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Division III  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36836-0-III

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STATE OF WASHINGTON, Respondent,

v.

SHANE MALOTTE, Appellant.

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**APPELLANT'S REPLY BRIEF**

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**TABLE OF CONTENTS**

**AUTHORITIES CITED**.....ii

**I. ARGUMENT**.....1

**II. CONCLUSION**.....6

**CERTIFICATE OF SERVICE** .....7

**AUTHORITIES CITED**

**State Cases**

*State v. Kealey*, 80 Wn. App. 162, 907 P.2d 319 (1995).....5

*State v. Mehrabian*, 175 Wn. App. 678, 308 P.3d 660 (2013).....2, 4

*State v. Mermis*, 105 Wn. App. 738, 20 P.3d 1044 (2001).....1

*State v. Sloan*, 79 Wn. App. 553, 903 P.2d 522 (1995).....2, 3

*State v. Smith*, 2 Wn.2d 118, 98 P.2d 647 (1939).....2

*State v. Williams*, 3 Wn. App. 2d 1048, \_\_ P.3d \_\_, 2018 WL 2069499 (case no. 34172-1-III, filed May 3, 2018) .....3

*State v. Woodlyn*, 188 Wn.2d 157, 392 P.3d 1062 (2017).....6

**Statutes**

RCW 9A.56.010(2).....5

RCW 9A.56.010(5).....1

**Other Sources**

13B Seth A. Fine, *Washington Practice: Criminal Law and Sentencing* § 31:11 (3d ed. Dec. 2019) .....2

## I. ARGUMENT

The State does not argue that theft of a firearm, as submitted to the jury in this case, is not an alternative means crime. *Respondent's Brief*, at 8-10. Instead, the State argues that substantial evidence supports the alternative means of "theft by deception" and "theft by misappropriation." *Respondent's Brief*, at 10, 17. Case law belies the State's argument.

To prove theft by deception, the State must show that the defendant obtained control of the property of another using deceptive means. *State v. Mermis*, 105 Wn. App. 738, 744, 20 P.3d 1044 (2001).

Under the statutory definition:

"Deception" occurs when an actor knowingly:

- (a) Creates or confirms another's false impression which the actor knows to be false; or
- (b) Fails to correct another's impression which the actor previously has created or confirmed; or
- (c) Prevents another from acquiring information material to the disposition of the property involved; or
- (d) Transfers or encumbers property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or
- (e) Promises performance which the actor does not intend to perform or knows will not be performed.

RCW 9A.56.010(5).

By the State's own account, Malotte came into possession of the gun with Griffith's permission for the purpose of target shooting. *Respondent's Brief*, at 16. According to the State, Malotte then assaulted Griffith with the gun and either fled with it or secreted it. *Respondent's Brief*, at 17. But Malotte's actions after the fact cannot establish that he obtained control of the gun by deception; if his possession was lawful before the theft, he is not guilty of theft by deception. 13B Seth A. Fine, *Washington Practice: Criminal Law and Sentencing* § 31:11 (3d ed. Dec. 2019); *see also State v. Smith*, 2 Wn.2d 118, 121, 98 P.2d 647 (1939).

Furthermore, the State does not identify here, and did not argue at trial, any false impression Malotte created that induced Griffith to give him the firearm or to keep Griffith from recovering it. *See State v. Mehrabian*, 175 Wn. App. 678, 700, 308 P.3d 660, *review denied*, 178 Wn.2d 1022 (2013), *abrogated on other grounds in State v. Schwartz*, 194 Wn.2d 432, 450 P.3d 141 (2019); *State v. Sloan*, 79 Wn. App. 553, 554, 903 P.2d 522 (1995). Griffith, Malotte, and Boyer did, apparently, engage in target shooting with Griffith's gun. I RP 82-83, 85. The State has not demonstrated (and did not argue below) that Malotte's statement that Boyer had never shot a gun before was false. *Respondent's Brief*, at 12. Instead, it simply argues that Malotte never returned the gun. *Respondent's Brief*, at 14. While this would prove a wrongful taking or

perhaps an embezzlement, it does not establish the use of any deception in obtaining control over the gun or preventing Griffith from learning about its disposition. *See Sloan*, 79 Wn. App. at 555 (when deception is not the means of obtaining control over another's property, evidence is insufficient).

