90816-8

Supreme Court No. _____
COA No. 70261-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BATEMAN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Petitioner

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WASHINGTON COURT RULES AND STATUTES

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Daniel Bateman was the appellant in Court of Appeals No. 70261-1.

B. COURT OF APPEALS DECISION

Mr. Bateman was convicted by a jury on two of three charges of identity theft, and he seeks review of the Court of Appeals decision affirming the judgment. Court of Appeals No. 70261-1. Appendix A. An order denying reconsideration was entered September 2, 2014. Appendix B.

C. ISSUES PRESENTED ON REVIEW

1. The identity theft statute is violated where a person (with intent to commit a crime) does knowingly "obtain, possess, use, or transfer" someone's financial information. RCW 9.35.020(1). Under State v. Owens, are these terms so similar that the foregoing phrase is merely a definition, or are these acts four alternative means of committing the offense?

2. Mr. Bateman's defense was that he had no knowledge, because the credit cards his girlfriend lent to him were "cloned," i.e., they bore her true name embossed on the plastic but contained improper financial information on the metallic strip. Was the defendant's counsel ineffective where he failed to move to strike a

hearsay answer, and then to object to hearsay, in which a store manager said that the store *clerk* told her she had run a "4 by 4" check that defeated his claim that the cards bore one name on the front, and different financial information on the back?

D. STATEMENT OF THE CASE

Daniel Bateman was charged with various counts including three charges of "identity theft" in the second degree based on store purchases, one by Mr. Bateman and two by his girlfriend Ms. Matera, allegedly knowingly using credit cards that had been taken in a burglary of a house in Ballard. CP 1-2, 5-9, 20-26.

Just prior to trial, Matera pled guilty to several counts of using credit card information at different locations in the Seattle area. See CP 48; 3/19/13RP at 556-58. However, at trial she testified for Mr. Bateman, stating that he couldn't possibly have had any knowledge that there was anything wrong with the credit cards she lent him or used with him, because they were in fact "cloned" -- meaning they were not the stolen cards themselves, but were cards with her own name embossed on the plastic, and the stolen card's *numbers* embedded in the metallic strip on the back side. 3/19/13RP at 542-44. During trial, the prosecutor introduced evidence of the burglary that resulted in the obtaining of the cards,

evidence that the cards were carried and/or passed between Mr. Bateman and Ms. Matera, and evidence that they were used at stores. 3/8/13RP at 159; 3/14/13RP at 151-174, 179-83; 3/18/13RP at 275-96; 3/19/13RP at 543-56.

Mr. Bateman was convicted on two of the three counts of identity theft. He appealed, and the Court of Appeals affirmed, rejecting his arguments on alternative means, and dismissing his argument in his Statement of Additional Grounds that his counsel was ineffective. Appendix A.

E. ARGUMENT

1. THE COURT OF APPEALS DEPARTED FROM THE ALTERNATIVE MEANS DECISIONS OF THIS COURT AND THE COURT OF APPEALS.

a. Review is warranted under RAP 13.4(b). The decision of the Court of Appeals that the identity theft statute does not set forth alternative means is in conflict with the analysis prescribed by this Court in State v. Jeramie Owens, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014), and with decisions of the Court of Appeals, as argued infra. Review is warranted. RAP 13.4(b)(1), (2).

b. Alternative means are indicated by the statutory language. Criminal defendants in Washington have a right to a

unanimous jury verdict. Wash. Const. art. 1, § 21, § 22; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to an *expressly* unanimous verdict. Ortega-Martinez, 124 Wn.2d at 707 (right to expressly unanimous jury verdict includes right to unanimity on means by which defendant committed crime) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)).

The determination whether a given statute or charge sets forth alternative means depends on the statutory language, in the circumstances of the case. State v. Peterson, 168 Wn.2d 2d 763, 769, 230 P.3d 588 (2010) (citing State v. Arndt, 87 Wn.2d 374, 378, 553 P.2d 1328 (1976)). The statute in question, RCW 9.35.020(1), provides:

> (1) 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 acts of "obtaining," using," "transferring," and "possessing" financial information are instances of conduct that are more repugnant to each other than they are consistent with each other. This is an indication that the Legislature conceived of the acts as alternative means. See Arndt, at 378-79. These acts

also do not inhere in the same transaction, further showing that they are alternative means. Arndt, at 378-79.

