

No. 94813-5

No. 47916-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

Appellant.

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

The Honorable  
Cause No.

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CORRECTED  
BRIEF OF RESPONDENT

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**A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether charges of burglary, possession of a controlled substance and theft of a firearm may properly be considered part of Linville's pattern of criminal profiteering activity, and if not, were these charges required to be severed under RCW 9A.82.085.
2. Whether the failure to argue mandatory severance under RCW 9A.82.085 constituted ineffective assistance of counsel.
3. Whether a defendant can be convicted as an accomplice under both of trafficking's alternative means, and if not, did the failure to instruct the jury that it must find Linville guilty as a principal constitute manifestly prejudicial constitutional error.
4. Whether the State presented sufficient evidence to prove Linville was "armed" for the purpose of convicting him for Burglary In the First Degree, While Armed With a Firearm and the corresponding sentencing enhancements.
5. Whether the jury was required to unanimously specify which of the alternative means of trafficking they convicted Linville under, and if so, whether their failure to do so constitutes manifestly prejudicial constitutional error.
6. Whether double jeopardy prevented the State from charging Linville with more than one count of trafficking.
7. Whether the State's Seventh Amended Information impermissibly amended Count 130 after the State had already rested its case.

**B. STATEMENT OF THE CASE**

Following a wave of daytime burglaries in the Olympia area, Appellant Kenneth Linville, (hereinafter "Linville") was arrested on April 2, 2014. Linville was subsequently convicted by a Thurston County Court

of leading organized crime, 43 counts of burglary, four of which were committed with armed with a firearm, 38 counts of trafficking, 39 counts of theft, four counts of theft of a firearm, four counts of identity theft, four counts of unlawful possession of a firearm, and one count of possession of stolen property; 138 counts in total. RP 5689-5710. For these acts, Linville was sentenced to 829 months in prison. Sentencing Record at 60.

During the ten week trial, the State presented testimony from numerous co-defendants who identified Linville as the leader of their burglary ring, claiming that he recruited, trained, and directed them to carry out illicit activities, rewarding participants with illegal drugs.<sup>1</sup> These statements were corroborated by extensive testimony from law enforcement officers and victims, and through stolen goods recovered in the possession of Linville and his co-defendants.<sup>2</sup> Linville's alleged pattern of activity, which he referred to as his "work,"<sup>3</sup> involved using a pry bar to break into Thurston County residences through the front door, quickly scanning for

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<sup>1</sup> Linville's former girlfriend, Jessica Hargrave, provided the most in depth testimony, detailing the numerous burglaries carried out by the pair, and how Linville disposed of stolen goods after the thefts. RP 868-912. Other co-defendants who testified against Linville included several of his former paramours, Jennifer Krenik and Jolee Hart, RP 3275-304, 3730-73, and a number of his friends, Avery Garner, Ryan Porter, Kelly Olsen, and Teya Harris. RP 1361-1402, 2921-34, 3094-147, 3508-23, 4193-264.

<sup>2</sup> The record contains nearly 3,000 pages of testimony from victims and law enforcement officials.

<sup>3</sup> Linville not only referred to the burglaries as his "work," RP 836-37, 3275, 4221, he also referred to himself as "Robin Hood," claiming he robbed from the rich and gave to the poor. RP 849-850, 4279-80.

valuables, and absconding with the ill-gotten gains before law enforcement had time to respond, often committing multiple burglaries in a single day.<sup>4</sup> Linville would then sell or trade the spoils to fences, jewelers or pawn shops, and begin the process anew.<sup>5</sup>

Following his conviction, Linville brought this appeal, alleging seven counts of error.

### C. ARGUMENT

1. The Trial Court Was Not Required to Sever Certain Disputed Charges, and Because the Facts Establish That Linville Was Not Manifestly Prejudiced, the Issue May Not Be Raised For the First Time on Appeal.
  - i. Any harm was not prejudicial because the State would have produced the same evidence to prove the underlying theft and trafficking charges, which are not alleged to be outside the pattern of criminal profiteering.

Although Linville concedes the issue was not raised at trial, App. Brief at 17, he argues that RCW 9A.82.085<sup>6</sup> required the trial court to sever certain charges which he claimed were outside the pattern of criminal

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<sup>4</sup> Testimony regarding Linville's specific modus operandi came from many sources throughout the trial, but Jessica Hargrave likely provided the best description. RP 836-912.

<sup>5</sup> Again, there is extensive evidence regarding Linville's numerous sales of stolen goods, but testimony from Jessica Hargrave is perhaps the most informative. RP 836-912.

<sup>6</sup> RCW 9A.82.085 Bars On Certain Prosecutions. In a criminal prosecution alleging a violation of RCW 9A.82.060 or 9A.82.080, the state is barred from joining any offense other than the offenses alleged to be part of the pattern of criminal profiteering activity. When a defendant has been tried criminally for a violation of RCW 9A.82.060 or 9A.82.080, the state is barred from subsequently charging the defendant with an offense that was alleged to be part of the pattern of criminal profiteering activity for which he or she was tried.

profiteering, and that the inclusion of the disputed charges lent improper weight to the State's evidence. App. Brief at 15. The foundation of Linville's claim is based upon an erroneous reading of RCW 9A.82. However, even if the trial court severed the disputed charges, specifically burglary, theft of a firearm, possession of a firearm, and possession of a controlled substance, the State would still have presented substantially the same evidence to prove the theft and trafficking charges, which are not alleged to be outside the pattern of criminal profiteering. Because the inclusion of the disputed charges did not alter the proceedings or lend weight to the State's evidence, there is no manifest prejudice or constitutional error, and Linville may not raise the issue for the first time on appeal.

Since Linville failed to raise the issue of mandatory severance at trial, he must prove that the inclusion of the disputed charges was "manifest error affecting a constitutional right." RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-333 (Wash. 1995) ("As a general rule, appellate courts will not consider issues raised for the first time on appeal."); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Linville must identify a constitutional error and show how, in the context of this particular trial, the alleged error actually affected his rights; "it is this showing of actual prejudice that makes the error "manifest", allowing appellate review."

*McFarland*, 127 Wn.2d at 333; *Scott*, 110 Wn.2d at 686-87. While Linville claims any failure to sever under 9A.82.085 is automatically constitutional error and manifestly prejudicial, he fails to identify how, in the context of the trial, his rights were actually affected by the inclusion of the disputed charges, nor is it apparent that any violation of 9A.82.085 automatically establishes constitutional error.<sup>7</sup> App. Brief at 15.

For Linville to suffer prejudice, the failure to sever the disputed charges must have lessened the State's burden. *See State v. O'Hara*, 167 Wn.2d 91, 100 (Wash. 2009) (finding no manifest error because the disputed instructions did not relieve the State of its obligation to prove the elements of the crime). However, it is not disputed that 38 charges of trafficking, 38 charges of theft, and 4 charges of identity theft could be properly joined under 9A.82,<sup>8</sup> or that all of the offenses arose from the same series of criminal acts.

