

No. 47916-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH LINVILLE,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the clear provisions of RCW 9A.82.085.

2. Mr. Linville was denied his Sixth Amendment right to the effective assistance of counsel.

3. Mr. Linville's conviction for trafficking cannot be predicated on accomplice liability.

4. The trial court erred in giving the to-convict instructions for Trafficking in Stolen Property; Instructions, 49, 53, 56, 59, 62, 65, 68, 71, 76, 80, 83, 86, 89, 92, 97, 100, 104, 108, 115, 118, 123, 126, 129, 132, 135, 138, 141, 144, 147, 151, 157, 161, 164, 167, 170, 173, 178, 182, 185.

5. There was insufficient evidence to support Mr. Linville's convictions of first degree burglary.

6. There was insufficient evidence to support the imposition of four firearm enhancements.

7. The to-convict instructions for Trafficking in Stolen Property violated Mr. Linville's right to a unanimous jury in violation of Article I, section 21.

8. Multiple convictions for trafficking in stolen property violated the Fifth Amendment's Double Jeopardy Clause.

9. The untimely amendment of the information violated Article I, section 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a person is charged with the offense of leading organized crime, RCW 9A.82.085 limits the offenses which may be joined at trial to only those offenses alleged to be a part of the criminal profiteering activity. Where the State did not allege any offense was a part of the pattern of criminal profiteering activity did the court err in joining the 140 counts with the charge of leading organized crime?

2. Criminal profiteering activity is specifically defined by statute as involving one of 46 specific types of crimes. Where 53 of the counts against Mr. Linville involved crimes which are not defined as criminal profiteering activity did the court err in joining those offenses at trial?

3. The Sixth Amendment guarantees a person the effective assistance of defense counsel. That right is denied where counsel's deficient performance prejudices the defendant. Where defense counsel moved to sever counts but did not assert that RCW 9A.82.085 required

severance of the counts, did that deficient performance deny Mr. Linville his right to the effective assistance of counsel?

4. The general statute governing accomplice liability is superseded when a specific offense dictates the liability of a group of actors who participate in an offense. Trafficking in stolen property punishes the actions of the person who organizes, initiates or manages the theft of property for resale. When the legislature defines an offense to focus upon the actions of such a leader, can a conviction rest upon accomplice liability?

5. A person is guilty of first-degree burglary, as opposed to second-degree burglary, if he or an accomplice is armed with a deadly weapon. To prove this element, the State must show more than mere possession of a firearm during the burglary and instead must show the defendant or an accomplice handled it in a manner indicative of an intent or willingness to use it in furtherance of the crime. Here, the State's evidence shows nothing more than the theft of firearms during a burglary. Did the State fail to prove first-degree burglary, requiring dismissal of that conviction and entry of a conviction on the lesser charge of second-degree burglary?

6. Proof of a firearm enhancement requires the State prove the defendant or an accomplice possessed a firearm during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime. Where the State merely proved theft of a firearm during a burglary did the State prove Mr. Linville was armed for purpose of the enhancement?

7. Article I, section 21 of the Washington Constitution guarantees the right to a unanimous jury verdict. This right in turn requires that in cases in which the State alleges a single crime may have been committed by alternative means, the jury must unanimously agree upon a single alternative means. The 39 counts of trafficking in stolen property allege two alternative means of committing the offense. Each of the 39 to-convict instructions expressly tells the jury they need not unanimously agree which alternative means was committed. There was no special verdict form stating which alternative the jury found the State proved beyond a reasonable doubt. Do those 39 convictions violate Mr. Linville's right to a unanimous jury verdict?

8. The Double Jeopardy Clause of the Fifth Amendment prohibits multiple convictions based upon a single unit of prosecution. The unit of prosecution is the behavior or act which the legislature

intends to criminalize. Where the statute defining the crime reveals the unit of prosecution for trafficking in stolen property, is organizing and engaging in the marketplace of stolen property do Mr. Linville's 39 convictions of trafficking in stolen property violate double jeopardy protections?

9. The notice provisions of Article I, section 22 are violated where an information is amended after the state has rested to charge a higher degree of an offense. Where the State amended the information several days after it rested its case and the amended information charged a higher degree of theft in Count 130, did the amendment violate Article I, section 22?

C. STATEMENT OF THE CASE

In late 2013, authorities began noticing an increase in residential burglaries in Thurston County. RP 477-78. Police noticed similarities among the burglaries including the fact that the vast majority involved entry through the front door and involved use of a tool to pry and force the door open. RP 478-80.

The police investigation led them to Kelly Olsen who acknowledged her involvement but who quickly pointed to Mr. Linville as the one responsible. RP 485-86.

Police also arrested Jessica Hargrave, after she sold items stolen in a burglary. RP 514. Ms. Hargrave admitted her involvement in a substantial number of the burglaries for which Mr. Linville was ultimately charged. RP 517-18.

Ultimately police arrested Mr. Linville. Upon searching the apartment where Mr. Linville lived with Ms. Hargrave and Teya Harris, police recovered numerous items belonging to several of the homeowners whose homes had been burglarized. RP 578-80

The State charged Mr. Linville with 138 counts including: one count of leading organized crime, 41 counts of burglary, 39 counts of trafficking in stolen property, numerous counts of theft, numerous counts of possession of stolen property, firearm possession counts, and possession of controlled substances. CP 365-391. The State also alleged four firearm enhancements. CP 370, 377, 386, 390.

A number of persons who participated in the crimes received substantially reduced sentences. In turn each testified to their involvement but pointed the finger at Mr. Linville as the instigator of the crimes. Ms. Hargrave, despite her admission to participating in the vast majority of burglaries pleaded guilty in exchange for a Drug Offender Sentencing Alternative of 90 months. RP 977. Ms. Harris,

who participated in several burglaries, whose car was regularly used to commit the offenses, and in whose apartment a large amount of stolen property was recovered, entered drug court with a sentence of 22 to 29 months. RP 4247-48. David Knutson, Mr. Linville's drug dealer and in whose home a large amount of stolen property was recovered, including guns, entered drug court with a sentence of 18 to 20 months. RP 3526-28. Ms. Olsen, who participated in a number of burglaries, pleaded guilty with a standard range of 63 to 84 months. RP 3122-23. Avery Garner who participated in some of the burglaries pleaded guilty with a standard range of 43 to 57 months. RP 1378-79.

