No. 94813-5
Court of Appeals No. 47916-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH LINVILLE,

Respondent.

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

ANSWER

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A. INTRODUCTION

The State charged Kenneth Linville with the offense of leading organized crime, requiring the state to prove Mr. Linville engaged in criminal profiteering activity. As this Court has previously determined, the Legislature has provided a specific statutory definition of "criminal profiteering." Moreover, in a prosecution for leading organized crime the Legislature, in RCW 9A.82.085, prohibited joining any offense which is not within the statutory definition of "criminal profiteering."

Ignoring the limitations of RCW 9A.82.085 and the specific statutory definition of "criminal profiteering," in the Information charging the one count of leading organized crime the State also charged 140 additional counts. None of these counts were alleged to be a part of Mr. Linville's criminal profiteering activity, and more than 50 of them do not meet the statutory definition of criminal profiteering at all. Despite the plain limits of RCW 9A.82.085, defense counsel never objected to the improper joinder of these offenses. Had counsel objected the clear requirements of the statue would have required the trial court to sever those counts. Instead, Mr. Linville was convicted of those more than 50 counts; four of which required 240 months mandatory prison time.

The Court of Appeals concluded defense counsel's failure to be aware of and raise the clear mandate of RCW 9A.82.085 was unreasonably deficient performance. The Court also concluded that but for that deficient performance, the result of Mr. Linville's trial would have plainly been different. Thus, the court found Mr. Linville was denied his Sixth Amendment right to the effective assistance of counsel.

Arguing essentially that the Legislature did not really mean what it said in the plain language of the Criminal Profiteering Act, and that this Court did not really mean what it said when it previously interpreted those provisions, the State now asks this Court to review the opinion of the Court of Appeals.

This Court should deny review.

B. ISSUES PRESENTED

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 more than 50 of the counts against Mr. Linville involved crimes which are not within the broad statutory definition of "criminal profiteering activity" the Court of Appeals

properly concluded Mr. Linville was denied his Sixth Amendment right to the effective assistance of counsel by defense counsel's failure to object to the improper joinder of those offenses at trial.

2. 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. This Court has previously held 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. Despite this, the Court of Appeals concluded the taking and possessing of a firearm in the course of a burglary establish first degree burglary.

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 Court of Appeals properly gave effect to the plain language of RCW 9A.82.010 and the court's application of that statute is consistent with opinions of this Court and the Court of Appeals. The conclusion that Mr. Linville was denied his Sixth Amendment right to the effective assistance of counsel does not warrant review under RAP 13.4.

The Court of Appeals found Mr. Linville was denied his Sixth Amendment right to the effective assistance of counsel where defense counsel failed to object under RCW 9A.82.085 to the improper joinder of more than 50 counts in his trial for leading organized crime. The court's conclusion turned on the proper interpretation of the term "criminal profiteering" defined in RCW 9A.82.010. The court interpreted the statute in precisely the same fashion as this Court has done previously. The Court of Appeals interpreted the statute in the same fashion as prior Court of Appeals decisions. Tellingly, the court interpreted the statute in precisely the same way as the State did at trial in Mr. Linville's case. There is no reason to accept review of this issue in this case.

Nonetheless, and despite this Court's cases, the State maintains the Court of Appeals gave an overly narrow construction to the definition of "criminal profiteering" in RCW 9A.82.010. Thus, the

State argues, defense counsel was not ineffective for failing to object under RCW 9A.82.085 to the improper inclusion of more than 50 counts which do not fit within the definition of "criminal profiteering activity."

The State charged Mr. Linville with a single count of leading organized crime in violation of RCW 9A.82.060. CP 365. That statute provides

> 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.

In a prosecution for leading organized crime, RCW 9A.82.085 limits the offenses which may joined for trial providing "the state is barred from joining any offense other than the offenses alleged to be part of the pattern of criminal profiteering activity." *Id.*

> "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.

