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Division III
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No. 35940-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

LAURENCE J. MAYO,

Appellant.

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

The Honorable Judge Scott R. Sparks

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Laurence Jamal Mayo was charged with eight counts: possession of a stolen firearm, unlawful possession of a firearm in the first degree, five counts of unlawful possession of fictitious identification, and one count of driving while license suspended in the third degree. Mr. Mayo pleaded guilty to driving while license suspended in the third degree before trial. A jury found Mr. Mayo guilty of unlawful possession of a firearm in the first degree and one count of unlawful possession of fictitious identification (count 7, a Texas driver's license). The jury found Mr. Mayo not guilty of possession of a stolen firearm, and was unable to reach a verdict on the remaining four counts of unlawful possession of fictitious identification.

As to the sole conviction for unlawful possession of fictitious identification (count 7, a Texas driver's license) insufficient evidence existed for this conviction. The State did not prove Mr. Mayo possessed the fictitious identification with the intent to commit theft, forgery, or identity theft, as required for a conviction. No evidence existed to show Mr. Mayo stole property or services while using the Texas driver's license, forged documents or other instruments while using the driver's license, or used the license to steal another person's identity. The conviction for count 7 should be reversed and dismissed with prejudice.

In the alternative, the trial court violated Mr. Mayo's constitutional right to a unanimous jury verdict for unlawful possession of fictitious identification (count 7, a Texas driver's license), because at least one of the alternative means was not supported by sufficient evidence. The State could not prove the identification was possessed with the intent to commit theft, forgery, or identity theft. The case must be reversed and remanded for a new trial as to count 7.

The trial court ordered court costs of $200 and a $100 DNA fee, which were mandatory despite indigency at the time they were imposed. Due to new legislation and case law, which applies prospectively to cases on appeal, the $200 in court costs and $100 DNA fee should be stricken from the judgement and sentence.

Mr. Mayo also preemptively objects to the imposition of any appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Mayo guilty of unlawful possession of fictitious identification, as charged in count 7, where the evidence was insufficient.
2. The trial court violated Mr. Mayo's right to a unanimous jury verdict for unlawful possession of ficitious identification, as charged in count 7, because at least one of the alternative means was not supported by sufficient evidence.
3. The trial court erred in imposing legal financial obligations of a $200 criminal filing fee and $100 DNA testing fee.
4. An award of costs on appeal against Mr. Mayo would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Mayo guilty of unlawful possession of fictitious identification as charged in count 7, where the evidence was insufficient.

Issue 2: In the alternative to Issue 1, whether the trial court violated Mr. Mayo's constitutional right to a unanimous jury verdict for unlawful possession of fictitious identification, as charged in count 7, because at least one of the alternative means was not supported by sufficient evidence.

Issue 3: Whether the trial court erred by imposing legal financial obligations (LFOs) of a $200 criminal filing fee where Mr. Mayo remains indigent, and a $100 DNA testing fee when Mr. Mayo previously paid the fee.

Issue 4: Whether this Court should deny costs against Mr. Mayo on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

On January 8, 2015, a trooper on patrol on I-82 in Kittitas County stopped a driver for speeding. (RP 143-145). The driver was Laurence Jamal Mayo. (RP 144).

Mr. Mayo admitted to the trooper he could not provide a valid driver's license and that he was driving with a suspended license. (RP 145). He also informed the trooper that the vehicle was a rental. (RP 146). After determining Mr. Mayo would be unable to find someone who could assist in moving the vehicle to a safe location, the trooper called for a tow truck to impound the vehicle, and arranged a ride with a second trooper for Mr. Mayo. (RP 149-152). After Mr. Mayo left the scene, and while performing an inventory search, the

trooper discovered a firearm in the glovebox. (RP 157-158). Knowing Mr. Mayo was not legally permitted to possess a firearm, the trooper requested Mr. Mayo be returned to the scene. (RP 158-159). When Mr. Mayo arrived, he was arrested for unlawful possession of a firearm and later transported to jail. (RP 159, 179).

