

No. 94813-5

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT 1

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 1

 a. *Only offenses enumerated in RCW 9A.82.010(4) can constitute a “pattern of criminal profiteering activity.”* 1

 b. *RCW 9A.82.085 barred the State from joining at trial any offense the was not alleged to be a part of the pattern “criminal profiteering activity” supporting the charge of leading organized crime*..... 7

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

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 12

3. 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 15

B. CONCLUSION 16

TABLE OF AUTHORITIES

Washington Constitution

Const. Art. I, § 22 15

United States Constitution

U.S. Const. amend. VI..... 12, 15
U.S. Const. amend. XIV 11

Washington Supreme Court

HomeStreet, Inc. v. State, Dep’t of Revenue, 166 Wn.2d 444,
210 P.3d 297 (2009)..... 8
State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984)..... 11
State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007)..... 11
State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 12
State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992) 16
State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987) 15
State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008) 12, 15
State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995) 15
State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146
Wn.2d 1, 43 P.3d 4. (2002)..... 5
Trujillo v. Nw. Tr. Servs., Inc., 183 Wn.2d 820, 355 P.3d 1100
(2015)..... 3, 7
*Washington State Human Rights Comm’n v. Cheney School
Dist. No. 30*, 97 Wn.2d 118, 641 P.2d 163 (1982) 8
Winchester v. Stein, 135 Wn.2d 835, 959 P.2d 1077 (1998)..... 3

Washington Court of Appeals

State v. Barnes, 85 Wn. App. 638, 932 P.2d 669 (1997)..... 5
State v. Munson, 120 Wn. App. 103, 83 P.3d 1057 (2004) 3

United States Supreme Court

Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d
284 (2010)..... 12
Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.
Ed. 2d 674 (1984) 12

Other Courts

Robertson v. GMAC Mortg. LLC, 982 F. Supp. 2d 1202 (W.D. Wash. 2013)..... 3

Statutes

RCW 9A.82.010passim
RCW 9A.82.060 1, 7
RCW 9A.82.085passim
RCW 9A.82.100 3, 5, 6

Court Rules

CrR 4.4..... 11, 13

A. 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. *Only offenses enumerated in RCW 9A.82.010(4) can constitute 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. 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.

“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.

In his opening brief, Mr. Linville contends the plain language of RCW 9A.82.010(4) limits the acts which constitute criminal profiteering to acts chargeable as one the enumerated crimes. 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].

This is the construction given the statute by the Supreme Court and this Court.

Addressing, the provisions of RCW 9A.82.010, the Supreme Court said “[t]he statute has a very detailed definition of “pattern of criminal profiteering activity.” *Trujillo v. Nw. Tr. Servs., 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 holding in *Trujillo* echoes an early ruling by this Court 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).

¹ The Criminal Profiteering Act provides numerous civil remedies as well defining criminal offenses. RCW 9A.82.100 set forth a variety of 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.

Nonetheless, the State insists the statute should be read to define criminal profiteering to mean:

- (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,
- (3) 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 [enumerated offenses].

Importantly, by the State's reading the list of enumerated offenses modifies only the provision of the statute pertaining to out-of-state acts, and thus any criminal act in Washington can be a part of criminal profiteering activity. The State's interpretation of the statute must be rejected for a number of reasons. The first of which is that it is contrary to the construction given the statute by Supreme Court and this Court. The above cases make clear that list of enumerated crimes narrows the class of acts which can constitute criminal profiteering activity regardless of whether those acts are committed in Washington or elsewhere.