The identity theft statute also must be read as indicating alternative means of committing the crime because these four terms set forth different acts, rather than being merely multiple examples that form a definition. State v. Lindsey, ___ Wn. App. ___ (Wash. App. Div. 2, October 15, 2013); see State v. Smith, 159 Wn.2d 763, 769, 230 P.3d 588 (2010).

Under the recent case of State v. Jeramie Owens, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014), alternative means offenses are indicated, in part, when the statutory terms are acts in which the conduct varies significantly. Conversely, statutory terms are not alternative means where it would be hard to imagine how a person could be doing one of the acts and not also be doing all the others. In Owens, the acts were too similar to constitute distinct alternative means. Owens, at 99 (the terms "organize," "plan," "direct," "manage" and the like (of the theft of goods for sale to others) were merely definitional because one could not imagine how one could be doing one of them, and not also be doing all the others).

The identity theft statute is similar to the statute in State v. Nonog, 145 Wn. App. 802, 187 P.3d 335 (2008), aff'd on other

grounds, 169 Wn.2d 220, 237 P.3d 250 (2010). There, the Court of Appeals deemed the 'interference with domestic violence reporting' statute to set forth distinguishable means of committing the offense, where the offense required a domestic violence crime, followed by a person who:

> prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

State v. Nonog, 145 Wn. App. at 812 (quoting RCW 9A.36.150(1)). The Court made clear that each of these variations were themselves essential terms, and not a set of mere definitional examples. State v. Nonog, 145 Wn. App. at 812-13 (comparing RCW 9A.72.120, under which tampering with a witness may also be committed by alternative means, and State v. Fleming, 140 Wn. App. 132, 135–37, 170 P.3d 50 (2007)).

Also similar is State v. Mary Peterson, 174 Wn. App. 828, 851-53, 301 P.3d 1060 (2013). There, the Court of Appeals correctly held that the animal cruelty statute sets forth alternative means, because the phrase "starves, dehydrates, or suffocates" is not "merely descriptive or definitional" of a single element;

rather, those acts are so different that they can only be essential elements of distinct alternative means.

The identity theft statute is similar to the statutes in these cases, and these authorities support the contention that alternative means were charged in this case, considering the statute, and also the jury instructions. CP 66, CP 67 ('to-convict' instructions); Appellant's Opening Brief, at pp. 16-17. As argued, the central distinction for purposes of alternative means is that the manners of committing the crime that are listed in the statute are not a 'definition' of an element – definitions do not create alternative means. Appellant's Opening Brief, at pp. 15-16 (citing Smith, 159 Wn.2d at 785).

c. Alternative means are conclusively indicated by the express statement of Legislative intent. The 2008 statement of Legislative intent, passed subsequent to enactment of the offense statute itself, indicates conclusively that identity theft is an alternative means crime. In State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006), this Court held that a single unit of prosecution for the offense of identity theft under RCW 9.35.020 would comprise all of the petitioner's multiple instances of using another person's particular credit card. Leyda, at 345-36.

The statute, passed in reaction to Leyda, shows that the Legislature intends the identity theft statute's language setting out four acts -- obtain, possess, use, transfer – to be considered different acts, each of which is a separate offense convictable and punishable of itself without offending Double Jeopardy.

Under the express language of the statute, each of the four acts in the identity theft statute is a separate "unit of prosecution." The Legislature enacted the statute in order to overrule State v. Leyda, which stated that one use of a person's financial information multiple times was a single offense, as was any act of possessing, use, transferring, and/or obtaining.

> RCW 9.35.001. Findings--Intent
>
> . . . The unit of prosecution for identity theft by use of a means of identification or financial information is each individual unlawful use of any one person's means of identification or financial information. Unlawfully obtaining, possessing, or transferring each means of identification or financial information of any individual person, with the requisite intent, is a separate unit of prosecution for each victim and for each act of obtaining, possessing, or transferring of the individual person's means of identification or financial information.

