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Division II  
State of Washington  
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NO. 51174-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH EDWARDS,

Appellant.

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

The Honorable Michael Evans, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. AN INAUDIBLE, UNRECORDED, AND UNMEMORIALIZED SIDEBAR AMOUNTS TO A COURTROOM CLOSURE.

The State agrees “it is well settled that for cause and peremptory challenges implicate the public trial right.” Br. of Resp’t, 17. Thus, the only questions are whether the sidebar conference at issue constituted a closure and whether the public trial violation was de minimis. Edwards rests on the opening brief as to why the violation was not de minimis. Am. Br. of Resp’t, 19-21.

The State first cites to State v. Crowder, 196 Wn. App. 861, 385 P.3d 275 (2016), to contend no closure occurred. Br. of Resp’t, 17-20. But Crowder actually supports Edwards’s argument. There, the trial court conducted an off-the-record sidebar prior to entering a formal ruling on a juror challenge. Crowder, 196 Wn. App. at 867. However, the juror was questioned, defense counsel made his motion for cause, and the State concurred, all while in open court. Id. As such, the court of appeals held, “[t]here was nothing further to make public.” Id. Crowder could not show that anything substantive occurred during the off-the-record sidebar. Id.

In Edwards’s case, by contrast, the jurors were questioned in open court, but the parties made every one of their for-cause challenges at an

unrecorded, unmemorialized sidebar. Twelve jurors were excused for cause. CP 147-49. This is the substance that was lacking in Crowder.

The State repeatedly contends, without any citation to the record, that defense counsel did not object to any of these twelve jurors being excused. Br. of Resp't, 19 (“Importantly, defense counsel did not object to any of these jurors being excused.”), 20 (“Edwards understandably did not oppose excusing any of these particular jurors.”), 30 (“Edwards did not object to the rulings.”). But the record is silent as to whether either party opposed these for-cause excusals. The record is also silent as to whether the trial court denied for-cause challenges by either party, effectively insulating any such rulings from public scrutiny and from appellate review.

The State also attempts to distinguish State v. Whitlock, 188 Wn.2d 511, 396 P.3d 310 (2017), on its facts. Br. of Resp't, 28. As Edwards noted in his opening brief, the sidebar at issue in Whitlock occurred in chambers, which are closed to the public. Am. Br. of Appellant, 17. The State contends “[t]hat fact alone renders Whitlock inapposite.” Br. of Resp't, 28.

The State misses the mark in two key ways. First, it is the *rule* of Whitlock, first articulated in State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014), that is relevant. The Whitlock court emphasized a “proper” sidebar is one that is contemporaneously recorded and/or promptly memorialized.

188 Wn.2d at 522 (quoting Smith, 181 Wn.2d at 516). Of course, neither occurred in Edwards's case.

Second, the effect of the sidebar in Edwards's case is the same as the in-chambers conference in Whitlock. State v. Schierman, 192 Wn.2d 577, 438 P.3d 1063 (2018), makes this lack of distinction plain. There, a closure occurred when the trial court considered some for-cause and hardship challenges in chambers. Id. at 614 (lead opinion); id. at 747 (Madsen, J., concurring in the lead opinion); id. at 763 (Yu, J., concurring in part and dissenting in part). Whether in chambers or at inaudible, unrecorded, and unmemorialized sidebar, either way the public cannot learn what transpired. The public is ultimately excluded from the proceeding.

The Crower court recognized sidebars generally do not meet the experience and logic test "because they historically have been closed to the public and because public access would not positively enhance the proceedings." 196 Wn. App. at 867. But jury selection has historically been open to the public. State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015). And the lead opinion in Schierman recognized public confidence in the judiciary is enhanced by "real-time observation" of jury selection, which encompasses the parties' arguments and trial court's rulings on for-cause challenges. 192 Wn.2d at 615.

2. WASHINGTON AND RELEVANT FEDERAL LAW RECOGNIZES A CONSPIRACY ENDS WHEN THE COCONSPIRATORS HAVE BEEN ARRESTED.

The State does not cite a single Washington case involving a postarrest statement by a coconspirator. Br. of Resp't, 32-33 (citing, for instance, State v. Israel, 113 Wn. App. 243, 281-82, 54 P.3d 1218 (2002) (prearrest statements by coconspirators); State v. Halley, 77 Wn. App. 149, 150-51, 890 P.2d 511 (1995) (same); State v. Baruso, 72 Wn. App. 603, 615, 865 P.2d 512 (1993) (same)).

