No. _____
COA No. 47916-8-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH A. LINVILLE, JR.,

Respondent.

PETITION FOR REVIEW

JON TUNHEIM
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I. IDENTITY OF THE PETITIONER.

The State of Washington, by and through its attorney, Joseph J.A. Jackson, Deputy Prosecuting Attorney for Thurston County, asks this Court to accept review of the Court of Appeals decision terminating review designated in part II of this petition.

II. COURT OF APPEALS OPINION.

The State seeks review of the Court of Appeals decision that reversed Kenneth Linville, Jr.'s convictions for 137 crimes based on a finding of ineffective assistance of counsel for failing to object to joinder of charges. A copy of the Court of Appeals decision is in the appendix at pages 1 -13. Division II's opinion was filed on June 27, 2017.

III. ISSUE

1. Whether the Court of Appeals correctly interpreted the legislature's intended meaning of RCW 9A.82.010(4).

2. Whether the Court of Appeals erred in ruling that certain offenses were not part of a pattern of criminal profiteering activity and should have been severed pursuant to RCW 9A.82.085.

3. Whether the Court should adopt an interpretation of the definition of a pattern of criminal profiteering that creates the potential for double jeopardy issues for non-enumerated offenses that share the same nexus to enumerated offenses under RCW 9A.82.010(4).

4. Whether the Court of Appeals erred in finding that Linville's trial counsel rendered ineffective assistance.

IV. STATEMENT OF THE CASE.

Following a wave of daytime burglaries in the Olympia area, Appellant Kenneth Linville, (hereinafter "Linville") was arrested on April 2, 2014. Linville was subsequently convicted by a Thurston County Court of leading organized crime, 43 counts of burglary, four of which were committed while armed with a firearm, 38 counts of trafficking, 39 counts of theft, four counts of theft of a firearm, four counts of identity theft, four counts of unlawful possession of a firearm, and one count of possession of stolen property; 137 counts in total. RP 5689-5710. For these acts, Linville was sentenced to 914 months in prison.

During motions in limine, the trial court considered defense counsel's motion to sever counts, and based on the four part test enumerated in State v. Russell, 125 Wn.2d 24, 61; 882 P.2d 747 (1994), the trial court denied the motion to sever. RP 28-50.

During the argument of that issue, the State noted the pattern of criminal profiteering was essentially based on a series of 43 burglaries. RP 43.

During the ten week trial, the State presented testimony from numerous co-defendants who identified Linville as the leader of their burglary ring, claiming that he recruited, trained, and directed them to carry out illicit activities, rewarding participants with illegal drugs.1

Following his conviction, Linville brought this appeal. In its Part Published Opinion, Division II found that Linville's trial counsel rendered ineffective assistance by failing to move for severance of offenses that were, "not part of the pattern of criminal profiteering activity" from the charge of leading organized crime under RCW 0A.82.085. State v. Linville, COA No. 47916-8-II, Part Published Opinion at 3.

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1 Linville's former girlfriend, Jessica Hargrave, provided the most in depth testimony, detailing the numerous burglaries carried out by the pair, and how Linville disposed of stolen goods after the thefts. RP 868-912. Other co-defendants who testified against Linville included several of his former paramours, Jennifer Krenik and Jolee Hart, RP 3275-304, 3730-73, and a number of his friends, Avery Garner, Ryan Porter, Kelly Olsen, and Teya Harris. RP 1361-1402, 2921-34, 3094-147, 3508-23, 4193-264.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

This Court will accept review when the decision of the Court of Appeals conflicts with a decision of the Supreme Court, RAP 13.4(b)(1), conflicts with another decision of the Court of Appeals, RAP 13.4(b)(2), raises a significant question of law under the Washington or the United States Constitutions, RAP 13.4(b)(3), or involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). The decision at issue involves an issue of substantial public interest that should be determined by the Supreme Court. Trials on the charge of Leading Organized crime are often lengthy and complex. The decision of the Court of Appeals would require multiple trials for crimes based on the same series of criminal activity and could lead to instances where the State is placed in the position of having to choose as charge of leading organized crime or other offenses with the possibility of jeopardy attaching.

1. The plain language of RCW 9A.82.010(4) includes all anticipatory or completed offenses, committed for financial gain that are chargeable or indictable in Washington State.

Central to Division II's finding that Linville's trial counsel rendered ineffective assistance of counsel is the interpretation of

the definition of "criminal profiteering" in RCW 9A.82.010(4). The statute is included below with emphasis added,

> "Criminal profiteering" means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred *and, if* the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, *as any of the following:*
>
> (a)Murder, as defined in RCW 9A.32.030... (followed by 51 more enumerated criminal offenses)

Division II accepted Linville's interpretation of "as any of the following" to limit criminal profiteering to the 52 enumerated acts, regardless of where the act occurred.

