COA No. 43932-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW AHO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Beverly G. Grant

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF APPEAL

Mr. Aho was charged with theft of a firearm and unlawful possession of that firearm, committed November 7, 2010. When the defendant moved to dismiss after the State rested, arguing that the State had failed to prove that the firearm was the .357 specifically alleged in the information, the State was allowed to amend the information to allege that the firearm was a 10 mm. Yet the jury instructions subsequently told the jury it could rely on "any" firearm for the theft count, and on the possession count, that the defendant was guilty if he possessed "a" firearm. The charging documents failed to provide notice, the information was improperly amended, and at a minimum, Mr. Aho was entitled to a unanimity instruction, and its absence was harmful and requires reversal.

On Mr. Aho's second charge of unlawful possession of a firearm, committed January 28, 2011, the State produced evidence of a 9 mm handgun found in the defendant's girlfriend's car, and an Enfield rifle that Mr. Aho gave to her father a month previously. When the jury inquired during deliberations if both the firearms were relevant to this possession charge, the prosecutor asked the court to answer yes, and the court told the jury to refer to its instructions. The jury instructions only generally stated that the

defendant was guilty if he possessed "a firearm," and the jury returned 6 minutes later with its verdicts. Where the Enfield rifle was not operable, the State failed to prove the alternative means in the instructions, and the defendant's right to jury unanimity on the criminal act was also violated, requiring reversal.

B. ASSIGNMENTS OF ERROR

1. The charging documents and the entire record in Mr. Aho's case failed to provide notice of the charges in counts 4 and 5.

2. The trial court erred in allowing the State, after it had rested, to amend the original information to change the firearm specified in the information from a .357 to a 10 mm.

3. The defendant's Petrich right to express assurances of jury unanimity was violated on counts 4 and 5.

4. Mr. Aho was convicted of an uncharged crime in counts 4 and 5.

5. The trial court erred in denying Mr. Aho's motion to dismiss for the State's failure to make out a *prima facie* case.

6. On count 8, the State failed to produce substantial evidence to support the alternative statutory means of "possessing," "owning," and "controlling" a device that was a "firearm" on or about January 28, 2011.

7. Mr. Aho's right to jury unanimity under Petrich was violated as to count 8.

8. The trial court erred in answering the jury's inquiry # 2, which pertains to the unanimity errors as to the means, and the facts, in count 8.

9. The trial court erred in instructing the jury that a firearm is any gun-like device that is not a "toy."

10. The trial court violated the time for trial rule by continuing Mr. Aho's trial date on the basis of court congestion.

11. The trial court erroneously sentenced Mr. Aho to three consecutive terms for his three firearm-related offenses.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were the charging documents and the entire record in Mr. Aho's case inadequate to provide notice of the charges of theft of a firearm and possession of the firearm, as charged in counts 4 and 5?

2. Did the trial court abuse its discretion in allowing the State, after it had rested, to amend the original information to change the firearm specified in the information from a .357 to a 10 mm?

3. Was Mr. Aho's Petrich right to express assurances of jury unanimity violated on counts 4 and 5?

4. Was Mr. Aho convicted of an uncharged crime in counts 4 and 5?

5. Did the trial court abuse its discretion in denying Mr. Aho's motion to dismiss for the State's failure to make out a *prima facie* case?

6. On count 8, did the State fail to produce substantial evidence to support the alternative statutory means of "possessing," "owning," and "controlling" a device that was a "firearm" on or about January 28, 2011?

7. Mr. Aho's right to jury unanimity under Petrich was violated as to count 8.

8. Did the trial court abuse its discretion in answering the jury's inquiry # 2?

9. Did the trial court abuse its discretion in instructing the jury that a firearm is any gun-like device that is not a "toy"?

10. The trial court violated the time for trial rule by continuing Mr. Aho's trial date on the basis of court congestion, without documenting the basis for the continuance.

11. Did the trial court erroneously sentence Mr. Aho to three consecutive terms for his three firearm-related offenses, contrary to RCW 9.94A.589(1)(c)?

D. STATEMENT OF THE CASE

1. <u>The notice given in the pre-trial information</u>. In an information and affidavit of probable cause filed January 31, 2011, the Pierce County prosecutor notified Mr. Aho to defend against the following charges:

- on November 7, 2010, committing residential burglary of the Lake Whitman home of Bruce Gambill (count 3[1]),
- theft of a ".357 revolver handgun" from the home (count 4),
- second degree unlawful possession of the firearm on that date (VUFA) (count 5);

along with charges of:

- on January 28, 2011, committing unlawful possession of a controlled substance (count 6),
- unlawful use of drug paraphernalia (count 7, misdemeanor), and
- second degree unlawful possession of a 9mm firearm (count 8), committed on that date (charged as ownership, possession and control of the firearm), when Mr. Aho was arrested at the residence of his girlfriend, former co-defendant Jill Newkirk, who plead guilty.

CP 1-3 (information); CP 4-5 (affidavit).

According to the State's allegations, Nathan Rolfe, along with Mr. Aho, Ms. Newkirk, and Brandi Snow (who also pled guilty),

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[1] Prior counts 1 and 2, not listed in the January 31, 2011, information pertained to co-defendant Nathan Rolfe.

agreed to a plan wherein Newkirk and Snow would go to Mr. Gambill's house and seek his assistance with their car down by the nearby Lake, following which Mr. Rolfe and Mr. Aho would enter the residence. The women did not see Mr. Aho go into the house. Mr. Gambill stated he found items missing from the home on his return from the Lake. However, he did not report the burglary immediately, but, using "Facebook," he eventually located Brandi Snow, and secured her help in recovering a laptop computer. Brandi Snow testified at trial that Mr. Gambill had showed up at her home with brass knuckles, and took her grandmother's ring off her finger, and took her car, "[b]ecause of what we did." CP 1-3, 4-5; 8/22/12RP at 271.

A month later, Gambill made a report of the burglary to the Pierce County Sheriff's Office, claiming he had a .357 "Rueger" handgun stolen, and describing it in detail, along with other items he asserted were taken. CP 1-3, 4-5; Exhibit 50 and Exhibit 51 (theft report and "inventory sheet").

On January 28, 2011, deputies arrested Ms. Newkirk and Mr. Aho inside a fifth-wheel trailer home situated on the property of Ms. Newkirk's father, on January 28, 2011. Brandi Snow would later testify that she had seen Rolfe and Aho handling some type of

Western movie-style handgun (no gun was ever located) at the fifth wheel, to which the four had allegedly repaired in the hours after the burglary. A search warrant located a methamphetamine bindle, and a glass pipe, and also a .9mm handgun in Ms. Newkirk's vehicle which was the basis for the second count of unlawful firearm possession (count 8) charged against Mr. Aho. The search of the fifth wheel also located a receipt for selling gold, and a weight scale, which a Deputy stated did not have drugs on it and was never tested for any substances. CP 1-3, 4-5; 8/22/12RP at 264-66; 8/23/12RP at 342, 362-33, 399.

2. <u>Counts 4 and 5</u>. At trial, Mr. Gambill testified that the gun that was stolen from his home was a 10 mm semi-automatic magazined handgun, rather than the Ruger .357 cylindered revolver he reported to the Sheriff. 8/20/12RP at 81, 115, 8/22/12RP at 189. Deputy Filing testified that Mr. Gambill told him that his previous inventory of stolen items should simply include an additional gun, the claimed 10 mm handgun. 8/20/12RP at 115; 8/23/12RP at 377. Neither firearm, the one allegedly stolen, or the one not stolen, was ever produced.

Brandi Snow testified that the pistol she claimed she saw Mr. Aho handle at the fifth wheel appeared to be a small, engraved,

"older western type" gun of the sort seen in movies, rather than the type seen in modern police shows. 8/22/12RP at 264, 69-270.

Before the State rested, all of its prosecution witnesses had been excused following their testimony.[2]

After the State rested its case, Mr. Aho moved to dismiss for failure to make out a *prima facie* case on several charges, *inter alia*, that Mr. Gambill had a .357 firearm taken, as stated in the information. The State responded by seeking to amend the information to change the specified firearm from a .357 gun to a "10mm" gun, which the court permitted over defense objections. 8/27/12RP at 483-88; CP 55-57.

