

No. 33987-4-III

**FILED**

OCT 26, 2016

Court of Appeals  
Division III  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

SHANE SAYER MORGAN,

Appellant.

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

The Honorable Judge Scott R. Sparks, III

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APPELLANT'S REPLY BRIEF

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## A. INTRODUCTION

Appellant Shane Sayer Morgan accepts this opportunity to reply to the State's brief. Mr. Morgan requests that the Court refer to his opening brief for issues not addressed in this reply.

## B. ARGUMENT IN REPLY

### **1. Mr. Morgan's argument under Issue 4 is a multiple acts argument, not an alternative means argument.**

This argument pertains to Issue 4 raised in Mr. Morgan's opening brief. Mr. Morgan argues the trial court violated his constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for second degree identify theft, as charged in count 2. *See* Appellant's Opening Brief pgs. 30-34. Mr. Morgan argues that because the State alleged three possible distinct acts that could have formed the basis of this conviction, and the State did not elect one of this acts upon which to seek a conviction, the trial court had to instruct the jury to agree on a specific act. *See* Appellant's Opening Brief pgs. 31-33.

In response, the State argues that second degree identity theft is not an alternative means crime, citing *State v. Butler*, 194 Wn. App. 525, 374 P.3d 1232 (2016). *See* Respondent's Brief pgs. 17-18, 23. In *Butler*, the court held "identity theft is not an alternative means crime, and therefore the trial court did not err by not issuing a unanimity instruction." *State v. Butler*, 194 Wn. App. 525, 530, 374 P.3d 1232 (2016).

Mr. Morgan agrees with the State that *Butler* held that identify theft is not an alternative means crime. *See Butler*, 194 Wn. App. at 530. However,

*Butler* does not apply to Mr. Morgan’s argument under Issue 4. Mr. Morgan’s argument under Issue 4 is a multiple acts argument, not an alternative means argument. *Cf. State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990) (“To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act.”) *with State v. Emery*, 161 Wn. App. 72, 198, 253 P.3d 413 (2001) (“The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged.”) (*citing State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994)); *see also State v. Bobenhouse*, 166 Wn.2d 881, 892-95, 214 P.3d 907 (2009) (setting forth the difference between multiple acts and alternative means).

Here, as argued in Mr. Morgan’s opening brief, the trial court’s failure to instruct the jury on unanimity for second degree identity theft, as charged in count 2, was a constitutional error, and the error was not harmless. *See* Appellant’s Opening Brief pgs. 30-34.

### **C. CONCLUSION**

Based upon the arguments set forth above and those set forth in Mr. Morgan’s opening brief, Mr. Morgan’s convictions should be reversed dismissed with prejudice. In the alternative, the convictions should be reversed and remanded for a new trial. At a minimum, the case should be remanded for resentencing. Mr. Morgan also objects to any appellate costs

should the State prevail on appeal. The record does not reflect that Mr. Morgan has the ability to pay.

Respectfully submitted this 26th day of October, 2016.

  
Jill S. Reuter, WSBA #38374

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 33987-4-III  
vs. )  
SHANE SAYER MORGAN )  
Defendant/Appellant )  
PROOF OF SERVICE )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 26, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Shane Sayer Morgan, #374829  
C-404  
Monroe Correctional Complex, WSRU  
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Having obtained prior permission from the Kittitas County Prosecutor's Office, I also served the Respondent State of Washington at prosecutor@co.kittitas.wa.us using Division III's e-service feature.

Dated this 26th day of October, 2016.



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