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No. 98582-1
COA No. 47916-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH LINVILLE,

Appellant.

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

The Honorable Carol Murphy
Cause No. 14-1-00296-7

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the law of the case doctrine precludes further consideration of the trial court's correct conclusion that improper joinder pursuant to RCW 9A.82.085 is statutory and does not constitute a manifest constitutional error that can be reviewed for the first time on appeal, where the Court of Appeals held as much in its previous decision and that conclusion was not accepted for review by this Court.

2. Whether the Court of Appeals' finding that sufficient evidence supported each of the firearm enhancements imposed conflicts with State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007), where the evidence, when viewed in a light most favorable to the State demonstrates that either Linville or an accomplice actually possessed each of the firearms.

3. Whether the Court of Appeals' conclusion that Linville's convictions for trafficking in stolen property did not violate double jeopardy conflicted with State v. Walker, 143 Wn. App. 880, 892, 181 P.3d 31 (2008), where the Court of Appeals distinguished Walker in its decision and the unit of prosecution for trafficking stolen property supports the Court of Appeals' decision.

4. Whether the Court of Appeals' conclusion that the first means of trafficking in stolen property can be proven by accomplice liability such that a failure to object at trial to accomplice liability instructions does not constitute a manifest constitutional error conflicts with State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011), where the Hayes decision addressed the crime of leading organized crime which, unlike the crime of trafficking in stolen property, requires that the defendant be at the apex of the criminal hierarchy.

B. STATEMENT OF THE CASE.

For purposes of this brief, the State relies on the Statement of the Case filed in the Corrected Brief of Respondent, filed in the Court of Appeals on December 1, 2016 and the Statement of the Case in the Supplemental Brief of Respondent filed in the Court of Appeals on April 29, 2019, with the following additional procedural history.

After Linville was convicted at trial of 1 count of leading organized crime, 35 counts of residential burglary, 1 count of attempted residential burglary, 4 counts of first degree burglary, 3 counts of second degree burglary, 39 counts of trafficking stolen property, 17 counts of first degree theft, 18 counts of second

degree theft, 1 count of attempted second degree theft, and 1 count of possession of stolen property. Division II of the Court of Appeals held that Linville's defense counsel was ineffective for not moving to sever the charge of leading organized crime based on RCW 9A.82.085. State v. Linville, 199 Wn. App. 461, 463-464, 471, 400 P.3d 333 (2017). In a footnote, Division II of the Court of Appeals stated, "Linville fails to show that the issue affects a constitutional right, thus we address whether the alleged improper joinder is reversible error only in the context of ineffective assistance of counsel." Id. at n. 7.

In the unpublished portion of the decision of the Court of Appeals, the Court of Appeals held that the State presented sufficient evidence that Linville or an accomplice was armed with a deadly weapon for purposes of first-degree burglary. State v. Linville, No. 47916-8-II, June 27, 2017, Wash.App. LEXIS 1526, 2017 WL 2774492. This Court accepted review of the issues of the Court of Appeals interpretation of RCW 9A.82.010(4) and RCW 9A.82.085, and whether or not Linville had demonstrated ineffective assistance of Counsel. State v. Linville, 189 Wn.2d 1016, 404 P.3d 486, (2017); See also, Petition for Review, No. 47916-8-II, July 25, 2017.

This Court agreed with the Court of Appeals analysis that unlisted crimes cannot be jointed as part of a “pattern of criminal profiteering activity,” but found that the record was insufficient to demonstrated that Linville’s trial counsel was ineffective by choosing to defend against the crimes in one prosecution. State v. Linville, 191 Wn.2d 513, 517, 423 P.3d 842 (2018). This Court reversed the decision of the Court of Appeals and remanded for further proceedings. Id. at 526.

On remand, the Court of Appeals noted that it had previously addressed whether the issue regarding RCW 9A.82.085 could be raised for the first time on appeal and clarified that the rule against joinder is rooted in statute and therefore Linville could not show that improper joinder constituted a constitutional error. State v. Linville, No. 47916-8-II, “Unpublished Opinion,” April 21, 2020, at 6-7, n. 7. The Court of Appeals also specifically noted that this Court did not accept review of the issue of whether sufficient evidence proved that Linville was armed with a firearm as related to his conviction for first degree burglary and therefore the Court of Appeals did not revisit the decision. Id. at 1, n.1.