However, the jury instructions for the counts, 4 (firearm theft) and 5 (VUFA, firearm possession by a felon), stated generally that the defendant was guilty on the November 7 counts if he stole "any firearm," and that he was guilty of the possession charge if he possessed "a firearm." CP 27, CP 28.

3. <u>Count 8</u>. At trial, the State had introduced the 9mm handgun found in Ms. Newkirk's car when Mr. Aho was arrested on January 28, and proved it could be fired normally. 8/27/12RP at

[2] 8/22/12RP at 195 (witness Gambill excused); 8/22/12RP at 241 (witness Jill Newkirk excused); 8/22/12RP at 301 (witness Brandi Snow told to step down); 8/23/12RP at 400 (Deputy Filing excused); 8/23/12RP at 437 (Deputy Baker told to step down); 8/27/12RP at 463 (drug analyst excused), 8/27/12RP at 471 (Mason allowed to step down).

470. The State also introduced a World War 1-era Enfield[3] rifle that Mr. Aho's girlfriend's father gave to deputies at the time of Matthew's arrest. Mr. Aho had given the device to him a month earlier, as a rent payment for allowing him to stay in his daughter's fifth wheel on the property. When the State's last witness, its firearms examiner, testified that the Enfield was "inoperable," the prosecutor proffered a supplemental jury instruction stating that a "firearm" need not be operable, but need only be a non-toy gun. 8/27/12RP at 475-76. Over objection, the court allowed this instruction to be added; the statutory definition of "firearm" appearing earlier in the instructions, was left to remain in the packet also. CP 31; CP 37.

4. <u>Closing argument</u>. In the State's closing argument, the prosecutor argued on counts 4 and 5 that Mr. Gambill said it was a 10mm handgun that was stolen, and criticized the anticipated defense arguments impeaching Mr. Gambill's shifting claims. 8/27/12RP at 530, 546. The prosecutor did not argue that the jurors should all agree on one of Gambill's claims or the other.

On count 8, the prosecutor argued that the 9 mm handgun found in Jill Newkirk's car was constructively possessed by Mr.

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[3] The transcript refers to the rifle as an "Infield."

Aho. 8/27/12RP at 534-36. The prosecutor did not tell the jury to disregard the alternative statutory means in the jury instructions, charging Mr. Aho with "owning" a firearm on or about January 28.

5. <u>Deliberations and jury inquiries</u>. During deliberations on August 28, the jury sent out its first note to the trial court, stating that it could not come to a unanimous decision on count 8. The jury was told to return the next day to continue deliberating. 8/28/12RP at 571-73; CP 58.

On August 29, the jury sent out its second inquiry regarding count 8, asking about the 9mm handgun and the Enfield:

> Do both exhibits 48 and 49 (either/or) apply to count VIII?

CP 65; 8/29/12RP(volume III) at 4.

The State urged the court that the response was "yes." The prosecutor stated: "The two firearms, and **yes** they do relate to that same count [count 8]." (Emphasis added.) 8/29/12RP at 4. The defense argued that this went beyond closing argument. 8/29/12RP(volume III) at 4. The trial court ruled:

> Well, they are the triers of fact, and so I think the more nebulous concept would be simply to say, "Just simply follow the instructions as they were given to you."

8/29/12RP("volume III") at 4. The court responded to the jury inquiry by writing,

> You should follow the instructions as given to you along with your recollections of the testimony and your notes.

CP 65. The court's written answer to this second jury inquiry was given to the jury at 9:44 a.m. Supp. CP ___ (minutes of 8/29/12, 9:44 a.m. minute entry). At 9:50 a.m., the jury announced that it was ready with its verdicts. Supp. CP ___ (minutes of 8/29/12, 9:50 a.m. minute entry).

Mr. Aho was sentenced to 210 months incarceration for complicity to burglary and for the other offenses. The bulk of the total prison term was comprised of 90 months for stealing a firearm, 60 months for being a felon possessing the firearm, and 60 months for possessing a different firearm on the later date of his arrest, the terms consecutively-run. CP 83-87. He appeals. CP 88.

E. ARGUMENT

1. COUNTS 4 AND 5 MUST BE REVERSED FOR INADEQUATE NOTICE, IMPROPER AMENDMENT, AND THE ABSENCE OF EXPRESS ASSURANCES OF JURY UNANIMITY AGREEING ON GUILT ON A CRIME CHARGED.

(a). <u>Late amendment</u>. Following the prosecution's final witness, the forensic firearms examiner Mr. Mason, the State rested its case, then sought leave to re-open it.

> MS. HAUGER: Your Honor, **at this time the State rests** subject to any rebuttal witnesses.
> THE COURT: All right. Thank you. We'll take a short recess at this time. Please do not discuss this case among yourselves or with anyone else. No social media.
> (WHEREUPON, jury leaves the courtroom.)
> MS. HAUGER: Your Honor, when the jury returns I do need to ask the Court for leave to reopen the State's case. Parties have previously entered into a stipulation with regards to Mr. Aho's prior felony conviction. I need to have the Court read that to the jury.

(Emphasis added.) 8/27/12RP at 477. The court granted the motion and the State then, in front of the jury, re-opened its case, and corrected the failure to introduce the evidence on the "prior felony" element of VUFA. 8/27/12RP at 480-81. When the prosecutor then rested the State's case, Mr. Aho timely raised certain motions. 8/27/12RP at 481. Counsel moved to dismiss the burglary and firearm offenses, for failure of the State to make a

prima facie case, addressed to certain accomplice issues, and the complete failure to prove the allegation in the information stating the subject matter was a .357 firearm. 8/27/12RP at 483-84; see, e.g., CP 1-3 (information, charging "That MATTHEW DAVID AHO . . . did . . . wrongfully obtain . . . a firearm, to wit: a .357 revolver handgun, belonging to Bruce Gambill[.]"); see State v. Rhinehart, 92 Wn.2d 923, 927-28, 602 P.2d 1188 (1979).

In response to the *prima facie* motion, the prosecutor argued that it could amend the information:

> So at this time the State would move to amend count IV, the theft of a firearm, to allege specifically a 10 millimeter handgun as opposed to a 357 revolver.

8/27/12RP at 484. Following argument, the trial court allowed the amendment. 8/27/12RP at 485-87. With regard to any .357, the court stated that there was no prejudice to the defendant because the testimony regarding the specific handgun had been developed in direct examination and in the defense's cross examination. 8/27/12RP at 487.

An amended information was filed on that date alleging the new subject matter of a 10 mm firearm. 8/27/12RP at 487; see CP 55-57 (amended information, charging "That MATTHEW DAVID AHO . . . did . . . wrongfully obtain . . . a firearm, to wit: a 10mm

handgun, belonging to Bruce Gambill," [and] based on the same conduct [did feloniously possess] a firearm" on that date).

(b). <u>Jury Instructions</u>. Despite all of the foregoing, the 'to-convict' instructions for the firearm theft in count 4, and for the subsequent VUFA unlawful possession of the gun taken in count 5, both stated generically that the defendant need only be proven to have stolen "any firearm," or "a firearm," and to have possessed "a firearm," and did not specify either the .357 as charged in the original information, or the 10mm as charged in the later-amended information. CP 27 (Instruction 15); CP 28 (Instruction 16) ("a firearm"); CP 32 (Instruction 20) ("a firearm"); CP 33 (Instruction 21) ("a firearm").

> A person is guilty of theft of a firearm if he or an accomplice commits a theft of **any** firearm.

(Emphasis added.) CP 27. The jury, which had been introduced to the original charges in the case at the time of final jury selection and opening statements, was not told of the amended charges regarding a 10mm gun. Supp. CP ___ (minutes of August 20, 2012, 10:57 am).

(c). <u>*Per se* prejudice</u>. In a hypothetical criminal homicide case, a charge of murder may be laid, alleging that the defendant killed John Smith in a home invasion. An amendment of the

charge, after the start of trial in which the primary witness now says John may or may not still be alive, and after the State has rested its case-in-chief, to allege instead that the defendant killed *Jane* Smith, is an amendment that charges a new subject matter and a different crime. In this case, the State's amendment of the information must be deemed categorically or *per se* prejudicial, rendering the amendment improper, and requiring a new trial.