Prior to entering the jail, Mr. Mayo was searched and several credit cards and a Texas driver's license were found in his possession. (RP 180-181). Most of the cards had the name "James Smith" on them, including a Texas driver's license. (RP 165-167, 180). The Texas license had an expiration date of December 22, 2017. (RP 181).

The State charged Mr. Mayo with unlawful possession of a firearm (count 2) and unlawful possession of fictitious identification of a Texas driver's license (count 7).[1] (CP 22).

The case proceeded to a jury trial. (RP 124-185). At trial, witnesses testified consisted with the facts stated above. (RP 124-185).

In addition, two employees from the car rental agency testified. (RP 129-142). Ron Rotz, a manager, testified his company rented a 2016 Fusion to an individual named "James Smith." (RP 130, 132). Mr. Rotz testified his computer

[1] The State also charged Mr. Mayo with possession of a stolen firearm (count 1), unlawful possession of fictitious identification (counts 3, 4, 5, and 6), and driving while license suspended in the third degree (count 8). (CP 21-23). The jury acquitted Mr. Mayo of possession of a stolen firearm (count 1) and could not reach a verdict on four of the five counts of unlawful possession of fictitious identification (counts 3, 4, 5, and 6). (RP 291-293; CP 185-188). Mr. Mayo pleaded guilty to the driving while license suspended in the third degree (count 8). (RP 117-118; CP 67-73). Therefore, those charges are not on appeal here.

indicated the person renting the car had a Texas driver's license. (RP 132-133). Mr. Rotz stated that "[u]sually you have to have a credit card and a valid driver's license" to rent a vehicle. (RP 133). Mr. Rotz could not identify what, if any, credit card was used to rent the vehicle. (RP 133). However, he testified James Smith's name was on the rental agreement, which may have been computer-generated from a credit card swipe. (RP 133-134). Mr. Rotz also never saw the individual who rented the vehicle. (RP 134).

A second employee at the car rental agency, Kolby Lucas, testified at trial. (RP 137-142). Mr. Lucas had difficulty remembering, but ultimately testified he rented a car to an individual named "James Smith" on January 3, 2018. (RP 138-139). Mr. Lucas testified his company requires a driver's license and valid credit card to rent a vehicle. (RP 139). He stated he rented a vehicle to "James Smith" with a Texas driver's license, but Mr. Lucas could not remember which vehicle had been rented out. (RP 139-140). He stated a valid driver's license is required in order to rent a vehicle, and that only military personnel are permitted to rent a vehicle with an expired driver's license. (RP 141-142).

A trooper testified a database search revealed the Texas driver's license was not registered to a real person. (RP 167).

While discussing jury instructions, defense counsel proposed a special verdict form. (RP 208-209; CP 58). Defense counsel voiced concerns the crime of unlawful possession of fictitious identification required an alternative means

instruction because it required proof of intent to commit theft, forgery, or identity theft with the fictitious identification. (RP 208-212; CP 58). But the trial court denied defense counsel's proposed instruction, stating the crime was not one of alternative means. (RP 208-212; CP 58). The parties also discussed the definitions of theft, forgery, and identity theft with the trial court. (RP 212-215). The trial court opined that identity theft in the context of this case made no sense, and did not apply to these facts. (RP 213-214). The State did not object to the use of the definitional instructions for forgery, written instrument, and access device. (RP 222). The State proposed these instructions. (RP 222; CP 131-133).

The trial court instructed the jury that to find Mr. Mayo guilty of unlawful possession of fictitious identification, the jury had to find:

> (1) On or about January 5, 2018 the defendant possessed a personal identification card, Texas Driver License;
> (2) That the personal identification card contained a fictitious person's identity;
> (3) That defendant possessed the identification card *with the intent to commit theft, forgery, or identity theft*; and
> (4) That the these acts occurred in the State of Washington.

(CP 170; RP 249-250).

The jury was also instructed as follows:

> Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

(CP 156; RP 243).

. . . .

> A person commits forgery when, with intent to injury or defraud, he possesses, offers, disposes of, or puts off as true, a written instrument which he or she knows to be forged.

(CP 163; RP 246).

> . . . .
>
> "Written instrument" means any access device.

(CP 164; RP 246).

