70261-1

70261-1

NO. 70261-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BATEMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN A. RIETSCHEL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Constitutional Provisions

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES

1. Jail phone calls are not "private affairs" protected by Article I, Section 7 of Washington's Constitution, and recording them does not violate Washington's Privacy Act. Bateman and those he called were informed that their conversations were recorded and were asked to press a button to continue the call if they accepted the recording policy. Is Bateman barred from contesting the constitutionality of recording jail calls since his calls are not constitutionally protected private affairs and his argument implicates Washington statute, not its constitution? Did the jail comply with the Washington State Privacy Act where Bateman did not have a reasonable expectation of privacy in his jail calls and both parties consented to the recording of the calls?

2. The Washington Supreme Court has rejected the idea that every way in which a crime might be committed constitutes an alternative means. The mere use of a disjunctive in a statute does not necessarily create alternative means of committing a crime. RCW 9.35.020(1) states that, "No person may knowingly obtain, possess, use or transfer a means of identification or financial information of another person, living or dead, with the intent to

commit, or to aid or abet, any crime." Does the identity theft statute establish a single means which can be committed in multiple ways?

3. Jurors need not be unanimous as to alternative means, as long as sufficient evidence supports each of the alternatives. The State charged Bateman with second degree identity theft in counts II and III, including that he knowingly obtained, possessed, transferred or used a means of the victims' identification or financial information. Bateman and Matera, who had an intimate relationship and little income, were caught on video at multiple locations using victims' credits cards mere hours after the victims' home was burglarized. Bateman used one of the stolen credit cards himself at one location, and drove Matera to and from another location so that she could use a stolen credit card. Assuming, arguendo, that the identity theft statute does create alternative means, did substantial evidence support each of the alternative means of committing identity theft in the second degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Daniel Bateman with three counts of identity theft in the second degree (counts I-III), violation of the

uniform controlled substances act (count IV), and possessing stolen property in the second degree (count VI).[1] CP 20-22. The Honorable Jean Rietschel received the case for trial on March 12, 2013. 3/12/13RP 4.[2] A jury convicted Bateman as charged, except it found him not guilty of one of the identity theft charges (count I). CP 82-86; 3/21/13RP 794-97. The jurors were not asked to specify how Bateman committed identity theft in the second degree in counts II and III.

The trial court imposed a sentence totaling 54 months, including concurrent standard range sentences of 54 months on each of the identity theft charges, 24 months on the drug charge, and 29 months on the possession of stolen property charge. CP 87-95; 4/12/13RP 14-15. The trial court also imposed six months of community custody, restitution, and a no contact order with the victims in the case. CP 87-95; 4/12/13RP 15-16. Bateman timely appealed. CP 96-105.

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[1] Co-defendant Marisa Matera was charged in the same information with two counts of identity theft in the second degree (counts I and II), identity theft in the first degree (count V), and possessing stolen property in the second degree (count VI). CP 20-22. Matera pled guilty as charged prior to Bateman's trial. 3/12/13RP 22.

[2] The Verbatim Report of Proceedings will be cited in the same way as Appellant.

2. SUBSTANTIVE FACTS

a. Count I: Second Degree Identity Theft At A-1 Mart (Bateman And Matera).

On August 7, 2012, Amy Snover and Charles Nevins were away on vacation when they were alerted that their home in the Ballard neighborhood of Seattle had been burglarized. 3/14/13RP 151-52, 155, 157. The burglars took, amongst other things, three computers, cameras, jewelry, cash, and five credit cards. 3/14/13RP 159; 3/18/13RP 245. Nevins' sister, who discovered that Snover and Nevins' home had been burglarized, listened to their voice mail messages on their behalf and heard numerous messages from credit card companies. 3/18/13RP 237-39. The stolen credit cards were audited. 3/18/13RP 373-74.

The case detective discovered that Snover and Nevins' Capital One credit card was used a little before 6 p.m. on August 4, 2012 at A-1 Mart, a convenience store in Seattle's Greenwood neighborhood. 3/18/13RP 323, 325, 328-30, 373, 377-78, 389. A video tape of this particular transaction revealed Bateman, carrying two puppies, together with Matera in the store. 3/18/13RP 325-26, 333-34, 338; 3/19/13RP 467-68, 545, 579. Matera purchased about $17 worth of items on the stolen credit card, left

the store, returned, and purchased more items for $62.28.[3] 3/18/13RP 328, 333-34, 336, 386; 3/19/13RP 546, 578-79.

b. Count III: Second Degree Identity Theft At Nordstrom (Bateman).[4]

Less than twenty minutes later, Snover and Nevins' American Express card was used at the Northgate Nordstrom. 3/18/13RP 251, 259, 262; 3/19/13RP 581. A video tape of this transaction showed Bateman purchasing two pairs of men's jeans for $326.20. 3/18/13RP 258, 260, 263, 391-93, 395. Bateman was also recorded on video at a later date at a different Nordstrom store exchanging one of the pairs of jeans. 3/19/13RP 264-65, 396-97.

c. Count II: Second Degree Identity Theft At Walgreens (Bateman And Matera).