To meet its burden on the trafficking charges, the State had to establish Linville knowingly initiated, organized, planned, financed,

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<sup>7</sup> Courts have noted that there are some circumstances where constitutional error is so critical, that it is automatically manifest error. *See O'Hara*, 167 Wn. 2d at 108 (noting that error with jury instructions will be inherently prejudicial when a court directs a verdict, the court does not require unanimity, omitting elements of the crime, shifts the burden to the defendant, etc). However, the list of errors which are inherently manifestly prejudicial has never before included this type of jury instruction charge. *Id.*

<sup>8</sup> The undisputed trafficking and theft charges do not all overlap, as there were no trafficking charges for several unsuccessful thefts, and some of the thefts concerned the theft of a firearm, which are disputed. CP 365-93. Nevertheless, between the 80 undisputed charges, at least one overlaps with each disputed theft and burglary charge.

directed, managed, or supervised the theft of property for sale to others, or that he knowingly trafficked in stolen property, RCW 9A.82.050, whereas the theft charges required the State to demonstrate that Linville committed the theft of more than \$5,000 for the 1st degree charges, and \$750 for the 2nd degree charges. RCW 9A.56.030; 9A.56.040. The evidence to prove these charges necessarily overlaps with the evidence needed to prove burglary.<sup>9</sup> Moreover, although Linville disputes the inclusion of charges for theft and possession of a firearm, he is also charged with trafficking the firearms,<sup>10</sup> requiring the State to present evidence that Linville obtained and possessed stolen firearms. Next, it is the State's theory that Linville trafficked stolen property to support his addictions to controlled substances which makes his possession of Oxycodone relevant. Finally, a separate trial for the disputed charges would have still required the State to prove Linville directed his co-defendants to burglarize houses, and evidence regarding the sale of stolen property would have been admissible to show possession. Therefore, all of the evidence regarding the disputed charges was not just admissible, it was required to prove the elements of the undisputed charges.

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<sup>9</sup> The evidence overlaps, but because burglary requires a separate element, they remain separate offenses. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)

<sup>10</sup> Counts 29, 61, 109, and 129 are trafficking offenses which correspond to burglaries of firearms. CP 365-91.

Because a severance would not have substantially altered the proceedings, it cannot be said that Linville was manifestly prejudiced. Generally when analyzing whether a defendant is prejudiced by a failure to sever, courts look at four factors: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63 (Wash. 1994); *State v. York*, 50 Wn. App. 446, 451, 749 P.2d 683 (1987), review denied, 110 Wash. 2d 1009 (1988). The State provided a strong evidentiary basis for its claims, including eight co-defendants who testified that Linville spoke about committing burglaries, and that they participated personally in the burglaries with Linville, RP 868-912, 1361-1402, 2921-34, 3094-147, 3275-304, 3508-23, 3730-73, 4193-264; two vehicles used by Linville were spotted at the scenes of burglaries, RP 481-482, 792-93, 806-09; Linville was identified by an eye-witness near the scene of one burglary, RP 4283-88; Linville's clothing and appearance matched surveillance videos taken at the scenes of several burglaries, RP 1150, 1416-18, 4874; several local businesses provided records of Linville selling stolen property, RP 2860-77, 3695-702, 4145-52, 4166-78; Linville and his co-defendants were found in possession of stolen property, RP 556-633; and Linville admitted involvement in several of the acts. RP 4965.

Furthermore, no affirmative defenses were raised; the jury was instructed to consider each charge separately; and the evidence from the disputed charges was not just admissible, it was necessary. Accordingly, the facts do not demonstrate significant prejudice, nor do they suggest that the lack of severance violated Linville's due process rights. *Russell*, 125 Wn.2d at 63.

Lastly, failure to comply with 9A.82.085 does not automatically lead to constitutional error. While Linville correctly states that a trial court must follow the law, App. Brief at 17, this does not mean that any failure to follow the law is constitutional error. *O'Hara*, 167 Wn.2d at 98 ("In analyzing the asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude."). As the discussion above establishes, the dangers which 9A.82.085 seeks to prevent, specifically, poisoning the jury by introducing evidence of unrelated crimes, is not present here. If the purpose of 9A.82.085 is not at issue, and Linville's due process rights are not otherwise impacted, then this should not be considered a question of constitutional rights.

Accordingly, Linville has not met his burden of proving his constitutional rights were manifestly prejudiced by the inclusion of the disputed charges.

ii. *If Any Error Occurred, It Was Harmless Error.*

Even if Linville's interpretation of 9A.82 is correct, and even if Linville can raise the issue of mandatory severance for the first time on appeal, this claim must still fail because any error is harmless error. *Chapman v. California*, 386 U.S. 18 (1967) (holding that certain constitutional errors may be deemed harmless); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error."). As discussed above, the State would have presented substantially the same evidence regardless of whether or not the disputed charges were severed. The State made a strong case, and there is no reason to believe that Linville would escape conviction if he was charged with a mere 82 counts rather than 138. Thus, it is clear beyond a reasonable doubt that the alleged error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341 (Wash. 2002) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)) ("the ... test for determining whether a constitutional error is harmless: Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'").

iii. *There is no merit to Linville's argument that every act alleged to be a part of criminal profiteering must be expressly specified.*

Linville contends that the jury instructions for leading organized crime must have specifically listed all 82 offenses alleged to be part of his pattern of criminal profiteering, rather than referring to them by category as in the present case. App. Brief at 10. This supposed error is less than a mere technicality; the format was a necessary byproduct of trying a defendant who has committed dozens of criminal acts. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (U.S. 1988) (“Mere technicalities’ should not stand in the way of consideration of a case on its merits.”). To claim that such an immaterial issue meets the standard for reversal is wholly without merit.

The combined language of Jury Instructions No. 14 and No. 15 stated that a guilty verdict for leading a criminal enterprise requires the jury to find Linville guilty of *at least three* acts of criminal profiteering, defined as “any act of theft in the first degree, theft in the second degree, trafficking in stolen property in the first degree, or identity theft in the second degree which is committed for financial gain, whether by an accomplice or principal, and includes any attempted or completed commission of those offenses.” RP 5237. Specific details of the included acts was listed elsewhere in the jury instructions. This language mirrors the statutory definition of a pattern of criminal profiteering found in RCW 9A.82.010.<sup>11</sup>

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<sup>11</sup> Linville’s trial counsel actually requested that the jury instructions regarding criminal enterprise mirror the language of 9A.82. RP 5102.

The language of 9A.82 does not ask the State to do anything beyond show that at least three acts of criminal profiteering occurred, and the State met this burden. *State v. Brown*, 132 Wn.2d 529, 605 (Wash. 1997) (“A specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case. The court need not give a party's proposed instruction if it is repetitious or collateral to instructions already given.”). To require the State to expressly specify all 82 charges it categorized as criminal profiteering is not supported by the law, and would needlessly complicate future jury instructions.

iv. *Because all of the charges arise from the same set of criminal acts, and separate trials would have imposed a substantial burden on the courts, it was proper to try them together to avoid imposing a significant burden on the court system.*

To require the courts to hold two separate ten week trials for the same criminal activity would be the very definition of judicial inefficiency. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 711 (Wash. 2004) (“Separate trials are not favored in Washington because of concerns for judicial economy, “foremost among these concerns is the conservation of judicial resources and public funds.”). In separate trials, the State would have called the same witnesses and presented the same evidence, only the jury instructions and verdict forms would differ.