The Washington Constitution includes a guarantee that the State will adequately inform Mr. Aho of the charges he is to meet at trial. Wash. Const. art 1, § 22 (amend. 10).

> It is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, **and cannot be tried for an offense not charged**.

(Emphasis added.) State v. Markle, 118 Wn.2d 424, 431-32, 823 P.2d 1101 (1992).

The applicable Court Rule, CrR 2.1, delineates the constitutional boundaries applicable to amendments during trial, with demonstrable prejudice as the touchstone. State v. Schaffer, 120 Wn.2d 616, 622-23, 845 P.2d 281 (1993). CrR 2.1(d) always precludes the State from amending an information, at any time during trial or after the prosecution rests its case, if doing so prejudices "substantial rights" of the accused. CrR 2.1 (d).

Further, the Washington Constitution imposes a rule of categorical or *per se* prejudice, applicable where the State seeks to amend the information after resting its case-in-chief. Wash. Const. art 1, § 22 (amend. 10); State v. Pelkey, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987). Technical, non-material amendments are not governed by this rule.[4]

Here, first, the State amended late. The State rested its case, and the defendant raised a motion entitling him to dismissal with prejudice regarding the .357, but a late amendment was permitted, apparently with relation back so as to defeat the *prima facie* motion previously raised. But see State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) (amendment of information that prejudices the defendant's defense does not relate back).[5]

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[4] Under this rule, the State nonetheless may almost always amend an information to correct scrivener's errors, technical defects, and statutory mis-citations, or even to correct a non-material manner of committing the crime, such as what the date was when committed so long as a limitations period is not at issue. See State v. Kiliona-Garramone, 166 Wn. App. 16, 23 and n. 6, 267 P.3d 426 (2011); State v. DeBolt, 61 Wn. App. 58, 808 P.2d 794 (1991); State v. Gosser, 33 Wn. App. 428, 656 P.2d 514 (1982); see also State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995). Such amendments are a matter of form rather than material substance. Debolt, at 61-63.

[5] A motion to dismiss for failure of the State to have made out a *prima facie* case is determined by the allegations in the existing information. State v. Rhinehart, 92 Wn.2d 923, 927-28, 602 P.2d 1188 (1979) (citing, inter alia, State v. Dixon, 78 Wn.2d 796, 802, 479 P.2d 931 (1971)). As the Court stated in Rhinehart,

The Supreme Court in Pelkey, addressing late amendments, articulated a bright-line constitutional rule of prejudice:

> A criminal charge may **not** be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.

(Emphasis added.) Pelkey, 109 Wn.2d at 491.

This amendment was improper and caused categorical prejudice to Mr. Aho's defense, considering the ease with which the State may amend any charges prior to trial based on its case, and the multiple manifestations of prejudice that resulted to the defendant thereafter:

> **During the investigatory period between the arrest of a criminal defendant and the trial**, the State frequently discovers new data that makes it necessary to alter some aspect of the information. It is at this time amendments to the original information are liberally allowed, and the defendant may, if necessary, seek a continuance in order to adequately prepare to meet the charge as altered.

> The State did not charge the petitioner with possession of stolen parts of a vehicle although clearly the prosecuting attorney could have done so initially or by amendment after it became clear that there was insufficient proof that petitioner ever possessed the stolen vehicle. The information put petitioner on notice that he must answer the charge as to a stolen Ford Bronco, not one part thereof. This was the charge his defense prepared to meet. The Court of Appeals is reversed and the trial court's order of dismissal is affirmed.

Rhinehart, 92 Wn.2d at 927-28 (also citing CrR 2.1(b)). The trial court erred in denying Mr. Aho's motion to dismiss for failure of the State to make out a *prima facie* case.

(Emphasis added.) Pelkey, at 490.

> The constitutionality of amending an information after trial has already begun presents a different question. All of the pretrial motions, *voir dire* of the jury, opening argument, questioning and cross examination of witnesses are based on the precise nature of the charge alleged in the information. Where a jury has already been empanelled, the defendant is highly vulnerable to the possibility that jurors will be **confused** or prejudiced by a variance from the original information. [Pelkey,] at 490, 745 P.2d 854. [Thus, the] Pelkey court articulated a bright-line rule: "A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." [Pelkey,] at 491, 745 P.2d 854. An amendment under these circumstances is reversible error *per se*, and the defense is not required to show prejudice.

State v. Hull, 83 Wn. App. 786, 799-800, 924 P.2d 375 (1996), review denied, 131 Wn.2d 1016, 936 P.2d 416 (1997) (citing Pelkey, at 490; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992), and State v. Schaffer, 120 Wn.2d 616, 621, 845 P.2d 281 (1993) (distinguishing between mid-trial amendments before and after the close of the State's case in chief)); see also State v. Peterson, 133 Wn.2d 885, 889-93, 948 P.2d 381 (1997).

Of course, the present case does not involve a scrivener's error, nor a technical defect, nor a manner of committing the crime that was immaterial to proof of Mr. Gambill's claims to the jury.

Instead, in the circumstances of the case, the subject matter of the firearm allegations was a highly material aspect of the State's case. The Washington courts have consistently held a new crime is charged when the prosecution, by amendment and/or jury instructions, changes the identity of the subject property. See, e.g., State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980) (reversing conviction when information charged defendant with assaulting both victims but jury was instructed that guilt could be based on assault of either of two victims); State v. Phillips, 27 Wash. 364, 67 P. 608 (1902) (reversing conviction for stealing Canadian currency when defendant charged with stealing United States currency); State v. Van Cleve, 5 Wash. 642, 32 P. 461 (1893) (denying amendment changing name of larceny victim from Wm. Burkbank to Walter Burbank).

Like Pelkey, here the shift in substance of the prosecutor's charging document, in the factual context of this case, caused *per se* prejudice. First, in combination with the generically-worded instructions of law that stated the defendant was guilty if he stole "any" firearm, it presented a high and unacceptable probability, and certainly a "possibility that jurors [would] be confused . . . by a variance from" the original allegations. Pelkey, 109 Wn.2d at 490.

The complainant, Mr. Gambill, shifted his claims repeatedly. He testified that he had a firearm sitting on his desk; he said he had fired the gun a year previously and found it operable. 8/21/12RP at 81, 87, 116-17. Gambill was intending to work on "switching out the holsters" but then went to the Lake to help the girls with their car. 8/21/12RP at 80, 87. Mr. Gambill stated that he first thought that the firearm that was stolen was a "357" of his, but he then testified that the gun that went missing "was a 10" with a clip or magazine that his father gave him. 8/21/12RP at 81, 87, 116-17. Gambill did not state a 10 mm when he filled out his theft inventory sheet, Exhibit 51; this, of course, was done a full 30 days after he suffered the supposed theft of a gun. He testified:

> I can see that I wrote down I thought it was a little Ruger that was taken. I was confused, I guess. I don't know, mad or something, when I was filling this out. I don't know. There's a chance I made a mistake but I'm sure the values are pretty close to being the same, I suppose.

8/21/12RP at 118. Mr. Gambill also denied he was or had been trying to get back a firearm that he never owned. 8/21/12RP at 119-20. His written police statement states, "My pistol was gone off my desk I had taken out to oil and put in a new holster;" his original inventory sheet lists a "357 Reuger revolver" whose appearance he describes in detail as a "Smooth-Back – no hammer – Gift from my

father after all were stolen by Meyers." Exhibit 51. Then he stated at trial that the stolen 10mm gun was from his father. Exhibit 51; 8/21/12RP at 81, 87, 117-19.