The next day on August 5, 2012, at approximately 7 a.m., Snover and Nevins' American Express credit card was charged at the Ballard Walgreens in Seattle. 3/18/13RP 275, 280-82. A video tape of this transaction revealed a car pulling up outside of the store and Bateman getting out of the driver's seat to meander

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[3] This is the only crime charged for which the jury acquitted Bateman. CP 82-86; 3/21/13RP 794-97.

[4] The crimes charged were not charged in chronological order.

around the car. 3/18/13RP 283, 404-05, 413-14; 3/19/13RP 549. Matera, who was carrying a small, white dog, got out of the car, conversed with Bateman and entered the store. 3/18/13RP 405-07, 413-14. While at the cash register, Matera ran back out to the car for a minute before returning to the store to complete the purchase of gift cards and other items totaling $229.52. 3/18/13RP 281, 295-96, 406, 409-10, 415; 3/19/13RP 552. When Matera got back in the car, Bateman drove away. 3/18/13RP 415-16.

Snover later discovered that several photos had been uploaded and stored automatically in her computer's "drop box," a cloud-based way to store and share photos. 3/14/13RP 161-62, 165-66. Snover recognized the people and puppies in the pictures from the surveillance photos that she had seen and from the description the police had given her of the people who had been using their credit cards. 3/14/13RP 166. She advised the case detective about what she had discovered and gave him access to the photographs. 3/14/13RP 167; 3/18/13RP 416-17.

The case detective noted that the photos and videos of the male, female, and puppies on the stolen computer matched those in the surveillance tapes from A-1 Market, Nordstrom and Walgreens. 3/18/13RP 417-19. The "meta data" for these

photographs helped the detective determine that the photos were taken at an apartment complex in Kirkland. 3/18/13RP 421. Further investigation subsequently identified the female suspect as Matera and the male suspect as Bateman. 3/18/13RP 422-23.

d. Count V: First Degree Identity Theft (Matera).

The puppies that appeared in the videos were two purebred teacup toy Pomeranian puppies purchased by Matera for $5,158 on July 7, 2012, using the name and stolen Bank of America credit card of Sophia Tuan. 3/14/13RP 184; 3/18/13RP 341, 344-45, 348; 3/19/13RP 474-76, 558; 3/20/13RP 610, 646. Tuan, who did not have a locking mailbox, had requested a replacement credit card from Bank of America, but never received it. 3/14/13RP 179-81; 3/19/13RP 473. Matera ordered these puppies from a company called Puppy Collections in Florida and arranged for them to be flown to Washington State. 3/18/13RP 344-45, 349; 3/19/13RP 475-76, 559-60; 3/20/13RP 646. Matera gave Puppy Collections a call-back number of 206-877-2549, which was later determined to be Bateman's phone number. 3/18/13RP 345-47. A Kirkland Fred Meyer security video from July 13, 2012 showed Matera faxing the

required paperwork, including a copy of Tuan's credit card, back to Puppy Collections. 3/18/13RP 301, 305, 311; 3/19/13RP 558-60; 3/20/13RP 610.

e. Count VI: Second Degree Possession Of Stolen Property (Bateman And Matera).

On October 8, 2012, a fast food drive-through employee told a Renton police officer that a woman in the backseat of the car in front of him appeared to be in distress. 3/14/13RP 195. The police officer caught up with and stopped the vehicle being driven by Bateman. 3/14/13RP 195, 197. The officer asked Bateman if there was a female in the car and Bateman replied no, that it was just him and the dogs. 3/14/13RP 198. During this stop, Bateman referred to the dogs as belonging to him. 3/14/13RP 200.

When Bateman was asked if he would open the back of the car, Bateman replied the key didn't work. 3/14/13RP 199. However, officers discovered the key did work and they found Matera curled up trying to hide in the trunk of the car. 3/14/13RP 199, 209. An animal control officer identified the dogs from their microchips as the two puppies ordered from Puppy Collections and

purchased with Sophia Tuan's stolen credit card. 3/18/13RP 340, 343-45.

f. Count IV: Violation Of The Uniform Controlled Substances Act (Bateman).

Bateman and Matera were both arrested on warrants and were transported to the jail together, handcuffed, in the back seat of a patrol car. 3/14/13RP 200, 211. At the time of his arrest, Bateman was wearing a pair of jeans matching the jeans he purchased with the stolen credit card at Nordstrom. 3/19/13RP 438-39. In a small pocket on the outside belt area of these jeans, the detective discovered one and a half orange pills. 3/19/13RP 444-45. The Washington State Patrol crime lab tested the pill and determined that it was Alprazolam, a Schedule IV narcotic, commonly known by its trademark name Xanax. 3/18/13RP 359, 362.

g. Facts Pertaining To Jail Calls.