Furthermore, requiring mandatory severance in the present case runs contrary to the legislative intent behind 9A.82.085. When a defendant is charged with leading organized crime, that statute requires the court to sever any charges which are not part of the pattern of criminal profiteering activity.<sup>12</sup> Linville argues that the disputed charges are not acts of criminal profiteering, yet they indisputably arise from the same criminal acts which form the pattern of criminal profiteering. The disputed and undisputed charges share similar intent, accomplices, principals, victims, methods of commission, and a nexus to the criminal enterprise. RCW 9A.82.010 (19) (defining a pattern of criminal profiteering). Thus, even assuming the disputed charges are not considered acts of criminal profiteering, they are still so closely tied to the acts underlying criminal profiteering that they should be considered a part of the pattern. Certainly, it seems doubtful that the legislature intended to require mandatory severance of such intertwined offenses.

*v. The plain language of RCW 9A.82.010 (4) only limits criminal profiteering to the 52 enumerated offenses if the act occurred outside of the state of Washington.*

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<sup>12</sup> "Pattern of criminal profiteering activity" means engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act 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 (19).

Finally, regardless of whether Linville is permitted to raise this issue on appeal, his first claim must fail because it is based upon an incorrect reading of 9A.82.010 (4). Specifically, Linville incorrectly interprets 9A.82.010 (4) to limit criminal profiteering to specific enumerated acts regardless of where they occurred. The definition of criminal profiteering is critical because as discussed above, he argues that any acts which cannot be considered criminal profiteering under his narrow reading must be severed under 9A.82.085.<sup>13</sup> App. Brief at 11. However, the plain language of 9A.82.010 does not support Linville’s proposed interpretation. *Bowie v. Dep’t of Revenue*, 171 Wn.2d 1, 11 (Wash. 2011) (“We first look to a statute’s plain language when interpreting its meaning.”); *State v. Ervin*, 169 Wn.2d 815, 820 (Wash. 2010) (“The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we give effect to that plain meaning.”); *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998) (holding that an undefined term is “given its plain and ordinary meaning

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<sup>13</sup> In a criminal prosecution alleging a violation of RCW 9A.82.060 or 9A.82.080, the state is barred from joining any offense other than the offenses alleged to be part of the pattern of criminal profiteering activity. When a defendant has been tried criminally for a violation of RCW 9A.82.060 or 9A.82.080, the state is barred from subsequently charging the defendant with an offense that was alleged to be part of the pattern of criminal profiteering activity for which he or she was tried. 9A.82.085.

unless a contrary legislative intent is indicated”). The statute is included below with emphasis added,

"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*:

(a) Murder, as defined in RCW 9a.32.030... (followed by 51 more enumerated criminal offenses)

Linville interprets “as any of the following” to limit criminal profiteering to the 52 enumerated acts, regardless of where the act occurred. This is contrary to the natural reading of the statute, wherein the list of enumerated offenses is only relevant if the act occurred outside of Washington. *Berrocal v. Fernandez*, 155 Wn.2d 585, 592 (Wash. 2005) (holding that the natural reading of grammar is part of the plain language).

The natural reading of the statute must take notice of the “and, if.” The use of “and, if” signifies a separate conditional clause, thus the qualifier “as any of the following” is only applicable to the clause following the “and, if.” *Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me. 1979) (stating that “and also” signified a second separate clause). Because the structure may appear unclear, it is best read broken down into its component elements:

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:

Rather than acknowledge that the “and, if” denotes a separate clause, Linville would argue that the correct interpretation applies the qualifier to the entire section. According to Linville, the statute should be read in the following manner:

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:

Such a reading would produce a plainly ungrammatical sentence.<sup>14</sup> *Berrocal* 155 Wn.2d at 592 (“Permitting the modifying phrase to relate back to the

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<sup>14</sup> The Rule of the Last Antecedent is inappropriate here. That canon holds that unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent. *Berrocal*, 155 Wn.2d at 593. Placing a comma before a qualifier is one way to indicate applies to all antecedents under this rule of interpretation. *Id.* However, cases where the rule is invoked don’t address circumstances where a qualifier follows a separate conditional clause. Also it is unclear whether the qualifier is actually intended to be separated by a comma, or if the comma is merely a byproduct of the directly preceding dependent clause which states “regardless of whether the act is charged or indicted.”

first relative clause, as [plaintiffs] advocate, produces a plainly ungrammatical sentence.”).<sup>15</sup>

Finally, it is reasonable for the legislature to only limit out of state acts of criminal profiteering to the list of enumerated crimes.<sup>16</sup> The statute already carries strong extraterritoriality implications by allowing the state of Washington to prosecute individuals for conduct occurring anywhere outside of its borders. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (U.S. 2010) (discussing the presumption against extraterritoriality). Without the “as any of the following” qualifier, there is no limit to what acts could theoretically be covered, rendering the language impermissibly overbroad and vague. *State v. Harrington*, 181 Wn. App. 805, 823 (Wash.

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<sup>15</sup> If the legislature’s intent was to limit the acts to only those listed in the statute regardless of where they occurred, it could have been clearly written to say so. For example:

Criminal profiteering" means any act, including any anticipatory or completed offense regardless of whether the act is charged or indicted, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, *regardless of where the act occurred*, would be punishable as a felony and by imprisonment for more than one year under the laws of this state had the act occurred in this state, as any of the following:

This simple change would make it apparent that the statute applies to acts in and out of state.

<sup>16</sup> The legislative record is sparse, and though it may imply an intent to apply “as any of the following” to the entire section, it is far from definitive. Earlier versions of the law used the even more vague term “involving” instead of “as any of the following,” and did not refer to specific Washington criminal statutes. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 425 (Wash. 2014) (holding that explicit legislative intent must be without vagueness, ambiguity, or implication).

Ct. App. 2014) (“A statute is void if either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement.”). Acts within the state of Washington present no such dangers though, and in fact, the legislature has a greater incentive to have a broader scope for acts committed within Washington to ensure its citizens are protected from predatory criminal enterprises.

Without any other indication of a legislative intent to the contrary, the plain language must control, and grammar must be interpreted according to its natural reading. *Berrocal*, 155 Wn.2d at 592. Thus, the list of enumerated offenses is only relevant when the act occurs outside of Washington. As a result, Linville’s first issue is premised upon an incorrect interpretation, and his claim must fail.

2. *The Failure to Request Mandatory Severance Under RCW 9A.82.085 Did Not Rise to the Level of Ineffective Assistance of Counsel.*

Next, Linville claims his trial counsel’s failure to argue for mandatory severance under RCW 9A.82.085 demonstrates ineffective assistance of counsel, however this would impose a requirement on counsel that goes beyond what is required by law. App. Brief at 17. To prevail on an ineffective assistance of counsel claim, Linville must prove (1) deficient

performance by counsel and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The question is whether trial counsel's performance fell "below an objective standard of reasonableness," viewed according to the circumstances at the time of the Motion to Sever. *Strickland*, 466 U.S. at 688-89 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The presumption is that trial counsel provided effective assistance, unless there is no possible tactical explanation for his actions. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Regarding the first prong of the test, there is no statement on the record as to why Linville's trial counsel did not raise 9A.82.085. As discussed above, certainly a reasonable attorney could read 9A.82.085 to not require mandatory severance in the present case. Nevertheless, the record does show that the trial counsel filed a discretionary Motion to Sever, and though, ultimately unsuccessful, the Motion was competently written, demonstrating that trial counsel sought to provide effective assistance to

Linville. RP 26-51. Because there are potential explanations for why the trial counsel did not raise 9A.82.085, and because counsel otherwise adequately sought to sever the charges, it cannot be said that counsel's performance was so deficient that it overcame the presumption of effective assistance. *Strickland*, 466 U.S. at 689.