A jury convicted Mr. Linville of 138 counts and four firearm enhancements. CP 528-712.

Mr. Linville received a sentence in excess of 76 years in prison. CP 878.

D. ARGUMENT

1. The trial court erred and violated the terms of RCW 9A.82.085 in joining offenses for trial with the charge of leading organized crime.

a. *Because the State charged Mr. Linville with leading organized crime, RCW 9A.82.085 does not permit joinder of any other offense at trial unless the State alleges the offense is a “part of the [a] pattern of criminal profiteering activity.”*

Count 1 charged Mr. Linville with the offense of leading organized crime in violation of RCW 9A.82.060.¹ CP 365. That statute provides

¹ In 1984, the legislature enacted chapter 9A.82 RCW as the “Washington State Racketeering Act” This legislation was scheduled to take effect July 1, 1985. But before it took effect, the 1985 legislature renamed it the “Criminal Profiteering Act.” The 1985 version of chapter 9A.82 RCW contained significant changes to the original act, including a ten-year termination provision to the entire Criminal Profiteering Act effective July 1, 1995 [codified at RCW 9A.82.903].

State v. Thomas, 103 Wn. App. 800, 805, 14 P.3d 854 (2000). In 1995, the Legislature sought to repeal RCW 9A.82.903, the termination provision, with the intent that the Criminal Profiteering Act would not terminate. However, the repeal of former RCW 9A.82.903 was contained within a bill that addressed insurance fraud in the context of the Criminal Profiteering Act and other statutes. Laws 1995, ch. 285. *Thomas* concluded the 1995 legislation violated the single-subject and single-title provisions of article II, section 19 of the Constitution and was therefore void. 103 Wn. App. at 810-13. Thus, *Thomas* concluded the provision of the 1995 Act repealing the termination provision was void for all portions of the Criminal Profiteering Act except those specifically pertaining to insurance fraud, and that the majority of provisions the Criminal Profiteering Act had terminated in 1995. 103 Wn. App. at 813-14.

In response to *Thomas*, the Legislature adopted anew the provisions of the Criminal Profiteering Act found to have lapsed in 1995. Laws 2001, ch. 222, § 1.

A person commits the offense of leading organized crime by:

(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

“Pattern of criminal profiteering activity”

means engaging in at least three acts 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). RCW 9A.82.010(4), in turn, defines the term

“criminal profiteering” providing first

“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 . . .

The statute then sets forth a list of 46 specific crimes with the relevant statutory cites.

This 2001 legislation reenacted the provisions of the Criminal Profiteering Act discussed here. *Id.*

RCW 9A.82.085, however, limits those offenses which may be joined in a prosecution for leading organized crime.

In a criminal prosecution alleging a violation of RCW 9A.82.060[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. . . .

Id.

b. *The Information does not allege any offense “to be part of the pattern of criminal profiteering activity” and thus RCW 9A.82.085 did not permit joining any offenses with the leading organized crime charge.*

Here, the Information does not allege any offense(s) “to be part of the pattern of criminal profiteering activity” for purposes of the leading organized crime charge. CP 365-93. The language for the leading organized crime charge merely alleges Mr. Linville acted with intent “to engage in a pattern of criminal profiteering activity” without specifying the three or more acts which constituted that pattern. CP 365. Similarly, the charging language for the remaining 137 counts does not allege that any of these acts constituted part of the required pattern. Because the State did not allege that any of the remaining 137 counts were a part of the pattern, RCW 9A.982.085 precluded the State from joining any of the remaining counts at Mr. Linville’s trial.

c. 53 of the charged counts do not constitute “criminal profiteering activity” and could not be joined at trial on a charge of leading organized crime under any circumstance.

Even if the information could be read as alleging the 140 subsequently charged crimes were the offenses alleged to be part of the pattern of criminal profiteering activity a large number of those crimes are not included in the definition of criminal profiteering and therefore could not be a part of “pattern of criminal profiteering activity.” Specifically, the list of specific crimes included in the definition of “criminal profiteering activity” in RCW 9A.82.010(4) does not include a number of the offenses joined in this case, burglary, theft of or possession of a firearm, or possession of a controlled substance.

i. Only those offenses listed in RCW 9A.82.010(4) constitute criminal profiteering activity.

There can be no doubt that the list of crimes in RCW 9A.82.085 is exclusive. Nothing in the plain language of RCW 9A.82.085(4) suggests the listed crimes “are examples meant only to guide a court's thinking.” *In re Postsentence Review of Leach*, 161 Wn.2d 180, 186, 163 P.3d 782 (2007). *Leach* concluded a list of 47 crimes defined as “crimes against persons” was exhaustive as the statute did not contain language such as “similar offenses” or “like offenses.” *Id.* Such

language is absent from RCW 9A.82.085 as well. The plain language makes clear the opposite is true.

First, if the statute meant to include any criminal act committed for financial gain it could have simply said that. Second, if the Legislature meant to include any crime committed for financial gain there would be no reason for a list at all, much less a list that singles out 46 distinct types and degrees of crimes from murder to unlawful shipment of cigarettes. RCW 9A.82.010(4)(a)(II). There would be no reason to list eight specific types of theft, while omitting others. There would be no reason to specifically cite “assault as defined in 9A.36.011 and 9A.36.021” (first and second degree assault), if the legislature intended to include all assaults committed for financial gain.

Every legislative act is presumed to have a material purpose. *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). Since its enactment, the Legislature has amended the list in RCW 9A.82.085 to add new crimes. *See e.g.*, Laws 2013, ch. 302 § 10 and Laws 2012 ch. 139 § 1 (subsection (4) (ss) (rr) and (tt) adding crimes related to trafficking and promoting commercial sexual abuse of minor); Laws 2008, ch. 108 § 24 (subsection (4)(qq) adding mortgage fraud). If the Legislature intended criminal profiteering to include any

crime committed for financial gain, or any “similar or like” crime, these additions were wholly unnecessary and meaningless. Plainly the Legislature only intended to include the listed crimes within the definition of “criminal profiteering activity.”²

ii. Only those offenses which constitute criminal profiteering activity may be joined at trial with a charge of leading organized crime.