Beyond its contradiction of established case law, the State's strained reading of the statute creates other problems in applying the

Act.² First, by the State’s reading the term “regardless of whether the act is charged or indicted” refers only to out-of-state acts. Thus, any act occurring in Washington act must be charged in order to be a part of a “pattern of criminal profiteering activity.” While that may not cause problems in criminal prosecutions under the Act, it would substantially limit the civil remedies provided for in RCW 9A.82.100. Courts have viewed those provisions as independent of the criminal penalties of the Act. *State v. Barnes*, 85 Wn. App. 638, 654, 932 P.2d 669 (1997). Indeed, RCW 9A.82.100(13) says: “A private civil action under this section does not limit any other civil or criminal action under this chapter or any other provision.” But under the State’s reading of RCW 9A.82.010(12), no civil action, private or public, can exist for acts committed in Washington unless the State first charges the acts, as in those circumstance the State’s reading limits “pattern of criminal profiteering activity” to charged offenses. Beyond making the civil proceeding dependent upon the criminal, that substantially limits a

² When interpreting a statute a court must do so in context of the act in which the statute is found. *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4. (2002).

private party's ability to seek a civil remedy. If the State does not charge the offense, the private party has no civil recourse at all.

Additionally, RCW 9A.82.100(2) permits injunctive relief to "prevent, restrain, and remedy a pattern of criminal profiteering." Again, by the State's definition there could be no "pattern of criminal profiteering activity" unless the acts have already resulted in the filing of charges. That means the acts must have already occurred and thus an injunction could not prevent or restrain the commission of those acts.

Finally the position the State takes on appeal is contrary to the position it took at trial. 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. Those offense are among the enumerated offenses in RCW 9A.82.010(4). The slide did not list the burglary, firearm, and controlled substance counts as "qualifying crimes," a recognition that only the enumerated offenses constitute criminal profiteering.

The State's interpretation of the meaning of "criminal profiteering" substantially limits the civil remedies provisions. The State's reading of the statute ignores its plain language and is contrary to the interpretation employed by the Supreme Court and this Court.

Only acts chargeable as one of the enumerated crimes in RCW

9A.82.010(4) can constitute criminal profiteering. *Trujillo*, 183 Wn.2d at 837.

b. *RCW 9A.82.085 barred the State from joining at trial any offense the was not alleged to be a part of the pattern "criminal profiteering activity" supporting the charge of leading organized crime.*

In a prosecution such as Mr. Linville's case, for leading organized crime RCW 9A.82.085 specifically limits those offenses which may be joined.

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.

Mr. Linville has made two arguments stemming from this statute. First, as the Information does not allege any offenses to be a part of the pattern of criminal profiteering activity, the statute barred the state from joining any offenses with the charge of leading organized crime. Second, as 53 of the joined offenses are crimes that are not among the enumerated offenses in RCW 9A.82.010(4) defined as criminal profiteering activity, those 53 offenses could not be joined at trial.

The closest the State comes to addressing the plain language of RCW 9A.82.085 in its response brief is to suggest the Legislature did not really mean what it said. Brief of Respondent at 11. The State opines “it seems doubtful the legislature intended to require mandatory severance of such intertwined offenses.” *Id.* “Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.” *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing *Washington State Human Rights Comm'n v. Cheney School Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). The language of RCW 9A.82.085 is plain and leaves no room for any actual doubt of the legislature’s intent.

RCW 9A.82.085 barred joining any offense not alleged to be a part of the criminal profiteering activity alleged as part of the charge of leading organized crime. As argued in Mr. Linville’s initial brief, the Information did not allege any offense to be a part of the pattern of criminal profiteering activity. Thus, RCW 9A.82.085 barred joining any of the remaining 140 counts with the charge of leading organized crime. In addition, and as argued in Mr. Linville’s initial brief, RCW 9A.82.085 most certainly barred joining offenses which are not included in the definition of criminal profiteering in RCW

9A.82.010(4). Because 53 of the charged offenses in this case are not among the enumerated offenses in RCW 9A.82.010(4), RCW 9A.82.085 barred joinder under any circumstances. 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.

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

The violation of RCW 9A.82.085 resulted in a manifestly unfair trial. 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. Thus, the court recognized the prejudice and but for the violation of RCW 9A.82.085 that prejudice would have been mitigated.

