Motion for Over-length Brief
Granted 5/1/20

SUPREME COURT NO. 98190-6
C.O.A. No. 51174-6-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH EDWARDS,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the December 10, 2019 unpublished opinion of the Court of Appeals in *State v. Joseph L. Edwards*, COA No. 51174-6-II. This decision affirmed Joseph Edwards' convictions, but remanded for the trial court to vacate either count 4 or 5 and to strike all reference to the vacated conviction in the judgment and sentence, remanded for the trial court to vacate count 3 and the corresponding deadly weapon enhancement, and to strike all references to that conviction and enhancement, and remanded to strike certain legal financial obligations.

II. STATEMENT OF THE CASE

The State adopts the statement of facts set forth in the Court of Appeals opinion, set forth as follows.

This appeal involves two discrete October 28, 2016 home invasions that occurred hours apart in Kelso. The first home trespass occurred at the Salzman residence, while a second occurred at the Collazo house.

Salzman Home Invasion

Alexander and Heather Salzman slept in their home in Kelso during the early morning of October 28, 2016. Alexander's mother slept in

a motor home outside of the residence with the couple's three-year-old child. At 3 a.m., Alexander awoke to his dog growling and a knock at the front door. Before answering the door, he pushed a curtain aside and viewed a woman he did not recognize. The woman was Mescha Johnson. Alexander asked Johnson if she needed help, and she replied that someone tried to injure her. Alexander let Johnson inside, closed the door, and locked it. Thereafter, Heather entered the dining room and allowed Johnson to use her cell phone to make a call.

Another woman came to the door. Heather assumed the new woman at the door was Mescha Johnson's friend, so Heather let her inside the residence. Seconds later, two masked men barged into the house. One of the two masked men, a Caucasian, wore red shoes, baggy pants, a hoodie, and a red bandanna across his face. This man secreted his hands underneath his sweatshirt simulating as if he held a pistol in his waistband. The second masked man, a tall and thin African-American, wore a hoodie, a Seahawks hat, and a black ski mask with the eyes and mouth exposed. The State claimed this second masked man to be Joseph Edwards. Mescha Johnson and Joseph Edwards, nicknamed New York, shared a child together.

Alexander Salzman noticed that the taller African-American man had metal dental work. He wielded a bright yellow and gray crowbar type

object, which appeared to be a nail puller. At first, the man held the weapon in a threatening manner. He later concealed the bar under his sleeve. Salzman could discern the intruder's skin tone. The two masked intruders demanded to see a man named Michael Woods, who apparently owed them $10,000. Alexander denied knowing anyone by that name and explained to the intruders that he did not have $10,000. The taller man with the gloves saw Alexander's wallet on a nearby cabinet and pocketed it. Alexander offered the burglars his iPhone. Both of the masked men accompanied Alexander into the bedroom to retrieve his cell phone. All four intruders left the residence seconds later with Alexander's cellphone and wallet, as well as Heather's cellphone.

Law enforcement officers went to the Salzman residence. Police collected a latex glove discarded on the side of the road near the Salzman home.

Collazo Home Invasion

Jessica Collazo, her husband Alexander Collazo, and their five children also lived in Kelso. On October 28, 2016, Alexander and Jessica awoke to find three masked intruders, two women and one man, rushing into the bedroom. One burglar struck Jessica in the head, causing her to bleed.

The male intruder stood at the foot of the Collazos' bed and repeatedly struck Alexander with a crowbar. The attacker repeated: "Give me everything; give me everything." Report of Proceedings (RP) (July 12, 2017) at 156. Jessica rushed toward one of the women and grabbed her arms. She ripped the mask off the woman and recognized her as Mescha Johnson. Johnson previously lived with the Collazos. Johnson was familiar with the contents of the Collazo household and therefore knew a firearm rested in the closet. As the struggle continued, Johnson entered the closet. Johnson grabbed the gun, and Jessica and Johnson tussled over the weapon. Johnson yelled: "New York" and the masked man bashed Jessica again with the crowbar. When the man turned to hit her, his mask fell to his neck, and Jessica recognized him as New York. She also recognized the man's voice.