Crucially, Sheriff's Deputy Anthony Filing told the jury that at some juncture after the case began, Mr. Gambill orally told him that he was "missing another handgun," a 10 mm. 8/23/12RP at 377; 8/20/12 at 115. Gambill, according to the Deputy, never retracted his detailed written claim that a .357 was taken. CP 51; 8/23/12RP at 376-77 ("No, he never retracted that information.").[6]

This shifting and conflicting testimony inevitably created substantial confusion for the defendant attempting to respond to the State's allegations. The challenge was even greater for the jury trying to determine what the truth was with regard to which, or whether any gun at all, was stolen. A jury that is unsure through multiple junctures in the case as to what the State is alleging, what the defense is defending against, is left even more dangerously confused as to what it is being asked to find. This is the inevitable product of the insufficient notice and subsequent late amendment,

[6] During a recess for a possible mistrial, when the trial court was attempting to explain to Mr. Gambill that he needed to stop baselessly saying to the jury that there were death threats to the deputies involved in the case, Mr. Gambill complained to the trial court that he had to submit the inventory report to the sheriff's office, but then his newly-changed homeowner's insurance policy "didn't cover anything." 8/21/12RP at 123.

and the jury instructions, in this case. The amendment should have been denied under the constitutional standard of proper notice before trial commences.

Mr. Aho's case stands in comparison to Schaffer, 120 Wn.2d at 617-18. In that case, which involved review of a juvenile bench trial, the original information alleged that the malicious mischief respondent, had damaged "tires" on Mrs. Krogstadt's property. Mid-trial, however, other eyewitnesses stated that the defendant also knocked over Ms. Krogstadt's mailbox. An amendment was obtained by the State after direct examination of the witnesses providing this new information; following the amendment, the trial continued including with cross-examination by the defense. Schaffer, 120 Wn.2d at 617-18. The Court, affirming the amendment, contrasted Pelkey, wherein the State, after resting, had moved to amend the charge from bribery to "trading in special influence," with different charged facts, justifying application of Pelkey's *per se* rule. Schaffer, 120 Wn.2d at 620-22. The present case by definition involves no opportunity such as in Schaffer to address the subject matter of the new charges during the State's case, including as precedent to a properly-made *prima facie* motion

to dismiss. For one thing, all the State's witnesses had been released.

Notably, the Schaffer Court made clear that in a trial before a jury, and where the amendment at issue comes later in trial, impermissible prejudice is more likely to exist, requiring denial of an amendment under the always-applicable constitutional touchstone of prejudice. Schaffer, 120 Wn.2d at 621 (citing article 1, section 22 and CrR 2.1).

Further, in any event, Mr. Aho suffered demonstrable prejudice to his substantial rights. CrR 2.1.

(d). Late amendment – demonstrable prejudice. If Pelkey's categorical rule does not apply to the change to the subject matter after the State rested and the court had commenced entertaining the defense *prima facie* motions, Mr. Aho suffered demonstrable prejudice to substantial rights of his, under CrR 2.1. CrR 2.1; Pelkey, supra, State v. Schaffer, 120 Wn.2d at 622-23. As the Washington decisions have made clear, the presence of such prejudice renders an amendment constitutional error, at any time of trial.[7]

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[7] It has been said that the defendant has the burden under CrR 2.1 of showing how an amendment prejudiced his substantial rights. State v. Gosser, 33 Wn. App. 428, 434-5, 656 P.2d 514 (1982). In Gosser, the appellant was

First, the fundamental procedural facts of this case – the unusually late change to the information, the confusion engendered in the jury by all the circumstances surrounding the charge, the shifting trial claims, the jury's ignorance of the change to the charges and, later, of what it was charged with finding, are the fundamental demonstrations of unfair prejudice in fact, to Mr. Aho's substantial rights. U.S. Const. amend. 14; United States v. Valenzuela–Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) (denial of the ability to present a cogent defense violates the right of Due Process); see, e.g., Morris v. Suthers, 246 F.Supp.2d 1120, 1144-45 (D.Colo. 2001) (on *habeas* review, trial court's rulings erroneously allowing opinion testimony of state's witnesses and disallowing defense expert opinion violated defendant's right to present a cogent defense).

Mr. Aho was prejudiced, including because he defended against Mr. Gambill's claim of having a 357 stolen, and when

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actually charged with assault under one statutory alternative, and the information was amended to charge a different alternative, of the same degree. Gosser, 33 Wn. App. at 434-35 (also stating, in the same context, "The fact a defendant does not request a continuance is persuasive of lack of surprise and prejudice."). However, the Supreme Court has stated that the constitution is not only implicated just when the Pelkey rule of *per se* prejudice applies; rather, an amendment that violates the defendant's substantial rights is constitutional error. Such error generally must be proved not harmful, beyond a reasonable doubt. Here, Mr. Aho argues that he should prevail based on the prejudice to his substantial rights under CrR 2.1, even if he bears the burden.

Gambill proffered his surprise claim regarding a 10mm semiautomatic handgun, Mr. Aho attempted to employ the shift in claims as impeachment. After the State elicited from its reluctant witness Brandi Snow that she had seen a firearm in the trailer subsequent to the alleged burglary, counsel elicited that she had seen an older, small, Western-movie style gun. When the State rested, and then changed the subject matter of the crime, counsel turned out to have instead *helped support* the firearm theft and possession accusations, fundamentally prejudicing Mr. Aho's substantial rights to be apprised of the factual allegations he was to meet at trial, see CrR 2.1, not in mere form or technical grievance, but in substance.

This should be unacceptable prejudice. The notice requirement exists as a means to allow the defendant to "mount an adequate defense" in response to the charges laid. Schaffer, 120 Wn.2d at 620; State v. Wilson, 174 Wn. App. 328, ___ and n. 44, 298 P.3d 148 (April 2, 2013). Hence the dictate of CrR 2.1(a)(1) (requiring that the "information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.").

Mr. Aho argues that the shifting ground under his feet cannot be constitutional notice. The amendment was, instead, prejudicial to substantial rights of his, engendered by the withholding of constitutional notice until the relevant time for notice's utility had passed. Wash. Const. art. 1, §22; CrR 2.1; U.S. Const. amends. 6, 14. He asks for a new trial on that basis.

Regarding Assignment of Error 4, the circumstances of trial below also caused palpable prejudice to Mr. Aho, not just in defending before the jury, but in his substantial right to be convicted only of the crime charged. See State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911), U.S. Const. amend. 6; see also RCW 10.61.006, .010, .020 (statutory right to be convicted only for crime specified in the information or a lesser crime).

Finally, regarding Assignment of Error 1, even if one were to concede *arguendo* that the original information *was* properly amended, there is still no adequate Article 22 notice as to counts 4 or 5 when the original information specifies a .357, then it is amended after the State's case to instead specify a 10mm gun, and then the jury is told in its instructions to pick "any" firearm. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This is not notice to anybody.

(e). The verdicts on counts 4 and 5 lack express assurances of jury unanimity, including as to the crime charged. At a minimum, Mr. Aho was entitled in this case to jury verdicts on the gun theft and possession counts (4 and 5) that were accompanied by express assurances of unanimity, in order to protect his right to a unanimous jury, and his right to not be convicted on an uncharged offense. Reversal is required, as the State cannot prove that the evidence was so overwhelming and uncontroverted as to meet the harmless error standard of State v. Petrich and State v. Kitchen, infra. It cannot be shown that no juror could have had a reasonable doubt as to Mr. Gambill's claims, as those assertions shifted over time, during the 30 days it took him to report the alleged taking to the Sheriff's Office, and through the subsequent months to the time of the trial -- including when Mr. Gambill told Detective Filing that he was reporting both alleged handguns stolen.

(i). The state constitution guarantees an expressly unanimous verdict.

A jury must unanimously agree on the act that underlies a conviction, and this act must be the same one as charged in the information. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); State v. Workman, supra, 66 Wash. at 294-95. Where

multiple facts are presented that might prove the crime, the trial court should instruct the jury that its verdict must be based on a unanimous finding as to the fact satisfying the criminal allegation, which must be found by agreement of all 12 jurors, beyond a reasonable doubt. Wash. Const. art. 1, § 22; Petrich, 101 Wn.2d at 572; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich); see U.S. Const. amend. 14; Wash. Const. art. 1, § 21; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1995).

