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A. ASSIGNMENTS OF ERROR

1. Appellant's conviction for violating the Uniform Firearms Act (VUFA) violates his right to be free from double jeopardy, as he was convicted of the same offense in a prior proceeding.

2. The trial court erred in denying the motion to dismiss the current VUFA charge under mandatory joinder rules.

Issues Pertaining to Assignments of Error

1. Whether appellant's convictions for owning, possessing or controlling the same firearm in 2004 and 2005 violate the prohibition against double jeopardy because the VUFA statute proscribes a continuing course of conduct involving a particular firearm?

2. Whether the trial court erred in denying appellant's motion to dismiss the current charge based on mandatory joinder rules where the prosecutor knew of this related offense at the time of the prior proceeding but purposely held it back for future prosecution when appellant exercised his right to trial in the prior proceeding?

B. STATEMENT OF THE CASE

On July 12, 2007, the Mason County prosecutor's office charged appellant James Kenyon with unlawfully possessing a .9 millimeter Smith and Wesson (serial no. A299617) on October 14, 2004. CP 52-53; RCW

9.41.040(1)(a).¹ According to the probable cause declaration, police arrested Kenyon on October 14, after his girlfriend Destiny Meehan allegedly attempted to elude police. CP 57. During the pursuit, Kenyon reportedly threw the gun out Meehan's car window. CP 57.

Police learned of the gun's disposal after recording several of Kenyon's telephone calls from jail. During a conversation with Meehan on October 22, 2004, Kenyon recounted throwing the gun as they drove around a bend. RP 58. Meehan responded she retrieved the gun for Kenyon a few days later. CP 58. On October 24, the jail recorded Kenyon telling his father about throwing the gun. CP 60. In a follow-up conversation, Kenyon's father reported he retrieved Kenyon's gun from somebody named Andy; apparently, Meehan tried to sell him the gun. CP 57-60.

The declaration for the current charge also alleged that on June 29, 2005, during a warrant sweep of David Reading's trailer, police recovered Kenyon's gun (serial # A299617) from a gray box. CP 58. When detectives contacted Meehan on May 17, 2006, she corroborated the information conveyed during her and Kenyon's taped conversations and

¹ The state alleged Kenyon had a prior serious offense, which elevated the offense from second to first degree. CP 52-53.

identified a photograph of the gun from Reading's trailer as the gun Kenyon reportedly asked her to retrieve after the 2004 traffic stop. CP 58.

According to the probable cause statement, an individual named David Stiner testified in Mason County Superior Court that Kenyon gave him the box and gun to place in Reading's trailer. CP 58-59.

Kenyon moved to dismiss the current charge based on mandatory joinder rules. CP 44-49; Supp. CP ___ (sub. no. 55, Memorandum, 2/7/08). The testimony alluded to in the probable cause statement was from a 2006 prosecution in which the Mason County prosecutor charged Kenyon with 7 VUFA counts, the first of which was for possessing the same Smith and Wesson (serial # A299617) as charged in the current case, although the state alleged Kenyon possessed the gun during a different time period (between 6/23/05 and 6/30/05) than the current charge (10/14/04). Under Mason County Superior Court No. 06-1-00041-2, Kenyon was convicted of all counts and sentenced to 232 months of incarceration. Supp. CP ___ (sub. no. 55, Memorandum, 2/7/08).

As Kenyon pointed out, the Mason County prosecutor was well aware of the 2004 gun toss at the time of Kenyon's 2006 trial. Indeed, at trial on the 2006 case, Meehan testified about the police pursuit and Kenyon's disposal of the gun. CP 45-46; Supp. CP ___ (sub. no. 55,

Memorandum, 2/7/08); Supp. CP __ (sub. no. 66, Report of Proceedings(No. 06-1-00041-2), 2/22/08). Although Kenyon was not charged with possessing the gun on October 14, 2004, the prosecutor argued the evidence was relevant under ER 404(b):

". . . that the defendant -- that ties the defendant to a particular firearm during a time frame in which he is not charged for possessing a firearm, which is now in evidence and is charged with -- and he is charged with possessing that as to other time frames."