During Bateman's trial, the prosecutor sought to admit segments from a few phone calls made by Bateman when he was in custody in the King County Jail. 3/19/13RP 494. Sergeant

Catey Hicks from the King County Jail laid the appropriate foundation for the admission of these calls. 3/19/13RP 486-94. Sergeant Hicks explained how all inmates and call recipients are informed about the jail's policy of recording jail phone calls and the option they have to accept that policy:

> There is a written notice on each telephone. There's also a written notice in the inmate rule handbook and there's a recording on each phone call that lets the inmate know that the phone call is open to monitoring and recording. In order for the phone call to actually go through, the inmate must accept that policy by pressing one. That same recording is also played for the call receiver that they must also acknowledge that the phone call is subject to monitor[ing] and recording. They must also press one. If one is not pressed or if there's no button pressed, the call will disconnect.

3/19/13RP 488-89. She added that the phones are located in open day rooms and are not separated from other people by walls or any other dividers. 3/19/13RP 489-90. If someone is around an inmate making a phone call from the jail, they would generally be able to hear the inmate's side of the conversation. 3/19/13RP 490.

When the prosecutor offered the jail calls exhibit after laying the necessary foundation, defense counsel stated, "No objection." 3/19/13RP 494. The prosecutor used segments from three jail phone calls during direct examination of Sergeant Hicks, and segments from two phone calls during cross-examination of

Matera, and portions of those during closing argument. 3/19/13RP 499-509; 3/20/13RP 635, 661-65, 725, 729-38. Defense counsel also played portions of Bateman's jail phone calls during his direct examination of Matera. 3/20/13RP 667-68, 670.

C. ARGUMENT

1. THE ADMISSION OF JAIL PHONE CALLS AT TRIAL DID NOT VIOLATE A PRIVACY RIGHT.

Bateman requests reversal of his convictions arguing that the court violated his right to privacy under the Washington Constitution's Article I, Section 7 by admitting portions of his recorded jail phone calls. This argument should be rejected. This issue is not properly brought before this court, so this Court should decline to hear it. Furthermore, the recording and admission of Bateman's jail phone calls did not violate Bateman's right to privacy under Washington State's Constitution, nor under its Privacy Act.

a. Bateman Failed To Preserve A Challenge To Jail Calls.

This Court should decline to hear Bateman's claim regarding jail calls because he did not raise the issue at the trial court level and jail calls recorded under the circumstances that they were in

this case are not constitutionally protected private affairs. Bateman's characterization of this issue as a question of privacy, and thus a reviewable constitutional issue, should be rejected.

As a general rule, issues cannot be raised for the first time on appeal. RAP 2.5(a). Under RAP 2.5(a)(3), a claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to his rights. Id. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Bateman had the opportunity at trial to challenge what he now claims is a constitutional violation of his right to privacy. However, he failed to do so. Bateman did not object to the admissibility of the recorded jail phone calls based on an alleged privacy right violation at any time during trial. In fact, Bateman's defense counsel even utilized the jail phone calls himself by playing portions during his direct examination of Matera. 3/12/13RP 11; 3/20/12RP 667-68, 670. Because Bateman did not object to the

admission of the jail calls at trial, and indeed used the calls himself, he has waived the right to challenge the admission of this evidence on appeal. RAP 2.5(a).

Bateman's challenge to the jail phone recordings under Article I, Section 7 of the Washington Constitution[5] has been rejected by this Court, in State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, review denied, 166 Wn.2d 1016 (2009). This Court concluded in Archie that jail phone calls made under circumstances virtually identical to those in this case were not "private affairs" protected by Article I, Section 7. Id. at 204. This Court noted that the Washington Supreme Court has found no invasion of privacy when other forms of inmate communication are inspected, as long as inmates have been informed of that practice. Id. at 204, citing State v. Hawkins, 70 Wn.2d 697, 704, 425 P.2d 390 (1967).[6]

The alternative holding of Archie was that when a call recipient who is informed of the recording presses a button to continue the call, as was required in each call in this case, that

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[5] Article I, Section 7 provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

[6] "Needless to say, and for very obvious security reasons, practically every jail and penal institution examines the letters and packages, incoming and outgoing, of all inmates. Certainly, there can be no claim of invasion of privacy under such circumstances." Hawkins, 70 Wn.2d at 704.

party has expressly consented to the recording and there is no constitutional violation. 148 Wn. App. at 204. It is well established that if one party in a conversation consents to a recording, the recording does not violate Article I, Section 7. State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996). Bateman and his call recipients consented to the recording of these calls. Bateman was informed that the calls were being monitored or recorded and understood that a third party could listen to the calls. 3/19/13RP 488-89. Both Bateman and the recipient of his calls had to press a button on the phone to accept the jail's recording policy and continue the call. Id. As the court concluded in Archie, they expressly consented to the recording. Because at least one party consented to each recording, there was no constitutional violation. Archie, 148 Wn. App. at 204.

