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Court of Appeals
Division III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36836-0-III

STATE OF WASHINGTON, Respondent,

v.

SHANE MALOTTE, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd #789
Kennewick, WA 99336
Phone: (509) 572-2409
Andrea@2arrows.net
Attorney for Appellant

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I. INTRODUCTION

The State charged Shane Malotte with theft of a firearm and its “to convict” instruction set forth three alternative means of committing the crime. Because the evidence was insufficient to establish at least one of the alternative means, the conviction for theft of a firearm must be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The State failed to present substantial evidence supporting at least one of the alternative means of committing theft of a firearm set forth in the “to convict” instruction.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether theft of a firearm is an alternative means crime.

ISSUE NO. 2: Whether the State presented substantial evidence that Malotte obtained a firearm by color of deception.

ISSUE NO. 3: Whether the State presented substantial evidence that Malotte misappropriated a lost or misdelivered firearm.

IV. STATEMENT OF THE CASE

Todd “TJ” Griffith started drinking one afternoon and decided to visit his neighbor, Vera Hamilton. I RP 68, 71, 76-77, 171. Hamilton’s daughter Destiny Boyer and Boyer’s boyfriend, Shane Malotte, were downstairs when he arrived and Malotte began to drink with him. I RP 81, 297, 341, 375. At first, everybody got along; Griffith let Malotte and Boyer shoot his gun, an SKS rifle. I RP 82-83, 85. But for reasons Griffith could not clearly recall at the time of trial, the evening quickly turned violent.

It appears the conflict between Malotte and Griffith began to build when Griffith grabbed Hamilton’s son Preston¹ and made a sexual comment and gesture toward him. I RP 378-79. Griffith admitted asking Preston whether he blew one of the neighbors down the road. I RP 92. He also remembered saying they had better kick Boyer (who was pregnant) in the stomach but denied kicking her, saying he may have just nudged her in the leg. I RP 95, 145. Preston, who said that he went upstairs after Griffith accosted him, said Malotte told him Griffith had pulled out a knife

¹ Because Preston Hamilton and his mother Vera share a last name, this brief will refer to the son by his first name, “Preston.” No disrespect is intended.

and swung it at him. I RP 383. Griffith admitted carrying a pocket knife and lead knuckles. I RP 84.

Preston reported looking out the window after he heard a strange sound and saw Griffith on the ground. I RP 386-87. Malotte was yelling at him to stay down but he would try to get back up and Malotte would continue to punch or kick him to get him down. I RP 389. Griffith remembered only that suddenly it was dark out and Malotte was kicking him in the face. I RP 97, 99. He believed Malotte was hitting him with the gun, but Preston said that no weapons were used. I RP 98, 101, 390.

When police arrived, Malotte ran up the road with the gun. I RP 105, 398-99. An officer chased him up the road on foot for some distance before returning to Hamilton's house. I RP 167-70. He found Griffith standing next to his police car with blood all over his face and his eyes swollen. I RP 172. After recovering shell casings from the road and a knife on the ground near the passenger door of Griffith's truck, the officer arrested Griffith for assault and took him to the hospital. I RP 179-80, 187-88. Griffith was ultimately treated for lacerations and fractures of the nose and sinus. II RP 521-25.

Malotte returned to Hamilton's house later that night or the next day, bringing the rifle with him. I RP 412-13. He also obtained a box of

ammunition for the gun. I RP 415. Police eventually identified Malotte as a suspect through social media postings and Griffith identified him as the person who assaulted him. I RP 196-98. Learning that he had been convicted of a felony and could not possess a firearm, police searched Hamilton's home and located the gun in a room Malotte had been using along with a box of ammunition matching the caliber of the rifle. I RP 198-201, 208. When police arrested him, Malotte said that he had to act because of the comments toward Preston and said that Griffith should get in trouble for the gun because it was his gun. I RP 233.

The State charged Malotte with several crimes arising from the fight and his subsequent arrest. CP 92. Among the charges was a count of theft of a firearm contrary to RCW 9A.56.300(1). CP 93. The "to convict" instruction for that count read:

To convict the defendant of the crime of theft of a firearm, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 28, 2018, the defendant
 - (a) wrongfully obtained or exerted unauthorized control over a firearm belonging to another; or
 - (b) by color or aid of deception, obtained control over a firearm belonging to another; or
 - (c) appropriated a lost or misdelivered firearm belonging to another; and
- (2) That the defendant intended to deprive the other person of the firearm; and

(3) That this act occurred in Ferry County in the State of Washington.