CP 46; Supp. CP __ (sub. no. 66, Report of Proceedings(No. 06-1-00041-2), 2/22/08).

Not only did the prosecutor know of the 2004 gun toss, but he threatened at the time of the 2006 case that if Kenyon insisted on going to trial, the state would hold back the current offense to charge at a later time. In his own words, the prosecutor declared (in responding to Kenyon's motion to dismiss):

I was the prosecutor responsible for the prosecution of this defendant under Mason County Superior Court cause number 06-1-0041-2. The defendant was represented in that matter by Legrand Jones.

That some of the evidence in such previous prosecution involved the defendant throwing a particular firearm from a vehicle while he and the driver of the vehicle were attempting to avoid apprehension by law enforcement on October 14, 2004. Discovery relating to such incident was provided to Mr. Jones in a timely fashion during his representation of the defendant. Moreover I specifically

communicated to Mr. Jones that if the defendant chose to go to trial on the multiple counts he was charged with, such incident would be held back for future prosecution but would still be offered into evidence as to the charged counts under ER 404(b). The defendant chose to go to trial on the multiple other counts and evidence of the defendant's possession of this particular firearm on October 14, 2004, was admitted into evidence for the jury's consideration under ER 404(b).

Supp. CP __ (sub. no. 65, Declaration, 2/20/08) (emphasis added).

In his motion to dismiss, Kenyon argued the state should not be allowed to "unduly harass the defendant and place a 'hold' on him through the use of multiple trials." CP 48 (quotations in original); RP 17.²

The state responded that the current charge did not violate mandatory joinder rules because eight months separated "the defendant's two incidents of possessing this particular firearm," and "the defendant had intentionally divested himself of such possession after the first incident and the defendant spent numerous periods of time incarcerated in either prison or jail in the interim." Supp. CP __ (sub. no. 64, State's Memorandum, 2/20/08); RP 22-23. According to the prosecutor's documentation, Kenyon served three relatively short periods of incarceration between the alleged 10/14/04 possession currently charged and the 6/23/05-6/30/05 possession previously

² The verbatim report of proceedings consists of one bound volume, consecutively paginated.

charged. Supp. CP __ (sub. no. 65, Declaration of Reinhold P. Schuetz, 2/20/08).

The court denied Kenyon's motion to dismiss, adopting the state's reasoning. CP 44; RP 25-26. Kenyon waived his right to a jury trial and was convicted following a stipulated bench trial. CP 20, 23, 40. The court sentenced Kenyon to 101 months *consecutive* to the sentence imposed in the 2006 VUFA case. CP 12. Kenyon appeals. CP 4-6.

C. ARGUMENT

1. BECAUSE THE VUFA STATUTE PROSCRIBES A COURSE OF CONDUCT RELATING TO A PARTICULAR FIREARM, KENYON'S MULTIPLE CONVICTIONS FOR OWNING, POSSESSING OR CONTROLLING THE SAME FIREARM IN 2004 AND 2005 VIOLATE DOUBLE JEOPARDY.

Kenyon was twice convicted of unlawful possession of a firearm for owning, possessing or controlling the same gun during an eight-month span of time. Because the VUFA statute criminalizes possession of "each firearm," and possession is a continuing offense, the "unit of prosecution" is a course of conduct per gun. Kenyon's multiple convictions for a single course of conduct -- ownership, possession or control of the same gun -- therefore violate the prohibition against double jeopardy. Alternatively, Kenyon's construction is at least as reasonable as the state's below and the rule of lenity applies to resolve any ambiguity in his favor.

Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once under the same criminal statute if only one unit of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; 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); State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). The unit of prosecution is designed protect to the accused from overzealous prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution may be an act or a course of conduct. Tvedt, 153 Wn.2d at 710 (citations omitted). The unit of prosecution, or the punishable act under the statute, is determined by examining the statute's plain language. Leyda, 157 Wn.2d at 342; Westling, 145 Wn.2d at 610. The construction of a statute is a question of law that this Court review de novo. State v. Martin, 137 Wn.2d 774, 788, 975 P.2d 1020 (1999). Statutes should be construed to effect their purpose and to avoid strained, unlikely, or absurd consequences. State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations

are conceivable. State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001). If the legislature has failed to specify the unit of prosecution in the statute, or if its intent is not clear, this Court resolves any ambiguity in favor of the defendant, "thus preventing the State from turning a single transaction or course of conduct into multiple offenses. Tvedt, 153 Wn.2d at 711.