The Court of Appeals decision on remand addressed the arguments that:

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

Id. at 2.

The Court of Appeals held that sufficient evidence supported the firearm sentencing enhancements, Linville's convictions for trafficking in stolen property did not violate double jeopardy, and that the trial court erred in permitting the State to amend the charging information after the State rested its case. Id. Linville now seeks review of the decision of the Court of Appeals.

C. ARGUMENT.

A petition for review will be accepted by this Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

1. This Court should not re-consider the issue of whether RCW 9A.82.085 constituted a manifest constitutional error that could be considered for the first time on appeal.

The law of the case doctrine “refers to the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand or to the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case.” State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (internal quotations and citations omitted). The doctrine promotes efficiency and finality of the judicial process by protecting against relitigation of a settled issue. Harrison, 148 Wn.2d at 562. The doctrine derives from both RAP 2.5 (c)(2) and common law. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844, 848 (2005).

In this case, the original decision of the Court of Appeals concluded that improper joinder under RCW 9A.82.085 did not manifest a constitutional error and could not be raised for the first time on appeal. That decision necessarily predicated that Court of

Appeals' conclusion that Linville's trial counsel rendered ineffective assistance of counsel and this Court's review of that issue. The doctrine of the law of the case should be construed as prohibiting further review of the issue.

Even if the law of the case doctrine did not apply, the Court of Appeals decision correctly concluded that Linville had not demonstrated constitutional error. State v. Linville, No. 47916-8-II, "Unpublished Opinion," April 21, 2020, at 7. The anti-joinder provision contained in RCW 9A.82.085 is rooted in statute. Linville did not demonstrate a manifest error affecting a constitutional right. RAP 2.5(a); State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46 (2014); State v. Kirkman, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007). Linville has not demonstrated a basis upon which this Court should accept review of this issue.

2. The Court of Appeals decision that the evidence was sufficient to support the imposition of firearm enhancements was correct and does not conflict with decisions of this Court.

The decision of the Court of Appeals correctly notes that the facts of this case are distinguishable from those in State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007). The test for determining sufficiency of the evidence for a firearm enhancement is whether,

after viewing the evidence in a light most favorable to the State, any rationale trier of fact could have found guilt beyond a reasonable doubt. State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017); State v. Sassen Van Elsloo, 191 Wn.2d 798, 826, 425 P.3d 807 (2018). For purposes of a firearm enhancement, a defendant or an accomplice is armed with a firearm if the weapon was readily accessible and easily available and there is a nexus between the defendant, the crime, and the weapon. State v. Easterlin, 159 Wn.2d 203, 206, 149 P.3d 366 (2006); RCW 9.94A.533(3). In Brown, this Court found that mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed.” State v. Brown, 162 Wn.2d at 431. However, constructive possession is distinguishable from actual possession. State v. Hernandez, 172 Wn. App. 537, 544, 290 P.3d 1052 (2012).

The decision of the Court of Appeals correctly noted that, in a light most favorable to the State, the record demonstrated that Linville or an accomplice had actual possession of the firearms for each of the burglaries. State v. Linville, No. 47916-8-II, “Unpublished Opinion,” April 21, 2020, at 11; RP 893-895, 1148, 1816, 2520-2521, 2527-2533, 3254-3255, 3654, 3656-3657, 3770-

3771, 3777, 3808-3809, 3979-3983, 4256-4258. The decision of the Court of Appeals properly acknowledged and applied Brown. Unlike the facts in Brown, for each firearm enhancement, Linville or an accomplice actually possessed the firearm. There is no basis pursuant to RAP 13.4(b) for which this Court should accept review.

3. The Court of Appeals properly concluded that Linville's convictions for trafficking in stolen property did not violate double jeopardy and the decision is not contrary to State v. Walker, 143 Wn. App. 880, 892, 181 P.3d 31 (2008).