If you find from the evidence that elements (2) and (3), and any of the alternative elements (1)(a), (1)(b), or (1)(c) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives (1)(a), (1)(b), or (1)(c) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 132. Malotte proposed a “to convict” instruction that would have required only that the jury find he wrongfully obtained or exerted unauthorized control over a firearm, but the trial court did not give it. CP 63. Neither Malotte nor the State objected to the instructions given. I RP 494, II RP 507, 509.

The jury acquitted Malotte of first degree assault but convicted him of second degree assault, theft of a firearm, possessing stolen property, unlawfully possessing a firearm, and possessing a controlled substance. II RP 627-28; CP 159-64. The trial court imposed a 41 month sentence based on consecutive terms for theft of a firearm and unlawful possession of a firearm. CP 187. Malotte now appeals. CP 204.

V. ARGUMENT

In Washington, a criminal defendant's constitutional right to a fair trial requires a unanimous verdict. Wash. Const. art. I, § 21; *State v. Woodlyn*, 188 Wn.2d 157, 162-63, 392 P.3d 1062 (2017). Consequently, express jury unanimity is required when the jury is instructed on an alternative means crime and one or more of the means is unsupported by sufficient evidence. *Woodlyn*, 188 Wn.2d at 164; *State v. Barboza-Cortes*, ___ P.3d ___, *slip op.* no. 96397-5 (filed Nov. 7, 2019), at *2.

Here, theft of a firearm is an alternative means crime and the jury was instructed on all three alternatives. But there was no evidence that Malotte employed deception to take the firearm, or that the firearm was lost or misdelivered. Because two of the three alternative means lacked sufficient evidence, express jury unanimity was required and a general verdict fails to satisfy due process guarantees. *See Woodlyn*, 188 Wn.2d at 165. The jury here was expressly instructed that it did not have to be unanimous. Consequently, Malotte's conviction for theft of a firearm must be reversed. *See id.*

A. Theft of a firearm is an alternative means crime.

Before the court considers a unanimity challenge, it must first determine whether the statute creates alternative means of committing a crime. *Barboza-Cortes*, slip op. no. 96397-5, at *2. The mere use of disjunctive “or” language is not conclusive; instead, the court evaluates whether the language describes distinct acts, or nuances of the same act. *Id.*

The Washington Supreme Court has recognized that RCW 9A.56.020(1) establishes alternative means of committing the crime of theft. *See State v. Linehan*, 147 Wn.2d 638, 647, 56 P.3d 542 (2002) (“Linehan is correct that theft is an alternative means crime.”); *Woodlyn*, 188 Wn.2d at 163 (“The criminal act charged in this case, theft in the second degree, is an alternative means crime.”). Subsection (1)(a) penalizes theft by taking; (1)(b) penalizes theft by deception; and subsection (1)(c) penalizes theft by misappropriation. *See State v. Lee*, 128 Wn.2d 151, 157, 904 P.2d 1143 (1995) (identifying four statutory types of theft); *but see Linehan*, 147 Wn.2d at at 647-49 (clarifying that common law theft by embezzlement is not a separate alternative means of theft because embezzlement is one definition of theft by taking, and RCW 9A.56.010 does not create alternative means of theft).

The theft of a firearm statute expressly incorporates the three alternative means of theft set forth in RCW 9A.56.020(1). RCW 9A.56.300(4). Applying *Linehan* and *Woodlyn*, theft of a firearm is an alternative means crime because the charge can be proved by establishing the firearm was taken wrongfully, taken by deception, or taken by misappropriation. Because theft of a firearm is an alternative means crime, unanimity is not sufficiently ensured by a general verdict if sufficient evidence does not support each of the means submitted to the jury. See *Woodlyn*, 188 Wn.2d at 165.

B. Insufficient evidence supports the means of theft of a firearm by deception and theft of a firearm by misappropriation.

The jury was instructed that it could convict Malotte if it found he

- (a) wrongfully obtained or exerted unauthorized control over a firearm belonging to another; or
- (b) by color or aid of deception, obtained control over a firearm belonging to another; or
- (c) appropriated a lost or misdelivered firearm belonging to another.

CP 132. Sufficient evidence is present if a rational jury could conclude that the defendant committed the acts charged. See *Woodlyn*, 188 Wn.2d at 168.