Alexander unlatched their bedroom window and jumped through the window. The man and the other woman followed Alexander out the window, while Johnson remained behind. Emergency providers rushed Alexander to the hospital by ambulance, where he remained for one month. Jessica later discovered two of her laptops and other electronics to be missing from the house.

Heather Delagasse lived directly across the street from the Collazo family. After bidding her children goodbye for school, Delagasse saw one

male and two females, running from the alley behind the Collazo's house and onto the Collazo's front porch. RP 172-73. Delagasse recognized one of the women as Mescha Johnson and the lone man as "Joe" Edwards, both of whom she had previously met. When Edwards spoke to Johnson, Delagasse noticed that Edwards had gold teeth.

Heather Delagasse went inside her house to call Alexander Collazo. He did not answer. When Delagasse returned outside, she saw a bloody Alexander stumbling in the middle of the street and heard him yelling for help. Delagasse called the police.

Kelso Police Department Detective Craig Christianson responded to the Collazo home on October 28, 2016. He saw both Alexander and Jessica Collazo covered in blood. Detective Christianson detained Mescha Johnson, who remained at the residence. While on his way to the Kelso Police Department with Johnson for questioning, Johnson showed Christianson her parked car and gave him consent to search it. Police collected latex gloves from the vehicle's backseat and the door pockets. Two gloves found in the backseat of Johnson's car contained Joseph Edwards' DNA. Detective Christianson found, inside the car, an identification card belonging to Kelsie Lee in a backpack. Kelsie Lee was Edwards' recent girlfriend. Police seized other latex gloves located on the Collazo lawn and inside the home.

On October 31, 2016, a Washington court issued arrest warrants for Joseph Edwards and Kelsie Lee. On November 9, 2016, Ohio State Trooper Joshua Smith stopped a car driven by Edwards for going 103 m.p.h. in a 70 m.p.h. speed zone. Lee was a passenger in the vehicle. Edwards initially gave Trooper Smith a false name, but later admitted to providing false information because he wanted to avoid going to jail on outstanding warrants. Trooper Smith arrested Edwards pursuant to the outstanding Washington State warrant. Washington extradited Edwards and Lee back to Washington.

Both Mr. and Mrs. Salzman testified that Edwards was approximately the same height as the man with the ski mask and the crowbar. RP 96, 97, 134. They both also identified the two iPhones which the police recovered as the ones taken from them. RP 101, 132, 133. Deputy Danny O'Neill saw Edwards riding a bicycle in Kelso around 8:30 the morning of the Salzman home invasion RP 323-25, 328.[3]

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of

[3] These facts are provided in addition to those in the Court of Appeals decision.

the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)

A. Public trial right

Edwards argues that review is warranted under this issue under all four RAP 13.4(b) criteria.

1. The Court of Appeals decision is not in conflict with the Supreme Court decisions in *State v. Smith*,[4] *State v. Love*,[5] and *State v. Whitlock*.[6]

Edwards asserts that the Court of Appeals decision in his case "reveals tension between this court's decisions in *State v. Smith*, *State v. Love,* and *State v. Whitlock.*" He does not show how the Court of Appeals decision is in conflict with these cases or with another decision of the Court of Appeals.

In *State v. Smith*, the Washington Supreme Court adopted a three-step framework for analyzing public trial right cases. The steps are: (1) Does

[4] 181 Wash. 2d 508, 334 P.3d 1049, 1056 (2014)
[5] 183 Wn.2d 598, 354 P.3d 841 (2015)
[6] 188 Wash. 2d 511, 396 P.3d 310, 314 (2017)

the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) if so, was the closure justified? *Smith*, at 521. If the answer to the first question is negative the court need not reach the remaining steps. *Smith,* at 508. The appellant carries the burden on the first two steps; the proponent of the closure carries the third. *State v. Love,* at 605.