Because the Legislature only intended to include specific crimes within the definition of “criminal profiteering activity” it is equally clear that only those crimes can constitute a “pattern of criminal profiteering activity” under RCW 9A.82.010(12) - “engaging in at least three acts of criminal profiteering.” Further, only acts which fit within each of those definitions can be “offenses alleged to be part of the pattern of criminal profiteering activity” for purpose of being joined at trial under RCW 9A.82.085 with the charge of leading organized crime.

RCW 9A.82.010(4) includes a number of specific theft offenses:

...
(e) Theft, as defined in RCW 9A.56.030, 9A.56.040, 9A.56.060, 9A.56.080, and 9A.56.083;
...

² The State seemingly understood the burglary, firearm, and controlled substance counts could not constitute criminal profiteering activity. In closing argument the State displayed a slide identifying “qualifying crimes” for leading organized crime and listed only first and second degree theft, trafficking, and identity theft. CP 520.

(g) Theft of telecommunication services or unlawful manufacture of a telecommunication device, as defined in RCW 9A.56.262 and 9A.56.264;

...

(oo) Theft with the intent to resell, as defined in RCW 9A.56.340

RCW 9A.82.010(4). But the list does not include theft of firearm as defined in RCW 9A.56.300, and as charged in Counts 27, 63, 106, 107, and 127.

Similarly, the four counts of unlawful possession of a firearm, Counts 28, 64, 108, 128, could not be joined with the leading organized crime charge for trial as that crime is not included among the 46 specific crimes. So too, RCW 9A.82.010(4) does not include burglary in any degree within the definition of “criminal profiteering activity.” Thus, the 43 burglary counts, whether first or second degree burglary, residential burglary, or attempted second degree burglary could not be joined at trial. Unlawful possession of a controlled substance is not included in the list of offenses, and therefore Count 138 could not be joined for trial. None of these charges are “criminal profiteering activity,” no collection of them can constitute a “pattern of criminal profiteering activity,” and none of them can be “offenses alleged to be part of the pattern of criminal profiteering activity.” Thus joining these

52 additional offenses with the remaining counts in a single trial is a plain violation of RCW 9A.82.085.

d. *The Court must reverse Mr. Linville's convictions and remand for separate trials as required by RCW 9A.82.085.*

Discretionary severance of joined offense under the court rules is required where it is shown that a joint trial is so “manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). By mandating severance in RCW 9A.82.085 the Legislature necessarily engaged in that balancing and determined that joining additional offenses which are not alleged to be a part of the pattern of activity in a trial for leading organized crime is impermissibly and manifestly prejudicial. That prejudice flows both ways. The improper joinder of additional crimes lends improper weight to the State’s proof on the leading organized crime charge and properly joined charges. The same is true with respect to the added improper weight of the profiteering offenses on the State’s proof on the wrongly joined offenses.

RCW 9A.82.085 represents a legislative conclusion that a fair trial cannot be had on either class of offense if they are tried together; *i.e.*, the joint trial was manifestly prejudicial. Any other conclusion

would render RCW 9A.82.085 superfluous to the discretionary severance rule of CrR 4.4. Because a violation of RCW 9A.82.085 results in a manifestly unfair trial, the remedy is to reverse all convictions and remand for two separate trials. That result is required even though defense counsel did not draw the court's attention to RCW 9A.82.085.

A court's discretionary decision to join or sever counts is afforded deference on review as it contemplates the trial court's weighing of numerous factual questions such as the weight and cross-admissibility of evidence on each charge and the available defenses. *Bythrow*, 114 Wn.2d at 718-24. By contrast, RCW 9A.82.085 bars joint trials as matter of law. That result is required regardless of the strength of the State's case, or cross-admissibility of evidence or the available defenses. There is no allowance for the trial court's discretion. Because it is a purely legal question, review is *de novo*. *State v. Siers*, 174 Wn.2d 269, 274, 274 P.3d 358 (2012). This Court need not afford the trial court's actions any deference, as either the court complied with the statute or did not. That standard is the same regardless of whether an objection was lodged or it was not.

As discussed previously, 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. A manifestly unfair trial deprives a defendant of due process in violation of the Fourteenth Amendment. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) (“only a fair trial is a constitutional trial.”). Mr. Linville can challenge his manifestly unfair trial regardless of whether he objected. A trial court must follow the law regardless of the arguments raised by the parties before it. *State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008).

The Court must reverse Mr. Linville’s convictions and order separate trials as required by RCW 9A.82.085.

2. Defense counsel’s failure to move for severance of offenses under RCW 9A.82.085 denied Mr. Linville his Sixth Amendment right to the effective assistance of counsel.

a. *Mr. Linville is entitled to the effective assistance of counsel.*

The Sixth Amendment guarantees the effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An attorney’s

performance constitutes ineffective assistance of counsel when her actions “fell below an objective standard of reasonableness” and “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1482, 176 L.Ed.2d 284 (2010) (quoting *Strickland*, 466 U.S. at 688); *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

b. *Defense counsel's performance was deficient.*

Counsel’s performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *Kyлло*, 166 Wn.2d at 862 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Reasonable conduct for an attorney includes knowing the relevant law. *Kyлло*, 166 Wn.2d at 862 (citing *Strickland*, 466 U.S. at 690–91).

As made clear, RCW 9A.82.085 affords no discretion to the trial court. At a minimum, a motion to sever based upon RCW 9A.82.085, would have required the court to sever the 52 counts and the four accompanying firearm enhancements from the remaining counts. Defense counsel never made such a motion.

Instead, defense counsel did make a motion asking the court to exercise its discretion to sever the burglaries from one another under CrR 4.4. RP at 28-33. In doing so defense counsel shouldered the burden of attempting to demonstrate the “potential” prejudice of joint trials, rather than point to legislative recognition of prejudice in RCW 9A.82.085. Rather than seize a remedy to which he was entitled, he sought a discretionary remedy for which he carried the burden of persuasion.

