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A. ASSIGNMENTS OF ERROR

1. Appellant's conviction for violating the Uniform Firearms Act (VUFA) violates his right to be free from double jeopardy, as he was convicted of the same offense in a prior proceeding.
2. The trial court erred in denying the motion to dismiss the current VUFA charge under mandatory joinder rules.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did double jeopardy occur when Kenyon was convicted under RCW 9.41.040(1)(a) for unlawful possession of a firearm in the first degree when over eight months passed between the two separate occasions when he unlawfully possessed the Smith & Wesson .9 millimeter handgun?
2. Did the trial court err by denying Kenyon's motion to dismiss the charge of unlawful possession of a firearm in the first degree under CrR 4.3-Joinder of offenses and defendants, when a prosecuting attorney is vested with great discretion in determining how and when to file criminal charges?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP." The Appellant' Brief will be referred to as "AB."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Kenyon's recitation of the procedural history and facts.

### 3. Summary of Argument

Kenyon's conviction under RCW 9.41.040(1)(a) for unlawful possession of a firearm in the first degree does not constitute double jeopardy because over eight months passed between the two separate occasions when he unlawfully possessed the Smith & Wesson .9 millimeter handgun.

A commonsense reading of the facts and record in Kenyon's case would lead a reasonable person to conclude that Kenyon unlawfully possessed the .9 millimeter Smith & Wesson on two separate occasions; First in October 2004 when he threw it out of a moving vehicle, and again in June 2005 at David Reading's trailer. Kenyon's reliance on State v. Leyda is misplaced because identity theft and not firearms, which are treated differently under the law, was at issue in that case.

The trial court also did not err by denying Kenyon's motion to dismiss the charge of unlawful possession of a firearm in the first degree under CrR 4.3-Joinder of offenses and defendants, because a prosecuting attorney is vested with great discretion in determining how and when to file criminal charges. Kenyon's unlawful possession of the handgun in October 2004 was separate and distinct from that in June 2005, and the prosecuting attorney retained the discretion to charge the two cases separately. That Kenyon did not take advantage of the State's plea offer

under a separate cause number constitutes a tactical decision on his part that was simply unsuccessful. Kenyon's reliance on State v. Holt is, like that with Leyda, misplaced because firearm violations are treated differently under the law than possession of obscene material and child pornography.

The trial court did not err, and the State respectfully requests that this Court affirm Kenyon's conviction.

#### E. ARGUMENT

1. KENYON'S CONVICTION UNDER RCW 9.41.040(1)(a) FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE DOES NOT CONSTITUTE DOUBLE JEOPARDY BECAUSE OVER EIGHT PASSED BETWEEN THE TWO SEPARATE OCCASIONS WHEN HE UNLAWFULLY POSSESSED THE SMITH & WESSON .9 MILLIMETER HANDGUN.

Kenyon's conviction under RCW 9.41.040(1)(a) for unlawful possession of a firearm in the first degree does not constitute double jeopardy because over eight months passed between the two separate occasions when he unlawfully possessed the Smith & Wesson .9 millimeter handgun.

Our legislature has provided that: (1) each firearm a defendant possesses is a separate offense, RCW 9.41.040(7), but (2) when separate offenses encompass the "same criminal conduct," they count as one crime

for offender-score calculation purposes, RCW 9.9A.589(1)(a). State v. Stockmyer, 136 Wash.App. 212, 218, 148 P.3d 1077 (2006).

We generally construe this statute narrowly so that most crimes are not considered to be the same criminal conduct. Stockmyer, 136 Wash.App. at 218-219. We have previously held that multiple, unlawful firearm possession convictions constitute the same criminal conduct if the possessions occurred at the same time and place. Stockmyer, 136 Wash.App. at 219.

The facts of Stockmyer are partially analogous to those in Kenyon's case because the possession of firearms is at issue. In Stockmyer, the police found three firearms during a search of his residence: (1) a .30/06 rifle in the closet near the front door entryway; (2) a .44 Desert Eagle handgun on top of the refrigerator in the kitchen; and (3) a .380 semi-automatic pistol that Stockmyer had shot at law enforcement on a kitchen counter. Stockmyer, 136 Wash.App. at 215.