The specific issue in Smith was whether sidebar conferences on evidentiary matters in a hallway outside the courtroom implicated the public trial right. *Smith,* at 513. This issue addressed the first question of the above three-step framework – whether the proceeding at issue implicated the public trial right. The proceeding at issue was a customary evidentiary sidebar. The court held that the sidebars or evidentiary conferences there did not implicate the public trial right at all.[7] Because the answer to the first question was in the negative, the court did not need to reach the remaining steps – whether the proceeding was closed, and if so, whether the closure justified. In seeking to provide guidance to assist reviewing courts in the future the court, citing *State v. Lormor,* [8] observed that "a closure occurs "when the courtroom is completely and purposefully

[7] The court reached this conclusion because (1) sidebars deal with "mundane issues implicating little public interest," (2) sidebars "have traditionally been held outside the hearing of both the jury and the public," and (3) "allowing the public to 'intrude on the huddle' would add nothing positive to sidebars in our courts." Smith, at 516, 519.
[8] 172 Wash.2d 85, 93, 257 P.3d 624 (2011)

closed to spectators so that no one may enter and no one may leave." *Smith,* at 519–20. In a footnote, the Smith court cautioned "that merely characterizing something as a "sidebar" does not make it so. To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record. Whether the event in question is actually a sidebar is part of the experience prong inquiry and is not subject to the old legal-factual test." *Smith*, at 508. The Smith court also noted that "proper sidebars," unlike pretrial suppression hearings on issues with a significant impact in the community, deal with the mundane issues implicating little public interest. *Smith*, at 516. Nothing in the appellate court's decision in Edwards conflicts with *State v. Smith.*

In *State v. Love*, the issue was whether a particular method of challenging jurors after voir dire—a method commonly employed in trial courts around the state—violated the constitutional right to a public trial. At the conclusion of voir dire questioning, counsel exercised for cause challenges orally at the bench and subsequently exercised peremptory challenges silently by exchanging a list of jurors and alternatively striking names from it. Love argued that there was a closure during voir dire because the attorneys discussed challenges for cause at the bench, which

the spectators could not hear, and exercised their peremptory challenges in writing. The court rejected this argument because the public was present in the courtroom during all of jury selection, including the juror challenges, observed the questioning of jurors, and saw which jurors were ultimately empaneled. The court held Love did not show a closure occurred and his public trial claim failed. *Love*, at 607. Nothing in the appellate court's decision in Edwards conflicts with *State v. Love.*

In *State v. Whitlock*, during a bench trial the State objected to a question regarding an informant and asked for a sidebar. The trial court rejected the State's request to address its objection to the scope of cross-examination at sidebar. Instead, the court adjourned the bench trial proceedings, called counsel into chambers, and discussed that critically important and factually complicated issue behind closed doors. No reporter or the even the defendant was present. The 10 minute discussion was about the proper extent of cross-examination of a confidential informant who was the State's key witness. *Whitlock,* at 514.

Analyzing the three-part inquiry, the *Whitlock* court held that the proceeding was certainly a closure since it occurred in the judge's chambers, a private and closed setting, and the closure was not justified since trial court did not conduct a Bone-Club analysis. *Whitlock*, at 520. To answer the first question, (whether the proceeding at issue implicates

the public trial right) the court, citing *Smith*, explained that the Smith ruling that sidebars do not implicate the public trial right under the experience and logic test were limited to "proper sidebars," that is, proceedings that "deal with the mundane issues implicating little public interest[,] ... done only to avoid disrupting the flow of trial, and ... either ... on the record or ... promptly memorialized in the record. With those principles in mind *Whitlock* concluded the in-chambers proceeding was definitely not a "proper sidebar." This was so *because it occurred in chambers which by definition was closed to the public*, and was not recorded or promptly memorialized. (Emphasis added). Nothing in the appellate court's decision in Edwards conflicts with *Whitlock.* The court correctly held the facts here were simply distinguishable from *Whitlock.*

Edward focuses on whether the procedure here was a "proper sidebar." He seems to read *Whitlock* as creating a bright line rule that for a sidebar to be "proper" it must meet three requirements. A proper sidebar, Edwards reasons, must (1) only deal with mundane issues such as scheduling, housekeeping, and decorum, (2) not occur in chambers which, by definition, are closed to the public, and (3) be recorded or promptly memorialized. From this construct, Edwards argues that the exercise of juror challenges here was not a proper sidebar because "it did not meet the first and third requirements." Appellant's brief, page 11. Therefore, he

reasons, since the proceeding was not a proper sidebar, it then automatically amounts to a courtroom closure.