In the course of his motion counsel did mention that severing the leading organized crime charge could alleviate the prejudice. RP 33. But he never argued it was a mandatory outcome under RCW 9A.82.085. Nor, did counsel renew that motion as required by CrR 4.4.

The State responded that Counts 2 through 138 were each “predicate crimes that the State has to prove to in order to prove leading organized crime.” RP 35. Yet, defense counsel never pointed out that since the State had not alleged in the information that any of those offenses were a part of a pattern, RCW 9A.82.085 precluded their joinder at trial. Nor did defense counsel point out that 52 of the counts, including all the burglaries defense counsel sought to sever, could not in any event be alleged to be a part of the pattern as they are not

included in the definition of “criminal profiteering activity” in RCW 9A.82.010(4). That is deficient performance. *Kyllo*, 166 Wn.2d at 868 (“[f]ailing to research or apply relevant law was deficient performance.”)

c. Because counsel’s deficient performance prejudiced Mr. Linville this Court must reverse Mr. Linville’s convictions.

Had counsel objected based on RCW 9A.82.05 to the impermissible joinder of offenses, following Mr. Linville’s trial on the leading organized crime charge, Mr. Linville would not be serving a mandatory minimum sentence of 200 months for the firearm enhancements attached to the four counts of first degree burglary. Mr. Linville would not be serving consecutive sentences for the firearm counts. Beyond that, without the unlawful possession of a firearm charges, the jury would not have heard of his prior conviction.

In its closing argument, the State specifically pointed to the burglaries as evidence of Mr. Linville’s guilt for leading organized crime. The State argued his selection of the houses and direction of accomplices during the burglaries showed he “managed” and “directed” and “supervised” the criminal profiteering activity.” CP 518-

19. But for the improper joinder of the burglary counts, the State could not make that argument.

Furthermore, a jury separately considering the burglary charges would not have heard testimony of Mr. Linville's accomplices accusing him of orchestrating a broad scheme. Such evidence would have likely been inadmissible on the question of whether Mr. Linville and/or a given accomplice committed a specific burglary on a given day.

In denying Mr. Linville's motion for discretionary severance, the trial court acknowledged "that general prejudice has been shown." RP 51. But the court concluded that prejudice was the result of the State's effort to prove a pattern of activity for purposes of the leading organized crime charge. That prejudice was real, and it is precisely the prejudice which RCW 9A.82.085 seeks to eliminate. But for defense counsel's performance that prejudice would not have infected Mr. Linville's trial. Mr. Linville is entitled to have his convictions reversed and his case remanded for separate trials.

3. A conviction of the first alternative means of trafficking in stolen property cannot rest on accomplice liability.

a. *The general accomplice liability statute does not apply to the first alternative means of committing trafficking in stolen property.*

Under RCW 9A.08.020, a person may be convicted as an accomplice to a crime by knowingly aiding or assisting another in the commission of that crime. *State v. Roberts*, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000).

While the general law defining accomplice liability applies to many offenses, it does not govern the legal complicity required for all offenses. *State v. Montejano*, 147 Wn. App. 696, 196 P.3d 1083 (2008). It has long been the case that the complicity statute is “general in its terms and manifestly intended to meet cases not otherwise specifically provided for by statute.” *State v. Wappenstein*, 67 Wash. 502, 530, 121 P.2d 989 (1912); *Montejano*, 147 Wn. App. at 703; 13A Washington Practice, § 104, Complicity (2010) (“If, however, the statute defining a crime specifically addresses the culpability of an accomplice, the general accomplice statute cannot be applied to that crime.”).

RCW 9A.82.050(1) provides:

A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of

property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

In *State v. Lindsey* this Court concluded that provision sets forth two alternative means of committing the offense delineated by the use of the terms “who knowingly.” 177 Wn. App. 233, 243-44, 311 P.3d 61 (2013). The Supreme Court adopted that reading of the statute. *State v. Owens*, 180 Wn.2d 90, 97-98, 323 P.3d 1030 (2014). Thus, a person is guilty of the offense if he (1) knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or (2) knowingly traffics in stolen property. *Id.* Under the first, or “supervisory” alternative, a person may not be convicted as an accomplice.

A court

determine[s] legislative intent from the statute’s plain language, “considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.”

State v. Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015)

(*Association of Wash. Spirits & Wine Distributors. v. Wash. State*

Liquor Control Bd., 182 Wn.2d 342, 350, 340 P.3d 849 (2015)).

Trafficking in stolen property is a part of the Criminal Profiteering Act

RCW 9A.82. In determining the intent of the supervisory alternative of trafficking stolen property it is useful to examine interpretations of other provisions of that Act.

In *State v. Hayes* the court analyzed language of the leading organized crime statute, also a part of the Criminal Profiteering Act (RCW 9A.82.060), which requires the person “organiz[e], manag[e], direct[], supervis[e], or finance[e] any three or more persons with the intent to engage in a pattern of criminal profiteering activity.” 164 Wn. App. 459, 466, 262 P.3d 538 (2011). While not identical, that language is in all relevant respects the same as that found in the supervisory alternative of RCW 9A.82.050(1). While acknowledging nothing in the accomplice statute precluded its application to leading organized crime, the court noted “it is sometimes apparent from the way the legislature has defined a particular crime that traditional accomplice liability provisions are not applicable to that crime.” *Hayes*, 164 Wn. App. at 469. The court concluded the language of the leading organized crime statute made it apparent that accomplice liability could not apply. *Id.* “The statutory definition of the crime shows that it is intended to apply to persons who ‘lead’ organized crime, rather than to all persons in a group who commit crimes.” *Id.* at 469 (Internal quotations omitted).

Quoting *State v. Johnson*, 124 Wn.2d 57, 71, 873 P.2d 514(1994); *see also, Montejano*, 147 Wn. App at 696 (because riot statute, RCW 9A.84.010, requires acting with three or more people but is elevated to felony only where the “actor” is armed, accomplice liability could not apply to felony riot conviction).