The second prong is not met either. *Id.* As previously discussed, the evidence against Linville was sufficient to convict. Whether it required one trial or two, the results would have been the same. Consequently, it cannot be said that Linville's trial counsel performed below the objective standard of reasonableness.

3. *Although A Trafficking Conviction May Rest On Accomplice Liability, Facts Nevertheless Show That Linville Acted As A Principal, Therefore He Suffered No Manifest Prejudice, and Cannot Raise the Issue for the First Time on Appeal.*

i. *Because Linville does not claim manifest constitutional error, he may not raise an objection to jury instructions for the first time on appeal.*

In his third point of error, Linville claims that there are two alternative means of committing trafficking, and that a conviction in the first alternative may not rest on accomplice liability, therefore the trial court erred when it did not instruct the jury that it must find Linville guilty as a principal.<sup>17</sup> App. Brief at 22. However, Linville did not object to the jury

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<sup>17</sup> The first alternative for trafficking in the first degree states:

instructions at trial, RP 5229, and absent a showing that this alleged error led to the manifest prejudice of a constitutional right, which Linville has not argued, this issue may not be raised for the first time on appeal. *McFarland*, 127 Wn.2d at 333 (holding that a defendant bears the burden to prove that his rights were manifestly prejudiced by a constitutional error).

To the contrary, the record overwhelmingly demonstrates that Linville acted as a principal, therefore his due process rights were not manifestly prejudiced. Jessica Hargrave, Kelly Olsen and Jennifer Krenik testified that Linville recruited them, stating that if they wanted money or drugs, they needed to join him in his “work.” RP 836-37, 3105, 3736.<sup>18</sup> Linville selected the houses, RP 838-39, 2929, 3112-12, 3276, 3764, 4195, trained the other burglars,<sup>19</sup> personally broke the doors, RP 842-44, 1369, 2924, 2932, disposed of the loot, held on to the profits,<sup>20</sup> and stated that he was “the boss.” RP 850.

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A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others... is guilty of trafficking in stolen property in the first degree. 9A.82.050(1)

<sup>18</sup> Jennifer Krenik testified that Linville told her that if she wanted his help paying for her attorney’s fees resulting from an unrelated matter, then she would have to join him in his burglaries. RP 3736.

<sup>19</sup> Jessisca Hargrave testified that she was initially so nervous she froze up, but that Linville directed her, and taught her how to carry out burglaries. RP 846. Additionally, Ryan Porter testified that he joined Linville on his criminal outings because he wanted to learn from an experienced burglar, RP 2975, while Kelly Olsen testified that told her to hurry up when burglarizing homes, and kept track of their time. RP 3146.

<sup>20</sup> Both Jessica Hargrave and Teya Harris testified that Linville kept possession of any stolen goods with monetary value, and that they was only allowed to keep costume jewelry.

Moreover, Linville had the opportunity to object to the allegedly erroneous jury instructions at trial, and his failure to do so should not be rewarded with a new trial. RAP 2.5(a); *State v. Kalebaugh*, 183 Wn.2d 578, 583 (Wash. 2015) (“An established rule of appellate review in Washington is that a party generally waives the right to appeal an error unless there is an objection at trial. Although this rule insulates some errors from review, it encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality.”); *State v. Kirkman*, 159 Wn.2d 918, 935 (Wash. 2007) (“Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct .... Failure to object deprives the trial court of this opportunity to prevent or cure the error.”). This is particularly true in the present case, where the strength of the State’s evidence was sufficient to convict Linville as a principal.

Ultimately, by failing to argue specific manifest prejudice in the context of this case, Linville has simply not met his burden. *Kirkman*, 159 Wn.2d at 927 (“The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial.”);

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RP 849, 913, 4215. Other co-defendants testified that they never received any share of the loot. RP 1370-71, 2933-34, 3141-43, 3280.

*O'Hara*, 167 Wn.2d at 98. Courts have noted that certain constitutional errors are so critical, they are inherently manifestly prejudicial, and do not require an appellant to prove harm in the context of the case. *O'Hara*, 167 Wn.2d at 100. The inclusion of accomplice liability is not listed as an inherently manifestly prejudicial error. *Id.* Without a showing that the alleged error actually impacted his rights in the present circumstances, the court must deny Linville's fifth complaint.

ii. *If any error existed, it was harmless.*

Next, the strength of the State's evidence establishes that any alleged error, if it exists, is harmless because the State presented sufficient evidence to convict Linville as a principal. *Brown*, 147 Wn.2d at 341 ("the ... test for determining whether a constitutional error is harmless: Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'). App. Brief at 24. Linville does not claim that but for the alleged error, the outcome at trial may have been different, nor do the facts give rise to such an inference. In fact, extensive testimony from law enforcement, co-defendants and victims has demonstrated that Linville supervised, planned and recruited for the criminal trafficking enterprise. It is clear from the record that that Linville was the principal, not an accomplice, and it can be inferred that the jury convicted him accordingly. *State v. Lindsey*, 177 Wn. App. 233, 248 (Wash.

Ct. App. 2013) (inferring that the jury decision was appropriate based on the strength of the evidence). Consequently, it would not be appropriate to require the State to retry the trafficking charges unless there is reasonable doubt as to whether a new trial would yield the same results.

*iii. Trafficking does not preclude accomplice liability.*

Finally, Linville's claim must fail because accomplice liability is applicable under both alternative means of trafficking. By default, accomplice liability is available under RCW 9A.08.020,<sup>21</sup> 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 (Wash. Ct. App. 2011).

In arguing that 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. However, the mere fact that both offenses arise from the same act and share some language is not sufficient to infer a shared intent to preclude

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<sup>21</sup> 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.

accomplice liability, particularly when it is clear that the legal reasoning of *Hayes* is not applicable to the crime of trafficking. *State v. Vosgien*, 82 Wash. 685, 687 (Wash. 1914) (noting that while the statute as a whole may be consulted to determine the meaning of ambiguous terms in a particular section, this general rule is not without exceptions).

It is true that when interpreting RCW 9A.82.060, *Hayes* held the statutory language of *leading* organized crime excluded accomplice liability, yet that court focused largely on the term “leader.” *Hayes*, 164 Wn. App. at 471 (“these instructions impermissibly relieved the State of the burden of proving that Hayes was a *leader* of organized crime.”) (emphasis theirs). 9A.82.050 is not titled Leading a Trafficking Enterprise, nor does it otherwise suggest that Linville was required to lead the trafficking. Additionally, the criminal enterprise statute imposed requirements that a defendant intentionally organized, managed, directed, supervised, or financed a criminal enterprise of three or more persons, which the court held to require a defined hierarchy. *Id.* Although RCW 9A.82.050 contains similar language, the legislature chose not include the “three or more persons” requirement which the court found so critical. *Hayes*, 164 Wn. App. at 470.

Without an implicit hierarchy or leadership requirement found in the language of 9A.82.050, the legal reasoning of *Hayes* is not applicable, and

any similarities in language by itself is otherwise unpersuasive. As a result, the only remaining question is whether the plain language of 9A.82.050 demonstrates a legislative intent to supplant the default rules, and preclude accomplice liability for the first prong of trafficking. It does not.