This right of criminal defendants in Washington to have the trial court instruct the jury on unanimity is essential to preserve the right to an expressly unanimous verdict following a jury trial. Wash. Const. art. 1, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see, e.g., State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995) (unanimity error where jury could have deliberated, following lack of jury unanimity instruction, to find the defendant passenger possessed cocaine found in the car, or in his backpack).

Here, no unanimity instruction was given in Mr. Aho's case, and there are no express assurances of unanimity. CP 8-49. (Jury instructions). Quite to the contrary, the entire proceedings of Mr.

Aho's prosecution on counts 4 and 5 resulted in an imminent and later realized danger of the absence of an expressly unanimous verdict.

In determining whether there are adequate assurances of unanimity, the reviewing court considers the whole record of trial, including the evidence, information, argument and instructions. State v. Bland, 71 Wn. App. 345, 351–52, 860 P.2d 1046 (1993); State v. Corbett, 158 Wn. App. 576, 593, 242 P.3d 52 (2010) (considering instructions, evidence and closing arguments, any reasonable jury would have known that it must find separate and distinct acts for each of four guilty verdicts); State v. Moss, 73 Wash. 430, 432, 131 P. 1132 (1913) (multiple possible acts of adultery were admitted as to one count charged, but no unanimity instruction necessary because State tried the defendant "from the beginning to the conclusion of the case" only for the specified first incident).

In the present case, where the defendant was charged with stealing and possessing a .357 firearm, but the evidence was inordinately conflicting as to what, if any firearm was taken, and the information was amended but the jury was instructed only generally on the firearm counts 4 and 5, nothing in closing argument was

adequate to override the jury instructions which told the jury that the November 7 allegations could be proved by "any" firearm. CP 27 (Instruction 15); see CP 28 (Instruction 16); CP 32 (Instruction 20); CP 33 (Instruction 21) (all allowing convictions on the counts for "a firearm").

Nothing alleviated the confusion that the varying, disputed claims, and the changed charges, and the trial evidence, engendered in the lay jury as the trier of fact. In closing argument, the prosecutor, after arguing that the jury should believe the claimed stealing of a 10mm firearm, then predicted that the defense attorney would challenge the complainant's case and credibility and argue no proof beyond a reasonable doubt that a 357, or a 10mm, or even perhaps either, were stolen from Mr. Gambill's home. The prosecutor stated in closing,

> You might hear some argument, and I anticipate that you will, probably hear a lot of argument from the defense attorney, Mr. Burgess, about what about this firearm? It's a 357 revolver? It's a 10 millimeter. Is it both? Is it neither? Was there even a firearm that was taken?

8/27/12RP at 530. Defense counsel indeed stressed Mr. Gambill's differing assertions, 8/27/12RP at 546, in addition to arguing lack of liability for the burglary or theft as an accomplice, and in addition to addressing the State's other firearm allegations as to count 8.

None of this results in what Mr. Aho was entitled to, which is express assurances of jury unanimity in his 210-month felony case. The State in its closing argument argued that Mr. Gambill was credible when he testified to a 10 mm, but this does not cure the manifest constitutional error of the absence of an instruction, and the presence of affirmative circumstances that produced a lack of express unanimity. The deputy prosecutor never urged the jury that it had to unanimously agree on the facts. State v. Heaven, 127 Wn. App. 156, 160-61, 110 P.3d 835 (2005) (State's non-limited discussion in closing argument of certain acts as supporting certain charged counts was not an election such as to render unanimity instruction unnecessary); RAP 2.5(a). Petrich requires more.

(ii). The Petrich error was not harmless.

A Petrich error is constitutional, and is presumed to be prejudicial. In Petrich cases, sufficiency of the evidence on the claims does not render the error constitutionally harmless. Rather, the presumption of reversible prejudice can be overcome only

> if no rational juror could have a reasonable doubt as to any one of the incidents alleged.

(Emphasis added.) Kitchen, 110 Wn.2d at 411 (clarifying Petrich constitutional harmless error analysis) (citing State v. Loehner, 42

Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)).

First the evidence below was controverted as to operability. Mr. Gambill testified that one of the supposed firearms had been fired some time previously, and was operable. But the jury must find beyond a reasonable doubt that the thing is a firearm; if it is not placed before them with proof of operability, there must be evidence of gunshots heard and bullets found or muzzle flashes. State v. Pierce, 155 Wn. App. 701, 714 n. 11, 230 P.3d 237 (2010). Here, it matters that one of the supposed stolen firearms asserted by Mr. Gambill was said to fire, but there was no evidence as to the other. Cf. State v. Wilson, 174 Wn. App. at ___, and n. 44) (under statute criminalizing insertion of 'any thing' into other's sexual organ, State's amendment before resting, to change thing in several counts from "vibrator" to "penis," was change to non-material manner of committing crime and stating that, in any event, the presence in first information of several other counts already charging both vibrator and penis for the crime affirmatively proved lack of prejudice).

Affirmance in the face of a Petrich error requires the Court of Appeals to be able to conclude that the jury could unanimously

come to only one conclusion: that each of Mr. Gambill's firearm claims was incontrovertibly and overwhelmingly proved. Only in such instance would the Petrich error be harmless. For example, in Kitchen,

> the prosecution placed testimony and circumstantial proof of multiple acts in evidence. There was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred.

Kitchen, at 412. Because the trial evidence conflicted as to whether one, or more, of the acts occurred, the Kitchen Court reversed. For further example, in State v. Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995), the State's evidence indicated that Mr. Brooks allegedly burgled several structures; reversal was required because the evidence as to one of the multiple acts was conflicting – there was evidence that that a person named Dave, and not the defendant, was responsible for burglarizing one of the structures. State v. Brooks, 77 Wn. App. at 52.

These cases are similar to here, where Mr. Gambill told the Sheriff's office that the firearm taken was a .357, and later stated it was a 10 mm gun, but he told Deputy Filing that both were stolen. A State's witness, a co-participant, claimed the co-defendant and the defendant appeared to have a Western movie-style revolver in

the trailer. No firearm of either type was recovered, and nor was any claimed 'non-stolen' firearm ever produced. 8/22/12RP at 194.

Here, reasonable jurors could disagree, or have great doubt about which firearm was proved, and the jury was not instructed on unanimity, in fact much to the contrary in the jury instructions. State v. Stephens, 93 Wn. 2d 186, 607 P.2d 304 (1980) (reversing conviction when information charged defendant with a firearm assault of both victims but jury was instructed that guilt could be based on assault of *either* of the victims, reasoning that erroneous jury instructions "**engender[ed] confusion**" rather than ensuring express unanimity). Reversal is required.

(iii). Crime not charged.

Further, under Workman and similar cases, the act found must be the one charged in the information. State v. Workman, supra. A criminal defendant cannot be convicted, under Article 1, section 22 of the state constitution, for a crime not charged. State v. Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). According to Kitchen:

> In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on

> in its deliberations or the court must instruct the jury to agree on a specific criminal act.

Kitchen, 110 Wn.2d at 409 (citing State v. Petrich, 101 Wn.2d at 572 and State v. Workman, supra, 66 Wash. at 294–95). Here, there is no assurance that the jury found the act charged in the information. Reversal is required.

(iv) Counts 4 and 5 must be reversed.

Finally, the error of course pertains to both counts 4 and 5. The State charged Mr. Aho with criminal liability for the taking of a gun from Mr. Gambill, and alleged that this gun was displayed in the fifth wheel trailer and possessed by him there, a short time after the alleged taking. The lack of an assuredly unanimous verdict on the gun charged as having been stolen is the same lack of an expressly unanimous jury verdict as to count 5, the first charge of VUFA possession. Both counts must be reversed.

2. THE UNLAWFUL FIREARM POSSESSION CONVICTION IN COUNT 8 MUST BE REVERSED FOR FAILURE OF THE STATUTORY ALTERNATIVE MEANS, OR THE ABSENCE OF JURY UNANIMITY ON THE FACTS.

Count 8 must be reversed for failure to prove all the statutory alternative means charged, where there was not substantial evidence that Mr. Aho "owned" or "controlled" a "firearm" on or

about January 28, because the 9 mm, but not the Enfield rifle, was a firearm, and this court cannot determine that the verdict was based on the 9 mm. CP 1-3, 55-57 (informations).