Here, the evidence established that Griffith brought the gun to Hamilton's house and voluntarily gave it to Malotte and Boyer to shoot at some point in the afternoon. I RP 82-83, 85. When the police arrived, Malotte grabbed it and ran away with it. I RP 105, 399, 401. When he returned, he kept the gun in his room and did not return it to Griffith. I RP 201, 413.

Nothing in the facts establishes either deception or misappropriation. Griffith did not claim that Malotte tricked him into giving him the gun, or that he lied in order to retain it. *See* I RP 131 (testifying he had not talked to any of the participants since that night). Nor was there any indication that Griffith lost the gun sometime after shooting it with Malotte and Boyer, and Boyer running off with it. Because no reasonable jury could find that either of these alternatives were committed, the verdict can be upheld only if the jury expressly and unanimously found that Malotte was guilty under the theft by taking prong set forth as element (2)(a). *See Woodlyn*, 188 Wn.2d at 164.

C. Because the jury was not required to be unanimous in finding which of the alternative means was committed, the conviction is invalid.

So long as sufficient evidence supports all of the charged means, the jury need not express unanimity as to each of the means; but if insufficient evidence supports any charged means, then “a particularized expression of jury unanimity is required.” *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). Here, by contrast, the jury was expressly instructed that it did not have to be unanimous as to which alternative means was committed. CP 132. Consequently, the verdict does not meet minimum due process guarantees. *See Woodlyn*, 188 Wn.2d at 162, 164.

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 18 day of November,

2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written in a cursive style.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

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 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
PO Box 769
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 18 day of November, 2019 in Kennewick, Washington.



Andrea Burkhart

2019 WL 5798580

Only the Westlaw citation is currently available.
Supreme Court of Washington.

STATE of Washington, Respondent,
v.
Jose G. BARBOZA-CORTES, Petitioner.

No. 96397-5
|
Argued 05/09/2019
|
Filed November 07, 2019

Synopsis

Background: Defendant was convicted in the Superior Court, Chelan County, T. W. Small, J., of possession of methamphetamine, unlawful possession of firearm, three counts of third degree possession of stolen property, and four counts of identity theft. Defendant appealed. The Court of Appeals, Pennell, C.J., 425 P.3d 856, reversed in part. Defendant petitioned for review of the affirmed conviction, and the State petitioned for review of the reversed conviction.

Holdings: The Supreme Court, en banc, Madsen, J., held that:

[1] second degree unlawful possession of firearm statute was not alternative means statute, disapproving *State v. Holt*, 82 P.3d 688, and

[2] second degree identity theft statute was not an alternative means statute.

Affirmed in part and reversed in part.

González, J., filed concurring opinion.

West Headnotes (14)

[1] **Criminal Law**
⇒ Criminal act or omission
Alternative means crime is one where the legislature has provided that the State may prove

the proscribed criminal conduct in variety of ways.

[2] **Criminal Law**
⇒ Review De Novo
When appellate courts review statutory interpretation questions, court's review is de novo.

[3] **Criminal Law**
⇒ Assent of required number of jurors
Under state constitution, defendants have right to unanimous jury verdict. Wash. Const. art. 1, § 21.

[4] **Criminal Law**
⇒ Assent of required number of jurors
In alternative means cases, when criminal offense can be committed in more than one way, expression of jury unanimity is not required, provided each alternative means presented to jury is supported by sufficient evidence; however, if insufficient evidence supports one or more of the alternative means presented to the jury, the conviction will not be affirmed. Wash. Const. art. 1, § 21.

[5] **Criminal Law**
⇒ Criminal act or omission
Deciding which statutes create alternative means crimes is left to the courts, and this review begins by analyzing language of the criminal statute at issue.

[6] **Criminal Law**
⇒ Assent of required number of jurors
Only if court determines that statute creates alternative means of committing crime will it then analyze jury unanimity challenge. Wash. Const. art. 1, § 21.

[7] **Criminal Law**

APPENDIX

↔ Criminal act or omission

Use of the disjunctive “or” in the statutory language in question, the presence of statutory subsections, or availability of definitional statutes do not necessarily create alternative means of committing crime.

[8] **Criminal Law**

↔ Criminal act or omission

When determining if statute creates alternative means crime, salient inquiry is whether each alleged alternative describes distinct acts that amount to the same crime.