The meaning of a statute is reviewed de novo. State v. Wooten, 178 Wn.2d 890, 895, 312 P.3d. 41 (2013). Courts in the State of Washington employ statutory interpretation to determine and give effect to the legislature's intent. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 274 (2013). To determine the legislative intent, courts first look to the plain language of the statute, and the statutory scheme as a whole. Id. at 192. Washington courts observe the rule against surplusage, which requires courts to avoid interpretations of a statute that would render superfluous a provision of the statute. In re Estate of Mower, 193 Wn.App. 706,

720, 374 P.3d 180 (2016); See Also, Veit v. Burlington N. Santa Fee Corp, 171 Wn.2d 88, 113, 249 P.3d 607 (2011).

Division II interprets RCW 9A.82.010(4) as limiting the crimes that can be included in a "pattern of criminal activity" to those enumerated in the statute, even if the offenses occurred in the State of Washington, citing to Trujillo v. NW Tr. Servs., Inc., 183 Wn.2d 820, 837, 355 P.3d 1100 (2015) and State v. Munson, 120 Wn.App. 103, 106, 83 P.3d 1057 (2004).

In Trujillo, the Court considered a claim that lenders NWTS and Wells Fargo violated the Deeds of Trust Act and claims under the Consumer Protection Act and Criminal Profiteering Act. Trujillo, 183 Wn.2d at 828. Trujillo's claims under the Criminal Profiteering Act alleged crimes of Theft and Leading Organized Crime. Id. at 837. While the Court defined criminal profiteering as commission of "specific enumerated felonies for financial gain," this statement was essentially dicta as it was not necessary for the Court's decision. Pedersen v. Klienkert, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960) (language is dicta when it is not necessary to the decision of that case). The Trujillo Court specifically found that Trujillo had failed to allege three or more acts constituting a criminal enterprise. Trujillo, 183 Wn.2d at 838. The Court's discussion of the definition of

criminal profiteering was unnecessary dicta, and certainly did not address the issue of statutory interpretation raised in this case. Dicta should not be transferred into a rule of law. State ex rel Hoppe v. Meyer, 58 Wn.2d 320, 329-330, 363 P.2d 1211 (1961).

Likewise, in Munson, Division III did not address the specific issue of statutory interpretation at issue in this case. In Munson, the court stated, "forgery is one of the 39 listed criminal profiteering activities that may serve as the basis for a leading organized crime charge." State v. Munson, 120 Wn.App. at 107. The Court stopped its inquiry into whether sufficient facts had been presented by acknowledging that forgery can serve as a predicate offense for a charge of leading organized crime and did not address whether other crimes committed for the purpose of financial gain could also serve as predicate offenses.

Here, Division II's interpretation of RCW 9A.82.010(4), makes the inclusion of the phrase, "and, if that act occurred in a state other than this state," un-necessary and renders that provision of the statute superfluous. Had the legislature intended the statute to read as Division II interprets, it could have defined criminal profiteering as "any act..., committed for financial gain, that is chargeable or indictable under the laws of the state in which the act

occurred and would be chargeable or indictable if committed in this state and punishable as a felony by imprisonment for more than one year...as any of the following." The legislature did not do so, and this court should not limit the plain language of the legislature.

2. The charges of residential burglary, first degree burglary, second degree, burglary, attempted residential burglary, theft of a firearm, third degree theft, unlawful possession of a firearm, and possession of stolen property were properly joined and should not have been excluded regardless of the Court's interpretation of RCW 9A.82.010(4).

CrR 4.3 governs joinder of offenses and defendants; the Washington State Supreme Court has held that "joinder pursuant to CrR 4.3(a) should be liberally allowed" where the charged offenses meet the rule's criteria. State v. Bluford, 188 Wash. 2d 298, 310, 393 P.3d 1219 (2017).

In Bluford, the Washington State Supreme Court sitting en banc recently conducted a thorough review of the joinder and severance of offenses pursuant to CrR 4.3. A party must move for severance pretrial and renew a denied pretrial motion for severance before or at the close of all the evidence; if the party does not timely make or renew a severance motion, severance is waived. Bluford, 188 Wash. 2d 298 at 306. Judicial economy and potential prejudice to the defendant are the key factors in a trial court's

determination whether joinder is appropriate. "We reaffirm our precedent and clarify that (1) both prejudice to the defendant and judicial economy are relevant factors in joinder decisions, but judicial economy can never outweigh a defendant's right to a fair trial, and (2) a trial court's decision on a pretrial motion for joinder is reviewed for abuse of discretion." Id. at 305. "We now reaffirm our precedent, which holds that the trial court must consider whether such joinder will result in undue prejudice to the defendant. If it will, joinder is not permissible." Id. at 302. There are four factors to consider when determining whether joinder causes undue prejudice: "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." State v. Russell, 125 Wash. 2d 24, 63, 882 P.2d 747, 63 USLW 2291 (1994).