There are several flaws in his argument. First, *Whitlock* did not create a three-part test consisting of *requirements* for a proper sidebar. Second, he cites no authority for his sweeping assertion that if a particular proceeding fails this test it then automatically amounts to a courtroom closure. The courts have consistently defined a courtroom closure as "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor, State v. Smith,* at 519–20. Last, and most importantly, the question of characterizing a particular sidebar as "proper" based upon its content, whether it is recorded, and where it occurs only goes to the first inquiry of the three-step framework – whether the proceeding at issue implicates the public trial right. Unlike *Smith*, where the proceeding at issue was a customary evidentiary sidebar which, as such, did not implicate the public trial right at all, here it is well-settled that jury selection does implicate the public trial right.[9] Therefore, the question is not whether the procedure

[9] "Edwards and the State agree that the public trial right attaches to jury selection, including for-cause and peremptory challenges. Based on *State v. Love*, 183 Wn.2d at 605-06, we agree." *State v. Edwards*, slip opinion, at 6.

here was a "proper sidebar," but rather whether it amounted to a courtroom closure.

The Court of Appeals in Edwards correctly held that under *Love* and its progeny, there was no courtroom closure. All of the excused jurors answered questions and provided information in open court. These jurors' responses clearly indicated why they were excused. Several jurors had work-related or medical issues (#'s 1, 17, 33). Other jurors knew witnesses and/or were biased (#'s 3, 20, 42). [10] Some of these jurors had been crime victims and explained why they were biased (#'s 8, 9, 10, 12, 15, 24). Importantly, defense counsel did not object to any of these jurors being excused and never requested to have the sidebar discussion memorialized on the record or made any other statement about the sidebar. Here, all that occurred at the sidebar conference was notating on the "struck juror list," (CP 43), designating the particular jurors excused for cause, and those peremptorily challenged and by whom. The struck juror list was filed and it was a part of the record, and the court announced the composition of the jury in open court. The court asked counsel if they had any objections to the seating of that jury and Edwards had none. Since the substance underlying

[10] Juror #3 was the mother of one of the police officers who testified and said she was biased. Juror #42 also said she knew a witness and was biased. Both were excused without objection prior to the sidebar at issue. RP 5-7, 40, 41.

why each of these jurors were excused was made known in open court, with no objection from Edwards, there was no improper courtroom closure.

2. The Court of Appeals decision is not in conflict with another decision of the Court of Appeals.

The Court of Appeals decisions in *State v. Effinger* [11] and *State v. Anderson*[12] followed *State v. Love*. *Effinger* is directly on point. There,

> "during voir dire, the trial court first asked the potential jurors several questions regarding their ability to remain fair and impartial. The potential jurors answered these questions in open court. Many of the potential jurors were either in law enforcement or had family members who were. The attorneys then conducted voir dire. The court invited the attorneys up to the sidebar where an unreported discussion was held. After conducting a sidebar and after asking the venire another question, the trial court conducted another sidebar to allow the parties to exercise for cause challenges and to excuse jurors for hardship. That procedure was not transcribed, but it occurred in open court. After the sidebar, the trial court announced in open court that nine jurors were excused. The trial court then conducted another unrecorded sidebar to allow the parties to exercise their peremptory challenges. Following the third sidebar, the trial court announced the composition of the jury. The trial court then swore in the jurors who were to hear the case. All of the sidebars were memorialized on a case information sheet. The sheet indicated that jurors 4, 6, 12, 13, 18, and 22 were excused for cause. It also indicated that the trial court excused juror 23 for cause, but the court did not announce that result in open court. The sheet showed that jurors 9 and 26 were struck for hardship and that 35 was struck because the number was not reached; however, the trial court had already excused juror 35 after the second sidebar. The trial court filed the case information sheet, and it was a part of the record." *Effinger*, at 559.

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[11] 194 Wash. App. 554, 375 P.3d 701 (2016)

[12] 194 Wash. App. 547, 549, 377 P.3d 278, 279–80 (2016)

Effinger held "no closure occurred, in violation of defendant's public trial right, when the parties struck jurors at sidebars, which were not transcribed; parties silently exercised peremptory challenges at sidebar so people in the courtroom could not hear, and record included the case information sheets showing those jurors who were excused, questioning of the potential jurors took place in open court for everyone to hear and observe, and jurors' answers to the questions occurred in open court." The court found the case factually similar to *Love*, noting that in both cases questioning of the potential jurors took place in open court for everyone to hear and observe; the jurors' answers to the questions occurred in open court; the court held a sidebar to discuss for cause challenges; the sidebar was visible to observers in the courtroom; although the record was silent as to what the public could hear, the trial court did not ask anybody to leave the courtroom; after the sidebars, both courts excused jurors who had been questioned in front of the defendant and the public; in open court and on the record, both courts read the names of some of the jurors who were excused; and both courts empaneled the jury in open court.