As *Hayes* recognized with respect to leading organized crime

While guilt for the crime is predicated on group conduct, the conduct criminalized by the statute is the conduct of the leader. . . . There must be a hierarchy in which the defendant is at the apex and three or more other persons are below.

164 Wn. App. at 474. If the language “organiz[e], manag[e], direct[], supervis[e], or finance[e]” in RCW 9A.82.060 defines the conduct of a leader the same must be true of the terms “initiates, organizes, plans, finances, directs, manages, or supervises” in RCW 9A.82.050(1). Both statutes target a leader or manager of an enterprise. Because the first alternative of trafficking in stolen property defines the acts of the organizer, manager or supervisor, and not the person(s) organized, managed or supervised, a conviction of that alternative cannot be based on accomplice liability.

Here for each of the trafficking counts, the court instructed the jury:

To convict the defendant of the crime of trafficking in stolen property in the first degree . . . each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) that on or about . . . the defendant, as a principal or as an accomplice, knowingly

(a) initiated organized, planned, financed, directed, managed, or supervised the theft of property for sale to others, or

(b) trafficked in stolen property knowing the property was stolen

CP 726, 728-37, 739, 741-51, 753-55, 757, 759-60, 763, 765, 768, 770-77, 779, 781-83, 785, 788-94, 796-98, 800-01, 803-04.

b. The impermissible extension of the accomplice liability doctrine requires reversal of the convictions for trafficking in stolen property.

As in *Hayes*, these instructions relieved the State of its burden of proof, by permitting the jury to convict Mr. Linville under the first alternative even if he merely acted as an accomplice. As in *Hayes*, these instructions impermissibly relieved the State of the burden of proving the offenses. 164 Wn. App. at 471. The 39 convictions of trafficking must be reversed. *State v. Jackson*, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999); *Hayes*, 164 Wn. App. at 471.

4. The State presented insufficient evidence to convict Mr. Linville of first-degree burglary or for imposition of the firearm enhancements attached to those offenses.

a. *Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt.*

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). This court may affirm a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. *The State failed to prove that Mr. Linville or an accomplice was armed with a deadly weapon because there was no evidence of intent or willingness to use the stolen gun in furtherance of the crime(s).*

In four of the burglaries firearms were stolen from the homes. RP 1816, 2528, 3656, 3981-82. For each of these the State charged Mr. Linville with first degree burglary and alleged a firearm enhancement for each. CP 370, 377, 386, 390.

The first-degree burglary statute provides:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1). The jury was instructed only on the first alternative means, “is armed with a deadly weapon.” CP 739-40, 760, 786, 798. On each of the four counts of first degree burglary, the jury was also instructed to answer the question of whether Mr. Linville was “armed” with a firearm. CP 806.

“The term ‘armed’, as used in RCW 9A.52.020, means that the weapon is readily available and accessible for use.” *State v. Chiariello*, 66 Wn. App. 241, 243, 831 P.2d 1119 (1992) (holding insufficient evidence on this element where accomplice threatened to kill victim

with knife in his pocket but knife was never produced). For proof of either the “armed” element of first degree burglary or the firearm enhancement there must be “a nexus between the defendant, the crime, and the weapon.” *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). Importantly, the State must present evidence that the defendant or his accomplice handled the weapon “in a manner indicative of an intent or willingness to use it in furtherance of the crime.” *Id.* at 432; *see also id.* at 433-34 (rejecting dissent’s view that evidence of intent to use weapon is not a requirement).

Here, the State offered no evidence beyond the fact that guns were stolen during four of the burglaries. There was no evidence that Mr. Linville or an accomplice was intent on or willing to use those firearms to further the crime. Instead, the evidence indicates the guns were simply “loot” taken away from the burglaries for resale. This conclusion is bolstered by the fact that police did not recover any guns on Mr. Linville and never recovered the guns taken from any of the four burglaries. RP 749-50.

Indeed, the state’s argument to the jury for each of the four counts consisted of nothing more than noting that the guns were taken. RP 5451, 5481, 5518, 5540. That evidence is insufficient to establish

the nexus for purposes of the four enhancements. Too, the evidence does not establish the required nexus for the armed element of first degree burglary.

Brown vacated not only the firearm enhancement in that case but also the first degree burglary conviction. The Court reasoned that for either, actual possession by either the defendant or an accomplice was not necessarily sufficient to establish the defendant was armed for purposes of either the enhancement or the armed element of the crime. 162 Wn.2d at 432-33. Instead, the Court held the State was still required to prove an intent or willingness to use the weapon. *Id.* at 434.

Subsequent decisions of this Court have failed to follow *Brown*'s ruling with respect to the "armed" element of first degree burglary, concluding instead that actual possession of a firearm by either the defendant or accomplice at any point during the course of burglary necessarily establishes that element beyond a reasonable doubt. *State v. Hernandez*, 172 Wn. App. 537, 544, 290 P.3d 1052 (2012). *Hernandez*, instead, cites another Supreme Court decision suggesting the Court had adopted the conclusion that possession of a firearm during a burglary per se establishes the person was armed. 172

Wn. App. at 543 (citing *In re the Personal Restraint of Martinez*, 171 Wn.2d 354, 365, 256 P.3d 277 (2011)).

Initially, because *Hernandez* only addresses the “armed” element of first degree burglary, it does not impact the application of *Brown* with respect to the firearm enhancements in Mr. Linville’s case. Those enhancements lack the necessary proof of a nexus. 162 Wn.2d at 435 (“[e]vidence that the [gun] was briefly in the burglar’s possession does not make [the burglar] armed within the meaning of the sentencing enhancement statute.”)

Further, and contrary to *Hernandez*, *Martinez* did not retreat from the analysis in *Brown*, it merely cited in dicta a Court of Appeals decision, which predated *Brown*, holding possession of a firearm was per se proof that the burglar was armed. That discussion in *Martinez* is dicta as the petitioner in *Martinez* was alleged to have possessed a knife and thus any supposed per se exception for firearms would be wholly irrelevant to the outcome. Moreover, *Martinez* concluded there was in fact insufficient evidence that the petitioner was armed.