However, offenses which normally may be joined pursuant to CrR 4.3 can still be barred from joinder by statute. RCW 9A.82.085 bars the joinder of offenses in a criminal prosecution for leading organized crime other than those offenses which are part of the pattern of criminal profiteering activity.

> In a criminal prosecution alleging a violation of RCW 9A.82.060 (leading organized crime) or 9A.82.080, the state is barred from joining any offense other than the offenses alleged to be *part of the pattern of criminal profiteering activity*.

RCW 9A.82.085.

Indeed, offenses which the State alleges are part of the pattern of criminal profiteering activity must be joined in a single action, because the statute also bars any subsequent criminal prosecution for such offenses.

> "When a defendant has been tried criminally for a violation of RCW 9A.82.060 or 9A.82.080, *the state is barred from subsequently charging the defendant with an offense that was alleged to be part of the pattern of criminal profiteering activity for which he or she was tried*."

RCW 9A.82.085.

RCW 9A.82.010(12) more specifically defines a "pattern of criminal profiteering activity," which is the exact wording used in RCW 9A.82.085. The statute reads (emphasis added):

> "Pattern of criminal profiteering activity" means engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. *In order to constitute a pattern, the three acts must have the same or*

> *similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.*

RCW 9A.82.010(12).

The plain language of RCW 9A.82.010(12) requires that the State prove not only the predicate offenses, but also that the offenses had the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.

Because of the nexus requirement, the State was required to prove the other charged crimes that are not specifically enumerated in RCW 9A.82.010(4) in order to show that the offenses that were specifically enumerated were all part of the criminal enterprise in which Linville was engaged. The definition of a pattern of criminal profiteering necessarily includes the means utilized and crimes based on the methods and results of offenses which would otherwise be enumerated are necessarily part of the "pattern" of criminal profiteering.

The decision of the Court of Appeals in this case considered only the portion of RCW 9A.82.010(12) defining a pattern of

criminal profiteering activity as "engaging in at least three acts of criminal profiteering." State v. Linville, 2017 WL 2774492, Wash. App. LEXIS 1527 at 5. The opinion does not address the remainder of the definitional statute which requires the State to prove more than just enumerated acts in order to prove a pattern of criminal profiteering activity.

The pattern of criminal profiteering in which Linville engaged necessarily included more than just offenses enumerated in RCW 9A.82.010(4). As stated in the State's arguments against severance at trial, the pattern of criminal prosecution alleged stemmed from numerous offenses that were all encompassed in a string of 43 burglaries. RP 35. Division II takes an excessively narrow reading of RCW 9A.82.010(12) and seems to ignore that all of the facts surrounding the acts of "criminal profiteering" are part of the pattern of criminal profiteering activity. Thus, even assuming the disputed charges are not considered acts of criminal profiteering, they are still so closely tied to the acts underlying criminal profiteering that they should be considered a part of the pattern. Certainly, it seems doubtful that the legislature intended to require mandatory severance of such intertwined offenses.

3. The Court of Appeal's interpretation of a "pattern of criminal profiteering" may prohibit the State from proceeding on both offenses that are not enumerated in RCW 9A.82.010(4) and the charge of leading organized crime.

The interpretation of a "pattern of criminal profiteering activity" adopted by the court of appeals requires that offenses committed which are listed under RCW 9A.82.010(4) must be tried separately from those that are not listed, even if they arise from the same fact pattern. However, as discussed there are limitations from RCW 9A.82.085 on subsequent criminal prosecution for offenses "alleged to be part of the pattern of criminal profiteering activity for which he or she was tried." RCW 9A.82.085. More importantly, such a practice of separating criminal prosecutions arising from the same factual circumstances invokes a constitutional issue, in a defendant's right to be free from double jeopardy.

Article I, section 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. In re Pers. Restraint of Percer, 150 Wash.2d 41, 48–49, 75 P.3d 488 (2003) (citing State v. Gocken, 127 Wash.2d 95,

100, 896 P.2d 1267 (1995)). Despite this limitation, the legislature may constitutionally authorize multiple punishments for a single course of conduct. State v. Calle, 125 Wash.2d 769, 776, 888 P.2d 155 (1995) (citing Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980)). Three steps are used in determining whether the Legislature authorized multiple punishments, so as to determine whether multiple punishments would not violate the double jeopardy clause. In re Burchfield, 111 Wash. App. 892, 895-96, 46 P.3d 840 (2002). "We first look at the statutory language to determine whether separate punishments are specifically authorized." Id.