The legislature defined unlawful possession of a firearm in RCW 9.41.040, which provides in relevant part:

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(Emphasis added).

The statute's prohibited conduct is owning, possessing or controlling *any* firearm (with a prior qualifying conviction). "Any" means "one or more indiscriminately for all those of a kind." Webster's Third New International Dictionary 97 (1993). In 1995, however, the legislature amended RCW 9.41.040 to provide: "*Each* firearm possessed under this

section shall be a separate offense." RCW 9.41.040(7) (emphasis added).³ Because the statute proscribes *ownership*, as well as possession or control, the statute criminalizes a continuing course of conduct, not a "now you see it, now you don't" event. See, e.g., State v. Payne, 54 Wn. App. 240, 773 P.2d 122 (1989) (marijuana grow operation "hardly a 'now you see it, now you don't' event to render several-month-old tip stale; operation was ongoing). A common sense reading of the VUFA statute is that it criminalizes a course of conduct, i.e., ownership, possession or control, related to a particular firearm.

By differentiating between Kenyon's ownership of the same gun in October 2004 and June 2005, the state turned a single transaction or course of conduct into multiple offenses, which is precisely what the prohibition against double jeopardy is designed to protect against.

The state argued below the charges did not constitute the same conduct because they were separated by eight months, and Kenyon "divested" himself of possession when he threw the gun out of Meehan's window. Regardless, it was still his gun. The statute criminalizes

³ See State v. Russell, 84 Wn. App. 1, 3-4, 925 P.2d 633 (1996) (under the former version of the statute, defendants could only be convicted of a single count no matter how many firearms possessed, but under the current version, subsection (7) was added so that the possession of each gun can result in a corresponding number of convictions).

ownership, among other courses of conduct. Under the state's interpretation, the prosecutor could charge Kenyon with not only the 2004 and June 2005 counts, but an additional count for each of the three times he returned to the community following a period of incarceration. In short, the state could charge Kenyon with an infinite number of counts based on his ownership, possession or control of the same firearm. The state's interpretation leads to an unlikely, strained and absurd consequence.

The Supreme Court's decision in State v. Leyda,⁴ is instructive. Leyda was convicted of four counts of second degree identity theft, based on three purchases and one attempted purchase he made at the Bon March using the credit card of Cynthia Austin, who did not give Leyda permission to use her credit card. Leyda, 157 Wn.2d at 338.

The identity theft statute under which Leyda was convicted provided:

(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(2)(a) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony.

⁴ State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006).

(b) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services, or anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony.

Former RCW 9.35.020(1)-(2).

On appeal, Leyda argued his multiple second degree identity theft convictions violated double jeopardy because he committed only one offense when he unlawfully obtained another person's credit card and used it four times. Leyda, 157 Wn.2d at 337. Division One disagreed, concluding that each use of Austin's credit card constituted a separate violation under the statute. Id.

The Supreme Court disagreed with the court's construction. In so doing, the Court first noted the temptation defining "use" as the unit of prosecution would pose to overzealous prosecutors.

[T]he dissent's proposed separate transaction unit of prosecution creates a broad unit indeed and one that would likely run afoul of double jeopardy prohibitions. This is because, under the dissent's reading, an overzealous prosecutor might be tempted to divide up a defendant's single course of unlawful conduct ad infinitum, thereby resulting in hundreds of identity theft charges though the distinctions between such charges are inconsequential. Accord State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998).

Leyda, 157 Wn.2d at 344 n.7.

As suggested above, the state's interpretation of the VUFA statute here creates the same danger noted by the Leyda majority.