Nevertheless, Bateman maintains that the Washington Supreme Court's recognition of a privacy interest in telephone records means that Bateman's telephone calls were recorded without legal authority. However, Bateman has failed to apply this Court's ruling in Archie to the case at hand. Bateman identifies no constitutional flaw in this Court's analysis in Archie. Nor does

Bateman identify any argument or analysis that distinguishes his case from Archie, factually or otherwise.

Even if Bateman had argued that Archie was factually distinguishable, such an argument would be irrelevant to the constitutional analysis of the scope of "private affairs." The actual content of the calls recorded by an individual inmate does not define the constitutional protection provided. The jail records all inmate calls and cannot know until afterward whether security issues are implicated, an escape is planned, or other crimes (such as intimidating a witness or violating a no contact order) are committed during the calls. Even if Bateman did not actually implicate security issues in his calls, that does not render the jail phone call recordings unconstitutional.

In summary, this Court should decline to consider the jail call issue raised by Bateman for the first time on appeal because he failed to preserve this issue at trial and has failed to show that the alleged error is a "manifest error affecting a constitutional right." RAP 2.5(a).[7] As in Archie, Bateman's "[jail] phone calls...were not private affairs deserving of Article I, Section 7 protection." Archie,

[7] Because this issue is not of constitutional magnitude, the question of whether the alleged error is "manifest" under RAP 2.5(a)(3) does not arise.

148 Wn. App. at 204.

b. Recording Jail Calls Under These Circumstances Is Not A Violation Of The Washington State Privacy Act.

While Bateman argues that the admission of the recorded jail phone calls is reviewable as a "manifest error affecting a *constitutional* right," his actual argument hinges upon language in a Washington statute, not its constitution.[8] Appellant's Brief at 10-13. Bateman argues that admitting the jail call recordings violated the Washington Privacy Act, RCW 9.73.030. He is mistaken.

The Washington Supreme Court has concluded that recording inmates' phone calls from jail under circumstances virtually identical to those in the case at bar does not violate the Washington State Privacy Act, RCW 9.73.030.[9] State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008). The Court concluded that inmates making phone calls from the King County Jail, who receive notice that calls are subject to recording through posted notices and an automatic warning at the beginning of every call, do not have a

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[8] Bateman attempts to bridge this gap by calling the constitutional privacy right and the privacy rights under Washington's Privacy Act "related." App.Br. at 11.

[9] "(1) Except as otherwise provided in this chapter, it shall be unlawful . . . to intercept, or record any: (a) Private communication transmitted by telephone . . . without first obtaining the consent of all the participants in the communication..." RCW 9.73.030.

reasonable expectation of privacy in those calls. Id. at 89. Therefore, recording of the calls did not violate the Privacy Act. Id. at 90.

The facts in this case are virtually identical to the facts in Modica. Bateman, like Modica, was housed in the King County Jail. 3/19/13RP 496-97. Also, as in Modica, Bateman had been informed of the recording policy through notices on the jail phones and an announcement heard by Bateman and the call recipient, instructing them to press a certain number to accept the policy. 3/19/13RP 488-89.

Other evidence also supports the conclusion that there is nothing in the record to suggest that Bateman had even a subjective expectation of privacy in the calls. For example, the phone used by Bateman was in a jail day room without privacy from others; conversations on the phone could be overheard. 3/19/13RP 489-90. Additionally, on at least one occasion, Bateman implies that he knows the phone call he made to his father is being recorded. 3/19/13RP 506 ("Look, trust me, this is the last thing I want to be talking about on the phone. You hear what I'm saying?").

Nevertheless, Bateman attempts to distinguish his case from Modica asserting that the Washington Supreme Court's decision "was based on facts including an emphasis that actual security concerns existed."[10] App. Br. at 10. Bateman suggests that the analysis in Modica is inapplicable here because there were no security concerns in his case. The need for jail security is part of the Modica court's conclusion that there is no expectation of privacy in calls made under these circumstances. 164 Wn.2d at 89. However, the security rationale was only one of several supporting its holding:

> First, we have already held that inmates have a reduced expectation of privacy. State v. Campbell, 103 Wn.2d 1, 23, 691 P.2d 929 (1984). Second, both Modica and his grandmother knew they were being recorded...[B]ecause Modica was in jail, because of the need for jail security, and because Modica's calls were not to his lawyer or otherwise privileged, we conclude he had no reasonable expectation of privacy.

Id. at 88-89.

The holding in Modica was based on the defendant's limited privacy rights as a detainee, combined with warnings of possible recordings. Id.; see also State v. Haq, 166 Wn. App. 221, 259-60,

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[10] In a parenthetical, Bateman describes the holding of Modica as follows: "recording of jail calls did not violate the privacy act because of security concerns." App. Br. at 10.

268 P.3d 997 (2012). The expectation of privacy is not dependent on whether law enforcement had a security concern as to each specific inmate. Presumably, everyone in the jail is a security risk; otherwise, they would not be in jail. Bateman has offered no authority in support of his novel position.