"If the language is silent, we apply the "same evidence" test to determine whether each offense has an element not contained in the other." Id. Under the same evidence test, two statutory offenses are the same for double jeopardy purposes if the offenses are identical in law and in fact. State v. Harris, 167 Wash. App. 340, 352, 272 P.3d 299 (2012) (citing State v. Hughes, 166 Wash.2d 675, 682, 212 P.3d 558 (2009)); State v. Calle, 125 Wash.2d 769, 888 P.2d 155 (1995). Under the legal prong of the analysis, if each offense includes an element not included in the other and requires proof of a fact the other does not, then the

statutory offenses are not constitutionally the same under this test and double jeopardy prohibitions are not violated. Hughes, 166 Wash.2d at 682, 212 P.3d 558; Calle, 125 Wash.2d at 777, 888 P.2d 155. The legal element analysis requires more than just a facial comparison of the statutory offenses' requirements. Id. The third part of the Burchfield analysis is whether the legislature has "clearly indicated its intent that the same conduct or transaction will not be punished under both statutes." Hughes, 166 Wash.2d at 682.

Additionally in Laviolette, this court held that a subsequent prosecution for second-degree burglary after a defendant had plead guilty to third-degree theft, in connection with the same incident, violated double jeopardy. State v. Laviolette, 118 Wash. 2d 670, 826 P.2d 684 (1992) (overruling (on other grounds) recognized in State v. Calle, 125 Wash.2d 769, 888 P.2d 155 (1995). In Laviolette, the defendant entered the workplace of his former employer and stole several personal items from former coworkers. Laviolette, 118 Wash. 2d at 672. The State first charged the defendant with four counts of third degree theft, to which he plead guilty. Id. 672-73. Subsequently, the State then charged the defendant with second degree burglary, and he was convicted at a

bench trial after he plead not-guilty. Id. In its role as finder of fact in a bench trial, the trial court relied solely on the defendant's previous theft convictions to prove the intent element of burglary, which is an essential element in the charge. Id. at 678-79. Because the trial court relied on conduct for which the defendant had been previously prosecuted, the court found that the prosecution for burglary violated double jeopardy. Id. at 678-79.

By contrast in Calle, this court determined that a defendant could be charged with first degree incest and second degree rape without violating double jeopardy, although both charges arose from the same act of intercourse, because they satisfied the "same evidence" test. Id. at 782. However, in Calle both charges were brought at the same time in the same action, while in Laviolette, one charge was brought subsequent to a separate prosecution on the other charge, as here in Linville. Id. at 771-72; Laviolette, 118 Wash. 2d at 672-73; Linville, 2017 WL 2774492, Wash. App. LEXIS 1527 at 1. More importantly, in Calle, neither charge needed to be proven predicate to prosecuting on the other charge, while in Laviolette the State needed to first prove theft before it could successfully charge the defendant with burglary. As such, the facts

of Laviolette are closer to those in the case at hand than those of Calle.

Theft is still included in the listed crimes under RCW 9A.82.010, while Burglary is not included. Utilizing the approach adopted here by the Court of Appeals, burglary and theft charges arising from the same incidents would need to be charged separately. As there is precedent in which suggests this approach violates a defendant's constitutional right to protection from double jeopardy, this court should not adopt that approach.

4. Linville's trial counsel was not ineffective in failing to object to joinder under RCW 9A.82.085.

As stated by the court of appeals, the Strickland standard (as reiterated by this court in Reichenbach) is the standard of review for ineffective assistance of counsel claims.

> To show ineffective assistance of counsel, a defendant must show that (1) defense counsel's conduct was deficient, and (2) the deficient performance resulted in prejudice. To show deficient performance, Linville must show that defense counsel's performance fell below an objective standard of reasonableness. *To show prejudice, Linville must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed.*

> State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), emphasis added.

There is a strong presumption that defense counsel's conduct is not deficient. Reichenbach, 153 Wash. 2d at 130. Claims of ineffective assistance of counsel are also reviewed de novo. State v. Sutherby, 165 Wash.2d 870, 883, 204 P.3d 916 (2009). Before applying this standard to this case, the Court of Appeals properly stated that "when assessing whether counsel's deficient performance was prejudicial, we ask whether *but for* counsel's purportedly deficient conduct would the outcome of *this trial* have differed." Linville, 2017 WL 2774492, Wash. App. LEXIS 1527 at 5. However, the court did not properly apply this standard.

In Linville, the court determined that Linville's counsel was deficient, and further determined that the deficient performance resulted in prejudice. Id. at 4-5. In reaching this holding, specifically that prejudice resulted, the court stated that "the State's argument requires us to make too many assumptions." Id. at 5. However, the court itself in stating the Reichenbach standard made it clear that the burden was on Linville to prove that the trial outcome would have been different; the burden was not on the State to affirmatively prove that the result would not have been

different. The State had sufficient evidence to convict Linville on all counts, and critical evidence would have been cross-admissible if separate trials were held. The court of appeals was skeptical on this point, stating that "we have no way to know what would be found admissible or inadmissible in some hypothetical trial." Id. The court viewed this as supporting Linville's argument, however it in fact favors the State's argument; the burden is on Linville to prove the result would have been different. Linville has not met this burden.