The Court of Appeals accepted Mr. Linville's contention that the plain language of RCW 9A.82.010(4) limits the acts which constitute criminal profiteering to acts chargeable as one the enumerated crimes. Opinion at 6-7. Breaking the somewhat convoluted structure apart, a natural reading of the statute provides "criminal profiteering" is:

> (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,
>
> (4) regardless of whether the act is charged or indicted,
>
> (5) as any of the following [enumerated offenses].

Opinion at 6. This is the construction given the statute by this Court and the Court of Appeals.

Addressing the provisions of RCW 9A.82.010, this Court said "[t]he statute has a very detailed definition of 'pattern of criminal profiteering activity.'" *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 838, 355 P.3d 1100 (2015). It is defined "as commission of specific enumerated felonies for financial gain." *Id* at 837 (citing RCW 9A.82.010(4)). *Trujillo* found a complaint in a civil action purporting to allege a claim under the Criminal Profiteering Act (CPA) was inadequate for failing to allege any acts constituting any of the enumerated crimes. *Id.* at 838.[1]

The State dismisses *Trujillo*'s holding as dicta. Petition for Review at 6-5. But the definition of "criminal profiteering" was the

[1] The Criminal Profiteering Act provides numerous civil remedies as well defining criminal offenses. RCW 9A.82.100 establishes several civil remedies available to the state as well as private individuals regarding "criminal profiteering activity." Among, these remedies is a private action for damages. The definition of "criminal profiteering activity" provided in RCW 9A.82.010 applies to both the criminal and civil provision of the Act.

issue in that matter, as *Trujillo* concluded the civil complaint was inadequate for failing to make the necessary factual allegations to satisfy the statutory definition of criminal profiteering.

The holding in *Trujillo* echoes an early ruling by the Court of Appeals that "'[c]riminal 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); *see also, Winchester v. Stein*, 135 Wn.2d 835, 849, 959 P.2d 1077 (1998); *Robertson v. GMAC Mortg. LLC*, 982 F. Supp. 2d 1202, 1209 (W.D. Wash. 2013).

The court's opinion in this case is consistent with and required by *Trujillo* and *Munson*. Thus, the question the State wishes this Court to address is already settled.[2] The Court of Appeals did nothing more

[2] The State imagines a double jeopardy problem arises where RCW 9A.82.085 mandates inclusion of theft charges that are a part of the pattern of criminal profiteering but bars joint prosecution of a burglary committed at the same time. Petition at 15-16. This, the State contends, the prior prosecution of the theft will bar subsequent prosecution of the burglary charge. However, the state's hypothetical is premised upon long overturned case law and no such problem exists. *Id*. (citing *State v. Laviolette*, 118 Wn.2d 670, 826 P.2d 155 (1995); *overruled*, *State v. Calle*, 125 W.2d 769, 888 P.2d 155 (1995)). *Laviolette* recognized that convictions, and thus separate prosecutions of both theft and burglary, are permissible under the *Blockburger* test. 118 Wn.2d at 677. Only by applying the same evidence test, from *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L.Ed.2d 548 (1990), did the Court find a double jeopardy violation. 118 Wn.2d at 678-79 The United States Supreme Court soon thereafter overruled the *Grady* test. *United State v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed.

than follow the holdings than existing law. Opinion at 6-7. RCW 9A.82.085 mandated severance of the 56 offenses which do not fall within the definition of criminal profiteering activity. Counsel's failure to be aware of the statute and object to the improper joinder of those 56 offenses was plainly deficient. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (reasonable conduct for an attorney includes knowing the relevant law). The Court of Appeals properly found counsel's performance was deficient.

Prejudice is established if "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); *Kyllo*, 166 Wn.2d at 862.