This Court is bound to follow the decisions of the Supreme Court on matters of state law such interpretation of a statute. *In re the Personal Restraint of Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366

(2012). *Brown* specifically rejected the notion that possession of a firearm during a burglary automatically proves the armed element of first degree burglary. That is indisputably established by the fact that *Brown* reversed and dismissed both the conviction and the enhancement. In reaching that outcome, the Court noted “[t]he dissent is essentially arguing that any actual possession of a deadly weapon during an ongoing crime shows a nexus between the weapon and the crime.” *Brown*, 162 Wn.2d at 432. The Court rejected that argument.

Instead, the Court made clear the actual possession without more was not necessarily sufficient:

The dissent cites a New Jersey Superior Court decision for the proposition that a nexus between the gun and crime is shown if the weapon could have been used for offensive or defensive purposes. Dissent at 254 (citing *State v. Merritt*, 247 N.J.Super. 425, 431, 589 A.2d 648 (App.Div. 1991)). In *Merritt*, the court found that “the majority of courts ... have held that a person who steals a weapon may be found to have been armed, without showing that he actually used or intended to use the weapon, so long as he had immediate access to the weapon during the offense. *Merritt* is inapposite because it did not involve application of a nexus requirement.

Brown, 162 Wn.2d at 434 n.4. In Washington, “the defendant’s intent or willingness to use the [weapon] is a condition of the nexus requirement.” *Id.* at 434. And because of the lack of proof of that nexus, the Court reversed both the burglary and the enhancement.,

Without proof of that nexus the State cannot prove Mr. Linville was armed for purposes of either the “armed” element of first degree burglary or the enhancement. Here, as in *Brown*, the State presented no evidence of intent or willingness to use the weapon in furtherance of the crime. Instead, just as in *Brown*, “the facts suggest that the weapon[s were] merely loot.” *Id.* at 434. Because the State presented no evidence that Mr. Linville or his accomplices intended to use the gun they stole in furtherance of the burglary, the convictions for first-degree burglary and the corresponding firearm enhancements must be reversed. *Id.* at 432-34.

c. The remedy is reversal of the convictions for first-degree burglary and enhancements and remand for entry of a conviction on second-degree burglary.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Linville committed the offenses for which he was convicted, the judgment may not stand. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. U.S. Const. amend. V; *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing *North*

Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969)). The first-degree burglary charges and firearm enhancements must therefore be dismissed with prejudice. However, because the jury was instructed on the lesser offense of second-degree burglary the Court may enter a conviction on that lesser offense. *Heidari*, 174 Wn.2d at 293-94; CP 740, 760-61, 786-87, 799.

5. The convictions on the 39 counts of trafficking violate Mr. Linville’s right to a unanimous verdict.

a. *A jury must be unanimous as to the means a crime is committed.*

Article I, section 21 guarantees criminal defendants the right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime. *Green*, 94 Wn.2d at 232-33; *Owens*, 180 Wn.2d at 95. Where an alternative means crime is alleged, the preferred practice is to provide a special verdict form and instruct the jury that it must unanimously agree as to which alternative means the State proved. *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987); *see also Ortega-Martinez*, 124 Wn.2d at 717 n.2 (urging that trial courts instruct on the requirement of unanimity for alternative means crimes). If the jury returns “a

particularized expression” as to the means relied upon for the conviction, the unanimity requirement is met. *Ortega-Martinez*, 124 Wn.2d at 707-08. If the jury does not provide a particularized expression of unanimity through a special verdict form, a reviewing court must be able to “infer that the jury rested its decision on a unanimous finding as to the means” in order to affirm. *Id.*, 124 Wn.2d at 707-08.

b. The jury’s verdicts on the trafficking counts do not contain a particularized expression of unanimity and there is no way to infer its verdicts were unanimous.

As set forth above, trafficking in stolen property is an alternative means crime. *Owens*, 180 Wn.2d at 98. The jury here did not return a particularized finding of unanimity on any of the trafficking in stolen property counts. Further, this Court cannot conclude that the jury rested its decision on a unanimous finding as to either means. Not only did the trial court fail to provide a special verdict form and fail to instruct the jury that it must unanimously agree as to which alternative means the State proved, the court affirmatively told the jury it did not have to be unanimous.

Each of the 39 to-convict instructions for trafficking I stolen property contained the following language

.....

If you find from the evidence that element (2), and either of alternative elements (1)(a) or (1)(b) 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 alternatives (1)(a) or (1)(b), has been proved beyond a reasonable doubt, as long as each juror finds at least one alternative have been proved beyond a reasonable doubt.*

.....

CP 726, 728-37, 739, 741-51, 753-55, 757, 759-60, 763, 765, 768, 770-77, 779, 781-83, 785, 788-94, 796-98, 800-01, 803-04.

These instructions directly contradict the Supreme Court's repeated urging that trial courts should instruct on the requirement of unanimity for alternative means crimes. *Ortega-Martinez*, 124 Wn.2d 717 n.2 (citing *Whitney*, 108 Wn.2d at 511). The 39 to-convict instructions regarding trafficking in stolen property do the opposite and violate Mr. Linville's right to unanimity under article I, section 21.

Those instructions prevent this Court from being able to infer that the jury rested its decisions on unanimous findings as to the means. Accordingly, this Court should reverse the convictions on the trafficking in stolen property counts.

c. *Whether or not the State presented sufficient evidence to support a potential verdict on any alternative means does not cure the violation of the right to a unanimous jury.*

The State may argue that because it presented sufficient evidence to survive a due process challenge as to alternative means of the four counts this Court should affirm. The State could find support for this argument based upon a misreading of *Ortega-Martinez*, 124 Wn.2d at 707-08. The Court in *Ortega-Martinez* reasoned:

If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary **to affirm** a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction **will not be affirmed**.

Id. (Internal citations omitted, italics in original, bold added.) It is plain from the language in bold the Court was speaking of the standard of harmless error for appellate review: whether the conviction could be affirmed. Thus, whether each alternative is supported by sufficient evidence is an appellate question. It is not proper to tell a jury they need not unanimously agree.

