have questioned Christopher about these differences during cross-examination.

Oakley's argument lacks merit. The prosecutor denied that Christopher revealed any new information to him during the earlier interview and no evidence in the record suggests otherwise. The defense cross-examined Christopher and had the opportunity to ask him about differences between his police statement and trial testimony.

Additionally, the trial court did not err when it refused to allow Oakley to call the prosecutor as a witness. Oakley relies on *State v. Stiltner*, 61 Wn.2d 102, 377 P.2d 252 (1962), in which our Supreme Court held that the defense should have been able to call the prosecuting attorney as a witness. This case can be distinguished from *Stiltner*. In *Stiltner*, there was a single, reluctant witness to a robbery. 61 Wn.2d at 103. The issue was whether the witness's testimony had been affected by coercion or intimidation when he was held in jail for three months before the trial. *Stiltner*, 61 Wn.2d at 106. Here, there are several witnesses and coercion is not an issue.

D. Sufficiency of Evidence

Oakley argues that there was insufficient evidence for the jury to conclude that he assaulted Christopher and Isaiah because the gun was pointed only at Stephen.

A person may commit assault by putting another in apprehension of harm. *See State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Here, there is sufficient evidence to support Oakley's second degree assault convictions based on assaults against Christopher and Isaiah. Stephen testified that his brothers were close behind him when Oakley first drew the gun. Christopher testified that he saw the gun spark and heard it crackle. Both Stephen and Christopher testified that all three Lynn brothers ran after Oakley drew the gun, suggesting an apprehension of harm. There was sufficient evidence for a jury to convict Oakley of second degree assault of Christopher and Isaiah.

E. Transferred Intent

Oakley argues that the trial court erred by giving a transferred intent instruction[5] for the

[5] Instruction 11 reads, "A defendant's intent to assault an intended victim transfers to an unintended victim. An intent against one victim is an intent against all victims." Clerk's Papers at 41.

assaults on Christopher and Isaiah. He states that there must be injuries from a battery for intent to be transferred. Oakley is incorrect. An assault may consist of (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); or (3) putting another in apprehension of harm. *Elmi*, 166 Wn.2d at 215. A battery does not have to occur for a defendant's intent to assault to transfer from one person to another.

The transferred intent instruction was also appropriate. Jury instructions are sufficient when they allow counsel to argue their case theory, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). Here, the transferred intent instruction allowed the State to argue its theory that Oakley assaulted Christopher and Isaiah as well as Stephen.

F. Admission of Police Report as Substantive Evidence

Oakley argues that, under ER 801, the trial court should have allowed "Christopher's police statement [to] be read to the jury." SAG at 9. In essence, this is an argument that the trial court erred by not admitting Christopher's April 15 written statement[6] into evidence. This is an evidentiary ruling that we will not disturb unless the ruling was based on untenable grounds. *See State v. Cronin*, 142 Wn.2d 568, 585, 14 P.3d 752 (2000). Oakley's argument fails.

During direct examination, the State impeached Christopher with prior inconsistent statements from his April 15 statement. During the State's impeachment, defense counsel moved to admit the entire statement into evidence under ER 106[7] to "put it in context." 6 RP at 693.

[6] A police officer wrote the statement based on Christopher's version of events. Christopher signed the statement.

The trial court denied the motion, ruling that the State's impeachment using the statement did not "leave[] such a misleading impression . . . that it would require that the remainder of the exhibit be published to the jury." 6 RP at 704.

Later, during Christopher's cross-examination, defense counsel renewed her motion to admit the entire statement under ER 106. The trial court stated that it was "premature" to rule on the motion before the end of cross-examination. 8 RP at 914. During a lengthy colloquy that followed, the trial court suggested that it would likely deny the renewed motion because the police statement was hearsay. Defense counsel argued that the statement was not hearsay because Christopher signed it under oath. Defense counsel subsequently impeached Christopher using the written statement.

The trial court's ruling to exclude Christopher's April 15 statement from evidence was based on tenable grounds. Here, both parties impeached Christopher using his prior inconsistent statements and omissions from the April 15 statement. The trial court properly concluded that the State's use of the statement during impeachment did not mislead the jury. Rather, it gave the jury an opportunity to assess and weigh Christopher's credibility. Oakley now contends that the April 15 statement was "not hearsay" under ER 801.[8] But, although defense counsel and the trial court

---

[7] ER 106, also known as "the rule of completeness," states, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it."

[8] Under the relevant evidence rule, a statement is "not hearsay" if "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." ER 801(d)(1)(i).

Our Supreme Court has concluded that, in some circumstances, a sworn statement to police may qualify as an "other proceeding" under ER 801(d)(1)(i). *State v. Smith*, 97 Wn.2d 856, 861, 863, 651 P.2d 207 (1982).

debated whether the police statement qualified as hearsay following defense counsel's renewed motion, this was not defense counsel's basis for Oakley's motion to admit the statement as substantive evidence under ER 106. The trial court did not err.

G. Ineffective Assistance of Counsel

Oakley argues that he received ineffective assistance of counsel because "Stephen Lynn . . . committed perjury, but defense counsel did not move the trial court for a dismissal, mistrial, or even object to preserve the issue." SAG at 16. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient by an objective standard of reasonableness, and (2) that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Oakley suggests that Stephen committed perjury when he testified at trial that (1) Stephen never told anyone that Oakley fired 4-5 shots, (2) Oakley pulled the gun from his jacket sleeve, and, (3) the entire length of the gun was outside of Oakley's vehicle during the attempted drive-by shooting. In his SAG, however, Oakley fails to note that his counsel impeached Stephen on each of these statements using Stephen's prior inconsistent statements. Thus, defense counsel performed capably by providing the jury with a reason to doubt Stephen's credibility based on these inconsistencies; we defer to the fact finder on issue of witness credibility. *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, Oakley's ineffective assistance claim fails.

We affirm Oakley's attempted drive-by shooting conviction and the imposition of firearm enhancements to his second degree assault sentences, and reverse and remand the portion of the restitution order that applies to Oakley.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Van Deren, J.