Bateman also contends that the Washington Supreme Court's decision in Modica was erroneous. App. Br. at 12. However, this Court is bound by Modica. In any event, Bateman's argument is unsupported by analysis or authority; this Court should refuse to consider it. RAP 10.3(a)(6), (g); Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996).

Bateman cites State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), and State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), for the proposition that a warrant or some other court authorization based on individualized suspicion was required in order to record his jail calls. However, both Gunwall and Jorden are distinguishable.

In Gunwall, the Washington Supreme Court held that citizens had a constitutionally-protected privacy interest in long distance home telephone records. 106 Wn.2d at 63. However, Gunwall was not in jail, did not have the reduced expectation of

privacy associated with being in jail, and the surveillance was of a personal telephone line, not jail phone calls. 106 Wn.2d at 56-57. Furthermore, Gunwall could not consent to being recorded. Id. Thus, Bateman's reliance on Gunwall is misplaced and not persuasive.

Similarly, in Jorden, a warrantless, random check of motel room registries without any individualized or particularized suspicion violated Article I, Section 7.[11] 160 Wn.2d at 130. Again, the review of a motel room registry is not analogous to recording phone calls made by inmates in jail, and the same standard is not applied when determining whether an invasion of privacy existed. In utilizing Jorden to try to support his argument, Bateman ignores the supreme court's holding in Modica that inmates have a reduced expectation of privacy, as well as this Court's holding in Archie that jail phone calls are not private affairs deserving of Article I, Section 7 protection. Modica, 164 Wn.2d at 88-89 (citing Campbell, 103 Wn.2d at 23); Archie, 148 Wn. App. at 203-04.

Finally, the Privacy Act permits recording if both parties consent, as all parties did in this case. Bateman made the calls

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[11] However, hotel or motel guest registries are not historically considered private when police officers have an individualized and particularized suspicion regarding a guest. In re Personal Restraint of Nichols, 171 Wn.2d 370, 377, 256 P.3d 1131 (2011) (citing Jorden, 160 Wn.2d at 127-28).

knowing that they could be recorded. Bateman and his call recipients each pressed a number on the phone to accept the call and the jails recording policies, after having been given notice that it was subject to monitoring and recording; this constituted express consent. Under these circumstances, the court of appeals in Modica concluded that the parties consented to any recording. 136 Wn. App. 434, 450, 149 P.3d 446 (2006), aff'd on other grounds, 164 Wn.2d 83 (2008). The Supreme Court in Modica did not reach the issue of consent because it found no expectation of privacy. 164 Wn.2d at 90. However, consent to the recordings is established in the record and is an alternative basis to conclude that the recordings did not violate the Privacy Act. 3/19/13RP 488-89.

Bateman has not met his burden of showing that the recording of his phone calls and their admission into evidence at trial violated either article I, § 7 of the Washington Constitution or the Washington Privacy Act. Modica, 164 Wn.2d at 88; Haq, 166 Wn. App. at 259-60. Thus, this court should affirm.

2. BATEMAN'S RIGHT TO JURY UNANIMITY WAS PRESERVED.

Bateman argues that count II (the Walgreens offense) and count III (the Nordstrom offense) must be reversed because identity theft includes multiple alternative means, and the State failed to provide substantial evidence as to one means for each count. App. Br. at 15-17. Specifically, he argues that evidence did not show that he "obtained" or "used" the stolen credit card at Walgreens, or that he "obtained" the credit card used at Nordstrom. These arguments should be rejected. Even if the statute includes true alternative means, substantial evidence supported a conviction for each means.

a. Bateman Has Not Demonstrated That Identity Theft Includes Alternative Means.

Bateman asserts, without citation to authority or analysis, that identity theft includes four alternative means.[12] That assertion is doubtful.

Criminal defendants have a right to an expressly unanimous verdict. Wash. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). However, when the

[12] The brief of the appellant or petitioner should contain the argument in support of the issues presented for review, together with citations to legal authority and references to the relevant parts of the record. RAP 10.3(a)(6). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

charged crime can be committed by more than one means, jurors need not be unanimous as to the alternative means, as long as sufficient evidence supports each of the means relied on by one or more of the jurors. Ortega-Martinez, 124 Wn.2d at 707-08; State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

"The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury." Ortega-Martinez, 124 Wn.2d at 707; State v. Ortiz, 80 Wn. App. 746, 749-50, 911 P.2d 411 (1996). If the evidence is sufficient to support each of the alternative means submitted to the jury, unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because it is inferred that the jury rested its decision on a unanimous finding as to the means. Ortega-Martinez, 124 Wn.2d at 707-08.