> . . . .
>
> Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

(CP 165; RP 246).

The jury was not provided with an instruction that it must be unanimous in its verdict as to one of the three alternative means found in the to-convict instruction for unlawful possession of fictitious identification. (CP 141-183). And during closing argument, the State told the jury it did not have to be unanimous as to whether Mr. Mayo intended to commit theft, forgery, or identity theft, when it came to consideration of unlawful possession of fictitious identification. (RP 274).

The jury found Mr. Mayo guilty of unlawful possession of a firearm (count 2) and unlawful possession of fictitious identification (count 7, a Texas

driver's license). (CP 189; RP 293). The jury could not reach a verdict on counts 3-6, unlawful possession of fictitious identification, which were the charges for four credit cards found on Mr. Mayo's person. (CP 185-188; RP 291-293).

At sentencing, the trial court inquired whether Mr. Mayo had other financial obligations in other courts. (RP 317-318). Mr. Mayo answered he had a "whole bunch" of them. (RP 317). The court waived $900 in fees, but imposed $200 in court costs and a $100 DNA fee. (CP 242; RP 318).

Mr. Mayo did not object to the entry of the legal financial obligations. (RP 318).

The Judgment and Sentence contains the following boilerplate language: "[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations." (CP 243).

Mr. Mayo timely appealed. (CP 253). The trial court entered an Order of Indigency, granting Mr. Mayo a right to review at public expense. (CP 251-252).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Mayo guilty of unlawful possession of fictitious identification as charged in count 7, where the evidence was insufficient.

Insufficient evidence exists to support Mr. Mayo's conviction for unlawful possession of fictitious identification, as charged in count 7. The State was required to prove Mr. Mayo possessed a fictitious identification with intent to

commit theft, forgery, or identity theft, and the State failed to prove Mr. Mayo intended to commit any of these crimes. *See* RCW 9A.56.320(4).

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citation omitted). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citation omitted).

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citation omitted). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" *Id*.

The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

To find Mr. Mayo guilty of unlawful possession of fictitious identification, the jury had to find:

(1) On or about January 5, 2018 the defendant possessed a personal identification card, Texas Driver License;
(2) That the personal identification card contained a fictitious person's identity;
(3) That defendant possessed the identification card *with the intent to commit theft, forgery, or identity theft*; and
(4) That the these acts occurred in the State of Washington.

(CP 170; RP 249-250) (emphasis added); *see also* RCW 9A.56.320(4) (unlawful possession of fictitious identification).

The jury was also instructed with the following definitions:

> Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the

> value thereof, with intent to deprive that person of such property or services.

(CP 156; RP 243); RCW 9A.56.020(1)(a).

> . . . .
>
> A person commits forgery when, with intent to injury or defraud, he possesses, offers, disposes of, or puts off as true, a written instrument which he or she knows to be forged.

(CP 163; RP 246); RCW 9A.60.020(1)(b).

> . . . .
>
> "Written instrument" means any access device.

(CP 164; RP 246); RCW 9A.60.010(7).

> . . . .
>
> Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

(CP 165; RP 246); RCW 9A.56.010(1).

For a card to qualify as an access device, it must usable to "obtain something of value." *State v. Rose*, 175 Wn.2d 10, 18, 282 P.3d 1087 (2012). In *Rose*, the State Supreme Court found insufficient evidence existed to prove a stolen credit card was an "access device" because the State failed to prove the card could be used to obtain something of value. *Id*. at 18. The credit card had

not been activated, required a $30 activation fee, and was not tied to an existing account. *Id*. at 14-15.

Under the law of the case doctrine, jury instructions not objected to become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citations omitted); *also State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017) (upholding "law of the case" doctrine in Washington State). "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *Id*. (citation omitted). A defendant may assign error to the sufficiency of the evidence of the element added by a jury instruction. *Id*. at 102 (citations omitted).