Effinger adopted the reasoning of *Love*, "Observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the

discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury selection. We hold the procedures used at Love's trial comport with the minimum guarantees of the public trial right and find no closure here." *Love,* at 607. The court recognized that in *Love*, the sidebar was recorded but that circumstance, was not dispositive of whether or not an open court violation occurred. "**The fact that the sidebars in Effinger's case were not recorded, therefore, is inconsequential to our analysis and decision**" (emphasis added) *Effinger,* at 563–64.

Edwards is just like *Effinger* and *Love*. Like those cases the public was present for and could scrutinize the jury selection from start to finish, observers could watch and hear the questions posed to the panel, listen to their answers, see counsel exercise challenges at the bench and on paper, the judge announced in open court the composition of the jury excusing jurors who had been questioned in front of the defendant and the public, a struck juror list was utilized and filed for the record which indicated which jurors were excused and what type of challenges were made, and the record preserved the bases for the jurors' dismissals. As in *Effinger* the fact that the sidebar was unrecorded does not amount to an open court violation.

State v. Anderson, [13]presented a similar situation. There, during voir dire, the questioning of jurors occurred in open court. Anderson challenged four prospective jurors for cause at a sidebar conference, which the judge told the jurors they would not be able to hear. At the sidebar conference, the trial court dismissed the four challenged prospective jurors. The trial court later dismissed a fifth prospective juror for cause on its own initiative at a second sidebar conference. The trial court then announced in open court which prospective jurors would be serving on the jury. The sidebar was unrecorded, but the trial court later noted the challenges and resulting dismissals for the record stating, "At a sidebar before we took the morning recess, I excused for cause, based upon the challenge by [defense counsel], for cause Jurors 5, 15, 18 and 34. Following the second questioning period by [defense counsel], and before we selected the jury, I excused Juror No. 27 for cause."

Upon reconsideration in light of *Love*, *Anderson* held that no courtroom closure occurred. The court noted the distinction that the sidebar challenges were recorded in *Love*. Despite that difference the court observed "The court in *Love* did not hold that the presence of a court reporter at a sidebar conference was required in order to avoid a courtroom closure. The

[13] 194 Wash. App. 547, 549, 377 P.3d 278, 279–80 (2016)

key factors for the court were that the public could (1) hear the voir dire questioning that provided the basis for the challenges for cause and (2) observe the sidebar conference while it was occurring. Further, anyone listening to the questioning of the jurors would have been able to easily discern why the trial court dismissed the five jurors for cause." *Anderson* at 607.

The same key points from *Anderson* are present here: (1) the public could hear the voir dire questioning that provided the basis for the challenges for cause (2) observe the sidebar conference while it was occurring, and (3) anyone listening to the questioning of the jurors would have been able to easily discern why the trial court dismissed the 12 jurors for cause.

Edwards contends that *Whitlock* "suggests" *Effinger* and *Anderson* are incorrect. *Whitlock* does not suggest *Effinger* and *Anderson* are incorrect. The facts in *Whitlock* were just different. Nothing in the appellate court's decision in Edwards conflicts with another decision of the Court of Appeals.

B. Uncharged alternative means and harmless error standard

Edwards asserts there is a conflict between *State v. Brewczynski* [14]and *State v. Nicholas*[15] on the issue of the harmless error standard as applied to his claim that he may have been convicted of an uncharged alternative means, and that review is warranted under RAP 13.4(b) (2) and (3) to resolve this conflict. He contends *Nicholas* and *Brewczynski* are "at odds with one another" because they both had special verdicts finding the defendant of being armed with a deadly weapon or firearm, "which established the charged alternative means." Appellant's brief, page 15.