(Emphasis added.) RCW 9.35.001 (2008 c 207 § 3, eff. June 12, 2008); see also Finding--Intent--2008 c 207 §§ 3 and 4. The Findings statement further provides as follows:

> The legislature enacts sections 3 and 4 of this act to expressly reject the interpretation of State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006), which holds that the unit of prosecution in identity theft is any one act of either knowingly obtaining, possessing, using, or transferring a single piece of another's identification or financial information, including all subsequent proscribed conduct with that single piece of identification or financial information, when the acts are taken with the requisite intent. The legislature finds that proportionality of punishment requires the need for charging and punishing for obtaining, using, possessing, or transferring any individual person's identification or financial information, with the requisite intent. The legislature specifically intends that each individual who obtains, possesses, uses, or transfers any individual person's identification or financial information, with the requisite intent, be classified separately and punished separately as provided in chapter 9.94A RCW.

Finding--Intent--2008 c 207 §§ 3 and 4. There must be a direct relationship between the unit of prosecution analysis for Double Jeopardy purposes, and the alternative means doctrine for purposes of the Unanimity guarantee, where both questions involve Legislative intent as the touchstone.

Where the Legislature has expressly indicated that "obtain," "possess," "use," and "transfer" are each separate units of prosecution for conviction and punishment purposes, these are each separately convictable and separately punishable criminal acts under the statutory language. See, e.g., State v. Reeder, ___

P.3d ___, 2014 WL 2818992 (Wash.App. Div. 1, June 23, 2014, at p. 11) (when the State charges a person with violating the same statutory provision numerous times, multiple convictions survive a double jeopardy challenge only if each is a separate unit of prosecution, requiring the Court to "determine what 'unit of prosecution' the legislature intends as a punishable act under the statute.").

Therefore, multiple acts of conduct – here, obtain, possess, use, and transfer -- listed in a statute are either simply definitional, or they are alternative means. If the four acts in the identity theft statute -- obtain, possess, use, transfer – are separately punishable as distinct units of prosecution, then the language setting forth those acts cannot constitute a mere 'definition.'

Thus the 2008 statutory revision makes clear that the Legislature intends the four acts to be separately punishable acts, and alternative means, including as to a single credit card. That result bodes ill for a person convicted of all four acts as to one card – but in this case, it requires a determination that the identity theft statute sets out four alternative means, since alternative means is a question of Legislative intent.

2. AS DEFENDANT ARGUED IN HIS SAG, COUNSEL WAS INEFFECTIVE.

a. Review is warranted. Mr. Bateman argues that the Court of Appeals decision is inconsistent with decisions of this Court and the Court of Appeals that deficient, prejudicial and non-tactical attorney performance establishes ineffective assistance, including on the basis of a failure to object to inadmissible evidence. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Review is warranted under RAP 13.4(b)(10 and (2).

b. Counsel was ineffective for failing to move to strike, and later object, as to inadmissible hearsay. Mr. Bateman's defense was that he had no idea that the credit cards loaned to him by Ms. Matera were anything other than her proper cards, including when she lent him one of them so he could buy two pairs of blue jeans at Nordstrom. 3/20/13RP at 749-53, 756-57.

For her part, Ms. Matera indicated that Mr. Bateman did not know that she had unlawfully worked with an associate to have that person encode illegal financial information onto the magnetic strip of certain of her own credit cards. 3/19/13RP at 546-48, 554; 3/20/13RP at 622, 628. As she described, this process is called

"cloning," because the plastic card itself had the holder's own name stamped or embossed on it, but the magnetic information on the back is that of someone else. 3/19/13RP at 542-43.

As Matera testified, Mr. Bateman did not know this. 3/20/13 at 756-57. It was inadmissible hearsay for the Nordstrom manager, Kelsey Danielsson, to testify as a State's witness that the sales clerk in her store told Danielsson that she did a "4 by 4" check, to see if the magnetic strip information matched the name embossed on the front of the plastic card itself (which the defense argued was embossed as 'Melissa Matera'). 3/18/13RP at 271-73. Hearsay is inadmissible. ER 802. "Hearsay" is defined as testimony repeating an out-of court statement that a party offers in court to prove the truth of the matter asserted in the statement. ER 801(a),(c). The store manager's testimony was hearsay. State v. Collins, 76 Wn. App. 496, 499, 886 P.2d 243 (1995); ER 801(a).