The text regarding trafficking's first alternative means, located in 9A.82.050, states that an individual is guilty of trafficking in stolen property if he:

Knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others.

In order to envision circumstances where an individual could aid in these acts without leading the enterprise, it is unnecessary to imagine far-fetched scenarios, because an example actually occurred in this case. While Teya Harris did not participate in most of the thefts, she knowingly allowed Linville to use her apartment for planning his criminal acts, and to use her car for carrying out the burglaries. RP 4192-93. Therefore, although she aided in planning and financing the trafficking, Linville's interpretation would exclude her from accomplice liability merely because she was not at the top of a criminal hierarchy. Barring some greater direction from the legislature, it should not be assumed that accomplice liability is inapplicable in such cases, or in any other instance where an individual aids in planning but not the theft itself. *Hayes*, 164 Wn. App. at 470. Consequently, Linville's third argument must fail.

4. *The Evidence Establishes That During Four Burglaries, Linville Had Actual Possession of Firearms, and Was Therefore Armed.*

In his fourth point of error, Linville disputes his four convictions for Burglary In The First Degree While Armed With A Firearm and the corresponding sentencing enhancements.<sup>22</sup> Although Linville obtained stolen firearms in the course of these burglaries, he contends he was never “armed” under Washington law because he considered the firearms to be mere loot. App. Brief at 27. To the contrary, Linville’s actual possession of a firearm in the course of a burglary establishes that a firearm was readily accessible and available for use. *State v. Valdobinos*, 122 Wn.2d 270, 282 (1993) (“A person is “armed” if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.”); *State v. Faille*, 53 Wn. App. 111, 115, 766 P.2d 478 (1988) (“A gun can be used, whether loaded or unloaded, for the purpose of frightening, intimidating or controlling people.”); *State v. Hernandez*, 172 Wn. App. 537, 544-545, 290 P.3d 1052 (2012), review denied, 177 Wn.2d 1022 (2013); *State v Hall*, 46 Wn. App. 689, 696 (1987).

In *Hernandez* this Court upheld a first degree burglary conviction, finding the defendants were armed when they carried a stolen gun into a waiting vehicle. *State v. Hernandez*, 172 Wn. App. 537, 542 (Wash. Ct.

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<sup>22</sup> These are Counts 26, 62, 105, and 126. CP 365-91.

App. 2012); *Hall*, 46 Wn. App. at 696 (holding the defendant was armed when he stole firearms from a residence and placed them in the getaway vehicle); *State v. Speece*, 56 Wn. App. 412 (1989). This Court went on to state “where defendant was in actual possession of the firearm, sufficient evidence supports a first degree burglary conviction despite no evidence showing that defendant intended to use it,” and that this holding applies to charges of first degree burglary and sentencing enhancements. *Hernandez*, 172 Wn. App. At 544 (“So even if we were considering a firearm enhancement, a “nexus” finding is not required because the possession was actual, not constructive.”); *State v. Randle*, 47 Wn. App. 232, 236 (Wash. Ct. App. 1987) (“[T]here often will be no practical difference between being “armed” and being in possession of a deadly weapon.”).

Viewing the evidence of this case in the light most favorable to the State, *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993) (“We draw all reasonable inferences from the evidence in the State's favor...”), the facts show that either Linville or his accomplices took actual possession of a firearm in the course of four burglaries. Victims testified that firearms were stolen in the course of the burglary, RP 1816, 2527-28, 3254-55, 3978-80, and Linville’s accomplices directly testified as to Linville’s actual possession of a stolen firearm in two of the burglaries. RP 893-95, 3770-71, 4256-58. The weapons were not briefly in his possession, rather in the

course of ransacking the homes of strangers who could return at any moment, Linville discovered, inspected, and carried the firearms out of the house. Thus the evidence demonstrate Linville's actual possession of a firearm during the course of his crimes, and consequently, supports his convictions of first degree burglary and the corresponding sentence enhancements.

Linville's reliance on *Brown* to impose an intent requirement is misplaced. *Brown* is informative, yet not controlling because it only dealt with constructive possession and "mere touching" of a firearm. *State v. Brown*, 162 Wn.2d 422, 425 (Wash. 2007) (finding the defendant was not armed when the evidence merely showed that he moved a gun from a closet to a nearby bed, but did not take it from the residence). This court already distinguished *Brown* from instances of actual possession, holding that the required nexus between the defendant, the crime, and the firearm is not at issue when the thief takes the firearm from the residence. *Hernandez*, 172 Wn. App. at 544-45 (citing *State v. Easterlin*, 126 Wn. App. 170, 173, 107 P.3d 773 (2005)) ("We have previously held that the "nexus" requirement is not applicable to firearm enhancements when there is actual, not constructive, possession of a firearm.... a nexus requirement is inapplicable when the charge is first degree burglary and a firearm is stolen."). Furthermore, *Brown* differentiates itself from cases where no nexus was

required, noting that *Faille* and *Hall* were not determinative “because in those cases weapons were removed from the homes.” *Brown*, 162 Wn.2d at 434.

Finally, finding Linville to be armed is in line with the legislative intent behind RCW 9.94A.533 (3) and 9.94A.825. Those sections specifically create additional punishments for crimes committed while in possession of firearms, and it can be inferred that they were drafted to reduce the possibility of deadly violence by disincentivizing gun possession during criminal acts. *Id.* During the course of the burglaries, Linville held firearms in his hands or within arm’s reach while standing in the homes of complete strangers, only avoiding confrontation with homeowners or law enforcement through dumb luck.<sup>23</sup> His co-defendants testified that Linville would not have meekly surrendered had he been confronted, RP 3117, 3516, 3772-73, and his possession of a firearm inherently makes the threat of confrontation significantly more serious, regardless of Linville’s initial intent. *Faille*, 53 Wn. App. at 115 (“Possession of a deadly weapon tends to

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<sup>23</sup> In at least one instance, the homeowner returned while the burglary was in progress, and in another incident, Linville narrowly missed the homeowner who was out for a walk at the time of the burglary. RP 899-901, 3126, 3209; Sentencing Record at 50-51. In other cases, Linville was unaware homeowners were present, and one victim testified that he was lucky to be away from home at the time of the crime because he was hard of hearing, and may not have heard Linville entering his home. RP 903-04, 1538, 3126, Sentencing Record at 48-49. Finally, Linville was still committing burglaries while under police surveillance. RP 692-709. If law enforcement had been able to more accurately pinpoint the location of Linville’s phone, he likely would have been confronted by law enforcement in the course of his burglaries.

escalate the possibility of violence by anyone discovering a burglary in progress.”). It is precisely this type of danger the legislature sought to prevent when it passed the relevant statutes.<sup>24</sup>

5. *Linville’s Failure to Preserve Error Regarding Jury Instructions for Alternative Means of Trafficking Prevents Him from Raising the Issue on Appeal, Nevertheless, There is no Error Because the Facts Are Sufficient to Convict Linville Under Either Alternative Means.*

In his fifth point of error, Linville argues that the jury instructions regarding criminal trafficking<sup>25</sup> violated his rights to a unanimous conviction because the jury should have been required to unanimously decide between the two alternative means of committing the offense, regardless of whether the evidence was sufficient to convict under either means. App. Brief at 34. Linville did not object to the jury instructions at trial, and while it is true that Linville had the right to a unanimous jury trial,

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<sup>24</sup> It must be noted that on at least two occasions, the statutes did serve their purpose. Both Knutson and Harris testified that they did not want to risk keeping firearms in their possession. RP 3540-44, 4256-58. Kelly Olsen also testified that, as a felon, she did not want to be connected to firearms. RP 3132. Thus it cannot be said that Linville was unaware of the potential consequences.