[9] **Criminal Law**

↔ Criminal act or omission

The more varied the criminal conduct, the more likely that statute describes alternative means of committing crime.

[10] **Criminal Law**

↔ Criminal act or omission

When statute describes minor nuances inhering in the same act, the more likely the various alternatives are merely facets of the same criminal conduct, and not alternative means of committing the same crime.

[11] **Weapons**

↔ Possessory crimes in general

Second degree unlawful possession of firearm statute was not alternative means statute; statute was more properly characterized as describing nuances inhering in the same prohibited act, namely accessing guns, and alleged alternatives of ownership, possession, and control were facets of the same criminal conduct; disapproving *State v. Holt*, 82 P.3d 688. Wash. Rev. Code Ann. § 9.41.040(2)(a).

[12] **False Pretenses**

↔ Degrees and aggravated offenses in general

Second degree identity theft statute was not an alternative means statute; statute could be properly characterized as describing nuances inhering in the same prohibited act, namely taking another's private information, the alleged alternatives were more aptly characterized as facets of the same criminal conduct, and punishment for using person's personal information did not depend on whether the crime committed was financial crime or any other crime. Wash. Rev. Code Ann. § 9.35.020(1).

[13] **Criminal Law**

↔ Criminal act or omission

Definitional statutes do not create multiple alternative means for a crime.

[14] **Criminal Law**

↔ Unanimity as to facts, conduct, methods, or theories

No jury unanimity instruction addressing alternative means was required since neither second degree unlawful possession of firearm statute nor second degree identity theft statute was an alternative means statute. Wash. Const. art. 1, § 21; Wash. Rev. Code Ann. §§ 9.35.020(1), 9.41.040(2)(a).

Appeal from Chelan County Superior Court, Docket No. 15-1-00085-4, Honorable Ted W. Small Jr., Judge

Attorneys and Law Firms

Kristina M. Nichols, Attorney at Law, Jill Shumaker Reuter, Eastern Washington Appellate Law, PLLC, Po Box 8302, Spokane, WA, 99203-0302, for Petitioner.

Douglas J. Shae, Ryan S. Valaas, Attorneys at Law, Po Box 2596, Wenatchee, WA, 98807-2596, for Respondent.

Opinion

MADSEN, J.

*1 ¶1 In this case the court is asked to determine if the second degree unlawful possession of a firearm statute, RCW 9.41.040(2)(a), and the second degree identity theft statute, RCW 9.35.020(1), are each alternative means statutes, and, if so, whether, under the circumstances of this case, the trial court was required to give a unanimity instruction addressing the alternative means. For the reasons discussed below, we hold that neither statute is an alternative means statute. Accordingly, the absence of a specific unanimity instruction regarding counts based on these statutes did not result in error. We affirm the Court of Appeals in part and reverse in part.

FACTS

¶2 This case began with the theft of a backpack from a vehicle. The backpack contained cash and checks obtained for a school fundraiser. Several days after the vehicle prowling, defendant was video recorded at an ATM (automated teller machine) depositing four checks in his bank account, three of which had been in the stolen backpack. The fourth check listed “Dava Construction Company” in the top left corner. Ex. 4. Police obtained a warrant to search defendant's residence for the backpack. During the search, police found methamphetamine in defendant's basement apartment and a shotgun under the mattress in the bedroom. There was no testimony that the defendant owned the shotgun.

¶3 The State charged defendant with multiple counts, including one count of second degree unlawful possession of a firearm and one count of identity theft for the Dava check. At trial, State's witness Shelly Bedolla testified that Dava Construction is a company that she and her husband operate. She testified that the check in question was not one of her company checks, although the name and address reflected her business. Nor did she know the persons listed on the check.

¶4 Following a three-day trial, the jury found defendant guilty of nine crimes, including second degree unlawful possession of a firearm and second degree identity theft.

¶5 Defendant appealed. In the published portion of its split opinion, Division Three of the Court of Appeals affirmed defendant's conviction for second degree unlawful possession of a firearm, holding that the firearm statute is not an alternative means crime; a different majority reversed defendant's conviction for second degree identity theft for the Dava check, holding that the identity theft statute *is* an alternative means crime and reversal is required because the

evidence did not support both alternative means and the trial court's instructions did not require express unanimity. *State v. Barboza-Cortes*, 5 Wash. App. 2d 86, 88-89, 425 P.3d 856 (2018). Defendant petitioned for review of the noted affirmed conviction, and the State petitioned for review of the noted reversed conviction. This court granted both petitions. *State v. Barboza-Cortes*, 192 Wash.2d 1009, 432 P.3d 788 (2019).