Courts also apply the "law of the case" doctrine to definitional instructions. *State v. Calvin*, 176 Wn. App. 1, 21, 316 P.3d 496 (2013) (citations omitted), *review granted on other grounds*, 183 Wn.2d 1013, 353 P.3d 640 (2015). *See also State v. Mumm*, 195 Wn. App. 1021 (2016), *review denied*, 189 Wn.2d 1016, 404 P.3d (2017) (unpublished opinion) (State's jury instruction defining a "school bus" as containing at least eleven seats was the law of the case despite lack of statutory authority for the instruction; therefore, insufficient evidence was presented of the bus's seating capacity to support school bus route stop enhancements); *see also* GR 14.1(a) (authorizing citation to unpublished

opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Here, the State failed to prove Mr. Mayo possessed the Texas driver's license with intent to commit theft, forgery, or identity theft.

No evidence showed Mr. Mayo intended to use the Texas driver's license to commit theft, as there was no evidence at trial that he intended to deprive anyone of property or services. (RP 124-183). Neither of the car rental agency employees' testimony indicated Mr. Mayo intended to use the Texas driver's license to steal the vehicle or fail to pay for the rental service of the vehicle. (RP 129-142). Also, no witness specifically identified the Texas driver's license presented at trial as the exact same one which was used to rent the vehicle. (RP 132-133, 138-141). Though the car rental agency was able to confirm the vehicle had been rented with a Texas driver's license, the license in Mr. Mayo's possession expired December 22, 2017, before the vehicle's rental in early January 2018. (RP 132-133, 138-142, 181). Even if the circumstantial evidence in the case points to Mr. Mayo renting a car with the same Texas driver's license—despite Mr. Lucas's testimony stating only military personnel are permitted to rent a car with an expired license—nothing presented at trial indicates Mr. Mayo intended to steal property or services from the car rental agency. (RP 129-142). The State failed to prove Mr. Mayo intended to commit theft with the use of the Texas driver's license. RCW 9A.56.020(1)(a) (definition

of theft); (CP 156; RP 243) (instruction given to jury defining "theft"); *Hickman,* 135 Wn.2d at 102 (law of the case doctrine). The State did not object to the use of the theft instruction and as such the theft instruction became the law of the case. (RP 232; CP 156).

The State further failed to prove Mr. Mayo used the Texas driver's license with intent to commit forgery. (CP 170; RP 249-250); RCW 9A.56.320(4) (unlawful possession of fictitious identification). The jury was instructed "forgery" occurs when a person intends to offer a "written instrument" which he knows to be forged. (CP 163; RP 246); RCW 9A.60.020(1). Although the State could have requested an instruction defining a "written instrument" as "identification", the State instead proposed, and the court presented to the jury, a definitional instruction solely stating a "written instrument" was an "access device." (CP 132, 164; RP 222, 246); RCW 9A.60.010(7)(a) & (b). An "access device" must be a card or "or other means of account access" to obtain something of value. (CP 165; RP 246); RCW 9A.56.010(1). Because the State so narrowly defined a "written instrument", the Texas identification does not qualify as an "access device" and thus the State did not prove Mr. Mayo intended to commit forgery with it. *Hickman,* 135 Wn.2d at 102 (law of the case doctrine).

The State might argue here that Mr. Mayo intended to commit forgery with another access device in conjunction with the use of the Texas driver's license—for example, with one of the credit cards the trooper discovered in Mr.

Mayo's possession and containing the name "James Smith." (RP 167-168, 180-181). However, the jury did not find Mr. Mayo guilty of unlawful possession of fictitious identification for any of the four credit cards found in Mr. Mayo's possession. (RP 291-293; CP 185-188). The jury could not come to a unanimous decision. (RP 291-293; CP 185-188). The jury could not find there was enough evidence that Mr. Mayo possessed the credit cards (counts 3, 4, 5, and 6) with the intent to commit, forgery, or identity theft; thus it is untenable that those same credit cards could also support a conviction for unlawful possession of fictitious identification of the Texas driver's license.

Moreover, an access device must be usable to "obtain something of value." *Rose*, 175 Wn.2d at 18. No evidence was presented at trial that the credit cards or driver's license were linked to any accounts or were activated. (RP 124-183). No evidence was presented that Mr. Mayo intended to use any of the credit cards to obtain anything of value, which was possibly a reason the jury could not come to a verdict on counts 3-6. (RP 124-183, 291-293; CP 185-188).