Furthermore, the court in Linville relied heavily on Reichenbach to determine prejudice from ineffective assistance of counsel, which can be distinguished from Linville in several respects. In Reichenbach, the appellant had been convicted of one count of possession of methamphetamine. Reichenbach, 153 Wash. 2d at 128. The methamphetamine in question had been obtained illegally, as part of a warrantless search. Id. at 136-37. The bag of methamphetamine was the sole basis for the defendant's conviction, and so it was abundantly clear that the defense counsel's failure to object to the evidence admission was the sole cause of the defendant's conviction. Id. at 137.

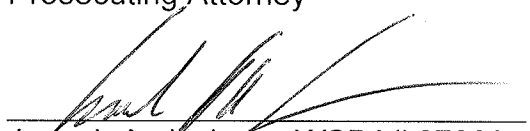
Unlike Reichenbach, there was no error in this case. For the reasons above, it was not error for the trial court to deny defense counsel's motion to sever, and without error, there cannot be ineffective assistance of counsel. The logic used by the Court of Appeals would thwart the legislative intent in criminalizing leading organized crime by creating potential double jeopardy issues. Even if there was error, Linville needs to meet the burden of proving that the result of the proceedings would have been different solely but for his counsel's performance, as the defendant in Reichenbach was clearly able to do. Linville has not done so.

VI. CONCLUSION.

Review of the instant case is appropriate; the decision of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court. The State respectfully asks this Court to accept review of the Court of Appeals decision reversing the respondent's conviction.

Respectfully submitted this 25 day of July, 2017.

JON TUNHEIM
Prosecuting Attorney



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 27, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH ALFRED LINVILLE, JR., Appellant.	No. 47916-8-II PART PUBLISHED OPINION

WORSWICK, J. — Kenneth Linville Jr. appeals his convictions for leading organized crime, burglary, trafficking in stolen property, theft, possession of stolen property, unlawful firearm possession, and possession of controlled substances. Linville was convicted of 137 crimes.

In the published portion of this opinion, we hold that Linville's counsel rendered ineffective assistance by failing to object to the improper joinder of charges, and, consequently, we reverse Linville's convictions and remand for separate trials. In the unpublished portion of this opinion, we further hold that the State produced sufficient evidence to support the first degree burglary convictions. We do not address Linville's other arguments.[1]

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[1] Linville additionally argues that (1) a conviction based on the first alternative means of trafficking in stolen property cannot rest on accomplice liability, (2) insufficient evidence supported the firearm sentencing enhancements, (3) his right to a unanimous jury verdict was violated because the jury was instructed that it need not be unanimous as to the means by which it found him guilty of trafficking in stolen property, (4) his multiple convictions for trafficking in stolen property violated the prohibition against double jeopardy, and (5) the trial court denied his right to due process by permitting the State to amend the charging information after the State rested its case.

FACTS

Following an increase in residential burglaries in Thurston County, law enforcement officers noticed similarities among several burglaries. Officers ultimately recovered numerous items taken during the burglaries from Linville's home.

The State charged Linville with 1 count of leading organized crime, 35 counts of residential burglary, 1 count of attempted residential burglary, 4 counts of first degree burglary, 3 counts of second degree burglary, 39 counts of trafficking in stolen property, 17 counts of first degree theft, 18 counts of second degree theft, 1 count of attempted second degree theft, 3 counts of third degree theft, 5 counts of theft of a firearm, 5 counts of identity theft, 4 counts of unlawful possession of a firearm, 1 count of possession of stolen property, and 1 count of possession of a controlled substance, for a total of 138 charges with numerous deadly weapon sentencing enhancements.[2,3] The State alleged that Linville was armed with a firearm during the commission of the four first degree burglaries.[4] At no point did Linville argue that joinder of any offenses was improper under RCW 9A.82.085.

During the jury trial, the State presented testimony from numerous co-defendants who identified Linville as the instigator and leader of the burglary scheme. The co-defendants'

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[2] On all charges except leading organized crime, Linville was charged either as a principal or as an accomplice. Linville never objected to being charged as a principal or as an accomplice.

[3] The deadly weapon sentencing enhancements were based on Linville's use of a pry bar during the burglaries.

[4] The four firearm sentencing enhancements were based on firearms Linville stole during the first degree burglaries.

testimony was corroborated by law enforcement officers and victims who described the common characteristics among the burglaries and identified stolen goods recovered from the homes of Linville and his co-defendants.[5]

The jury found Linville guilty of 137 offenses,[6] and he was sentenced to 914 months in prison, which included 240 months for four firearm sentencing enhancements. Linville appeals.