Importantly, prior to 2005, the pattern jury instruction did not specifically advise jurors they need not be unanimous as to the means. The comment to WPIC 4.23, the pattern instruction from which the erroneous language in the 39 challenged instructions is drawn provides:

The committee based its revision on the holding in *State v. Ortega-Martinez* . . . in which the Supreme Court specifically held that jurors need not be unanimous as to alternative means, as long as sufficient evidence supports each of the means relied on by one or more jurors. 124 Wn.2d at 707–08

11 *Washington Practice, Pattern Jury Instructions Criminal*, WPIC 4.23 (3d ed). That conclusion ignores the actual holding of the Court and conflates the standard of appellate review with the jury’s duty.

Beyond that, two problems remain with the presumption that sufficient evidence means the jury was unanimous. First, the presumption makes no sense unless the jury is told that it must be unanimous as to the means. Under such circumstances, a reviewing court could presume that the jury was unanimous as to the means even without a special verdict form, because juries are presumed to follow instructions.³ *See State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46

³ The only problem in such a situation would be that if there were insufficient evidence as to one of the means, and no special verdict form showed that the jury agreed on the means for which there was sufficient evidence. That situation would implicate not only the right to unanimity, but also the right to due

(2014). But if the jury is not told it must be unanimous as to the means, then the fact that sufficient evidence is presented as to both means logically makes it less likely that the jury unanimously agreed as to the means. Unanimity is certainly unlikely where, as here, the jury is explicitly told it need not be unanimous as to which alternative the State proved.

The second problem with the presumption is that it conflates the due process right to sufficient evidence of each element with the separate state constitutional right to a unanimous jury. As separately guaranteed rights, the fact that one right is honored does not mean the other can be ignored. To be sure, a verdict based upon insufficient evidence could not be affirmed simply because it was unanimous. The appellate standard for sufficiency of the evidence asks merely whether a reasonable juror could have relied on the evidence. *Green*, 94 Wn.2d at 221-22. The fact that a juror could have relied on one alternative or the other does not mean any or all the jurors did. A court can only

process and the right to appeal. But if there were sufficient evidence as to both means, and the jury was instructed that it had to be unanimous as to the means, there would be no reversible error. Thus, in the absence of a special verdict form, a reviewing court may affirm only where (1) the jury is instructed it must be unanimous as to which alternative was committed; and (2) sufficient evidence is presented of both (or all) alternatives.

assure the requirement of unanimity is met by knowing what the jury actually did rather than what they could have done.

The right to a unanimous jury is the right to unanimity on the necessary elements of the offense. *See State v. Franco*, 96 Wn.2d 816, 830-38, 639 P.2d 1320 (1982) (Utter, J., dissenting); *abrogated on other grounds*, *State v. Sandholm*, 184 Wn.2d 726, 364 P.3d 87 (2015).⁴ Thus, “unanimity with respect to at least one of the theories by which the crime may be committed remains the minimum constitutional requirement for conviction.” *Id.* at 838 n.4.

Cases from other states are informative. In an Oregon case, a defendant was charged with two alternative means of committing aggravated murder, and, as in this case, the court instructed the jury it did not have to agree on which alternative was committed:

With regard to this charge, it is not necessary for all jurors to agree on the manner in which Aggravated Murder was committed. That is, some jurors may find that it was committed during the course of and in furtherance of Robbery in the First Degree, and others may find it was committed to conceal a crime or its perpetrator. Any combination of twelve jurors agreeing that one or the other or both occurs is sufficient to establish this offense.

⁴ *Sandholm* held “We disavow the discussion and statement in *Franco* that three alternative means exist under the statute.” 184 Wn.2d at 736.

State v. Boots, 308 Or. 371, 374-75, 780 P.2d 725 (1989) (quoting instruction).

The jury convicted the defendant of aggravated murder, but the Oregon Supreme Court reversed, holding the state constitutional guarantee of unanimity was violated. The court explained it is obvious a jury must agree on all of the elements of the crime if only one alternative or the other is charged. *Id.* at 377. Accordingly, it “should be no less obvious when the state charges a defendant both under [one subsection of the statute] and under [another].” *Id.* “In order to convict, the jury must unanimously agree on the facts required by either subsection. Indeed, they may agree on both, if both are proved beyond a reasonable doubt.” *Id.* Because the jury was wrongly told it did not have to be unanimous as to either alternative, reversal or remand for a new trial was required, with no discussion of sufficiency of the evidence. *Boots*, 308 Or. at 381.

The Massachusetts Supreme Court has held its common law provides a right to unanimity on the means of committing an alternative means crime. *Commonwealth v. Berry*, 420 Mass. 95, 112, 648 N.E.2d 732 (1995). *Berry* involved a charge of first-degree murder, where the alternative methods alleged were premeditated murder and felony

murder. *Id.* at 111-12. Although the trial court did not affirmatively instruct the jury it need not be unanimous (as it did in this case and *Boots*), it denied the defendant's request to instruct the jury that it had to be unanimous as to the means. The state supreme court affirmed not because there was sufficient evidence to satisfy a due process challenge, but because it was clear on the record that, despite the absence of the instruction, the jury was unanimous as to felony murder. *Id.* at 112. Nonetheless, the court instructed "hereafter, as a matter of common law, when requested, a judge should give an instruction to the jury that they must agree unanimously on the theory of culpability where the defendant has been charged with murder in the first degree." *Id.*

A Michigan case is also instructive. In *People v. Olsson*, 56 Mich. App. 500, 224 N.W.2d 691 (1974), the defendant was charged with first degree murder by the alternative means of premeditation and felony murder. The Court of Appeals ruled the evidence of felony murder was insufficient, and that the trial court accordingly erred by instructing the jury on that alternative. *Id.* at 504. Furthermore, because there was only a general verdict form and the jury did not indicate upon which theory it relied, reversal was required because the Court of

Appeals could not “conclusively state” the jury relied upon the alternative supported by sufficient evidence. *Id.* at 505. Apart from the insufficiency of the evidence, the court held the jury instructions “did not adequately inform the jury of their duty to make a unanimous finding as to whether defendant was guilty of premeditated murder or murder in the perpetration of a felony.” *Id.* at 506. This failure to ensure unanimity constituted an independent error:

We agree with defendant that on the basis of these instructions, it is possible that the jury arrived at a compromise verdict, that is, some members may have felt that defendant was guilty beyond a reasonable doubt of murder in the perpetration of a robbery or larceny while the remaining members may have felt that defendant was guilty beyond a reasonable doubt of premeditated murder. Such a verdict would not be unanimous and could not convict defendant.