Therefore, as Mr. Bateman strongly contended in his Statement of Additional Grounds, his lawyer was ineffective under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984), and U.S. Const. amend. 6, for failing to timely and earlier object. Statement of Additional Grounds (SAG), at pp. 1-2, 14-17. Counsel should have moved to strike when his examination

of the witness produced a hearsay answer that counsel had not sought, and should have objected when the prosecutor later elicited similar hearsay statements from the witness.

This issue was crucial. Mr. Bateman did not know that his friend Ms. Matera, rather than graciously lending him a credit card of hers, in fact had lent him a "cloned" card. Counsel's deficiency was prejudicial where the prosecutor in closing argument used the hearsay to specifically argue against Mr. Bateman's viable 'cloned card' defense theory; 3/18/13RP at 269-70, 273-74; 3/18/13RP at 713-14 (State's closing argument).

F. CONCLUSION

Based on the foregoing, Mr. Bateman asks this Court to accept review.

DATED this 17 day of September, 2014.

Respectfully submitted,

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANIEL BATEMAN, Appellant.	)	No. 70261-1-I DIVISION ONE UNPUBLISHED OPINION FILED: September 2, 2014

BECKER, J. — Daniel Bateman appeals from his convictions for two counts of identity theft in the second degree, violation of the uniform controlled substances act, and possession of stolen property in the second degree. On appeal, he makes two arguments: (1) the trial court erred when it admitted recordings of his phone calls from jail and (2) substantial evidence did not support each alternative means of committing identity theft. We affirm.

The charges of identity theft arose from the use of stolen credit cards, or information taken therefrom, on three occasions in August 2012. The credit card information belonged to a couple whose home had recently been burglarized.

On August 4, 2012, a stolen Capital One credit card was used at a convenience store in the Greenwood neighborhood of Seattle. A video showed Bateman and Matera in the store. Matera made a purchase, left the store, returned, and made another purchase.

Later that day, a stolen American Express card was used to make a purchase at a mall department store in north Seattle. A surveillance video showed Bateman purchasing two pairs of men's jeans.

On August 5, 2012, the same card was used to make a purchase at a Ballard drugstore. The store's security cameras showed Bateman and Matera getting out of a car. They spoke for a moment, and Matera went into the store. A few minutes later, she ran back to the car, then went back into the store, paid for several items including gift cards, and returned to the car.

Bateman was charged with three counts of identity theft in the second degree for these incidents along with the other two charges. A jury convicted him of all charges except the identity theft count arising out of the convenience store incident. Bateman appeals.

Bateman first argues that admission of recordings of his jailhouse phone calls violated article I, section 7 of the Washington Constitution. He did not object to their admission at trial. Bateman argues admission was error because he had a privacy interest in his phone calls and no warrant was obtained to record them. His arguments fail under State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008), and State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, review denied, 166 Wn.2d 1016 (2009).

Bateman next argues that the crime of identity theft has four alternative means, some of which were not supported by substantial evidence. This argument implicates the right to a unanimous jury verdict provided by article I, section 21 of the Washington State Constitution. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

The crime of identity theft is defined as follows: "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 crime is identity theft in the first degree, a class B felony, if the offender obtains $1,500 or more in value. Otherwise, the crime is identity theft in the second degree, a class C felony. RCW 9.35.020 (2-3).

The to-convict instructions for counts 2 and 3 read: "the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial information."

An alternative means crime is one that provides that the proscribed criminal conduct may be proved in a variety of ways. State v. Peterson, 168 Wn.2d 763, 767, 230 P.3d 588 (2010).

The Supreme Court has articulated four factors that help to determine whether, in a particular statute, the legislature intended to define multiple offenses or a single offense committable in more than one way: (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, 378-84, 553 P.2d 1328 (1976). In Arndt, the defendant had been convicted of grand larceny for fraudulent receipt of public assistance. The statute criminalized various acts by which a person might obtain public assistance to which he was not entitled, such as making a willfully false statement and willfully failing to reveal a material fact concerning eligibility. Applying the factors, the court concluded that the statute did not define multiple offenses. Rather, it defined a single offense that could be committed by several different means. This conclusion defeated the defendant's argument that the jury had to agree unanimously as to each means of committing the crime that was mentioned in the to-convict instruction. The jurors only had to agree unanimously that the defendant committed grand larceny.

