

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

**TABLE OF CONTENTS**

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

**I. INTRODUCTION**.....1

**II. ASSIGNMENTS OF ERROR**.....1

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** .....1

**IV. STATEMENT OF THE CASE**.....2

**V. ARGUMENT**.....3

**VI. CONCLUSION**.....9

**CERTIFICATE OF SERVICE** .....10

**Appendix** – Opinion in *State v. Barboza-Cortes*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, *slip op.* no. 96397-5 (filed Nov. 7, 2019), 2019 WL 5798580.

**AUTHORITIES CITED**

**State Cases**

*State v. Barboza-Cortes*, \_\_ P.3d \_\_, *slip op.* no. 96397-5 (filed Nov. 7, 2019) .....6, 7

*State v. Lee*, 128 Wn.2d 151, 904 P.2d 1143 (1995).....7

*State v. Linehan*, 147 Wn.2d 638, 56 P.3d 542 (2002).....7

*State v. Owens*, 180 Wn.2d 90, 323 P.3d 1030 (2014).....10

*State v. Woodlyn*, 188 Wn.2d 157, 392 P.3d 1062 (2017).....6, 7, 8, 9, 10

**Constitutional Provisions**

Wash. Const. art. I, § 21.....6

**Statutes**

RCW 9A.56.020(1).....7

RCW 9A.56.300(4).....8

## **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 Preston<sup>1</sup> 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

---

<sup>1</sup> 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 Burkhardt". The signature is written in a cursive style with a large initial "A".

---

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:

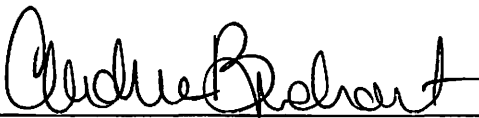
Shane R. Malotte, DOC #416474  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

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