Olsson, 56 Mich. App. at 506. Other states similarly enforce their unanimity requirements independent of the sufficiency of the evidence. *E.g.*, *State v. Saunders*, 992 P.2d 951, 968 (Utah 1999); *Probst v. State*, 547 A.2d 114, 121 (Del. 1988).

In sum, Mr. Linville has a constitutional right to a verdict in which all 12 jurors agree on the elements of the crime that were proven beyond a reasonable doubt. The verdicts in this case do not satisfy this constitutional requirement.

d. *The Court must reverse the convictions on the 39 counts of trafficking in stolen property.*

Because there was no special verdict form showing all 12 jurors unanimously agreed the State proved all of the elements of either alternative, or both, alternative means of trafficking in stolen property reversal is required unless this Court can nevertheless infer the jury was unanimous as to the means. The Court cannot make this inference because the jury was specifically instructed it did not have to be unanimous as to whether the State proved the elements of felony murder or the elements of intentional murder. The remedy is reversal and remand for a new trial on those 39 counts.

6. Double Jeopardy protections do not permit Mr. Linville's multiple convictions of trafficking stolen property.

a. *The federal and state constitutions prohibit multiple punishments for the same offense.*

The Double Jeopardy Clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. V; Const. Art. I, § 9.

The double jeopardy provisions of the state and federal constitutions protect against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

Pearce, 395 U.S. at 717, *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Focusing on the third of these, the prohibition on multiple punishments, the Supreme Court has said

When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.

State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). A person may not be convicted more than once under the same criminal statute if only one “unit” of the crime has been committed. *State v. Leyda*, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)).

The unit of prosecution is designed to protect the accused from overzealous prosecution. *State v. Turner*, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges. *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (“The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.”); [*Ex parte Snow*, 120 U.S. 274, 282, 7 S. Ct. 556, 30 L. Ed. 658 (1887)] (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges).

Adel, 136 Wn.2d at 635.

The unit of prosecution, the punishable conduct under the statute, may be an act or a course of conduct. *Tvedt*, 153 Wn.2d at 710. It is determined by examining the statute’s plain language. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007); *Leyda*, 157 Wn.2d at 342; *Westling*, 145 Wn.2d at 610. If the legislature has failed to specify the unit of prosecution in the statute, or if its intent is not clear, the court resolves any ambiguity in favor of the defendant. *Tvedt*, 153 Wn.2d at 711.

b. *Trafficking in stolen property is a course of conduct crime.*

Trafficking focuses upon engaging in the marketplace of stolen property as buyer, seller or intermediary, that is, the crime focuses upon the enterprise and not a particular act. That intent is illustrated by the terms “knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others.” RCW 9A.82.050(1). Plainly the statute includes both the taking and selling or property, but the statute focuses on the conduct bridging those acts. The statute focuses upon a course of conduct rather than a specific act.

Here, the State charged a separate count of trafficking based upon the property taken from each burglary. But, this Court has made clear the focus of the crime of trafficking in stolen property is not on the taking of the property. In ruling that theft and trafficking were not the same criminal conduct the court noted the offenses have different victims. *State v. Walker*, 143 Wn. App. 880, 892, 181 P.3d 31 (2008). The victim of theft is the owner of the property while the victim of trafficking is the potentially unwitting purchaser. This makes clear the gravamen of the offense is not the taking of the property but rather the course of conduct leading to sale. Moreover, *Walker* illustrates that taking property from separate owners does not establish separate

offenses. Thus, Mr. Linville could only be convicted of a single count of trafficking in stolen property, and certainly could not be charged with separate counts based on each separate taking.

Alternatively, if the unit of prosecution is taking the property, then theft and trafficking in stolen property are the same offense. In that case, the Court must dismiss each of the theft charges.

7. The trial court deprived Mr. Linville of due process by permitting the State to amend the information to charge a higher degree of theft in Count 130 several days after the state had rested its case.

Article 1, section 22 and the Sixth Amendment prohibit the State from trying an accused person for an offense not charged. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. *Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). “This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.” *Pelkey*, 109 Wn.2d at 488 (quoting *State v. Ackles*, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

If the State fails to meet this “essential elements” rule, it may move to amend the information to correct the error at any time prior to

resting its case-in-chief. *Pelkey*, 109 Wn.2d at 490. Once the State rests its case, however, it may not amend the information to correct its failure to charge a crime. *State v. Vangerpen*, 125 Wn.2d 782, 790-91, 888 P.2d 1177 (1995). This is a *per se* prohibition. “[A]n information may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense.” *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (citing *Pelkey*, 109 Wn.2d at 491. Amending the information to charge a higher degree of the charge violates Article I, section 22. *Quismundo*, 164 Wn.2d at 504. Allowing the prosecutor to amend the information to charge a higher degree of the offense after the State has rested its case constitutes “reversible error *per se* even without a defense showing of prejudice.” *State v. Markle*, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); *Quismundo*, 164 Wn.2d at 504.

The State rested its case on July 8, 2015. RP 5006. On July 13, 2015, the State filed its seventh amended information amending Count 130 from a charge of second degree theft to first degree theft. CP 365, 391. Amending of the information to charge a higher degree of theft after the State rested its case violated Mr. Linville’s rights under Article I, section 22. *Quismundo*, 164 Wn.2d at 504. Mr. Linville need not

demonstrate prejudice from that amendment. *Id.* This Court must reverse that charge and remand for a new trial. *Id.*

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Linville's convictions and remand for separate trials as required by RCW 9A.82.085. The Court must dismiss the four convictions of first degree burglary and the firearm enhancements.

Respectfully submitted this 30th day of August, 2016.

s/ Gregory C. Link
GREGORY C. LINK – 25228
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 47916-8-II
v.)	
)	
KENNETH LINVILLE, JR.,)	
)	
Appellant.)	

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