However, prior to analyzing whether the evidence is sufficient to support each alternative means of a crime, a preliminary question must be asked: does a particular statute actually create alternative means? An alternative means crime is one "that provide[s] that the proscribed criminal conduct may be proved in a variety of ways." State v. Smith, 159 Wn.2d 778, 784,

154 P.3d 873 (2007). To determine whether a statute sets forth multiple offenses or a single offense that may be committed by alternative means, a court must ascertain the Legislature's intent. When legislative intent is not clear from the statute, intent is ascertained by considering the following factors: "(1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; and (4) whether the acts inhere in the same transaction." State v. Arndt, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976); see also State v. Berlin, 133 Wn.2d 541, 553, 947 P.2d 700 (1997).

The Washington Supreme Court has limited the concept of "alternative means." The court has rejected the idea that every way in which a crime might be committed constitutes an "alternative means." Consequently, a constitutional violation does not always arise from the inclusion in a jury instruction of words that are unsupported by the evidence. State v. Linehan, 147 Wn.2d 638, 645-50, 56 P.3d 542 (2002); State v. Smith, 159 Wn.2d 778, 789-90, 154 P.3d 873 (2007).

In State v. Peterson, 168 Wn.2d 763, 230 P.2d 588 (2010), the Washington Supreme Court elucidated the concept of an

"alternative means" crime. The defendant there was convicted of failing to register as a sex offender. The statute sets out numerous registration requirements that apply under different circumstances. Nonetheless, the court held that the statute does not create numerous means. "The mere use of a disjunctive in a statute does not an alternative means crime make." Peterson, 168 Wn.2d at 770.

> There simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternative means of committing a particular crime. Instead, each case must be evaluated on its own merits....
>
> [The defendant] argues that failure to register is an alternative means crime because it can be accomplished in three different ways: (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another. This is too simplistic a depiction of an alternative means crime, as a comparison between theft and failure to register makes plain. The alternative means available to accomplish theft describe *distinct acts* that amount to the same crime. That is, one can accomplish theft by wrongfully exerting control over someone's property or by deceiving someone to give up their property. In each alternative, the offender takes something that does not belong to him, but his *conduct* varies significantly. In contrast, the failure to register statute contemplates *a single act* that amounts to failure to register: the offender moves without alerting the appropriate authority. His conduct is the same – he either moves without notice or he does not. The fact

> that different deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering.

Id. at 769-70 (citations omitted, emphasis in the original). See also State v. Linehan, 147 Wn.2d 638, 647-48, 56 P.3d 542 (2002) (The phrase "wrongfully obtain *or* exert unauthorized control," a theft definition under RCW 9A.56.020(1), did not establish alternative means, but rather a single means which could be committed in multiple ways.)

Applying these standards to the present case, it appears that identity theft does not describe alternative means.

> No person may knowingly obtain, possess, use or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.020(1). The "to-convict" instructions for identity theft (counts II and III) in Bateman's case read, in relevant part, that to be found guilty beyond a reasonable doubt, Bateman must have "knowingly obtained, possessed, or transferred or used a means of identification or financial information of Amy Snover and Charles Nevins..." CP 66-67.

In criminalizing the possession of stolen identities, the Washington Legislature made the following findings and set forth the following intention:

> The legislature finds that financial information is personal and sensitive information that if unlawfully obtained by others may do significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain and use financial information. The legislature intends to penalize unscrupulous people for improperly obtaining financial information.

RCW 9.35.001. This passage shows that the legislature was attempting to deter invasions of privacy and harm to individual citizens. The final sentence makes clear that the legislature was concerned about the improper obtaining of financial information, not simply its improper use. However, the passage does not clarify the legislature's intent as to whether RCW 9.35.020(1) sets forth multiple offenses or a single offense that may be committed by alternative means.

Therefore, it becomes necessary to examine the four factors set forth in State v. Arndt. 87 Wn.2d at 379. The first factor, the title of the act, is non-dispositive here because the title is "Identity Theft." As for the second factor, however, there is indeed a readily

perceivable connection between the various acts set forth in the identity theft statute. As with the failure to register statute in Peterson, 168 Wn.2d at 769-70, the identity theft statute contemplates a single means that amounts to stealing one's identity: the offender controls the identification or financial information of another without their authorization. The conduct is the same – one either controls the person's identity or they do not. The fact that there are multiple ways that this means of controlling a victim's identity can be committed does not change the ultimate nature of the criminal act: stealing their identity.

As for the third and fourth factors, the acts set forth in the identity theft statute are consistent with and not repugnant to each other, and they also inhere in the same transaction. As described above, the verbs are essentially stages along a continuum of activity, all of which constitutes stealing another's identity. For example, one must obtain financial information in order to possess, use, or transfer it. Likewise, one must possess such information in order to use or transfer it. There is no reason to think that the legislature intended to have a person's guilt depend on such subtle distinctions. Rather, the legislature intended that, if a person is

involved in any or all of these ways with stealing another's identity, that person is guilty of the crime of identity theft.