ANALYSIS

Standard of Review

[1] [2] ¶6 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 Wash.2d 333, 340, 394 P.3d 373 (2017) (citing *State v. Peterson*, 168 Wash.2d 763, 769, 230 P.3d 588 (2010)). Deciding which statutes create alternative means crimes is left to judicial interpretation. *State v. Sandholm*, 184 Wash.2d 726, 732, 364 P.3d 87 (2015) (citing *Peterson*, 168 Wash.2d at 769, 230 P.3d 588). Accordingly, as with other statutory interpretation questions, review is *de novo*. *State v. Mayorga DeSantiago*, 149 Wash.2d 402, 417, 68 P.3d 1065 (2003).

The Requirements of Unanimity and Alternative Means

*2 [3] [4] ¶7 Under our state constitution, criminal defendants have the right to a unanimous jury verdict. *Sandholm*, 184 Wash.2d at 732, 364 P.3d 87 (citing WASH. CONST. art. I, § 21). In alternative means cases, where the criminal offense can be committed in more than one way, “an expression of jury unanimity is not required provided each alternative means presented to the jury is supported by sufficient evidence.” *Id.* However, if insufficient evidence supports one or more of the alternative means presented to the jury, the conviction will not be affirmed. *Id.* (citing *State v. Ortega-Martinez*, 124 Wash.2d 702, 707-08, 881 P.2d 231 (1994)).

[5] [6] ¶8 As noted, deciding which statutes create alternative means crimes is left to the courts. *Id.* “This review begins by analyzing the language of the criminal statute at issue.” *Id.* (citing *State v. Owens*, 180 Wash.2d 90, 96, 323 P.3d 1030 (2014)). Only if the court determines that the statute creates alternative means will it then analyze a unanimity challenge. *Id.*

[7] [8] [9] [10] ¶9 In analyzing the statute at issue, the use of the disjunctive “or” in the language in question, the presence of statutory subsections, or the availability of definitional statutes do not necessarily create alternative means. *Id.* at 734, 364 P.3d 87. Rather, the salient inquiry is “whether each alleged alternative describes ‘distinct acts that amount to the same crime.’” *Id.* (emphasis omitted) (quoting *Peterson*, 168 Wash.2d at 770, 230 P.3d 588). “The more varied the criminal conduct, the more likely the statute describes alternative means.” *Id.* “But when the statute describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.” *Id.*

¶10 By way of example, this court in *Sandholm* explained that the mere listing of eight actions in the trafficking in stolen property statute, RCW 9A.82.050, did not create eight alternative means but only two true alternatives.¹

The first seven alleged “alternatives” represented multiple facets of a single means, while the eighth alternative was a true alternative because it described a *separate category of conduct*. In other words, only two statutory means existed because only two distinct types of conduct were established in the trafficking statute: *participating* in the theft of stolen property and *transferring* stolen property.

Id. at 734-35, 364 P.3d 87 (some emphasis added) (citation omitted) (discussing *Owens*, 180 Wash.2d at 97-98, 323 P.3d 1030).

¶11 Likewise, the *Sandholm* court explained that provisions in the sex offender registration statute, former RCW 9A.44.130 (2003), concerning failure to register with authorities after becoming homeless, after moving within the county, and after moving out of the county, did not present true alternatives. “Rather than describing distinct acts, ... the alleged ‘alternatives’ each described the same single act: failure to register as a sex offender without alerting the appropriate authorities. Thus, the statute created a single means to commit the crime.” *Sandholm*, 184 Wash.2d at 734,

364 P.3d 87 (discussing *Peterson*, 168 Wash.2d at 770, 230 P.3d 588).

¶12 The *Sandholm* court then turned to the DUI (driving under the influence) statute before it, former RCW 46.61.502 (2008), and considered the effect of its subsections containing “affected by” clauses. *Sandholm*, 184 Wash.2d at 735, 733, 364 P.3d 87 (i.e., “ ‘under the influence of or affected by intoxicating liquor or any drug; or ... under the combined influence of or affected by intoxicating liquor and any drug’ ” (quoting former RCW 46.61.502(b)-(c))). Reiterating that “the distinctiveness of the conduct” is the salient inquiry, this court opined:

*3 Under this analysis, the DUI statute’s “affected by” clauses do not describe multiple, *distinct types of conduct* that can reasonably be interpreted as creating alternative means. Rather, those portions of the DUI statute contemplate only one type of conduct: driving a vehicle under the “influence of or while “affected by” certain substances that may impair the driver. Former RCW 46.61.502 (2008). These statutory subsections describe facets of the same conduct, not *distinct criminal acts*. Whether the defendant is driving under the influence of alcohol, or drugs, or marijuana, or some combination thereof, the defendant’s conduct is the same—operating a vehicle while under the influence of certain substances. The fact that one substance or multiple substances may have caused that influence does not change the fundamental nature of the “influence of or “affected by” criminal act. Former RCW 46.61.502 (2008).

Id. at 735, 364 P.3d 87 (emphasis added and omitted). With this analysis in mind, focusing on whether the alleged alternative means describe *distinct types of conduct*, we turn to the parties’ contentions.

Second Degree Unlawful Possession of a Firearm

[11] ¶13 Jose Barboza-Cortes contends that the trial court violated his right to a unanimous jury verdict for unlawful possession of a firearm because one of the alternative means, ownership, was not supported by sufficient evidence. As discussed above, our first inquiry is whether the unlawful possession of a firearm statute qualifies as an alternative means crime. We begin with the statute's language. RCW 9.41.040, declares, in relevant part:

(2)(a) A person ... is guilty of the crime of unlawful possession of a firearm in the second degree, if the person ... owns, has in his or her *possession*, or has in his or her *control* any firearm:

(i) [a]fter having previously been convicted ... in this state or elsewhere of [specified felony crimes].

(Emphasis added.) Defendant urges us to adopt the analysis in Judge Fearing's dissent. Judge Fearing opined that the words "possess" and "control" are "similar in nature," such that if RCW 9.41.040(2)(a) contained only those alleged alternatives it would not qualify as an alternative means crime. *Barboza-Cortes*, 5 Wash. App. 2d at 112, 425 P.3d 856 (Fearing, J., dissenting in part). But the third alternative, "own," in the dissent's view, "is significantly different from possession or control." *Id.*

¶14 In the present context, we disagree. While there may be subtle distinctions in aspects of ownership, possession, and control that may be material in other contexts, in the present circumstance they all describe ways of accessing guns; and all of those interactions have been barred by the legislature as regards felons. Thus, in this context, the statute is more properly characterized as describing "nuances inhering in the same [prohibited] act"—accessing guns. *Sandholm*, 184 Wash.2d at 734, 364 P.3d 87. We conclude that the alleged alternatives are "facets of the same criminal conduct." *Id.* Accordingly, RCW 9.41.040(2) is not an alternative means crime.² We affirm the Court of Appeals on this issue.

Second Degree Identity Theft

[12] ¶15 The State contends that the second degree identity theft statute is not an alternative means crime and urges this court to reverse Division Three's holding, which reached the opposite conclusion. Again, we begin with the statute's language.

[13] ¶16 RCW 9.35.020(1) provides that "[n]o 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." (Emphasis added.) At issue is whether the phrases "means of identification" and "financial information" describe separate categories of conduct.³ See *Sandholm*, 184 Wash.2d at 734-35, 364 P.3d 87. Those terms are defined⁴ as follows:

*4 (1) "Financial information" means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:

(a) Account numbers and balances;

(b) Transactional information concerning an account; and

(c) Codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identicaid numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

....

(3) "Means of identification" means information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be used to identify the person, including unique biometric data.

RCW 9.35.005 (emphasis added).

¶17 We acknowledge that the "means of identification" definition expressly excludes information "describing finances or credit." RCW 9.35.005(3). Nevertheless, while the identity theft statute lists categories of information (and the definitional statute describes specific sets of such information) to which a violation of the statute applies, the statute describes and prohibits only a single type of conduct: the taking of another's private information to commit or