The to-convict instruction for count 8 stated that the defendant must be shown to have "knowingly had a firearm in his possession or control," and the prosecutor argued generally in closing that people often "own or possess" items that they are not carrying on their person. 8/27/12RP at 537-38; CP 34 (Instruction 22); see also 8/27/12RP at 531-32, 536 (State referring specifically to count 8 as requiring proof of either possession or control). The jury instruction defining the offense of VUFA stated that a person is guilty when he "knowingly owns a firearm **or** has a firearm in his or her possession **or** control." (Emphasis added.) CP 32 (Instruction 20). And when the jury, during deliberations, asked if both the 9 mm and the Enfield were the subject of count 8, the prosecutor urged the jury to answer yes, and the court told the jury to follow its instructions. 8/29/12RP ("volume III") at 4; CP 65.

In the alternative, count 8 must be reversed for lack of express assurances of factual unanimity under Petrich as to what gun – the 9 mm, or the inoperable Enfield, the jury found in satisfaction of the count, where the evidence was not overwhelming

and highly controverted, as to whether the Enfield was a firearm, or was owned, controlled, or possessed by Mr. Aho on January 28.[8]

(a). The Enfield rifle was not owned, or controlled, by Mr. Aho on or about January 28, 2011, and was not "a firearm."

On August 22, during the case-in-chief, the prosecutor showed its witness Phillip Newkirk (Jill Newkirk's father) what appeared to be a military style World War 1-era 1917 model Enfield rifle, which was Mr. Newkirk's and had been inside his house. 8/22/12RP at 160; 8/27/12RP at 473-74; State's Exhibit 49). Mr. Newkirk, on whose property his daughter's fifth wheel trailer was located, had presented the rifle to the deputies who executed the search warrant on January 28, 2011. 8/22/12RP at 160. Mr. Newkirk told the jury that Mr. Aho had given him the rifle in early December of 2010 (the previous year), as payment for letting him stay on the property with Jill. 8/22/12RP at 161-63.

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[8] Both errors were compounded by the court's answer to the second jury inquiry regarding count 8, declining to tell the jury that both the 9 mm gun and the Enfield were not both available bases for that VUFA count. It is within the sound discretion of the trial judge whether to give further instructions to the jury after it has retired for deliberations. State v. Miller, 40 Wn. App. 483, 489, 698 P.2d 1123, review denied, 104 Wn.2d 1010 (1985). However, a trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, Mr. Aho's counsel attempted to focus the jury on solely the 9 mm, but the court, over objection, told the jury to rely on its instructions and the evidence, thus exacerbating the likelihood of unanimity error as to the alternative means, and the facts offered as bases for count 8 under Petrich.

Mr. Newkirk had never tried to fire the Enfield. 8/22/12RP at 164. He stated that although it was real, it was "out of commission." 8/22/12RP at 170. Mr. Newkirk stated that he had never been able to load ammunition into the Enfield, and no one had ever fired it. 8/22/12RP at 168. In fact, Mr. Newkirk, a Coast Guard veteran who had been trained to determine the operability of firearms, stated that he attempted to fire the weapon, and tried to work the bolt action, but the device was "inoperable" -- which he explained to the jury meant that it "[w]ouldn't fire." 8/22/12RP at 169.

Agreeing with this assessment was the State's own firearm forensics examiner, Clarence Mason of the sheriff's office, who stated that the Enfield was "not operable." 8/27/12RP at 476. Prior to trial, Mr. Mason had been asked by the prosecutor to "check this weapon for operability." 8/27/12RP at 473. He did so in July of 2012. He first noted that the "magazine was broken from the weapon" and appeared to have been "bolted" back into it. 8/27/12RP at 474. Although he testified that the device was not a toy, and answered yes when the State asked whether the device appeared to include the "components" necessary to fire, Mr. Mason

repeated his expert determination that it could not be fired.

8/27/12RP at 475.[9]

> A: There is a hole that is drilled in the front of the forward part of the chamber of this weapon, and it's not a factory drilled or a factory modification[,] which would make this weapon not able to fire.
> Q: Okay. You say there was a hole bored into the chamber. If you did want to attempt to fire Exhibit No. 49, what would you need to do before you could even attempt to fire this firearm?
> A: **We could not.** When I say "we," I could not even get a round to chamber in this weapon. So there is an obstruction in the chamber, front of the chamber, somewhere.
> Q: And what would you need to do in order to be able to get a round to chamber if you were going to attempt to do that?
> A: A round **can't** be chambered in this weapon. **This weapon is not operable.**

(Emphasis added.) 8/27/12RP at 475-76.

Upon more questioning by the State, investigator Mason was asked if the device could fire a bullet 'but for' the several incapacitations that he had identified:

> Q: Could you plug the hole at all?
> A: I suppose you could, but you **still** wouldn't be able to chamber a round.
> Q: Okay. **If** a hole had **not** been bored into the forward portion of that chamber of Exhibit No. 49, would that weapon likely be capable of firing

[9] The verbatim report of proceedings mistakenly labels much of Mr. Mason's substantive testimony as "voir dire" of the witness, however, the *voir dire* of Mr. Mason was brief and is set forth solely on pages 471-72, prior to the above-cited testimony. 8/27/12RP at 471-72.

explosive – or excuse me – fire a projectile by means of an explosive such as gunpowder?

A: **If** the obstruction that's in the forward part of the chamber **could be** removed it would not be safe to fire by plugging the hole. **If** the hole had **not been bored and** the obstruction **was not there**, yes. It would fire a projectile.

(Emphasis added.) 8/27/12RP at 476.

(b). <u>Alternative means</u>. Mr. Aho was arrested on January 28, 2011, at the property of his girlfriend's father where he apparently stayed with her in a fifth wheel. The State charged him in count 8 with second degree VUFA on or about that date, and at trial introduced a 9mm handgun that was found by deputies in Ms. Newkirk's parked car, and the Enfield rifle that Mr. Newkirk provided to the police from inside his (Mr. Newkirk's) house.

However, there was no evidence that Mr. Aho owned or controlled the Enfield rifle on or about January 28, and further, the State's firearms expert testified that it was inoperable, and could not be made operable, much less be made so in a reasonable period of time. The alternatives "owns a firearm" and "controls a firearm" means of VUFA were not supported, and reversal is required. It cannot be said that there is no doubt that the verdict was based on only the alternative means of "possessing" the 9mm handgun.

This is required on review, or the Court must reverse. Under RCW 9.41.040(1)(b) as charged in the information and as defined in the jury instructions, "[s]econd 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." CP 1-3, 55-57; State v. Holt, 119 Wn. App. 712, 718, 82 P.3d 688 (2004), overruled on other grounds by State v. Willis, 153 Wn.2d 366 (2005).

In an alternative means case, there is no requirement for express jury unanimity as to each alternative means of a single crime so long as an inference of unanimity is present. See State v. Fortune, 128 Wn.2d 464, 475, 909 P.2d 930 (1996); State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). The threshold test on review is whether sufficient evidence exists to support each of the alternative means presented to the jury. State v. Smith, 159 Wn.2d 778, 790, 154 P.3d 873 (2007) (citing State v. Randhawa, 133 Wn.2d 67, 74, 941 P.2d 661 (1997)).

> If there is sufficient evidence to support each alternative means submitted to the jury, the conviction will be affirmed because [the reviewing court] infer[s] that the jury rested its decision on a unanimous finding as to the means.

Randhawa, 133 Wn.2d at 74. Evidence is sufficient if, 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. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means." State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007); see also State v. Morales, 174 Wn. App. 370, 380-83, 298 P.3d 791 (2013) (to-convict instruction allowed harassment conviction based on threat to other, different persons than charged in the information, allowing conviction on alternative means).

(i) No substantial/sufficient evidence.