<sup>25</sup> The text of the trafficking instruction state:

To convict the defendant of the crime of trafficking in stolen property in the first degree as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about (date of offense), the defendant, as a principal or as an accomplice, knowingly (a) initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others or (b) trafficked in stolen property knowing the property was stolen; and (2) That any of these acts occurred in the state of Washington.

If you find from the evidence that element (2), and either of the alternative elements (1)(a) or (1)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

this court has held that when sufficient evidence exists to support each alternative means of a trafficking charge, a jury expression of unanimity is unnecessary. *Lindsey*, 177 Wn. App. at 248 (“When sufficient evidence exists to support each alternative means submitted to the jury, a jury expression of unanimity is unnecessary because we infer that the jury was unanimous as to the means.”); *State v. Kitchen*, 110 Wn.2d 403, 410-411 (Wash. 1988) (“In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.”).

The trafficking charges are supported by co-defendant testimony that Linville delivered of stolen goods to Jennifer Krenik, RP 3726-29, and he personally sold stolen property to Kluh Jewelers, RP 2860-71; NW Territorial Mint, RP 4145-52, 4166-78; his “gold guy” Kenneth McClarty, RP 857-62, 2937, 3748-51; Sara Myers, RP 1391, 2936, 3748; and David Knutson. RP 855, 3509-11, 3538-39. Testimony indicated that Linville either personally disposed of all stolen property with monetary value, or others did so per his instructions.<sup>26</sup> Thus the second alternative means of trafficking is supported by sufficient evidence. Additionally, extensive co-defendant testimony indicates that Linville, recruited, planned, and

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<sup>26</sup> Linville only allowed co-defendants to keep loot if he deemed it to have no monetary value, such as costume jewelry. RP 849, 913, 1370-71, 4215.

personally led the burglaries, carried out for the purpose of selling the stolen goods to obtain money for drugs. RP 868-912, 1361-1402, 2921-34, 3094-147, 3275-304, 3508-23, 3730-73, 4193-264. Therefore, the first alternative means of trafficking is supported by sufficient evidence as well.

Since the evidence in the present case is sufficient to prove that Linville both knowingly trafficked in stolen goods, and knowingly supervised the theft of property for sale to others,<sup>27</sup> Linville's argument must fail. Additionally, because Linville failed to object at trial, he may not raise the issue now at appeal, and Linville concedes the alleged error would be found harmless under existing case law.

*i. Any error in the jury instruction was harmless because the state presented sufficient evidence to convict under either alternative.*

First, the strength of the State's evidence establishes that if any alleged error, if it exists, it is harmless. *Brown*, 147 Wn.2d at 341 ("the ... test for determining whether a constitutional error is harmless: Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'). Linville actually contends that *Ortega-Martinez* provides the standard of harmless error review for alternative

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<sup>27</sup> The jury instruction required the state to prove Linville initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others. *Lindsey* held that these acts are not alternatives, they are merely definitional. *Lindsey*, 177 Wn. App at 243-44. This court went on to hold that only one of the seven terms must be proven. *Id.* Accordingly, for the purposes of brevity, we are restricting usage to supervision, although evidence exists to support any of the seven terms.

means crimes; specifically, if the evidence is sufficient to support both means, then the conviction will be affirmed on grounds that the error is harmless. App. Brief at 37. While we do not agree as to the broader interpretation of *Ortega-Martinez*, we do agree with Linville that if the evidence is sufficient to support both prongs of the trafficking charge, then error is harmless. *State v. Ortega-Martinez*, 124 Wn.2d at 707 (Wash. 1994); *State v. Petrich*, 101 Wn.2d 566, 573 (Wash. 1984) (“The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt.”); *Kitchen*, 110 Wn.2d at 410.

The State’s evidence proves that Linville may be convicted under either of the alternative means for trafficking, and Linville offers no argument to the contrary. Considering the strength of the evidence arrayed against Linville, it would not be appropriate to require the State to retry the trafficking charges unless there is reasonable doubt as to whether a new trial would yield the same results.

ii. *Linville may not raise the disputed jury instructions for the first time on appeal.*

Next, because Linville failed to raise an objection at trial, and does not currently allege manifest prejudice, he cannot now raise the issue before this court. *McFarland*, 127 Wn.2d at 333 (holding that a defendant must demonstrate that his rights were manifestly prejudiced by a constitutional error). Linville did not object to the jury instructions at trial, and his silence

should not be rewarded. *Kalebaugh*, 183 Wn.2d at 583 (“An established rule of appellate review in Washington is that a party generally waives the right to appeal an error unless there is an objection at trial.”); *Kirkman*, 159 Wn.2d at 935 (“Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct .... Failure to object deprives the trial court of this opportunity to prevent or cure the error.”). This is particularly true in the present case, where the strength of the State’s evidence was sufficient to convict under either of the alternative means.

Although Linville has addressed the general constitutionality of alternative means instructions, he has not attempted to meet his burden of showing manifest prejudice in the particular context of this trial. *O'Hara*, 167 Wn.2d at 98 (placing the burden of showing prejudice on the appellant); *State v. Kirkman*, 159 Wn.2d at 927 (“The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial.”). Accordingly, the court must deny Linville’s fifth complaint.

*iii. Because sufficient evidence existed to support either of the two means of trafficking, the jury was not required to specify a particular theory.*

As long as the State produced sufficient evidence to convict Linville for both alternative means of trafficking, there is an established line of

Washington decisions which support upholding Linville's trafficking convictions. *Lindsey*, 177 Wn. App. at 248; *Ortega-Martinez*, 124 Wn.2d at 705; *State v. Franco*, 96 Wn.2d 816, 818 (Wash. 1982); *State v. Whitney*, 108 Wn.2d 506 (Wash. 1987). The facts show that the State did in fact produce sufficient evidence to convict on either of the alternative means, and Linville does not argue to the contrary, instead choosing to rely upon out of state case law which does not overrule existing Washington precedent.

Notably, there is one way in which the present case does differ from *Lindsey* and other Washington precedent. Here the instructions follow the language of WPIC 4.23, which states that a jury need not reach unanimity as to alternative means, so long as each juror believes at least one of the alternative means is proved beyond a reasonable doubt, RP 5246-47, whereas in *Lindsey* the instructions simply remained silent as to alternative means. *Lindsey*, 177 Wn. App. at 248. Nevertheless, despite the differences, *Lindsey's* legal reasoning and its focus on the practical effects of the jury instructions is no less applicable here. This is still an alternative means crime, and the State still presented sufficient evidence to support each of the alternative means of trafficking, and because each alternative means is supported by the evidence, there is still no threat that Linville was convicted on a theory of the crime unsupported by the evidence. *State v. Green*, 94

Wn.2d 216, 233 (Wash. 1980). Consequently, when viewed in the light most favorable to the State, it can still be inferred that the jury reached unanimity regarding all elements of trafficking. *Joy*, 121 Wn.2d at 339. As a result, Linville's fifth point of error must be denied.