The State did not prove Mr. Mayo possessed the Texas driver's license with the intent to commit forgery. Insufficient evidence existed.

Finally, the State also failed to prove Mr. Mayo intended to use the Texas driver's license to commit identity theft. No jury instruction was

given by the court to define "identity theft." (CP 141-178). But 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).

Because it was not proven Mr. Mayo possessed the Texas driver's license of another actual person, living or dead, there was insufficient evidence Mr. Mayo intended to commit identity theft. The evidence at trial supported the conclusion the Texas driver's license was not registered to a real person. (RP 167). The intent to commit identity theft did not exist nor was it proven. (RP 124-183). The trial court did not believe identity theft applied to this fact pattern, either. (RP 212-215).

Insufficient evidence exists to support the conviction of unlawful possession of fictitious identification in Count 7. The State failed to show Mr. Mayo intended to use the Texas driver's license to commit the crimes of theft, forgery, or identity theft. The conviction must be reversed and dismissed with prejudice. *Smith*, 155 Wn.2d at 505 (setting forth this remedy).

Issue 2: In the alternative to Issue 1, whether the trial court violated Mr. Mayo's constitutional right to a unanimous jury verdict for unlawful possession of fictitious identification, as charged in count 7, because at least one of the alternative means was not supported by sufficient evidence.

Mr. Mayo should receive a new trial on the unlawful possession of fictitious identification (count 7). The jury was not instructed that it had to be unanimous on whether Mr. Mayo possessed a fictitious personal identification card with the intent to commit theft, forgery, or identity theft, and insufficient evidence exists to establish at least one of these alternative means. (CP 141-178; RP 124-183). Therefore, the lack of a unanimity instruction on count 7 violated Mr. Mayo's constitutional right to a unanimous jury verdict.

"[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal." *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985); *State v. Martin*, 69 Wn. App. 686, 689, 849 P.2d 1289 (1993) (Even if instructing the jury on an alternate means that is unsupported by the evidence was "plainly the result of oversight, the giving of this erroneous instruction is not trivial… and may be raised for the first time on appeal."); *see also* RAP 2.5(a).

"An alternative means crime is one where the legislature has provided that the State may prove the proscribed criminal conduct in a variety of ways." *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017).

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707,

881 P.2d 231 (1994). "But in alternative means cases, where substantial evidence supports both alternative means submitted to the jury, unanimity as to the means is not required." *Armstrong*, 188 Wn.2d 340; *see also State v. Woodlyn*, 188 Wn.2d 157, 392 P.3d 1062 (2017) (stating "[w]hen there is sufficient evidence to support each alternative means, Washington defendants do not enjoy a recognized right to express unanimity"). "When one element of the crime can be satisfied by alternative means, jury unanimity is satisfied if the jury unanimously agrees the State proved that element beyond a reasonable doubt and the evidence was sufficient for each alternative means of committing that element." *Id*. at 343; *see also Woodlyn*, 188 Wn.2d at 165 (stating "[a] general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence.").

However, "if there is insufficient evidence to support *any* of the means, a 'particularized expression' of juror unanimity is required." *Woodlyn*, 188 Wn.2d at 165 (quoting *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). "When there is insufficient evidence to support one of the alternative means charged and the jury does not specify that it unanimously agreed on the other alternative, we are faced with the danger that the jury rested its verdict on an invalid ground." *Armstrong*, 188 Wn.2d at 343-344. In this situation, the conviction must be reversed. *Id*. at 344.

In *Woodlyn*, our Supreme Court rejected a harmless error approach that "a complete *lack* of evidence for one alternative allows courts to 'rule out' the

possibility that any member of the jury relied on the factually unsupported means." *Woodlyn*, 188 Wn.2d at 165-66. Instead, the Court found that "[a]bsent some form of colloquy or explicit instruction, we cannot assume that every member of the jury relied solely on the supported alternative." *Id*. at 166.