On count 8, the original information (and the post-resting amended information) charged Mr. Aho with owning, possessing, or controlling a firearm on or about January 28, 2011, the date of his arrest. The affidavit of probable cause alleged specifically that a

9mm handgun was found in the foot well of his girlfriend Jill Newkirk's car, which was parked on the property.[10]

The trial also included evidence in the form of the Enfield rifle, apparently transferred as personal property from Mr. Aho to Mr. Newkirk as a rent payment. But there was no substantial evidence that Mr. Aho owned the Enfield on or about January 28, where he transferred it the previous year, 2010. Further, there was no substantial evidence that the Enfield was a "firearm." The State must prove the gun was operable or could readily be made so. State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 ("a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm"), review denied, 139 Wn.2d 1003 (1999); State v. Pierce, 155 Wn. App. 701, 705, 230 P.3d 237 (2010) (there must be evidence of such operability); In re Pers. Restraint of Rivera, 152 Wn. App. 794, 803 & n.22, 218 P.3d 638 (2009), aff'd sub nom. In re Pers. Restraint of Jackson, 175 Wn.2d 155, 283 P.3d 1089 (2012) ("there must be sufficient evidence to find a firearm operable to uphold a firearm enhancement"); In re Pers. Restraint of Delgado, 149 Wn.

[10] The 9 mm handgun found in Ms. Newkirk's car, Exhibit 48, was shown to be capable of firing a projectile, as testified to by forensic firearms investigator Mason, who test-fired that firearm successfully. 8/27/12RP at 470-72.

App. 223, 237, 204 P.3d 936 (2009) ("a weapon is not a 'firearm' under the statutory definition unless it is operable"). The Enfield was not a firearm. Absent substantial evidence of the elements of the "owns' or 'controls' a 'firearm' alternative means of second degree VUFA, the substantial evidence test fails.

(ii) No adequate indication that the verdict rested on the supported alternative means.

On this record, there was not substantial evidence of the alternative means charged, that Mr. Aho owned or controlled a firearm. The record fails to indicate that the verdict on count 8 was based on the 9mm firearm constructively possessed by Mr. Aho. The result is reversible error. Only where the reviewing court can be sure there is no danger that the verdict was not unanimous as to the means, is reversal for lack of substantial evidence avoided. Fleming, 140 Wn. App. at 136-37 ("We can determine, from the record before us, that the verdict was based on only one of the alternative means."); State v. Allen, 127 Wn. App. 125, 137, 110 P.3d 849 (2005) (conviction overturned where the court could not be certain that the jury relied solely on one means because evidence regarding two alternatives was presented); State v. Rivas, 97 Wn. App. 349, 354-55, 984 P.2d 432 (1999), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007)

(conviction affirmed where there was no danger that the verdict rested on unsupported alternative means because evidence was presented as to only one means); see also State v. Witherspoon, 171 Wn. App. 271, 285-87, 286 P.3d 996, 1003 (2012) (citing State v. Lobe, 140 Wn. App. 897, 167 P.3d 627 (2007) (failure to make clear unconfusingly in closing argument that a certain means is the sole prosecution theory will require reversal under alternative means doctrine).

Here, the jury instructions defining, and setting forth the 'to-convict' requirements for, the crime of VUFA, stated that a person commits the crime of VUFA when he "owns," "possesses," or "controls" a firearm, and that to convict him, the State must prove the person possessed, or controlled, a "firearm" on or about the charging date. CP 32 (Instruction 20); CP 33 (Instruction 21).[11]

But there is no basis to be confident that the jury did not rely on the Enfield rifle, which was not owned or controlled by Mr. Aho on or about January 28, and was not a firearm under RCW 9.41.010(1). In the trial "testimony," the witnesses had discussed the 9 mm handgun found in the defendant's girlfriend's car and its

[11] The firearm definition in instruction 19 was also given along with an additional later-proposed definition, discussed infra, that was given to the jury over repeated defense objection. See infra.

operability, and, at far greater length, discussed the Enfield rifle and the question when it was given to Mr. Newkirk, and whether it was operable. In the "instructions," neither the VUFA crime definition for count 8 nor the VUFA to-convict instruction for count 8 specified a particular one of the firearms, either the Enfield or the 9 mm handgun, that were at issue in the testimony phase. Instead, both of these instructions directed the jury simply that the State merely had to prove that Mr. Aho, for purposes of count 8, knowingly possessed or controlled "a firearm." CP 32; CP 33.

When the trial court answered the jury inquiry regarding whether the Enfield and the 9 mm were possible bases for count 8, by telling the jury to rely on its instructions, the court confirmed the jury instructions' direction that conviction only required a finding of possession of any firearm. Because all of the statutory alternatives were not supported by substantial evidence, Mr. Aho's conviction on count 8 must be reversed.

(c). Absence of assurances of Petrich unanimity.

A Petrich error is constitutional, and is presumed to be prejudicial. In Petrich cases, sufficiency of the evidence on the claims does not render the error constitutionally harmless. Rather, the presumption of reversible prejudice can be overcome only

> if no rational juror could have a reasonable doubt as to any one of the incidents alleged.

(Emphasis added.) Kitchen, 110 Wn.2d at 411

Here, there was evidence that Mr. Aho constructively possessed the 9 mm handgun, proved to be a firearm, that was present in his girlfriend's car. However, the evidence was highly controverted, in particular as to whether Mr. Aho possessed or controlled the Enfield rifle, and, further, as to whether it was a "firearm." Mr. Mason's testimony and that of Mr. Newkirk, both of them gun experts, supported a finding that the Enfield had been so disabled that it was indeed not a firable device, and therefore, in effect, had been made into a toy. RCW 9.41.010. This controversion of the matter at trial establishes harmfulness of the constitutional error, and when it is present, it mandates reversal under Petrich.

3. THE JURY WAS ERRONEOUSLY INSTRUCTED THAT A FIREARM MEANS ONLY A NON-"TOY" GUN.

a. Over objection, the court improperly instructed the jury on the State's "*Raleigh*" non-toy definition, in conflict with the operability / permanently disabled standard of RCW 9.41.010. Immediately after Mr. Mason testified that the Enfield rifle was not operable , the State over defense objection successfully

sought a different "firearm" definition in the jury instructions, which it desired to be given to the jury in addition to the RCW 9.41.010(1) statutory definition, in the form of WPIC 2.10, which requires that the device in question must be able to fire a projectile. 8/27/12RP at 500-01; see CP 31 (Instruction 19, stating: "A 'firearm' is a weapon or device from which a projectile may be fired by an explosive such as gunpowder."); see Washington Pattern Jury Instructions, Criminal, 2.10 (2008); RCW 9.41.010(1).

The prosecutor claimed that this new additional instruction was based on this Court of Appeals' decision regarding "operability" in the case of State v. Raleigh, 157 Wn. App. 728, 238 P.3d 1211 (2010). 8/27/12RP at 500.

However, this was error. The appellate court reviews *de novo* claimed legal errors in jury instructions. State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008); State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). "Jury instructions are improper if they do not permit the defendant to argue his theories of the case, mislead the jury, or do not properly inform the jury of the applicable law." Vander Houwen, 163 Wn.2d at 29; State v. Hayward, 152 Wn. App. 632, 641, 217 P.3d 354 (2009).

Under RCW 9.41.010, a firearm is a device from which a bullet may be fired. The State's jury instruction claimed to be derived from State v. Raleigh, which merely quoted a carefully selected portion of this Court of Appeals reasoning in that case, was erroneous. The instruction read:

> A firearm need not be operable during the commission of a crime to constitute a "firearm" as defined in previous instructions. Instead, the relevant question is whether the firearm is a gun in fact rather than a toy gun or gun like object which is incapable of being fired.

CP 37 (Instruction 25). This instruction, as crafted, was wrong, as in conflict with State v. Padilla, 95 Wn. App. at 535, and State v. Pierce, supra, and other cited decisions cited which state that a firearm, under the statutory definition in RCW 9.41.010, is a device capable of firing a bullet or able to be made ready to do so with reasonable effort and within a reasonable time.

Further, even if the Raleigh instruction was somehow correct in isolation, the jury instructions as a whole were inadequate and confusing when this instruction was inserted, because the Raleigh-derived definition conflicted with the standard RCW 9.41.010 definition, on which the jury was also instructed, stating that a firearm must indeed be capable of firing a bullet. CP 31 (Instruction 19).