Indeed, there can be no question that with a proper application of RCW 9A.82.085, in a trial for leading organized crime Mr. Linville would not have been convicted of additional 53 counts. There is no

doubt that at a trial for leading organized crime, the jury could not have returned for guilty verdicts of first degree burglary with firearm enhancements and that Mr. Linville could not have received a minimum term of 200 months for those enhancements. There is no doubt the jury could not have returned verdicts on the several firearm charges and that Mr. Linville could not have received consecutive sentences for those counts. The error undeniably affected the jury's verdicts.

Moreover, there is no doubt that but for the error in joining the unlawful possession of a firearm charge, the jury would not have heard of Mr. Linville's prior conviction as it was relevant only to establish the predicate element of that offense. There could be no doubt that if properly severed the jury could not have heard the State's argument that the burglaries evidenced his leading the scheme. The violation of RCW 9A.82.085 defined and permeated the trial that took place and the sentence imposed.

Despite this, the State contends the error was not manifest constitutional error and indeed claims the error was not prejudicial at all. First and regardless of whether it found prejudice, the court was required to sever the counts. Second, the court's finding that joinder

resulted in actual prejudice defeats the State's claim that the error was not manifest.

An error is manifest where there is a "plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The trial court, itself, made such a finding. The error was undeniably prejudicial and far more than merely a identifiable consequence.

As discussed in Mr. Linville's earlier brief, RCW 9A.82.085, unlike CrR 4.4, affords the trial court no discretion regarding joinder of offenses. In that way, the statute must reflect a legislative understanding of the unfair prejudice which inevitably flows from the joinder of offenses in such trials. Such prejudice deprived Mr. Linville a fair trial in violation of the Due Process Clause 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."). The constitutional error is manifest.

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.

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. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Mr. Linville argues defense counsel was ineffective in failing to alert the trial court that RCW 9A.82.085 precluded joinder of the offenses. The State's only response to this claim is to contend that a reasonable attorney could read the language of RCW 9A.82.085 barring

joinder of offenses to actually permit joinder of offenses. Brief of Respondent at 16-17. The State does not posit how it is reasonable to read a statute in a manner directly contrary to the language of the statute.

Despite the plain statutory directive, defense counsel never brought this requirement to the trial court's attention. Rather than note that severance was mandatory under RCW 9A.82.085, defense counsel only asked the court to exercise its discretion in determining whether to sever counts under CrR 4.4. Rather than seize a remedy to which he was entitled, he sought a discretionary remedy for which he carried the burden of persuasion. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *Kylo*, 166 Wn.2d at 862. Counsel's failure to know the law is deficient performance.

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.

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.

With a proper objection, the State could not have argued in closing that the burglaries evidenced Mr. Linville's guilt for leading organized crime. Further, a jury separately considering the burglary charges would not have heard testimony of Mr. Linville's accomplices accusing him of orchestrating a broad scheme.

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. 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.**

The State rested its case on July 8, 2015. RP 5006 On July 13th the State filed the Sixth Amended information amending Count 130 from “theft in the Second Degree to Theft in the First Degree, and altering the amount alleged to be involved from an amount exceeding \$750 to an amount exceeding \$5,000. CP 334, 362. However the Sixth Amended information incorrectly classified first degree theft as a Class C felony rather than a Class B felony. Later that day, the State filed a Seventh Amended Information properly naming first degree theft as a Class B felony. CP 391

As set forth in Mr. Linville’s initial brief, that amendment to a higher charge violates Article I, section 22 and the Sixth Amendment. *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). *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.” *Quismundo*, 164 Wn.2d at 504 (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); *Qusimundo*, 164 Wn.2d at 504.

This Court must reverse Count 130 and remand for a new trial.

B. CONCLUSION

For the reasons above, and as argued in his initial brief, 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 22nd day of November, 2016.

s/ Gregory C. Link
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

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

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