Additionally, in State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011), this Court evaluated whether there was sufficient evidence to support an identity theft charge. The Court stated, "To convict Hayes of identity theft...one element the State had to prove was that Hayes or an accomplice 'knowingly obtained, possessed, or transferred a means of identification or financial information of Jeffrey Call.'" Id. at 482. The issue in Hayes was whether the alleged victim was a real person. However, in upholding Hayes' identity theft conviction, the Court did not distinguish between which conduct (obtaining, possessing, or transferring) was performed by Hayes. Id. at 482-83. The ruling in Hayes suggests that it didn't appear to the Court that there should be four different alternative means to this crime. Id.

Finally, the pattern instruction for the elements of second degree identity theft provides some guidance on this topic. The Washington Pattern Jury Instruction 131.06 states, in relevant part, that to convict one of identity theft, the State must prove:

> (1) That on or about (date), the defendant knowingly *[obtained, possessed, or transferred][or][used]* a

means of identification or financial information of another person *[, living or dead]*

A comment to this pattern instruction explains that:

> In element (1), the phrase "obtained, possessed, or transferred" is separately bracketed from the word "used." The separate bracketing is intended to emphasize that, for cases in which the defendant is charged only with "use" of the designated items, jurors should not also be instructed with the other statutory terms.

The formatting of this pattern instruction and accompanying comment regarding its use suggests that there are, at most, two alternative means for committing second degree identity theft, as opposed to four: one means being "obtained, possessed, or transferred" and the other means being "used." This distinction between these two ways of committing the crime is logically sound, as compared with four ways of committing it, because the first option pertains to one being in control of the identification or financial information, whereas the other pertains to actually utilizing that information. See also State v. Al-Hamdani, 109 Wn. App. 599, 605, 36 P.3d 1103 (2001) (not every use of the disjunctive in a criminal statute creates an alternative means). Not every "use" of stolen identity requires actual possession.[13]

[13] E.g., computer theft of identity.

Therefore, Bateman's presumption that identity theft has four alternative means fails because he has provided no support or analysis on this issue, RAP 10.3(a)(6), (g); Johnson, 119 Wn.2d at 171, but his argument also fails because the legislature's intent appears to contemplate a single means that can be committed multiple ways or, at most, two means of stealing another's identity.

b. Even Assuming, Arguendo, That Identity Theft Does Have Alternative Means, Substantial Evidence Was Presented For Each Means.

Assuming, arguendo, that each verb in RCW 9.35.020(1) creates a separate alternative means of committing identity theft, sufficient evidence was presented to justify convictions for each of the means for counts II and III.

As to Walgreen's count (count III), Bateman claims there was no evidence that "Bateman had either obtained, or on that date used, the financial information."[14] App. Br. at 17. Bateman, together with his co-defendant Matera, certainly "obtained" the credit card data on or about August 5, 2012, or they never could

[14] Bateman does not dispute that sufficient evidence existed to support a finding that he committed second degree identity theft in count II (Walgreens) by knowingly possessing or transferring a means of the victims' financial information. App. Br. at 17.

have made the purchase using the victims' card in Walgreens. They clearly also "used" the card together. Indeed, Matera admitted to knowingly using the victims' credit card at Walgreens. 3/19/13RP 547-48, 589.

The State did not need to prove that Bateman took each of these steps himself, only that he knowingly assisted Matera, as the jury was instructed on accomplice liability.[15] CP 59; RCW 9A.08.020; WPIC 10.51. Bateman drove Matera to the Walgreens on August 5th, spoke with her prior to her entering the store, and was in the car when Matera ran back out to the car during the purchase to retrieve the victims' card. 3/18/13RP 413-14; 3/19/13RP 549, 553, 584, 605. After Matera successfully made purchases in Walgreens using the victims' card, Bateman drove Matera away from the store. 3/19/13RP 553. Bateman was not only "present at the scene and ready to assist by his presence," RCW 9A.08.020, he also did assist Matera by transporting her to and from the crime scene. RCW 9A.08.020; 3/19/13RP 549, 553.

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[15] A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime... A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime." RCW 9A.08.020; WPIC 10.51; CP 59.

The State's theory of the case was that Bateman and Matera, working together, were on a 24 hour shopping spree using the victims' cards and that any rational juror could infer that Bateman was aware of the criminal acts taking place. This theory was premised, in part, on the facts that Bateman and Matera were in an intimate ten-year relationship,[16] they had little to no income between them,[17] and at least 6 purchases had been made on the victims' cards during their shopping spree before the cards were "burned." 3/14/13RP 170; 3/18/13RP 281-82, 251, 259, 262, 323, 330, 377-78; 3/19/13 436, 541-42, 565-67, 570, 588-89; 3/20/13RP 604, 661. The jury had little reason to believe that there were any secrets between them.

While Matera testified that Bateman was unaware that the financial information she used at Walgreens belonged to anyone other than her, 3/19/12RP 548, the jury did not find Matera credible on that point. Substantial evidence pointed to the fact that Bateman knew exactly what was going on during these incidents.