6. *Double Jeopardy Does Not Require the State to Aggregate All Counts of Trafficking to a Single Charge.*

i. *The unit of prosecution for trafficking applies to individual acts, however, even if trafficking was a course of conduct crime, the facts show that more than one unit of trafficking occurred, therefore charging Linville with more than one count did not violate the doctrine of double jeopardy.*

Although Linville argues that charging him with more than one count of trafficking constitutes double jeopardy, the facts and relevant case law establish that it was within the prosecutor's discretion to charge the acts separately. Double jeopardy is only at issue when a defendant is tried twice for the same crime, or punished multiple times for the same act. *North Carolina v. Pearce*, 395 U.S. 711, 717 (U.S. 1969); *State v. Gocken*, 127 Wn.2d 95, 100 (Wash. 1995). If the legislature has defined the unit of prosecution to apply to individual acts, then the prosecutor may choose to bring either multiple charges or aggregate them together. *State v. Adel*, 136 Wn.2d 629, 634 (Wash. 1998) ("When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one

unit of the crime."); *State v. Leyda*, 157 Wn.2d 335, 350 (Wash. 2006) ("Multiple convictions will not violate double jeopardy only when the accused's conduct supports multiple units of prosecution being charged.").

Claiming that trafficking must apply to the criminal enterprise as a whole, rather than specific acts, Linville argues that double jeopardy necessarily limits trafficking to a single charge per defendant, despite the fact that his conduct included multiple thefts, multiple victims, multiple sales of stolen goods, and multiple buyers over a period of several months. App. Brief at 48. Such an all-encompassing unit of prosecution is not supported by the law.

The proper source for trafficking's unit of prosecution are 9A.82.010 (19) and 9A.82.050 which unambiguously define the term. *Adel*, 136 Wn.2d at 635 ("The first step in the unit of prosecution inquiry is to analyze the criminal statute."); *State v. Tili*, 139 Wn.2d 107, 115 (Wash. 1999) (holding that the defendant failed to make a threshold showing that the statute is ambiguous, thus the rule of lenity was not applicable). According to the statutes' plain language, an individual has committed an act of trafficking when they have initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others, or when they have sold, transferred, distributed, dispensed, or otherwise disposed of stolen property to another person, or to bought, received,

possessed, or obtained control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person. 9A.82.010 (19), 9A.82.050.

Testimony from co-defendants and physical evidence establish that Linville obtained control of stolen property with the intent to sell on 38 separate occasions through his daytime burglaries. RP 556-633, 868-912, 1361-1402, 2921-34, 3094-147, 3275-304, 3508-23, 3730-73, 4193-264. He also initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others on 40 occasions when he carried out or attempted burglaries over the span of several months. *Id.* Additionally, employees of local pawn shops, jewelers and NW Territorial Mint testified that Linville paid them multiple visits to sell stolen property, RP 2860-77, 3695-702, 4145-52, 4166-78; and his co-defendants testified that Linville took numerous trips to sell stolen goods to David Knutson, RP 3509-11, 3538-39, Sara Myers, RP 3282-85, 3748, 4230, an individual named Carrie, 3285-86, and his dedicated “gold guy,” Kenneth McClarty. RP 857, 1391, 3281-82, 3748-51, 4233-39.

These criminal acts took place over the course of several months, and affected many different victims, including not only the burglary victims, but also the purchasers of the stolen property who are subsequently required to surrender the goods to law enforcement. *State v. Walker*, 143

Wn. App. 880, 889, 892 (Wash. Ct. App. 2008) (stating that buyers of stolen goods may be considered victims of trafficking). Moreover, these acts were neither simultaneous nor continuous. *Tili*, 139 Wn.2d at 124 (“Where crimes are sequential and not simultaneous or continuous, such that the defendant is able to form a new criminal intent before the second criminal act, the criminal intent, objectively viewed, changes from one act to the next.”). Rather, every time Linville received money or drugs in exchange for stolen goods, the act was complete, and he was free to walk away. Instead he invariably woke up the next morning, and made a fresh decision to steal and traffic. These facts indicate that Linville’s acts were a sequence of distinct criminal acts. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 985 (Wash. 2014) (noting that even where the unit of prosecution is a course of conduct, multiple convictions may be supported if the acts have separate intents, occur at separate locations and times, and are separated by intervening events); *State v. Bobic*, 140 Wn.2d 250, 266 (Wash. 2000) (“A factual analysis as to the unit of prosecution is necessary because even where the Legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.”); *Adel*, 136 Wn.2d at 638 (discussing *State v. McFadden*, 63 Wn. App. 441, 820 P.2d 53 (1991) (noting that the separate and distinct intents to commit criminal acts can result in two separate charges).

Thus, it is immaterial whether trafficking's unit of prosecution is a course of conduct,<sup>28</sup> separate act, buying, selling, obtaining, or supervising, because however the unit of prosecution is defined, it is clear that Linville committed dozens of units of trafficking. At the very minimum, it is clear that Linville is liable for more than one count of trafficking as Linville claims. App. Brief at 48.

Finally, it is well-established that prosecutors have considerable discretion to bring multiple charges. *State v. Kinneman*, 120 Wn. App. 327, 337 (Wash. Ct. App. 2003). Here, the prosecutor chose to divide charges corresponding with the date of burglaries, leading to charges which were discrete, divisible, and easy to comprehend.<sup>29</sup> Thus the prosecutor did not

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<sup>28</sup> Though it should not be considered a determinative issue in this case, unit of prosecution for trafficking should be defined as a separate act, rather than a course of conduct. Perhaps the most indicative language in RCW 9A.82.010 (19) is the section which states it an act of trafficking to "sell ... stolen property *to another person*." The plain language of "another person" necessarily implies that it refers to a single person. *Tili*, 139 Wn.2d at 124 (holding that the language "any penetration" indicated that the legislature intended the unit of prosecution to be separate acts). Accordingly, the unit of prosecution for trafficking cannot be a course of conduct encompassing sales of stolen goods to multiple buyers when the statute makes it apparent that every sale to a person is an act of trafficking. Had the legislature intended a broad course of conduct they would have used a broader term like "others" instead of "another person." Because the evidence establishes that Linville sold to another person on numerous occasions, more than one unit of prosecution is clearly appropriate in this case.

Add to this, the fact that all of the other means by which an individual can commit trafficking are discrete acts which do not imply a continuing course of conduct, and it becomes clear that there is no legal support to Linville's argument that the unit of prosecution for trafficking was intended to be a broad course of conduct.

<sup>29</sup> Although the jury instructions did not specify a particular means of carrying out the crime, sufficient evidence was produced to support both prongs of trafficking for each incident; in the course of each burglary Linville obtained possession of stolen goods with the intent to sell, and he initiated... or supervised the theft of property for sale to others. *Lindsey*, 177 Wn. App. at 248.

seek to maximize the number of charges through spurious distinctions, they merely sought to select the most manageable unit of prosecution in a complex case. *Adel*, 136 Wn.2d at 635 (“The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.”).

Linville claims that 9A.82.050 limits trafficking to a single charge and focuses on a course of conduct, but he offers nothing more to support that conclusory statement than an inapplicable decision. App. Brief at 47. The portion of *Walker* which Linville incorrectly relies on is relevant only to calculating an offender score, and the case does not suggest that the only the purchaser is the exclusive victim of trafficking,<sup>30</sup> or that taking property from separate owners doesn’t establish separate offenses. *State v. Walker*, 143 Wn. App. 880, 889, 892 (Wash. Ct. App. 2008). It takes more than conclusory statements and inapplicable precedent to overcome the unambiguous language of 9A.82, which suggests that Linville is liable for multiple units of trafficking.