Although Stockmyer argued that his convictions for unlawful possession of a firearm regarding these three weapons constituted the same criminal conduct, this argument was rejected. Per the Court, Stockmyer's criminal conduct was in fact separate because he had access to all three loaded firearms in different locations in his residence. Stockmyer, 136 Wash.App. at 215.

Applying the Court's rationale to Kenyon's case, his unlawful possession of the same handgun twice with more than eight months separating each possession constitutes two separate crimes. The first unlawful possession occurred when he handled and then threw the gun out of his vehicle, and the second happened when he possessed the gun at David Reading's residence. RP 37: 9-13; 39: 9-24. Kenyon's act of physically separating himself from the gun in October 2004 and then unlawfully possessing it again over eight months later in June 2005 marks two entirely separate and distinct crimes; a stronger factual distinction than occurred in Stockmyer, where all three of the guns were in that defendant's residence simultaneously.

Kenyon's argument could have far greater merit if hypothetically he had held the handgun, put it down, and then held it again ten minutes later. Such action could reasonably be defined as same criminal conduct. Under the facts as they stand, however, double jeopardy did not occur in Kenyon's case because he committed two separate felonies with the same handgun in October 2004 and again June 2005.

2. THE TRIAL COURT DID NOT ERR BY DENYING KENYON'S MOTION TO DISMISS THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE UNDER CrR 4.3-JOINDER OF OFFENSES AND DEFENDANTS BECAUSE A PROSECUTING ATTORNEY IS VESTED WITH GREAT DISCRETION IN

DETERMINING HOW AND WHEN TO FILE CRIMINAL CHARGES.

The trial court did not err by denying Kenyon's motion to dismiss the charge of unlawful possession of a firearm in the first degree under CrR 4.3-Joinder of offenses and defendants, because a prosecuting attorney is vested with great discretion in determining how and when to file criminal charges.

Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges. State v. Korum, 157 Wash.2d 614, 625, 141 P.3d 13 (2006). The Sentencing Reform Act of 1981 (SRA) chapter 9.94A RCW, recognizes this discretion and provides standards, not mandates, to guide prosecutors:

These standards are intended solely for the guidance of prosecutors in the [S]tate of Washington. They are not intended to, do not and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law by a part in litigation with the [S]tate. RCW 9.94A.401.

A defendant does not have a constitutional right to a plea bargain. State v. Yates, 161 Wash.2d 714, 741, 168 P.3d 359 (2007).

Kenyon's argument that the prosecutor in this case "threatened" him with the additional charge that forms the basis of this appeal is without merit because he rejected the State's plea offer and went to trial on a separate case. AB 4-5. The State had the discretion to proceed with

charges under two separate cause numbers involving the same gun and properly exercised its authority by doing.

That Kenyon did not achieve the result he hoped in his first case for is due to an unsuccessful trial strategy and has nothing to do with joinder. As was argued above, the State had two cases with different facts that involved the same handgun. Joinder was not required because the two different occasions that Kenyon unlawfully possessed the handgun constitute separate and distinct crimes in both time and place. No error occurred.

#### F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 10<sup>TH</sup> day of NOVEMBER, 2008

Respectfully submitted by:

  
Edward P. Lombardo, WSBA #34591  
Deputy Prosecuting Attorney for Respondent  
Gary P. Bursleson, Prosecuting Attorney  
Mason County, WA

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 JAMES R. KENYON, )  
 )  
 Appellant, )  
 \_\_\_\_\_ )

No. 37435-8-II

DECLARATION OF  
FILING/MAILING  
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DIVISION II

I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, NOVEMBER 10, 2008, I deposited in the U.S. Mail,  
postage properly prepaid, the documents related to the above cause number  
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Dana M. Lind  
Nielson, Broman & Koch, PLLC  
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Seattle, WA 98122

I, EDWARD P. LOMBARDO, declare under penalty of perjury of  
the laws of the State of Washington that the foregoing information is true  
and correct.

Dated this 10<sup>TH</sup> day of NOVEMBER, 2008, at Shelton, Washington.

  
Edward P. Lombardo, WSBA #34591