The Court of Appeals correctly found that the plain language of RCW 9A.82.050 demonstrates that trafficking stolen property occurs by either “(1) the knowing facilitating or participating in the theft of property so that it can be sold, or (2) transferring possession of property known to be stolen.” State v. Lindsey, 177 Wn. App. 233, 241-42, 311 P.3d 61 (2013); RCW 9A.82.050, 010(19), State v. Linville, No. 47916-8-II, “Unpublished Opinion,” April 21, 2020, at 13. The decision of the Court of Appeals correctly found that each of the 39 distinct convictions for trafficking stolen property were separate violations of the law. State v. Linville, No. 47916-8-II, “Unpublished Opinion,” April 21, 2020, at 16, State v. Reeder, 184 Wn.2d 805, 365 P.3d 1243 (2015); State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999).

Linville argues that the decision conflicts with State v. Walker; however, nothing in Walker compels a different conclusion than was reached by the Court of Appeals in this case. In Walker, Division II of the Court of Appeals held that first degree theft against the forest service and trafficking in stolen property were not same criminal conduct because the saw mill that received the property was a victim of the trafficking charge. State v. Walker, 143 Wn. App. at 892. That decision does not equate to Linville's claim that he can only be charged with one count of trafficking stolen property. As the Court of Appeals recognized, the property Linville trafficked came from 39 different houses over the course of several months and paid numerous visits to pawn shops, jewelers, and various individuals to sell the stolen goods for drugs or money. State v. Linville, No. 47916-8-II, "Unpublished Opinion," April 21, 2020, at 15-16.

The Court of Appeals explained why the decision does not conflict with Walker, stating "Linville's contention is without merit because the unit of prosecution includes the requisite element of knowing participation in the theft to facilitate the sale of stolen property thereafter." Id. at n. 5; Walker, 143 Wn. App. at 887. Contrary to Linville's claim, the decision of the Court of Appeals

does not conflict with Walker and there is no basis for review pursuant to RAP 13.4.

4. The Court of Appeals correctly found that accomplice liability can attach to the crime of trafficking stolen property and that decision does not conflict with *State v. Hayes*.

The decision of the Court of Appeals correctly found that trafficking stolen property does not prohibit accomplice liability. By default, accomplice liability is available under RCW 9A.08.020,¹ and only when it is apparent that the legislature intended to preclude accomplice liability will liability as a principal be required. State v. Hayes, 164 Wn. App. 459, 470, 262 P.3d 538 (2011). In arguing that RCW 9A.82.050 does not allow accomplice liability for trafficking, Linville relies solely upon comparisons to the statutory interpretation of RCW 9A.82.060, Leading Organized Crime, which was held in Hayes to disallow accomplice liability. Hayes, 164 Wn. App. at 470. As the Court of Appeals noted, leading organized crime, as described in Hayes, requires that the defendant be at the apex of the hierarchy, while trafficking stolen property does not.

¹ 9A.08.020. Liability for conduct of another — Complicity.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

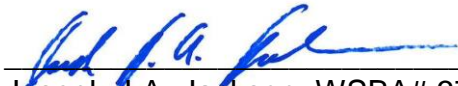
State v. Linville, No. 47916-8-II, “Unpublished Opinion,” April 21, 2020, at 8-9; Hayes, 164 Wn. App. at 470.

The decision of the Court of Appeals correctly distinguished Hayes from this case. Unlike in Hayes, the un-objected to accomplice liability instructions did not relieve the State of its burden to prove that Linville was at the apex of the criminal hierarchy. The charges of trafficking in stolen property had no such requirement. The Court of Appeals correctly found that Linville did not demonstrate a manifest constitutional error from the inclusion of instructions on accomplice liability which were not objected to at trial. There is no reason for this Court to accept review.

D. CONCLUSION.

For all of the reasons indicated above, the State respectfully request that this court deny Linville’s Petition for Review.

Respectfully submitted this 19th day of June, 2020.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

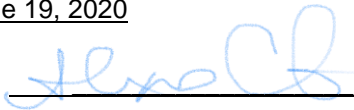
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I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Supreme Court using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: June 19, 2020

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A handwritten signature in blue ink, appearing to be "H. H. H.", written over a horizontal line.

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