ANALYSIS

Linville argues that his counsel rendered ineffective assistance by failing to move for severance of offenses that were not "part of the pattern of criminal profiteering activity" from the charge of leading organized crime under RCW 9A.82.085.[7,8] Br. of Appellant 17. We agree.

The Sixth Amendment guarantees the effective assistance of counsel in criminal proceedings. To show ineffective assistance of counsel, a defendant must show that (1) defense

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[5] Specifically, witnesses testified regarding four burglaries during which Linville and his accomplices stole firearms.

[6] The jury found Linville not guilty of possession of a controlled substance and found that the State failed to prove the deadly weapon enhancements based on Linville's use of the pry bar.

[7] Linville also argues that this court should review the improper joinder of these offenses independently of the ineffective assistance of counsel context because "RCW 9A.82.085 represents a legislative conclusion that a joint trial for leading organized crime and offenses which do not constitute a part of the pattern of criminal profiteering activity is manifestly unfair," and "[a] manifestly unfair trial deprives a defendant of due process in violation of the Fourteenth Amendment." Br. of Appellant 17 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)). However, Linville fails to show that the issue affects a constitutional right, thus we address whether the alleged improper joinder is reversible error only in the context of ineffective assistance of counsel.

[8] Linville also argues that the State was required to specifically designate which offenses were "part of the pattern of criminal profiteering activity" in the charging information in order to join them to a trial for leading organized crime and that his counsel rendered deficient performance for failing to object to the information. Br. of Appellant 10, 17. Because we otherwise reverse and remand we do not address this argument.

counsel's conduct was deficient, and (2) the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To show deficient performance, Linville must show that defense counsel's performance fell below an objective standard of reasonableness. *Reichenbach*, 153 Wn.2d at 130. To show prejudice, Linville must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed. *Reichenbach*, 153 Wn.2d at 130. We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

1. *Counsel Rendered Deficient Performance*

Linville argues that the plain language of RCW 9A.82.085 prohibits the joinder of crimes not "alleged to be part of the pattern of criminal profiteering activity" to a prosecution for leading organized crime, and therefore, defense counsel rendered deficient performance by not objecting to the joinder of charges not included in the definition of "criminal profiteering." Br. of Appellant 17. We agree.

We review the meaning of a statute de novo. *State v. Wooten*, 178 Wn.2d 890, 895, 312 P.3d 41 (2013). We employ statutory interpretation to determine and give effect to the legislature's intent. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). To determine legislative intent, we first look to the plain language of the statute considering the text of the provision in question, the context of the statute, and the statutory scheme as a whole. *Evans*, 177 Wn.2d at 192.

RCW 9A.82.085 states, in relevant part:

> In a criminal prosecution alleging a violation of [leading organized crime], the state is barred from joining any offense other than the offenses alleged to be part of the pattern of criminal profiteering activity.

RCW 9A.82.010(12) defines "pattern of criminal profiteering activity" as "engaging in at least three acts of criminal profiteering."

RCW 9A.82.010(4) defines "criminal profiteering" as:

> any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following: . . . .

RCW 9A.82.010(4) then lists 46 crimes and their defining statutes. First and second degree theft, trafficking in stolen property, leading organized crime, and identity theft are included in the list. *See* RCW 9A.82.010(4)(e), (r), (s), and (kk). However, residential burglary, first degree burglary, second degree burglary, attempted residential burglary, theft of a firearm, third degree theft, unlawful possession of a firearm, and possession of stolen property are not included in the list. *See* RCW 9A.82.010(4).

Linville argues that because these latter offenses are not listed in RCW 9A.82.010(4), RCW 9A.82.085 prohibits the State from joining them in its prosecution against him for leading organized crime. The State responds that the list applies only to acts which occurred outside of the state of Washington.

The State contends that the statute should be read as:

> Criminal Profiteering means
> (1) any act, including any anticipatory or completed offense, committed for financial gain,

> (2) that is chargeable or indictable under the laws of the state in which the act occurred and,
> (3) if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following: [list of specific felonies]. . . .

Br. of Resp't 14-15.

Linville contends that the statute should be read as:

> Criminal Profiteering means
> (1) any act, including any anticipatory or completed offense, committed for financial gain,
> (2) that is chargeable or indictable under the laws of the state in which the act occurred
> and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year,
> (3) regardless of whether the act is charged or indicted,
> (4) as any of the following: [list of specific felonies]. . . .

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Washington courts have agreed with Linville's interpretation of RCW 9A.82.010(4), stating, "'Criminal profiteering' is defined as commission of *specific enumerated felonies* for financial gain." *Trujillo v. Nw Tr. Servs., Inc.*, 183 Wn.2d 820, 837, 355 P.3d 1100 (2015) (emphasis added) (citing RCW 9A.82.0101(4)). And, "'Criminal profiteering' is any act committed for financial gain that is chargeable as one of the *predicate felonies enumerated in RCW 9A.82.010(4)*." *State v. Munson*, 120 Wn. App. 103, 106, 83 P.3d 1057 (2004) (emphasis added).