The State replies that there is no conflict between *Brewczynski* and *Nicholas*, they are simply distinguishable. The law is well-settled on this issue and no new significant question of law is presented that warrants review. The Court of Appeals here correctly ruled that between *Brewczynski* and *Nicholas, Nicholas* was factually similar to Edwards and controlled. Edwards is factually distinguishable from *Brewczynski,* not in conflict with it.

In *Brewczynski* the victim was discovered in his home *both severely beaten and shot* once in the head. Brewczynski was charged with first degree murder with aggravating circumstances, first degree burglary,

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[14] 173 Wash. App. 541, 294 P.3d 825 (2013)
[15] 55 Wash. App. 261, 273, 776 P.2d 1385, 1392 (1989)

and theft of a firearm. The first degree burglary charge alleged only one alternative –*being armed with a handgun*, but the jury was instructed on both the charged alternative and the uncharged alternative (assaulting a person). *Brewczynski*, at 548–49. The jury convicted him of all charges and found by special verdict that he was armed with a firearm and committed the murder "in the course of, in furtherance of, or in immediate flight from" first degree burglary. *Brewczynski*, at 541.

On appeal, the court held instructing the jury on the uncharged alternative was not harmless error because none of the remaining instructions limited the jury to consider solely the "armed with a deadly weapon" alternative of committing first degree burglary, and the prosecutor in closing argument urged the jury to consider both alternatives. The court reversed only the stand-alone first degree burglary conviction due to instructional error, concluding the error was not harmless because it remained possible that the jury convicted on the basis of the uncharged alternative. *Brewczynski*, at 550.

In *Nicholas*, defendant was charged with four counts of first degree robbery while armed with a deadly weapon. Count I alleged he was armed with a deadly weapon, not that he displayed what appears to be a firearm or other deadly weapon. But on Count I, the trial court instructed the jury that it could convict if it found that he was either armed with a deadly

weapon or displayed what appeared to be a firearm or deadly weapon. Nicholas argued that his first degree robbery conviction required reversal because the jury was instructed on an alternative means never charged. On appeal the court held this was harmless error because the jury found by special verdict that Nicholas was armed with a deadly weapon at the time of the commission of the crime. Because the jury was instructed that the State had to prove this fact beyond a reasonable doubt, no possibility existed that the jury impermissibly convicted Nicholas on the uncharged alternative.

Brewczynski is distinguishable from *Nicholas* and Edwards. First, in *Brewczynski,* the firearm special verdict form pertained to the murder charge.[16] Therefore, the special verdict did not establish that he was convicted only of the charged alternative (firearm), and not the uncharged alternative (assault). Given the clear evidence of both an assault and a firearm, and the prosecutor's argument, it is understandable that the court concluded Brewczynski could have been convicted on the uncharged alternative (assaulting a person) of first degree burglary.

Unlike *Brewczynsk* all of the evidence in Edwards established only the alternative that he used an actual deadly weapon, not that he

[16] It is unclear at best whether the firearm special verdict even applied to the charge of first degree burglary.

displayed something that appeared to be a deadly weapon, like a replica of a firearm.[17] The court correctly concluded that "instructions in Joseph Edwards' prosecution effectively defined the charged crime. For example, jury instruction 29 stated: "[a] person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use." CP at 49. The same instruction defined a deadly weapon as "an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death." CP at 49." Slip Opinion, at 13.

The instructional error was the same in both Edwards and *Nicholas* – both were charged with first degree robbery while armed with a deadly weapon, but the juries were erroneously instructed on the uncharged alternative of displaying what appeared to be a deadly weapon. In both,

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[17] Mr. Salzman testified, the taller man held up a crowbar in a threatening manner and he was waiting for the man to swing it at him. RP 97. He described the crowbar or nail puller as being yellow and gray. RP 96. The gray and yellow crowbar stood out to Mr. Salzman so he included the information in his written statement. RP 106, 107. Mrs. Salzman testified that two masked men came barging into the house. One held a crowbar up in the air. RP 122-125. The crowbar was 12 to 16 inches long, and yellow and gray or faded black. RP 129. The second man was above 6 foot tall, wore a black ski mask and gloves, and had dark skin. This second taller man was the one holding up the crowbar. This second man with the crowbar had something shiny in his teeth like silver or gold. When they left, the taller man stuck the crowbar up the sleeve of his sweatshirt. RP 129, 130. The taller man with the crowbar took Mr. Salzman's wallet. RP 131. The defendant was approximately the same height as the man with the ski mask and the crowbar. RP 134.

the juries returned deadly weapon special verdict forms. Additionally, in Edwards, instruction # 24, outlined the elements of the associated charge of burglary in the first degree pertaining to the Salzman's (Count 3): "1. That on or about October 28, 2016, the defendant entered or remained unlawfully in a building of Alexander Salzman. 2. That the entering remaining was with intent to commit a crime against a person or property therein. 3. That and so entering or while in the building or in immediate flight from the building, the defendant *was armed with a deadly weapon*..." (Emphasis added).

