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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 28417-4-III

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

In re Detention of Shawn Botner,

STATE OF WASHINGTON,

Respondent,

v.

SHAWN BOTNER,

Appellant.

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

The Honorable Annette S. Plese, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
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A. SUPPLEMENTAL ARGUMENT

1. THE EXISTENCE OF STATUTORY ALTERNATIVE MEANS DOES NOT PRECLUDE A UNANIMITY INSTRUCTION REQUIREMENT UNDER A MULTIPLE ACTS ANALYSIS.

By letter dated October 3, 2011, this Court permitted additional briefing addressing In re Detention of Williams, ___ Wn. App. ___, 257 P.3d 671 (2011) and/or In re Detention of Aston, 161 Wn. App. 824, 251 P.3d 917 (2011). Pursuant to the Court's letter, Botner submits the following additional argument.

The Aston opinion held no unanimity instruction was required because the recent overt act definitional statute lists alternative means for meeting that requirement. Aston, 161 Wn. App. at 841. The court's analysis is incorrect. This holding misapprehends the distinction between alternative means and multiple acts cases and is in conflict with State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976), and State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

When a statute sets forth alternative means of committing an offense, unanimity as to which alternative prong has been proved is not required. In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006). However, when the State presents evidence of multiple acts, each

of which could constitute the crime charged, the jury must be unanimous as to the factual basis for the verdict. Petrich, 101 Wn.2d at 572. To distinguish between these two outcomes, the Aston court relied on Halgren, which employed the test from Arndt. Halgren, 156 Wn.2d at 809-10 (citing Arndt, 87 Wn.2d at 377-79). But the Arndt analysis has been misapplied. It does not distinguish alternative means from multiple acts cases.

The Arndt analysis distinguishes: (1) statutes that establish alternative means of committing one single crime from, (2) statutes that set forth several separate offenses within the same statute. Arndt, 87 Wn.2d at 377. If the statute establishes one crime with alternative means, unanimity as to the means is not required. Id. at 377-78. On the other hand, if the statute “describes more than one crime, there must be a unanimous verdict as to each separate crime described.” Id.

While the Arndt analysis is helpful in determining whether the Legislature intended to create one crime or many,¹ multiple acts analysis under Petrich does not rest not on legislative intent. The multiple acts analysis turns on the nature of the charges and the evidence presented at trial. Petrich was charged with one count each of indecent liberties and second-degree statutory rape. Petrich, 101 Wn.2d at 568. At trial, the

¹ Arndt, 87 Wn.2d at 378.

victim described at least four incidents of sexual abuse during the charging period. Id. The court rejected the State's argument that the acts were a single continuing course of conduct and held jury unanimity "must be protected" via either election as to the act relied upon or jury instruction. Id. at 571-72. The court explained this scenario does not implicate the Arndt line of alternative means cases. Id. at 570. Notably, it did not apply the analysis from Arndt to determine whether it should do so. The analysis from Arndt and Halgren² is not dispositive of the argument that juries must be unanimous as to the factual basis for a recent overt act.

Here, the State argued there were numerous different acts that could satisfy the element of a "recent overt act." RP 1080. The prosecutor argued the recent overt act was not just the note, but also Botner's refusal to comply with supervision, his failure to register as a sex offender, and his drug use. RP 1080. There is no continuing course of conduct because the instances are separated by time, place, and other circumstances. State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994). Therefore, the jury must be unanimous as to the underlying act. Petrich, 101 Wn.2d at 572. 2.

² Halgren also relied on State v. Berlin, 133 Wn.2d 541, 553, 947 P.2d 700 (1997). Halgren, 156 Wn.2d at 809-10. But Berlin also considered whether the alternatives in the statute were alternate means of committing one crime or instead separate crimes. Berlin, 133 Wn.2d at 552.

2. THE EXAMINATION REQUIRED UNDER RCW 71.09.040 INCLUDES AN EXAMINATION AND RECORDS REVIEW BUT DOES NOT PERMIT PLETHYSMOGRAPH TESTING.

Once probable cause has been established, RCW 71.09.040 authorizes a pre-trial evaluation as to whether a person is a sexually violent predator. RCW 71.09.040(4). The question in this case is the scope of that evaluation, namely, whether the person may be compelled to submit to plethysmograph testing. The answer is no. See In re Detention of Hawkins, 169 Wn.2d 796, 238 P.3d 1175 (2010) (discussed in Reply Brief of Appellant). Division Two's recent decision in Williams does not affect that analysis.

Botner's maintains the compulsory plethysmograph 1) is unauthorized by statute and 2) violates his due process privacy rights. The Williams court also addressed a privacy challenge regarding a pre-trial evaluation, but the similarities end there. Williams argued the evaluation required by RCW 71.09.040(4) violated his right to privacy. Williams, ____ Wn. App. at ____, 257 P.3d at 675. In a very brief analysis, the court rejected this argument because, as a convicted sex offender, Williams' expectation of privacy was diminished. ____ Wn. App. ____, 257 Wn. App. at 275.

The evaluation in Williams included interviews, psychological testing, and a review of records including Williams' history, police reports, treatment records, court records, prison records, and psychological evaluations. ____ Wn. App. ____, 257 P.3d at 673. The opinion contains no indication the evaluation included plethysmograph testing or whether the court's analysis would stand if it did. The privacy analysis in Williams sheds little, if any, light on this case.

Next, Williams also made a statutory argument that RCW 71.09.040 authorizes only a review of records, not an examination. ____ Wn. App. at ____, 257 P.3d at 675. The court correctly rejected this argument because RCW 71.09.040 authorizes "an evaluation as to whether the person is a sexually violent predator." ____ Wn. App. at ____, 257 P.3d at 676. Williams had misconstrued the import of In re Det. of Williams, 147 Wn.2d 476, 479, 491, 55 P.3d 597 (2002),³ which merely held that no examination is permitted under CR 35 in addition to the examination already authorized by RCW 71.09.040. Williams, ____ Wn. App. ____, 257 P.3d at 676. By contrast, Botner does not challenge the statutory authority to conduct an examination, but merely whether that authority includes a plethysmograph. The Williams court's analysis does not touch on this issue.

³ The two Williams are not related. Williams, ____ Wn. App. at ____, 257 P.3d at 673 n.2.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant and the Reply Brief of Appellant, Botner requests this Court reverse his commitment.

DATED this 7th day of October, 2011.

Respectfully submitted,

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Appellant,)	
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v.)	COA NO. 28417-4-III
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STATE OF WASHINGTON,)	
)	
Respondent.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF OCTOBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THE 7TH DAY OF OCTOBER, 2011.

x *Patrick Mayovsky*