aid and abet commission of a crime. It is unclear what distinction the legislature intended when it divided “means of identification” and “financial information,” but what is clear is the overlap in a number of the items identified in each of these definitions. For example, driver’s license, Social Security, and tax identification numbers are expressly listed in both definitions. Additionally, there is implicit overlap in other items, “[I]nformation held for the purpose of account access or transaction initiation” often includes a mother’s maiden name, which also relates to the “ancestor of the person.” RCW 9.35.005(1)(c), (3). Thus, it is difficult to see these definitions as describing distinct or different conduct. It is also clear that the distinction between financial identifying information is not significant to the conduct the legislature is trying to prevent, which is the use of another’s identification to commit any crime. In other words, punishment for using a person’s personal information does not depend on whether the crime committed is a financial crime or any other crime. We conclude that the identity theft statute may be properly characterized as describing “nuances inhering in the same [prohibited] act”—taking another’s private information. *Sandholm*, 184 Wash.2d at 734, 364 P.3d 87. Thus, the alleged alternatives here are more aptly characterized as “facets of the same criminal conduct.” *Id.* Accordingly, we hold that RCW 9.35.020(1) is not an alternative means crime. We reverse the Court of Appeals on this issue.⁵

CONCLUSION

*5 [14] ¶18 We hold that the second degree unlawful possession of a firearm statute, RCW 9.41.040(2)(a), is not an alternative means statute and affirm the Court of Appeals on this issue. We hold that the second degree identity theft statute, RCW 9.35.020(1), also is not an alternative means statute and reverse the Court of Appeals on this issue. Because neither of the noted statutes is an alternative means crime, no unanimity instruction addressing alternative means was required and the absence of such instruction was not error. Accordingly, we affirm the Court of Appeals in part and reverse in part.

WE CONCUR:

Footnotes

Fairhurst, C.J.

Johnson, J.

Stephens, J.

Wiggins, J.

Gordon, McCloud, J.

Yu, J.

González, J. (concurring)

¶19 Reasonable minds may disagree about whether the identity theft and unlawful possession of a firearm statutes are alternative means crimes. *See State v. Barboza-Cortes*, 5 Wash. App. 2d 86, 95, 425 P.3d 856 (2018); *id.* at 116, 425 P.3d 856 (Fearing, J., dissenting in part). I agree with the majority that neither is an alternative means crime. I write separately, however, because this has convinced me we should modify our approach to alternative means crimes.

¶20 Our current system is unworkable and results in the vacation of fair convictions after fair trials. Instead, we should adopt the federal approach from *Griffin v. United States*, 502 U.S. 46, 56, 112 S.Ct. 466, 116 L. Ed. 2d 371 (1991). Under *Griffin*, on appellate review, a general jury verdict on an alternative means crime will not be vacated so long as sufficient evidence supports at least one of the means.¹ *See id.* In *State v. Owens*, 180 Wash.2d 90, 95 n.2, 323 P.3d 1030 (2014), and *State v. Ortega-Martinez*, 124 Wash.2d 702, 707-08, 881 P.2d 231 (1994), we declined to follow the approach from *Griffin*. As a result, we have created an arbitrary, unnecessary, and unpredictable standard that turns on increasingly subtle shades of statutory meaning. I recognize I signed some of the precedents that I would now reject.

¶21 With these observations, I concur.

All Citations

--- P.3d ---, 2019 WL 5798580

- 1 The statute in question provided, “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.” *Sandholm*, 184 Wash.2d at 734 n.3, 364 P.3d 87 (quoting RCW 9A.82.050(1)).
- 2 Cf. *State v. Holt*, 119 Wash. App. 712, 718, 82 P.3d 688 (2004) (stating without analysis that “Second degree unlawful possession of a firearm is an alternative means offense committed when a convicted felon (1) owns, (2) possesses, or (3) controls a firearm. RCW 9.41.040(l)(b).”). *Holt* is disapproved to the extent it is contrary to the resolution here.
- 3 In *State v. Butler*, 194 Wash. App. 525, 530, 374 P.3d 1232 (2016), Division Two of the Court of Appeals held that identity theft is not an alternative means crime. But the *Butler* court considered only “the four verbs” contained in the identity theft statute and did not consider the two provisions at issue here. *Id.*
- 4 While definitional statutes do not create multiple alternative means for a crime, see *State v. Smith*, 159 Wash.2d 778, 785, 154 P.3d 873 (2007), the means at issue here are listed in the substantive offense itself. See *id.* at 789-90, 154 P.3d 873 (“we limit the reach of the alternative means doctrine to those alternative means directly provided for by the assault statutes” in question).
- 5 Given our disposition, we do not reach the State’s contention that it effectively elected one alternative means in closing argument.
- 1 Defendants, of course, should be free to request jury instructions that require jury unanimity and judges should grant such requests if necessary to protect the defendant’s right to jury unanimity. See WASH. CONST. art. I, § 21.

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