(b). The error requires reversal. The instructional error requires reversal. An instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party by affecting the outcome of the trial. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Here, the erroneous instructions purported to define the core element of the crime of VUFA, expanding its scope beyond the statute and case law. Thus, appropriately, it is deemed presumptively prejudicial where it was given on behalf of the party in whose favor the verdict was returned. State v. Wanrow, 88 Wn.2d at 237. Reversal is avoided only if it affirmatively appears that the error was harmless -- that is, trivial, or formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and in no way affecting the final outcome of the case. State v. Wanrow, at 237.

That cannot be said here. The Enfield was brought within the meaning of a firearm under incorrect jury instructions procured by the prosecutor, and the error was neither trivial or academic. The lay jury was told to rely on the instructions and would have relied on this definition to ignore Mr. Newkirk and Mr. Mason's testimony that the Enfield could not be operated. This is error and reversal is required.

Further, "it [was also] reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove "every essential element of a criminal offense beyond a reasonable doubt." State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); U.S. Const. amend. 14. Here, the error of requiring that the State merely prove that Mr. Aho owned a "gun like" device that was not a child's toy relieved the State of proving the core element of the VUFA statute. That error was not harmless beyond a reasonable doubt where there was no overwhelming evidence of the Enfield being a "firearm" as properly defined. Mr. Aho's conviction on count 8 must be reversed based on the erroneous instructions to the jury.

4. MR. AHO'S TIME FOR TRIAL RIGHT WAS VIOLATED.

Mr. Aho waited well over 500 days for his trial. Supp. CP ___, ___, ___, and ___ (Orders Continuing Trial of May 10, May 14, May 15,and June 26, 2012); CP 1-3 (information). Although he was primarily out of custody, his trial date was extended beyond the pending CrR 3.3 expiry date of June 13, 2012 when, on May 15, 2012, the trial date was set for June 28, 2012, and the expiration date was re-set to July 28, 2012. The reason given was: "No courtrooms available. Possible defense witness issue." Supp. CP

___ (Order of May 15, 2012). Additionally, the expiration date, now July 28, 2012 and which Mr. Aho argues was improperly re-set on May 15, was again re-set on June 26, 2012, to August 25, 2012, with a trial date of July 26, 2012. The reason given was "Defense atty has scheduled vacation (7/2/12-7/10/12). No courtrooms available." Supp. CP ___ (Order of June 26, 2012).

These bases for continuance are untenable. Despite being accompanied by additional grounds for continuance, the minute orders fail to document any court congestion. A trial court must bring a defendant to trial within 60 days if he is in custody or 90 days if he is out of custody. CrR 3.3(b)(1)(i), (2)(i). Ruling on a motion to continue is discretionary with a judge because it involves "such disparate elements as surprise, diligence, materiality, redundancy, due process, and the maintenance of orderly procedures." State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974). However, courtroom unavailability and court congestion are not valid reasons for continuing a trial beyond a speedy trial deadline under CrR 3.3. State v. Kenyon, 167 Wn.2d 130, 137, 216 P.3d 1024 (2009); State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005). The trial court must, at a minimum, document the specific reasons for courtroom unavailability, including listing the available courts

and the matters being heard that prevent trial start in the cause. Kenyon, at 139.

Here, the continuances for unavailable courtrooms extended Mr. Aho's trial date beyond the "allowable time for trial" period as calculated under CrR 3.3 and adjusted by CrR 3.3(b)(5) and CrR 3.3(e). The record fails to indicate how a possible defense witness issue on May 15, 2012 required the extension ordered, or how the trial court could determine, following the end of defense counsel's vacation on July 10, 2012, that there would be no courtrooms available thereafter. Under CrR 3.3, once the time-for-trial date expires without a stated lawful basis for further continuances, the rule requires dismissal, and the trial court loses authority to try the case. State v. Saunders, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009). Mr. Aho's convictions must be reversed and the charges dismissed.

5. THE CONSECUTIVE FIREARM SENTENCING STATUTE IS AT LEAST AMBIGUOUS AS TO MR. AHO'S CONSECUTIVE TERMS.

The statutory language of RCW 9.94A.589 is, at least, ambiguous as it regards whether Mr. Aho may be sentenced consecutively for his convictions for theft and for unlawful possession of the .357 / 10mm devices and for his conviction for

the 9 mm / Enfield. The pertinent statute, RCW 9.94A.589, provides:

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

RCW 9.94A.589 subsection (1)(c). The provision addresses two different questions -- the offender scoring where the defendant is committed of these crimes, and the consecutive sentencing of certain of these crimes.

First, under the statutory language, it is plain that the offender scoring for VUFA possession, firearm theft, and/or possession of a stolen firearm is to be determined without considering the listed felony crimes of firearm theft, or possession of a stolen firearm, as prior convictions, as one would normally do with other current offenses. State v. Pineda–Guzman, 103 Wn. App. 759, 762, 14 P.3d 190 (2000) (plain language controls).

It is equally plain that a person with Mr. Aho's convictions (theft of a firearm, unlawful possession of that firearm, and unlawful possession of another firearm) shall be sentenced to consecutive sentences for each of the "felony crimes listed" -- i.e., "the felony crimes of theft of a firearm or possession of a firearm," if he is also convicted for unlawful possession of a firearm. RCW 9.94A.589(1)(c). When the Legislature used the language "felony crimes listed," in the second sentence, this language can only refer to the "felony crimes" listed after this same language in the first sentence: "the felony crimes of theft of a firearm or possession of a stolen firearm." State v. Sullivan, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) (Legislature's use of same terms indicates the terms are intended to have the same meaning); cf. In re Det. of Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) ("[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent").

Thus, Mr. Aho was improperly sentenced to a term for unlawful possession, run consecutively to the listed felony crimes. This is indicated by the plain language, but if the statute is ambiguous, " 'fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a

possible but strained interpretation in favor of the State might be found.' " State v. Wissing, 66 Wn. App. 745, 753, 833 P.2d 424 (1992) (citing State v. Wilbur, 110 Wn. 2d 16, 19, 749 P.2d 1295 (1988), quoting in turn State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)).

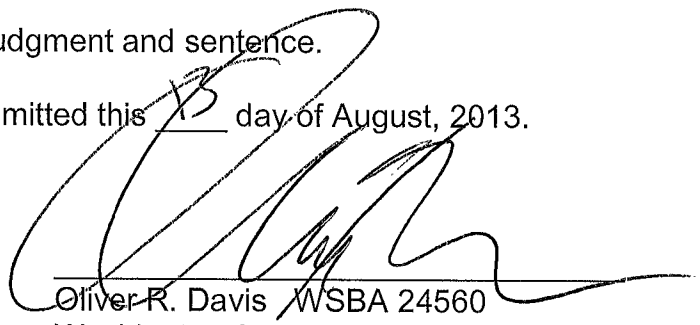
Second, the language of the statute states that "[t]he offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed." This final language can do only one of two things -- either (1) direct that a person serve consecutive terms for any of the listed felony crimes, and also for each firearm unlawfully possessed, which would be redundant surplusage unless the possession crimes can be run consecutively twice over, based on the two clauses of the sentence, or (2) direct that a person simply serve consecutive terms for each firearm unlawfully possessed. This indicates, as a first matter, that the three convictions were improperly ordered to be served back to back to back, as argued supra, and further indicates that only two convictions may be served consecutively -- unlawful possession of a firearm, and possession of a stolen firearm. Mr. Aho was not convicted of possession of a stolen firearm, thus there is no

conviction that may be run consecutively to his conviction for unlawful possession of a firearm. Any ambiguity in the statute in this regard must be resolved in Mr. Aho's favor. State v. Wissing, 66 Wn. App. at 753. Mr. Aho's sentence must be reversed.

F. CONCLUSION

Based on the foregoing, Mr. Aho respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 13 day of August, 2013.



Oliver R. Davis WSBA 24560
Washington Appellate Project - 9105
Attorneys for Appellant

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

STATE OF WASHINGTON, RESPONDENT, v. MATTHEW AHO, APPELLANT.	)))))))))	NO. 43932-8-II

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