Had counsel objected based on RCW 9A.82.085 to the impermissible joinder of offenses in Mr. Linville's trial on the leading organized crime charge, Mr. Linville would not be serving a mandatory minimum sentence of 240 months for the firearm enhancements attached to the four counts of first degree burglary as those charges could not be joined. Mr. Linville would not be serving consecutive

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2d 556 (1993). Thus, the only portion of *Laviolette* that remains valid is the conclusion that separate prosecutions of both burglary and theft do not violate double jeopardy. That is also consistent with the burglary anti-merger statute. RCW 9A.52.050.

sentences for the four firearm possession counts four theft of a firearm counts as those counts could not be joined. 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 improperly joined burglaries as evidence of Mr. Linville's guilt for leading organized crime. CP 518-19. But for the improper joinder of the burglary counts, the State could not make that argument.

There is no doubt that but for counsel's performance, Mr. Linville could not have been convicted of 56 of the counts at trial. Beyond simply a reasonable belief of a different outcome, there is clear proof of such a different outcome. Applying this standard, the Court of Appeals properly concluded Mr. Linville was prejudiced by counsel's performance.[3] Opinion at 9. There is no basis for review under RAP 13.4.

[3] The State theorizes that because it could have gained those 56 convictions had it actually conducted a separate trial, there can be no prejudice from counsel's failure to object to the improper joinder. Regardless of the potential outcome of a hypothetical separate trial, there is no question that the outcome of this trial would have been different.

Aside from its conclusion that counsel's performance fell below the requirement of the Sixth Amendment, the court's reversal is also compelled for a second reason.

As discussed above, RCW 9A.82.085 limits the offenses which may be joined for trial to those "offenses *alleged* to be part of the pattern of criminal profiteering activity." (Emphasis added.). 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 140 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 reaming 140 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.

Mr. Linville raised this argument in the Court of Appeals. Because it reversed Mr. Linville's convictions based upon counsel's

deficient performance, the Court of Appeals declined to reach this argument. Opinion at 3, n.8.

Moreover, the Mr. Linville also contended the mandate of RCW 9A.82.085 required the trial court on its own to sever the improperly joined. Again, the Court of Appeals declined to reach this argument, yet it provides further basis to support the court's opinion.

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. 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).

This argument provides further basis to deny review under RAP 13.4.

2. This Court should accept review of the Court's conclusion that the mere theft of a firearm in the course of a burglary establishes a first degree burglary as well as the basis for a firearm enhancement.

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 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).

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.

In relevant part, a conviction for first-degree burglary required the State to prove Mr. Linville or an accomplice was "armed" during the burglary. RCW 9A.52.020(1). "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, in *Brown*, this Court held 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 from the Court of Appeals, including this one, 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. Opinion at 11-12 (citing *State v. Hernandez*, 172 Wn. App. 537, 544, 290 P.3d 1052 (2012)).

Hernandez, instead, cites another 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.

The Court of Appeals is bound to follow the decisions of this 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.

The opinion of the Court of Appeals is contrary to this Court's decision in *Brown*. Review of this issue is appropriate under RAP 13.4.

3. Even if this Court were to grant review and reverse the opinion of the Court of Appeals, the matter will need to return to the Court of Appeals to address several unresolved claims.

Because it found the violation of Mr. Linville's Sixth Amendment right to counsel required reversal the Court of Appeals did

not address several additional arguments raised by Mr. Linville. Opinion at 1, n.1. If this Court were to reverse the opinion of the Court of Appeals, Mr. Linville's right to appeal under Article I, section 22 requires the Court of Appeals to resolve those claims. Those unresolved claims are:

(1) Whether a conviction for trafficking in stolen property may rest on accomplice liability;

(2) Whether the Double Jeopardy Clause of the Fifth Amendment permits 39 separate convictions of trafficking in stolen property; and

(3) Whether the State's amendment of the Information to charge a greater offense after the close of evidence violated Article I, section 22 are violated where an information is amended after the state has rested to charge a higher degree of an offense.

E. CONCLUSION

For the reasons above, this Court should deny review of the State petition. However, the Court should grant review of that portion of the Court of Appeals opinion affirming the sufficiency of the evidence to support the four first degree burglary charges and enhancements.

Respectfully submitted this 24th day of August, 2017.

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