Second, the Leyda Court held the language of the statute and its legislative history indicated that the legislature intended to punish a course of conduct, rather than a single act:

[W]e conclude that the language of RCW 9.35.020 and its legislative history indicate that the legislature intended that the prosecution unit be any one act of either knowingly "obtain[ing], possess[ing], us[ing], or transfer[ring]" a single piece of another's identification or financial information with the requisite unlawful intent. Former RCW 9.35.020(1) (emphasis added). Thus, once the accused has engaged in any one of the statutorily proscribed acts against a particular victim, and thereby committed the crime of identity theft, the unit of prosecution includes any subsequent proscribed conduct, such as using the victim's information to purchase goods after first unlawfully obtaining such information. Accord State v. Root, 141 Wn.2d 701, 710, 9 P.3d 214 (2000) (the unit of prosecution may be a single act or a course of conduct); State v. Ramirez, 2001 WI App 158, 246 Wis. 2d 802, 633 N.W.2d 656, 662 (Wisconsin identity theft statute created continuing offense encompassing value obtained as a result of the original theft of identity).

Leyda, 157 Wn.2d at 345.

In so construing the statute, the court relied on the disjunctive nature of the proscribed acts:

Contrary to the conclusion reached by the Court of Appeals, our reading of RCW 9.35.020 convinces us that the actual use of another's single means of identification or

financial information may be an element of the offense of identity theft, but not always. The language of the statute reveals that the legislature intended to establish an offense which has two elements--first, the accused must have engaged in a proscribed act involving another's means of identity or financial information and, second, the accused must have done so with the intent to commit, or to aid or abet, a crime. Former RCW 9.35.020(1). As indicated by the use of the word "or," the proscribed acts are disjunctive. Thus, under the statute's express language, "use" is a way to commit identity theft, but it is not the only way. An individual also commits identity theft when he has either possessed, obtained, used, or transferred a means of another's identification or information with the requisite intent.

This is not to suggest that the statute does not allow an accused to be charged with multiple counts of identity theft. Under RCW 9.35.020(1), identity theft is a crime committed against each person whose identity has been stolen. Therefore, there would not be a constitutional violation if the State charged an accused with a different count each time he uses, possesses, transfers, or obtains a separate individual's means of identification or financial information. Thus, Leyda could have been properly charged with multiple counts of identity theft if he had obtained, used, etc., the stolen credit cards of two or more persons. But, that is not the factual scenario here, the record showing that Leyda obtained, possessed, etc., a single credit card of one other individual, Ms. Austin. Thus, the State improperly charged him with multiple thefts of Austin's identity, who, common sense suggests, has only one identity that can be unlawfully appropriated.

Leyda, 157 Wn.2d at 346.

Applying the Leyda Court's reasoning here, the language of the VUFA statute supports Kenyon's construction. Like the identity theft

statute, the VUFA statute proscribes disjunctive acts: owning, possessing or controlling. And just as the identity theft statute criminalizes possessing, obtaining, using or transferring each person's identity, the VUFA statute criminalizes owning, possessing or controlling each firearm. In other words, the construction of the VUFA statute parallels that of the identity theft statute. It therefore makes sense to construe the VUFA statute similarly. Just as the identity statute prohibits a course of conduct involving a particular person's identity, the VUFA statute prohibits a course of conduct involving a particular firearm. Applying Leyda, once the person has engaged in any one of the statutorily proscribed acts involving the particular firearm, the unit of prosecution includes any subsequent proscribed conduct. Leyda, at 345.

Like the prosecutor in Leyda, the prosecutor here "skirt[ed] double jeopardy protections by breaking a single crime into temporal or spatial units." Leyda, at 347.

Finally, the Leyda court held the identity theft statute did not unambiguously denote the unit of prosecution and therefore applied the rule of lenity to resolve the ambiguity in Leyda's favor. The court's reasoning in Leyda supports Kenyon's construction of the VUFA statute. Moreover, the state's interpretation below will tempt overzealous prosecutors to divide

up a defendant's single course of unlawful conduct ad infinitum, an absurd consequence. For these reasons, Kenyon's construction is a reasonable one. The rule of lenity should apply to resolve the ambiguity in his favor. This Court should reverse and dismiss Kenyon's conviction.

2. THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS BASED ON THE MANDATORY JOINDER RULE.

The trial court erred in denying the motion to dismiss brought under CrR 4.3.1, which provides in relevant part:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

CrR 4.3.1(b)(3).