Ultimately, Linville’s proposed unit of prosecution for trafficking would make it impossible to ever charge a defendant with more than one

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<sup>30</sup> The relevant section suggests that a buyer can be considered a victim of trafficking, but it doesn’t suggest that the buyer is the exclusive victim. *Walker*, 143 Wn. App. at 892. There is nothing in the language which suggests that the victim of the theft cannot also be the victim of trafficking as well. *Id.*

count of trafficking. If separate sales of stolen goods, formed with separate intent, taken from different victims, and bought by different buyers months apart from each other are all part of a single over-arching criminal act, then what could conceivably constitute multiple acts? It is clear that Linville carried out separate discrete acts of trafficking as defined by 9A.82. Accordingly, there are no conflicts with double jeopardy for convicting Linville on multiple counts of trafficking.

ii. *Linville's alternative argument is not supported by a reasoned legal argument.*

In Linville's alternative argument, he claims that "if the unit of prosecution is taking the property, then theft and trafficking are the same offense" and the theft charges must be dismissed. App. Brief at 48. Linville offers nothing more than two brief sentences with no further explanation or legal authority, so it is not entirely clear what he is arguing. Because an appellate court does not review "issues for which inadequate argument has been briefed or only passing treatment has been made," this argument should not be considered. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).

Nevertheless, if the court did attempt to infer a reasoned legal argument from two sentences, it may be that Linville was claiming that trafficking and theft have similar units of prosecution, therefore punishing

Linville for both constitutes double jeopardy. However, double jeopardy is not an issue if the legislature intended multiple punishments for a single offense. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); *Walker*, 143 Wn. App. at 887-89 (“a court may penalize a defendant for one act or transaction that violates two distinct statutory provisions only if each “provision requires proof of a fact which the other does not.”) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Washington courts have already held that trafficking and theft are distinct offenses, and separate convictions do not violate double jeopardy. *Walker*, 143 Wn. App. at 887 (“We hold that these two offenses do not violate double jeopardy.”); *State v. Strohm*, 75 Wn. App. 301, 310-11, 879 P.2d 962 (1994), review denied, 126 Wn.2d 1002 (1995); *State v. Michielli*, 132 Wn.2d 229, 237 (Wash. 1997). Moreover, *Walker* held that trafficking and theft do not have the same elements, are not entirely proved by the same evidence, can affect different victims, and may require different intent. *Walker*, 143 Wn. App. at 887 (“We hold that these two offenses do not violate double jeopardy.... The crimes have different elements and the evidence used to prove one crime would not also completely prove a second crime.”). Thus, even if we give Linville’s alternative argument the benefit of the doubt, it too must fail.

7. The State's Seventh Amended Information Did Not Impermissibly Amend Count 130 After the State Had Rested, Because It Did Not Upgrade the Charge to a More Serious Offense.

In Linville's final point of error, he argues that by amending Count 130 in the Seventh Amended Information after it had rested its case, the State failed to fully apprise Linville of the charges against him, and denied his ability to mount a successful defense. App. Brief at 48. The amendment in question was limited to correcting the charge of theft in the first degree from a class C felony to its appropriate designation as a class B felony.<sup>31</sup> CP 362, 391. The initial designation as a Class C felony was scrivener's error, and theft in the first degree was properly listed as a Class B felony in the other sixteen counts. Otherwise, the charging document correctly listed the offense as felony in the first degree, cited to the corresponding statutes, and listed all of the appropriate elements for first degree theft. Thus, it is apparent that regardless of the scrivener's error, Count 130 contained all of the necessary elements of the crime and enabled Linville to mount a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787 (Wash. 1995) ("A

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<sup>31</sup> Prior to amendment, the charging documents stated:  
COUNT 130- THEFT IN THE FIRST DEGREE, RCW 9A.56.030(1)(A), RCW 9A.56.020(1)(A)- CLASS C FELONY:

In that the defendant, KENNETH ALFRED LINVILLE, JR, in the State of Washington, on or about February 6, 2014, as principal or as an accomplice, did wrongfully obtain or exert unauthorized control over property or services of another or the value thereof, with intent to deprive said person of such property or services, the value of which exceeds five thousand dollars (\$5,000.00) to wit: 840 76<sup>th</sup> Avenue NE Olympia, Washington. CP 391.

charging document is constitutionally adequate only if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense.”).

Linville’s reliance on *Vangerpen*, *Quismundo* and *Pelkey* is inappropriate because the class of felony is not an element of the crime, rather it is a sentencing guideline. *Vangerpen*, 125 Wn.2d at 782; *State v. Quismundo*, 164 Wn.2d 499 (Wash. 2008); *State v. Pelkey*, 109 Wn.2d 484 (Wash. 1987). Accordingly, Linville’s seventh claim must also fail.

In the alternative, should this court find that the charging documents were impermissibly altered after the State had rested, the State contends that the appropriate remedy is to reduce the charge to 2nd degree theft in keeping with the initial language of the charging documents.

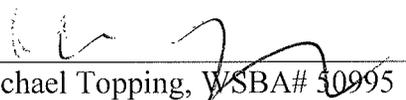
The common law rule barring amendments after the State has rested exist to ensure that the defendant has proper notice of the charges. *Vangerpen*, 125 Wn.2d at 787. At the very least, Linville had adequate notice of the 2nd degree theft charge under Count 130, and except for a higher valuation of goods stolen, the elements of 2nd degree theft are identical to the elements of 1st degree theft for which Linville was convicted. As a result, Linville is not unfairly prejudiced by reducing the sentence to a lesser charge.

Other cases addressing this issue have held that the appropriate remedy is to dismiss without prejudice and allow the State to retry. *Vangerpen*, 125 Wn.2d at 782; *Quismundo*, 164 Wn.2d at 499; *Pelkey*, 109 Wn.2d at 484. However, there is nothing in those cases which indicate that the State requested the imposition of a lesser charge.

**D. CONCLUSION**

For the reasons provided above, this court should uphold Mr. Linville's convictions.

Respectfully submitted this 1<sup>st</sup> day of December 2016.

  
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Michael Topping, WSBA# 30995  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of State's Corrected Brief on the date below as follows:

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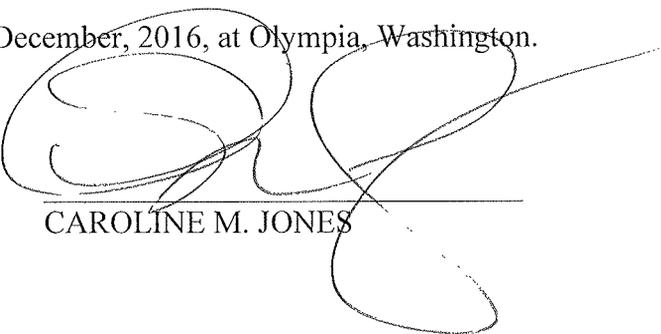
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1 day of December, 2016, at Olympia, Washington.

  
\_\_\_\_\_  
CAROLINE M. JONES

# THURSTON COUNTY PROSECUTOR

**December 01, 2016 - 3:04 PM**

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CORRECTED BRIEF

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