As acknowledged above, "[a]n alternative means crime is one where the legislature has provided that the State may prove the proscribed criminal conduct in a variety of ways." *Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017). No bright-line rule exists as to which crimes contain alternative means. *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). "The legislature has not statutorily defined alternative means crimes, nor specified which crimes are alternative means crimes." *Id*. Thus, whether a criminal statute contains alternative means for committing a crime is left to judicial determination. *Id*. Questions of statutory interpretation are reviewed de novo, and statutes are interpreted to give effect to legislative intent. *State v. Butler*, 194 Wn. App. 525, 528, 374 P.3d 1232 (2016).

To determine whether a statute contains alternative means, "[t]he statutory analysis focuses on whether each alleged alternative describes distinct acts that amount to the same crime." *Id*. (citation and internal quotation marks omitted). "The more varied the criminal conduct, the more likely the statute describes alternative means." *Id*. (citation omitted). The analysis focuses on "the different underlying acts that could constitute the same crime." *Id*. (citing *Owens*, 180

Wn.2d at 96-97). "The various underlying acts must vary significantly to constitute distinct alternative means." *Id*. (citing *Owens*, 180 Wn.2d at 97). Further, the statutory analysis "place[s] less weight on the use of the disjunctive 'or' and more weight on the distinctiveness of the criminal conduct." *Id*. (citation omitted).

Here, this issue is one of first impression. Currently no case law has addressed whether unlawful possession of fictitious identification is an alternative means crime.

But unlawful possession of fictitious identification, RCW 9A.56.320(4), sets forth three alternative means with which a person could be found guilty. As acknowledged above, unlawful possession of fictitious identification is defined as follows:

> (4) A person is guilty of unlawful possession of fictitious identification if the person possesses a personal identification card with a fictitious person's identification with intent to use such identification card to commit *theft, forgery, or identity theft*, when the possession does not amount to a violation of RCW 9.35.020.

RCW 9A.56.320(4) (emphasis added).

Theft, forgery, and identity theft are each distinct means of committing the crime of unlawful possession of fictitious identification, as by statutory definition they require different actions to prove criminal conduct. A review of the different crimes proves this.

For purposes of unlawful possession of fictitious identification, theft is defined as follows:

> To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services….

9A.56.020(1)(a).[2]

Also relevant to this inquiry, forgery is defined as follows:

> A person is guilty of forgery if, with intent to injure or defraud . . .
> [h]e . . . possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

RCW 9A.60.020(1)(b).[3]

Finally, 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.[4]

RCW 9.35.020(1) (emphasis added); *see also* CP 251; RP 617-618.

Each of these alternative means (theft, forgery, and identity theft) are distinct and separate crimes as defined by the legislature. Each crime carries its own method of commission, and each one carries its own penalties. RCW 9A.56.020-050

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[2] Although there are other means of committing theft, the jury was instructed only as to this portion of the statute. (CP 156; RP 243); RCW 9A.56.020(1)(a) and (b).

[3] Again, although there are other means of committing forgery, the jury was only presented instructions defining forgery pursuant to RCW 9A.60.020(1)(b) and did not include subsection (a). (CP 163; RP 246).

[4] The jury was never instructed as to the definition of "identity theft." (CP 141-178).

(theft statutes); RCW 9A.60.020 (forgery); RCW 9.35.020 (identity theft). Unlawful possession of fictitious identification is an alternative means crime because the State has to prove a defendant intended to commit theft, forgery, or identity theft, and each one of those alternatives are uniquely different methods of criminal conduct. RCW 9A.56.320(4).

Here, for count 7, the jury was instructed on unlawful possession of fictitious identification with intent to commit one or more of the following three crimes as alternatives: [1] theft, [2] forgery, or [3] identity theft. (CP 170; RP 249-250); RCW 9A.56.320(4) (unlawful possession of fictitious identification). The jury was not provided with an instruction that it must be unanimous in its verdict as to one of these three alternative means. (CP 141-183). In fact, the State informed the jury that unanimity as to these alternative means was not required. (RP 274). Defense counsel voiced concern the crime required an alternative means instruction, as well as proposed a special verdict form for this reason. (RP 208-212; CP 58). But the trial court denied the proposed instruction, stating the crime was not one of alternative means. (RP 208-212; CP 58).