Joinder principles are designed to protect defendants from:

Successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.

State v. McNeil, 20 Wn. App. 527, 532, 582 P.2d 524 (1978).

Accordingly, the rule requires mandatory joinder of "related offenses." CrR 4.3.1(b). Offenses are "related" under the rule "if they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1); State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997).

In Lee, the defendant was charged with criminal trespass and second degree theft of rent after he fixed up a house and collected rent from prospective tenants, when he did not own the house and did not have the permission of the house's owner. Lee, 132 Wn.2d at 500. Lee was subsequently charged with theft for collecting rent and deposits but failing to provide promised housing to different victims. Lee, 132 Wn.2d at 500. He successfully moved to dismiss the second case under the mandatory joinder rule. Lee, 132 Wn.2d at 501. But our Supreme Court reversed, explaining that "same conduct" for purposes of deciding which offenses are "related" and therefore subject to mandatory joinder, is conduct involving a single incident *or* episode:

[O]ffenses based upon the same physical act or omission or same series of physical acts. Close temporal or geographic proximity of the offenses will often be present; however, a series of acts constituting the same criminal episode could span a period of time and involve more than one place, such as one continuous criminal episode involving a robbery, kidnapping, and assault on one victim occurring over many hours or even days.

Lee, 132 Wn.2d at 503-04.

Assuming arguendo Kenyon's "offenses" were not one single offense, they were at the very least related such that the prosecutor was required to join them for trial. The offenses were within the same jurisdiction and venue -- Mason County Superior Court -- and based on the same conduct, owning, possessing or controlling the same firearm. Moreover, the prosecutor admitted he purposely held back the 2004 "offense" as retaliation when Kenyon exercised his constitutional right to a jury trial on the offenses charged under the 2006 cause number. The prosecutor's actions placed a "hold" on Kenyon and amounted not only to overzealous prosecution but harassment.

This Court's decision in State v. Holt⁵ requires reversal. Holt involved the state's appeal of the dismissal of its several-count information against Holt, which was dismissed based on the mandatory joinder rule. On September 9, 1981, the manager of Shurgard Mini Storage in Tacoma turned over a collection of pornographic magazines and films to police. The manager found them in a unit he entered after the lease expired and he was unable to reach the lessee. The rental agreement indicated the unit was rented from July 7 or 10, 1981, to August 1, 1981, by "Robert

⁵ State v. Holt, 36 Wn. App. 224, 673 P.2d 627 (1983).

Thorne." Holt, 36 Wn. App. at 225. As his place of employment, Thorne gave Jerry's Adult Bookstore at Ponders Corner in Pierce County. Police determined Thorne was really Christopher Oskowski, an employee at the Ponders Corner Bookstore; Jerry Holt owned the store. Id.

On December 11, 1981, the state charged Holt with 19 counts of possessing obscene material and one count of child pornography, allegedly occurring on July 9 and 10, 1981 (the date the rental agreement was executed). This Court referred to this set of charges as Holt II. Id.

On December 14, 1981, 3 days after Holt II was filed, Jerry Holt went to trial on a different set of offenses, Holt I. The charges in Holt I were based on the sale of an obscene film from another of Holt's adult bookstores by an employee to an undercover police officer and on a second film found during the resultant search of the store the evening of July 9 and early morning of July 10. Holt, 36 Wn. App. at 225-226. The trial in Holt I resulted in Holt's conviction for one count of possessing obscene material. Id., at 226.

Holt thereafter moved to dismiss the charges in Holt II on grounds they should have been joined and tried with the charges filed in Holt I. The court granted Holt's motion and the state appealed. Id., at 227.

This Court affirmed the dismissal, agreeing that the offenses were intimately "related" and required joinder.

The requisite connection between the commission of the Holt I offenses and the Holt II offenses is present. In Holt I the defendant was charged with two counts of possession of obscene material, specifically two films, with intent to sell, at Jerry's Adult Bookstore in downtown Tacoma on July 9 and 10, 1981. The obscene materials which are the basis for the second set of offenses, Holt II, were not found until September 9, 1981. Nevertheless, the State charged in its information that Holt possessed those materials on July 9 and 10, 1981.