Indeed, this fact is the critical difference between this case and the unpublished opinion in *State v. Williams*, 3 Wn. App. 2d 1048, \_\_\_ P.3d \_\_\_, 2018 WL 2069499 (case no. 34172-1-III, filed May 3, 2018), upon which the State relies. In *Williams*, the defendant contacted the rental car company after they had attempted to charge his credit card for the additional charged accrued to claim that the titled owner of the car owed him a billion dollars secured by the car. *Id.* at \*1. Thus, unlike here, the defendant in *Williams* asserted a fictitious claim of right to the property in order to retain possession of it. There is no evidence of any similar conduct by Malotte; to the contrary, Griffith advised that he had not spoken to Malotte or anybody else at the house since the fight. I RP 131.

Lastly, the State argues that Malotte told Preston Hamilton<sup>1</sup> not to reveal his identity, thereby perpetrating a deception on police who would

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<sup>1</sup> Consistent with the Appellant's Brief, this reply will distinguish between Preston Hamilton and his mother Vera Hamilton by using Preston's first name. No disrespect is intended.

have recovered the firearm if he was caught. *Respondent's Brief*, at 15. The State's claim that Malotte told anybody to lie is uncited and is not supported by the record. According to Preston, when police came into view, Malotte ran up the road with the gun after Boyer handed it to him. I RP 399, 401. Preston admitted telling police he did not know Malotte's name but said "they" told him not to say who it was. I RP 406. Because he did not remember what Malotte said before he ran off, by "they" Preston presumably referred to Boyer and Hamilton, who did lie to police about Malotte's identity. I RP 189, 195, 268, 271. Any deception urged by Boyer and Hamilton cannot, by this testimony, be attributed to Malotte.

But in any event, Hamilton's testimony established that Boyer handed Malotte the gun and Malotte ran away with it up the road. I RP 399, 401. Any deception to police was subsequent to Malotte obtaining possession of the gun, and therefore, was not used to obtain possession of it from Griffith. *See Mehrabian*, 175 Wn. App. at 701 ("It is sufficient that the false representations were believed and relied on by the victim and in some measure operated to induce the victim to part with the property.").

The State's argument that the evidence is sufficient to prove theft by misappropriating lost or misdelivered property is similarly groundless. Again, there is a statutory definition of the terms:

“Appropriate lost or misdelivered property or services” means obtaining or exerting control over the property or services of another which the actor knows to have been lost or mislaid, or to have been delivered under a mistake as to identity of the recipient or as to the nature or amount of the property.

RCW 9A.56.010(2). “Property is lost when the owner has parted with possession unwittingly and no longer knows its location. Property is mislaid when the owner intentionally puts it in a particular place, then forgets and leaves it.” *State v. Kealey*, 80 Wn. App. 162, 171, 907 P.2d 319 (1995), *review denied*, 129 Wn.2d 1021 (1996).

Again, there is simply no evidence that Griffith lost the firearm and that Malotte took it knowing he had lost it. Nor is there evidence that Griffith put it somewhere and forgot it, or that he gave it to Malotte believing Malotte to be somebody else. The State argues that Griffith had no idea where the firearm was after the assault. *Respondent’s Brief*, at 18. This overlooks Griffith’s testimony that after target shooting, the gun was still out in the yard. RP 105-06. Griffith also believed that Malotte used the gun to assault him. RP 98, 106. Thus, the only reason that Griffith did not know where the gun was, was because Malotte left with it, not because he lost or mislaid it first. Moreover, there is nothing to indicate that Malotte knew Griffith had lost or mislaid the gun – they had shot it together a short time before. Under the State’s argument, any wrongful

taking would be a misappropriation of lost or mislaid property because the owner does not know where it is after the thief carries it away. Such conflation calls into question why the legislature (and the common law) would intentionally establish separate categories of thefts by wrongful taking and thefts by misappropriation of lost or delivered property.

In short, the State fails to meet its burden to show that substantial evidence presents two of the three alternate means of theft presented to the jury. Accordingly, the instructions failed to ensure jury unanimity in the verdict. *State v. Woodlyn*, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017).

## VI. CONCLUSION

For the foregoing reasons, Malotte respectfully requests that the court REVERSE the conviction for theft of a firearm and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 2 day of April, 2020.

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Shane R. Malotte, DOC #416474  
Coyote Ridge Corrections Center  
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Connell, WA 99326

And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal to the following:

Kathryn I. Burke  
Ferry County Prosecuting Attorney  
kiburke@wapa-sep.wa.gov

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

Signed and sworn this 2 day of April, 2020 in Kennewick,  
Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

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