There is no conflict between *Brewczynski* and *Nicholas*, they are simply distinguishable. Edwards is distinguishable from *Brewczynski* and similar to Nicholas. The appellate court's decision here is not in conflict with another Court of Appeals decision. The law is well-settled on this issue and no new significant question of law is presented that warrants review.

C. Co-conspirator's statements

The Court of Appeals declined to address the issue of the admissibility of a co-conspirator's statements made after the declarant's arrest, "because the prodigious evidence of Edwards' guilt rendered any alleged error harmless." Edwards' sole argument on why this court should accept review under RAP 13.4(b)(2) and (4) is that because no Washington

court has opined on the admissibility of a co-conspirator statement after arrest since 1988, it "warrants another look." This is an insufficient basis for review. The Court of Appeals correctly decided that the overwhelming evidence against Edwards rendered any alleged error harmless.[18]

D. Juror bias

The Court of Appeals correctly ruled that the trial court did not abuse its discretion in declining to excuse a juror who "could not aver whether he witnessed events or merely dreamed about the events. Assuming the juror saw events in real life, the juror did not witness the crimes, but only a tangential event. Edwards did not dispute having ridden a bike in Kelso shortly after the burglaries." When questioned by defense

[18] Kelsie Lee's statements were not the only evidence of Joseph Edwards' involvement in the crimes committed at the Salzman and Collazo residences. Police officer testimony revealed that law enforcement found the Salzmans' stolen iPhones at Joseph Edwards' wife's house in Seattle. A jury could infer that Edwards brought the phones to his wife. Both Heather and Alexander Salzman testified Edwards and the masked home invader were approximately the same height, weight, and skin tone, and both had distinctive metallic teeth. Mescha Johnson testified that she, Edwards, Kelsie Lee, and another man drove to the Salzman residence in her car and Edwards rushed in demanding money. Johnson also testified that hours later, she, Edwards, and Lee drove to the Collazo residence. While there, Edwards assaulted Alexander and Jessica Collazo with a crowbar. Jessica Collazo testified that she recognized "New York's" voice and she knew that was Edwards' nickname. The neighbor across the street, Heather Delagasse, also identified Edwards as the man who entered the Collazo home with Johnson and another woman. Law enforcement found two gloves, similar to those worn by the man with the crowbar, in Johnson's car near the Collazo residence, with Edwards' DNA on them. Officer testimony established that an Ohio state trooper found Edwards and Lee on the lam. Edwards own letter convicts him. While in jail, Edwards wrote a letter to Johnson stating that he was going to prison. The overwhelming untainted evidence would lead a reasonable jury to conclude Edwards was the masked robber. Slip Opinion at 9.

counsel, the juror said the dream or actual event would not influence him. Slip Opinion, at 11. Edwards fails to show that the court's ruling involves a significant question of law under the Constitution of the State of Washington or of the United States or an issue of substantial public interest that should be determined by the Supreme Court.

E. Statement of Additional Grounds

Edwards fails to articulate, much less show, that the Court of Appeals ruling on the issues he raised in his statement of additional grounds meet any of the four conditions for acceptance by the Supreme Court.

IV. CONCLUSION

For the reasons stated above, the petition for discretionary review should be denied.

Respectfully submitted this 24 day of April, 2020.

By:

Tom Ladouceur/WSBA #19963
Chief Criminal Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that the opposing counsel listed below was served RESPONSE TO PETITION FOR REVIEW electronically via the appellate courts portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 24, 2020.

Julie Dalton

Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

April 24, 2020 - 12:55 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98190-6
Appellate Court Case Title:	State of Washington v. Joseph L. Edwards
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