We note that the State's interpretation of RCW 9A.82.010(4) on appeal conflicts with its position at trial. During its closing argument, the State explained "criminal profiteering" to the jury:

> You get further information in terms of criminal profiteering because *it's only specific types of crimes, right, that qualify for criminal profiteering.* We have theft in the first degree charged multiple times here, theft in the second degree charged multiple times here, trafficking in stolen property in the first degree charged multiple times here, and then identity theft in the second degree, also charged multiple times, and you're well in excess of three for each of those. And it has to be committed for financial gain, whether by an accomplice or the principal, and it includes any attempted or completed commission of those offenses.

30 Verbatim Report of Proceedings (VRP) at 5405-06. At trial, the State clearly understood "criminal profiteering" to mean only those crimes explicitly listed in RCW 9A.82.010(4).

We hold that a plain reading of RCW 9A.82.085 and 9A.82.010(4) make it clear that the State was statutorily barred from joining charges of residential burglary, first degree burglary, second degree burglary, attempted residential burglary, theft of a firearm, third degree theft, unlawful possession of a firearm, and possession of stolen property to Linville's prosecution for leading organized crime.

The unreasonable failure to research and apply relevant statutes without any tactical purpose constitutes deficient performance. *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). Here, defense counsel's failure to object to the State's improper joinder of charges based on RCW 9A.82.085 and 9A.82.010(4) was unreasonable and constitutes deficient performance.

2. *Counsel's Deficient Performance Resulted in Prejudice*

To succeed on his claim of ineffective assistance of counsel, Linville must also show that but for his counsel's deficient performance the outcome of the trial would have differed, and therefore the deficient performance was prejudicial. *Reichenbach*, 153 Wn.2d at 130. He meets this burden.

We review this issue differently than the related issue of discretionary joinder or severance pursuant to CrR 4.4(b). Under CrR 4.4(b), a trial court must grant a motion to sever offenses if it determines that "severance will promote a fair determination of the defendant's guilt or innocence of each offense." A defendant seeking such a severance bears the burden of demonstrating that a trial involving all counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Huynh*, 175 Wn. App. 896, 908, 307 P.3d 788 (2013). Appellate courts review a trial court's denial of a motion to sever under CrR 4.4(b) for manifest abuse of discretion.

In contrast, RCW 9A.82.085 leaves no room for the trial court's discretion. The State is *barred* from joining offenses other than those alleged to be part of the criminal profiteering activity in a prosecution for leading organized crime. As a result, severance of the charges here was mandatory, and severance would have been granted had Linville's counsel brought RCW 9A.82.085 to the trial court's attention.

The State argues that because it had sufficient evidence against Linville to support all of the convictions, Linville would have *eventually* been convicted of all charges. However, our focus in determining whether counsel's deficient performance was prejudicial is on the proceeding at hand; we do not speculate on the potential results of a hypothetical future proceeding. *Reichenbach*, 153 Wn.2d at 130.

When assessing whether counsel's deficient performance was prejudicial, we ask whether *but for* counsel's purportedly deficient conduct would the outcome of *this trial* have differed. *Reichenbach*, 153 Wn.2d at 130. Because of defense counsel's failure to object, Linville was improperly tried for 138 total charges and convicted of 137 offenses. Had counsel properly

objected to the joinder, 56 of the charges, including all of the burglary charges, would have been severed, the trial would not have included convictions for those 56 improperly joined charges, and the outcome of this trial would have been different. *See State v. Jones*, 183 Wn.2d 327, 341, 352 P.3d 776 (2015). Moreover, each of the four firearm enhancements, which resulted in a mandatory minimum sentence of 240 months, were associated with the four counts of first degree burglary, which would not have been considered but for defense counsel's deficient performance.

The improper joinder had additional prejudicial consequences. For example, by improperly joining four charges of unlawful possession of a firearm, the State was permitted to introduce evidence of Linville's prior felony for possession of a controlled substance without a prescription. This prior conviction evidence was highly prejudicial given that the State's theory was that Linville's crime ring was motivated by drugs. *See State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004). Also, the State relied heavily on the burglaries as evidence of Linville's guilt for leading organized crime. A jury separately considering the burglary charges would not necessarily have heard testimony of Linville's accomplices accusing him of orchestrating a broad scheme.

The State contends that this evidence would have been cross-admissible even if the charges were tried separately. But to admit such evidence the State would bear the burden of proving that the probative value of the evidence would outweigh the prejudice. *See* ER 404, 609. Without any such findings on the record, we have no way to know what would be found admissible or inadmissible in some hypothetical trial. Ultimately, the State's argument requires us to make too many assumptions.