Although both the State and Bateman contend that the Arndt factors support their respective positions, neither argues that the identity theft statute defines more than one crime. If the four verbs in the statute defined four distinct crimes, there would be no basis on which to argue that any of the four crimes could be committed by alternate means. Because the parties agree that RCW 9.35.020 describes a single offense, the Arndt factors are not relevant. The question is whether the single offense of identity theft can be committed by only one means or by several.

Bateman contends that the four different verbs used in the statute—obtain, possess, transfer, and use—define four alternative means of committing the crime of identity theft. Where a single crime can be committed in more than

one way, there must be juror unanimity as to guilt for the single crime charged, but the jurors need not be unanimous as to the means by which the crime was committed so long as substantial evidence supports each alternative means presented. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) (explaining the distinction between an alternative means case and a multiple acts case). If the four verbs in the identity theft statute comprise only a single means of committing identity theft, then the issue of juror unanimity does not arise.

There is no bright line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Peterson, 168 Wn.2d at 769. Each case must be evaluated on its own merits. Peterson, 168 Wn.2d at 769.

Bateman contends the use of four different verbs establishes that the crime is committable in more than one way. He argues there is no substantial evidence proving that he knowingly obtained or transferred the credit card used at the department store or that he knowingly obtained or used the credit card at the drugstore.

A defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); Peterson, 168 Wn.2d at 770. A definition that states methods of committing a crime in the disjunctive does not require a conclusion that the definition creates alternative means of committing the crime. State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999).

Where the word "knowingly" clearly relates to a series of verbs, its placement suggests only one means is intended. State v. Lindsey, 177 Wn. App. 233, 241, 311 P.3d 61 (2013), review denied, ___ P.3d ___ (2014). That is the case here. 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."

Bateman points to the comments to the pattern instruction on identity theft. Practitioners are advised to omit the phrase "obtained, possessed, or transferred" when the defendant is charged only with "use":

> 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.

11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 131.06 note on use at 560 (3d ed. 2008). Bateman contends the comment indicates that "use" is one "means" while possession is another "means." But the comment does not refer to "means," and it does not cite cases. We regard the comment not as a legal analysis but rather as practical advice intended to help practitioners avoid confusing a jury.

Bateman's argument is similar to one the Supreme Court rejected in State v. Owens, 180 Wn.2d 90, 323 P.3d 1030 (2014). The statute addressed in Owens provides that a person who "knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen

property in the first degree." RCW 9A.82.050(1). The defendant argued that the eight different verbs articulated eight alternative means for committing the crime of first degree trafficking in stolen property. He argued that his conviction had to be reversed because the State charged all eight and there was not substantial evidence to support each means charged. Relying on the placement of the word "knowingly" in two different positions in the list of verbs, the court concluded that the statute articulated only two alternative means, not eight. The court also pointed out that the first seven verbs were so closely related they did not really address distinct acts:

> For example, it would be hard to imagine a single act of stealing whereby a person "organizes" the theft but does not "plan" it. Likewise, it would be difficult to imagine a situation whereby a person "directs" the theft but does not "manage" it. Any one act of stealing often involves more than one of these terms. Thus, these terms are merely different ways of committing one act, specifically stealing. Consistent with Peterson, where the various acts of moving without giving proper notice were too similar to constitute distinct alternative means, an individual's conduct under RCW 9A.82.050(1) does not vary significantly between the seven terms listed in the first clause, but does vary significantly between the two clauses. We hold that RCW 9A.82.050(1) describes only two alternative means of trafficking in stolen property.

Owens, 180 Wn.2d at 99, citing Peterson, 168 Wn.2d 763. Because substantial evidence supported each of the two alternative means, the court affirmed the conviction.

The four verbs that describe identify theft are like the seven verbs that describe the first alternative means of trafficking in stolen property. They do not really address distinct acts. The State accurately characterizes them as "stages along a continuum of activity." For example, it would be hard to imagine the

crime of identity theft being committed by a single act of using a credit card that did not also involve obtaining and possessing the card. It does not matter which of the four verbs most accurately describes the way Bateman involved himself with another person's credit card. What matters is that the jury unanimously found he did so knowingly and with the intent to commit a crime.