Further, there was insufficient evidence to support the alternative means that Mr. Mayo intended to use the fictitious identification to commit theft, forgery, or identity theft. (RP 124-183). Although to prevail on this issue Mr. Mayo must only show one of the alternative means was not supported by sufficient evidence, none of the three alternative means were proven by the State,

as noted and thoroughly discussed above under Issue 1. *See Appellant's Opening Brief, Issue 1*. Mr. Mayo incorporates by reference here his argument above in Issue 1.

It cannot be assumed that every member of the jury relied solely on one of the alternatives of theft, forgery, or identity theft. *See Woodlyn*, 392 P.3d at 1067. Therefore, a particularized expression of juror unanimity on the alternative means was required. *Woodlyn*, 392 P.3d at 1067 (citation omitted). Because none was given, Mr. Mayo's conviction for unlawful possession of fictitious identification must be reversed and remanded for retrial. *State v. Kinchen*, 92 Wn. App. 442, 452, 963 P.2d 928 (1998) (setting forth this remedy).

The lack of a unanimity instruction deprived Mr. Mayo of his constitutional right to a unanimous jury verdict, and therefore, his conviction for unlawful possession of fictitious identification should be reversed and remanded for a new trial.

Issue 3: Whether the trial court erred in imposing $200 in court costs where Mr. Mayo was indigent, and a $100 DNA fee when DNA had already been collected due to a prior conviction.

The trial court imposed $200 in court costs on Mr. Mayo. The law now prohibits trial courts from imposing this $200 fee on defendants who are indigent at the time of sentencing, as well as the $100 DNA fee for those whose DNA has already been collected due to a prior conviction. These changes in the law apply

prospectively to cases on direct appeal at the time the law changed. Therefore, the $200 in court costs and $100 DNA fee imposed should be stricken.

At the time of Mr. Mayo's sentencing, the trial court was authorized to impose a $200 criminal filing fee:

> Clerks of superior courts shall collect the following fees for their official services . . . [u]pon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h) (2017).

However, effective June 7, 2018, by House Bill 1783, our Legislature amended this statutory provision to prohibit the imposition of this $200 criminal filing fee on indigent defendants:

> (2) Clerks of superior courts shall collect the following fees for their official services . . . (h) Upon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, *except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c)*.

Laws of 2018, ch. 269, § 17 (emphasis added).

In addition, House Bill 1783 amends former RCW 43.43.7541 to make the DNA database fee no longer mandatory if a defendant's DNA has been collected because of a prior conviction:

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction*.

Laws of 2018, ch. 269, § 18 (emphasis added).

Our Supreme Court recently held this statutory amendment applies prospectively to cases on direct appeal at the time the amendment was enacted. *See State v. Ramirez*, 426 P.3d 714, 721-23 (Wash. Sup. Ct. 2018).

In *Ramirez*, following his convictions in Superior Court, the court imposed $2,900 in LFOs on the defendant, including a $200 criminal filing fee and discretionary LFOs of $2,100 in attorney fees. *Ramirez*, 426 P.3d at 716. Following sentencing, the trial court issued an order of indigency. *Id*.

On appeal, the defendant argued "the trial court failed to make an adequate individualized inquiry into his ability to pay before imposing discretionary LFOs, contrary to *State v. Blazina*. *Id*. at 717; *see also State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). After Division Two of the Court of Appeals rejected this argument, our Supreme Court granted review. *Id*.

Our Supreme Court first held the trial court did not conduct an adequate individualized inquiry into the defendant's current and future ability to pay before imposing discretionary LFOs. *Id*. at 717-21. The Court noted that "[n]ormally, this *Blazina* error would entitle [the defendant] to a full resentencing hearing on his ability to pay LFOs." *Id*. at 721. The Court further noted that after it granted review, the legislature passed House Bill 1783. *Id*.

The Court then considered the defendant's argument that House Bill 1783's amendments applied to his case, because he qualified as indigent at the time of sentencing and his case was not yet final when House Bill 1783 was

enacted. *Id*. at 721-23. The Court held "House Bill 1783 applies prospectively to [the defendant] because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and [the defendant's] case was pending on direct review and thus not final when the amendments were enacted." *Id*. at 722. The Court concluded the defendant was entitled to benefit from the statutory changes in House Bill 1783. *Id*. at 723.