Consequently, we hold that Linville's defense counsel rendered ineffective assistance of counsel by failing to object to the joinder of offenses in violation of RCW 9A.82.085. We reverse Linville's convictions and remand for separate trials.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL ANALYSIS

II. SUFFICIENT EVIDENCE PROVES THAT LINVILLE WAS ARMED WITH A FIREARM

Linville next argues that the State presented insufficient evidence to convict him of first degree burglary because the State failed to prove a nexus among the defendant, the weapon, and the crime.[9] We disagree.

"Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). "A claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence." *State v. Caton*, 174 Wn.2d 239, 241, 273 P.3d 980 (2012). We consider circumstantial and direct evidence to be equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

[9] Linville also argues that insufficient evidence supported the firearm sentencing enhancements. However, because we are reversing and remanding, and "sentencing enhancements are not 'offenses' as contemplated by the double jeopardy clause's protection," we need not consider this issue. *See In re Pers. Restraint of Delgado*, 149 Wn. App. 223, 240, 204 P.3d 936 (2009).

First degree burglary requires the State to prove, among other elements, that the defendant was armed with a deadly weapon or assaulted a person. RCW 9A.52.020(l)(a). The statutory definition for "deadly weapon" provides:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6). "A firearm, whether loaded or unloaded, is a deadly weapon per se." *State v. Hernandez*, 172 Wn. App. 537, 543, 290 P.3d 1052 (2012) (citing *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 365, 256 P.3d 277 (2011)).

For purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). When a defendant has actual possession of a firearm, sufficient evidence supports a first degree burglary conviction despite the firearm being unloaded and no evidence showing that the defendant intended to use it. *Hernandez*, 172 Wn. App. at 543–44.

Linville, relying entirely on *Brown*, argues that the State was required to prove that a nexus existed. But *Brown* involved the question of constructive possession as it related to being "armed" for purposes of the firearm sentencing enhancement. *See Brown*, 162 Wn.2d at 434 n.4.

Our decision in *Hernandez* offers a more apt comparison to the facts here. There, a group of burglars committed a series of burglaries, during one of which they took a 20-gauge shotgun. *Hernandez*, 172 Wn. App. at 540. The *Hernandez* court held that the State was not required to prove a nexus between the firearm and the crime because there is no nexus requirement where

there is actual possession of a firearm, rather than constructive possession. *Hernandez*, 172 Wn. App. at 544.

Here, there is no dispute that firearms were taken in the course of the burglaries. Therefore, either Linville or his accomplices were in actual possession of the firearms during the commission of the burglary. Linville concedes that guns were stolen during four of the burglaries.[10] This fact is sufficient evidence to support the first degree burglary convictions and the firearm enhancements for the burglary.

Aside from his nexus argument, Linville asserts only that no evidence suggested that anyone involved in the burglary intended or was willing to use the stolen firearms in furtherance of the crime. But "[w]hen first degree burglary involves deadly weapons per se, specifically firearms taken in the course of a burglary, 'no analysis of willingness or present ability to use a firearm as a deadly weapon' is necessary." *Hernandez*, 172 Wn. App. at 543 (internal quotation marks omitted) (quoting *Martinez*, 171 Wn.2d at 367).

Accordingly, we hold that the State presented sufficient evidence that Linville or an accomplice was armed with a deadly weapon for purposes of first degree burglary.

IV. Other Issues

Linville makes several additional arguments. He argues that (1) a conviction for the first alternative means of trafficking in stolen property cannot rest on accomplice liability, (2)

[10] Additionally, in closing argument, Linville's counsel acknowledged that Linville and his accomplices stole guns during these burglaries, focusing instead only on their use of those guns: "Again, we are not contesting the burglary took place. We're not contesting a substantial tie that would basically at this point find him guilty of that burglary. Find him guilty of the taking of her stuff. Find him guilty of the crime of possession and theft of that firearm, but there's no factor that you can weigh to put it on that he's armed." 31 VRP at 5598.

insufficient evidence supported the firearm sentencing enhancements, (3) his constitutional right to a unanimous jury verdict was violated when the trial court instructed the jury that it did not need to reach a unanimous verdict with respect to the means by which it found him guilty of first degree trafficking in stolen property, (4) his 39 convictions for trafficking in stolen property violate his right against double jeopardy, and (5) the trial court erred by allowing the State to amend the charging information after it rested its case, Br. of Appellant 48. Because we otherwise reverse and remand, we do not reach these issues.

Worswick, J.

We concur:

Bjorgen, C.J.

Lee, J.

CERTIFICATE OF SERVICE

I certify that I served a copy of the Petition for Review on the date below as follows:

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

Dated this 25th day of July, 2017, at Olympia, Washington.

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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