In a statement of supplemental authority, Bateman calls attention to State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006), and its abrogation in 2008 by legislative amendment to chapter 9.35 RCW. Leyda, a unit of prosecution case, held that the defendant's convictions on four counts of identity theft violated constitutional prohibitions against double jeopardy. The court held it was improper for the State to charge Leyda with four counts of identity theft when he only had a single credit card of a single individual, even though the card was involved in at least four of his transactions. The court said common sense suggested that a victim "has only one identity that can be unlawfully appropriated." Leyda, 157 Wn.2d at 347.

The act now articulates the legislature's intent "to penalize for each unlawful act of improperly obtaining, possessing, using, or transferring means of identification or financial information of an individual person." RCW 9.35.001. The amendment changed the statute to permit what occurred in this case, the charging of Bateman with more than one count of identity theft though each transaction involved the same credit card of the same person.

It is not self-evident how the amendment and the new intent language might bear on Bateman's argument that identity theft is an alternative means

crime. Bateman admitted at oral argument that he has not located any authority explaining how a double jeopardy unit of prosecution analysis overlaps, if at all, with an alternative means juror unanimity analysis. We decline the invitation to incorporate the supplemental authority into our analysis. Such "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970).

We conclude Bateman has failed to establish that the crime of identity theft has alternative means.

Bateman filed a pro se statement of additional grounds for review pursuant to RAP 10.10. His statement outlines a number of instances of allegedly deficient performance of counsel and prosecutorial misconduct. He claims there was a speedy trial violation. And he faults the court for refusing his request to appoint new counsel and for allowing Matera to testify in jail clothes. The statement of additional grounds suffers generally from misunderstanding of applicable law. None of the grounds stated by Bateman warrant further review.

The reply brief of appellant prepared by appellant's counsel endorses and advocates one of the claims of ineffective assistance of counsel identified in Bateman's statement of additional grounds. Appellant's counsel also attempted to include the ineffective assistance issue in his oral argument before this court.

Counsel's conduct demonstrates a misunderstanding of the rules of appellate procedure. An appellate case is framed by the brief of appellant, which assigns error and identifies the issues the court is being asked to review. RAP

10.3(a). The brief of respondent answers the brief of appellant. RAP 10.3(b). The reply brief of appellant is limited to a response to the issue in the brief to which the reply brief is directed. RAP 10.3(c).

A pro se statement of additional grounds as allowed by RAP 10.10 is not a supplemental brief of appellant. Indeed, it is not a brief at all. It is an opportunity for an appellant to call the court's attention to matters that the appellant believes were not adequately addressed in the brief filed by appellant's counsel. RAP 10.10(a). The rule provides that the court may, in its discretion, request additional briefing from counsel to address issues raised pro se by the appellant. RAP 10.10(f). The rule does not provide discretion to counsel to supply additional briefing that the court has not requested.

Here, the brief of appellant did not raise ineffective assistance as an issue. Counsel did not obtain permission from the court to file a supplemental assignment of error or a supplemental brief. The court did not request additional briefing from counsel to address the issue of ineffective assistance. Counsel's inclusion of the issue in the reply brief of appellant was improper and violated RAP 10.7. In written and oral advocacy before this court, appellate counsel should stay within the confines of errors and issues identified in compliance with the rules of appellate procedure.

Affirmed.

Becker, J.

WE CONCUR:

Appendix B

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

STATE OF WASHINGTON, Respondent, v. DANIEL BATEMAN, Appellant.	No. 70261-1-I ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER DENYING MOTION TO ADDRESS ISSUE RAISED IN APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

Appellant, Daniel Bateman, has filed a motion for reconsideration of the opinion filed on August 11, 2014, and the court has determined that said motion should be denied.

Appellant has also filed a motion to address in his motion for reconsideration an issue raised in his statement of additional grounds, and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration and appellant's motion to address in his motion for reconsideration an issue raised in his statement of additional grounds are denied.

DONE this 2nd day of September, 2014.

FOR THE COURT:

Becker, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70261-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Stephanie Guthrie, DPA
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

NINA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 17, 2014

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Party Respresented: PETITIONER

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- ☐ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

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