The Court acknowledged that House Bill 1783 made the following statutory changes:

> House Bill 1783 amends former RCW 10.01.160(3) to expressly prohibit courts from imposing discretionary costs on defendant who are indigent at the time of sentencing: "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." LAWS OF 2018, ch. 269, § 6(3).
> . . . .
> House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the $200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17.

Id. at 722.

Accordingly, the Court held "the trial court impermissibly imposed discretionary LFOs of $2,100, as well as the $200 criminal filing fee, on [the defendant]." *Id*. at 723. The Court remanded the case for the trial court to strike these two amounts from the defendant's judgment and sentence. *Id*.

Here, this direct appeal was not yet final when House Bill 1783's statutory amendments were enacted. *See* Laws of 2018, ch. 269, § 17. Therefore, Mr.

Mayo is entitled to benefit from the statutory changes in House Bill 1783. *See Ramirez*, 426 P.3d at 721-23.

Mr. Mayo was indigent at the time of sentencing. (CP 251-252); *see also* RCW 10.101.010(3)(a)-(c) (defining indigent). Therefore, the trial court erred in imposing $200 in court costs. *See* RCW 36.18.020(2)(h). The trial court also erred in imposing a $100 DNA collection fee, because Mr. Mayo has previously been convicted of a felony, and therefore his DNA has already been collected. *See* CP 226, 238, 242; *see also* RCW 43.43.7541; Laws of 2018, ch. 269, § 18. The trial court authorized a second collection contrary to the amended RCW 43.43.7541.

This court should remand this case for the trial court to strike the $200 in court costs and $100 DNA collection fee from Mr. Mayo's judgment and sentence.

Issue 4: Whether this Court should deny costs against Mr. Mayo on appeal in the event the State is the substantially prevailing party.

Mr. Mayo preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Mr. Mayo indigent was entered by the trial court for purposes of appeal, and there has been no known improvement to this indigent

status. (CP 251-252). To the contrary, Mr. Mayo's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Mayo remains indigent. Mr. Mayo's report states he owns no real or personal property, does not have income from any source, was likely on food assistance before incarceration, and owes approximately $47,000 in legal financial obligations. The report shows Mr. Mayo's financial circumstances have not improved since the date he was sentenced in this case.

At sentencing, the trial court briefly inquired into Mr. Mayo's ability to pay legal financial obligations, and waived $900 in costs. (CP 242; RP 317-318). Yet the court imposed $800, stating: "I'm required to impose the victim assessment and the Court costs and the DNA collection fee, so I have to impose $800. That's the lowest I can do." (CP 242; RP 318).

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. *See Blazina*, 182 Wn.2d at 835. In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Id.* at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Id.* at 834. Only by conducting such a "case-by-

case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id*.

The *Blazina* Court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Mayo's indigency has been determined for purposes of this appeal. (CP 251-252).

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment

provides, "[t]he adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Mayo met this standard for indigency. (CP 251-252).

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); *see also* CP 251-252. "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to "seriously question" this indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Mayo to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal.

This Court is asked to deny appellate costs at this time. Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such

costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id*.

There is no evidence Mr. Mayo's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. To the contrary, there is a completed report of continued indigency showing that Mr. Mayo remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

Mr. Mayo's conviction in count 7 for unlawful possession of fictitious identification should be reversed and dismissed with prejudice because insufficient evidence existed to uphold the conviction. In the alternative, Mr. Mayo's conviction in count 7 must be reversed and remanded for a new trial because he was deprived of his constitutional right to a unanimous jury verdict.

The case should also be remanded to the trial court to strike the $200 in court costs and $100 DNA fee.

Finally, Mr. Mayo asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 16th day of November, 2018.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 35940-9-III
vs.	)	
	)	
LAURENCE JAMAL MAYO,	)	
	)	PROOF OF SERVICE
Defendant/Appellant	)	
	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 16, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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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 the Washington State Appellate Courts' Portal.

Dated this 16th day of November, 2018.

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