The State has itself supplied the intimate connection necessary for a conclusion that the offenses in Holt I and II are related offenses. It was the State's theory in Holt II that the materials were removed in haste from the Ponders Corner store and secreted at Shurgard Mini Storage in early July after the downtown Tacoma store was searched by police on the evening of July 9 and early morning of July 10. Commission of the possession offenses in Holt II was intimately connected with the commission of the possession offenses in Holt I. Comparing Holt I to Holt II, the charges were the same, the kind of material allegedly illegally possessed was the same, and the date of possession charged was the same. In fact, in Holt I, defendant was convicted for possessing part one of the film "Animal Action." Count 9 of Holt II charged possession of part two of "Animal Action." We hold that the two sets of offenses are based on the same conduct and therefore are related offenses under CrR 4.3(c)(3).

Holt, 36 Wn. App. at 228.

As in Holt, the state here has itself supplied the intimate connection for a conclusion that Kenyon's possession offenses in 2005 (Kenyon I) and

2004 (Kenyon II) are related offenses.⁶ To prove Kenyon possessed the Smith & Wesson in 2005, the state relied on evidence he possessed it in 2004. As the prosecutor explained during motions in limine, the 2004 evidence was relevant because:

". . . that the defendant -- that ties the defendant to a particular firearm during a time frame in which he is not charged for possessing a firearm, which is now in evidence and is charged with -- and he is charged with possessing that as to other time frames."

CP 46. The state's relevance argument presupposes that possession is ongoing, rather than a discrete event. Otherwise, Kenyon's gun toss in 2004 would have no relevance to whether he possessed that same gun in 2005 other than to show propensity. The prosecutor's argument in the former case therefore contradicts its current position.

The only difference between the circumstances of this case and those in Holt is that the state alleged the offenses in Holt I and II occurred on the same day. As indicated in the preceding section, however, the state's charging language is not dispositive for double jeopardy purposes. Nor is it dispositive for purposes of mandatory joinder. As our Supreme Court held in Lee:

⁶ Kenyon maintains they are in reality the same offense for double jeopardy purposes.

A series of acts constituting the same criminal episode could span a period of time and involve more than one place, such as one continuous criminal episode involving a robbery, kidnapping, and assault on one victim occurring over many hours or even days.

Lee, 132 Wn.2d at 503-04.

Kenyon's ownership, possession or control of the .9 millimeter Smith & Wesson over an eight-month-span of time -- if not constituting one offense -- is just such a series of acts constituting "one continuous criminal episode" requiring mandatory joinder. The trial court erred in denying the motion to dismiss the current charge.

In response, the state may argue, as it seemed to below, that by virtue of the prosecutor's threat to hold back this offense, Kenyon somehow waived his mandatory joinder objection. The argument is outlandish and should be rejected. Kenyon was not charged with the current offense until 2007. Consequently, he could not ask the court to join the offense with the 2006 case. CrR 4.3.1(b)(2); Holt, 36 Wn. App. at 229. Kenyon had no control over the prosecutor's decision to place a "hold" on him by holding back this charge.

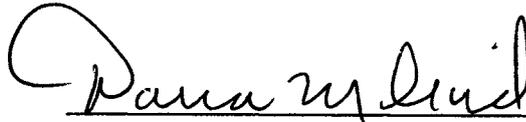
D. CONCLUSION

Whether this Court applies double jeopardy principles or the mandatory joinder rule, Kenyon's conviction should be reversed and dismissed.

DATED this 19th day of September, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Dana M. Lind", is written over a horizontal line.

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State V. James Kenyon

No. 37435-8-II

Certificate of Service by Mail

On September 19, 2008, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Monty Cobb
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521 N 4th Ave Ste A
PO Box 639
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James Kenyon 860617
McNeil Island Corrections Center
P.O. Box 881000
Steilacoom, WA 98388

Containing a copy of the brief of appellant, re James Kenyon
Cause No. 37435-8-II, in the Court of Appeals, Division II, for the state of Washington.

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



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