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[16] At the time of these incidents, Matera and Bateman had known each other for 10 years, dated for 4 of those years, and lived together. 3/19/13 565-67.

[17] Matera told Bateman in a jail call she didn't have a dollar to her name, testified she was running out of money in August of 2012, and also said Bateman's employment consisted of selling two purses online. 3/19/13RP 541-42, 570; 3/20/13RP 604, 661.

Snover and Nevins' home was burglarized sometime after 2 or 3 p.m. on August 4, 2012. 3/14/13RP 155. Starting shortly after 5pm that day and over the next twenty-four hours, there were no fewer than six purchases on Snover and Nevins' credit cards while Matera and Bateman had them.[18] 3/14/13RP 170; 3/18/13RP 281-82, 251, 259, 262, 323, 330, 377-78. These transactions all occurred very close to Snover and Nevins' home in Ballard. 3/14/13RP 151; 3/18/13RP 379. Matera testified that the stolen credit cards had to be used before they "burned," or rather before the victims deactivated them. 3/19/13RP 588-89. In light of their financial circumstances, this series of crimes connected together certainly makes it less likely that Bateman was just innocently chauffeuring Matera around to join her in some credit card binge shopping and more likely that Bateman knew exactly what was going on as he contributed to this pattern of criminal conduct.

Furthermore, Matera's testimony that Bateman was "not trying *(sic)* to have nothing *(sic)* to do with that," 3/19/12RP 554, referring to criminal activity, was contradicted by Bateman's own statements to his father on jail phone calls. Prior to counts V and

[18] Snover's Capital One card was also used without her authorization at Sears, Town and Country Markets, and Phillips 66 Gas Station on or just after August 4, 2012; however, these locations did not have accessible video surveillance. 3/14/13RP 170; 3/18/13RP 377-78.

VI being charged, Bateman told his father, "they're not charging us for the dogs," suggesting that he was aware of his and Matera's illegal conduct in possessing the stolen Pomeranian puppies. 3/19/13RP 501. In addition, during Bateman's conversation with his father about how to go about getting the puppies back and whether "they've contacted the other person... this Tuan, this Sophia," 3/19/13RP 505, Bateman stated, "If I rob a bank tomorrow, I keep that million dollars but I go do my time... But I keep that million dollars." 3/19/13RP 508. This statement, though false, demonstrates that Bateman knew that the puppy purchase using Tuan's credit card was illegal. The jury could reasonably infer from the fact that Bateman knew of his and Matera's similar, recent criminal activity that there was no reason why similar criminal activity would not now be shared or discussed between the two of them.

As for the Nordstrom incident (count III), Bateman says there was not sufficient evidence to show that he "illegally obtained" the financial information.[19] App. Br. at 17. First, the statute requires

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[19] Bateman does not dispute that sufficient evidence existed to support a finding that he committed second degree identity theft in count III (Nordstrom) by knowingly possessing, transferring, or using a means of financial information of the victims. App. Br. at 17.

only that he "obtained" with intent to commit a crime; there is no element that he "illegally obtained" the information.[20] RCW 9.35.020(1). Second, the evidence clearly showed that Bateman "obtained" the financial information because otherwise he could not have made the illegal purchase. Matera testified and admitted that she had obtained the financial information, 3/19/13RP 542-43, and that she gave Bateman the card to purchase the jeans. 3/19/13RP 555, 581, 619. Bateman was identified as the person who made the purchases at Nordstrom using the victims' credit card by the store's loss prevention officer, the case detective, and by Matera herself. 3/18/13RP 260, 391-93; 3/19/13RP 554-55.

The reasons previously discussed, *supra,* about how a reasonable juror could infer that Bateman *knowingly* participated in the identity theft at Walgreens also apply to how he *knowingly* obtained the victims' financial information to make his Nordstrom purchase. Bateman and Matera's relationship, lack of income, and shopping spree create the logical inference that he was aware of the criminality of the series of purchases being made.[21] Moreover,

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[20] Bateman seems to suggest the State needed to prove involvement in the burglary, which is not the case.

[21] This is particularly the case at Nordstrom where Bateman purchased two pair of jeans for $326.20. 3/18/13RP 258.

Bateman's own conduct during the actual purchase of the Nordstrom jeans also confirms this. The Nordstrom loss prevention officer observed that Bateman was "displaying suspicious indicators...indicative of somebody who might shoplift." 3/18/13RP 252. A reasonable juror could infer that consciousness of guilt from such behavior.

Considering all of this, sufficient evidence existed to support a finding that Bateman or Matera knowingly obtained and used the victims' financial information at Walgreens, and that Bateman knowingly obtained the victims' financial information at Nordstrom. Therefore, Bateman did not have a right to express unanimity on one or the other means.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Bateman's convictions and sentence.

DATED this 3rd day of February, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DANIEL BATEMAN, Cause No. 70261-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 3rd day of February, 2014

W Brame

Wynne Brame
Done in Seattle, Washington