Instead, the State relies exclusively on federal authority to contend a conspiracy does not, as a matter of law, end when the coconspirators are arrested. Br. of Resp't, 40-41. Specifically, the State points to decisions by the First, Second, Seventh, and D.C. Circuits so holding. Br. of Resp't, 40-41. Yet the Fifth and Ninth Circuits have held otherwise—that a conspiracy ends when the coconspirators have been arrested. Br. of Appellant, 26 (citing United States v. Postal, 589 F.2d 862, 888 (5th Cir. 1979); accord United States v. Poitier, 623 F.2d 1017, 1020 (5th Cir. 1980); United States v. Di Rodio, 565 F.2d 573, 575 & n.2 (9th Cir. 1977)). The State does not discuss or acknowledge these cases.

Thus, there appears to be a circuit split on the issue. The State's cited cases might be relevant or persuasive, except that our state supreme court has already taken a side. In State v. St. Pierre, 111 Wn.2d 105, 119,

759 P.2d 383 (1988), the court recognized that, in Washington, “[s]tatements made after the conspiracy has ended or following the arrest of one of the alleged coconspirators are not within this exemption.” The federal authority in line with St. Pierre therefore applies here, rather than the federal authority cited by the State.<sup>1</sup>

A conspiracy ends when its objectives “have either failed or been achieved.” Advisory Committee’s Note to FED. R. EVID. 801(d)(2)(E). In Washington, as in the Fifth and Ninth Circuits, the conspiracy has failed when the coconspirators have been arrested. In Edwards’s case, the coconspirators had not only been arrested, they had been charged. They could not “evade getting caught,” as the State claims. Br. of Resp’t, 36. They had already been caught. Their objectives had failed—any conspiracy was over.

3. LEE’S APOLOGY WAS TESTIMONIAL HEARSAY AND SHOULD HAVE BEEN EXCLUDED, HAD DEFENSE COUNSEL OBJECTED TO IT.

The State provides only a cursory two-page response to Edwards’s argument that his trial attorney was ineffective for failing to object to

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<sup>1</sup> The State also attempts to dismiss the rule of Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949). Br. of Resp’t, 41-42. Yet, in Dutton v. Evans, 400 U.S. 74, 81, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), the Court reiterated: “It is settled that in federal conspiracy trials the hearsay exception . . . applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise.”

admission of Lee's apology to the Salzmans. Br. of Resp't, 46-47. The State does not address Edwards's contention that Lee's apology was testimonial and therefore violated Edwards's right to confrontation. Am. Br. of Appellant, 33-34. By failing to address it, the State apparently concedes this point. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). There is no strategic reason for defense counsel's failure to object to otherwise inadmissible testimonial evidence.

Otherwise, the State contends, without support, that Mr. Salzman's testimony regarding Lee's apology was admissible as statement of identification. Br. of Resp't, 47. Under ER 801(d)(1)(iii), statements of identification, "made after perceiving the person," are not hearsay. Mr. Salzman testified he identified two women in photographs and later identified Lee in court when she pleaded guilty. 3RP 100-01. These were the pertinent statements of identification, admissible under ER 801(d)(1)(iii). Lee's apology was not a statement of identification—Mr. Salzman had already identified Lee. Rather, her apology was introduced to establish her participation, and therefore Edwards's, in the Salzman burglary. The evidence was not a proper statement of identification and was not admissible for that purpose.

4. A JUROR WHO IS A WITNESS TO THE ALLEGED CRIMINAL TRANSACTION MUST BE EXCUSED FOR IMPLIED BIAS.

The State contends “Edwards provides no analysis as to how juror 10 was impliedly biased under RCW 4.44.180,” claiming, without support, that “Juror 10 did not demonstrate an *interest in the event* of the action.” Br. of Resp’t, 51. Edwards disagrees. A juror is impliedly biased under RCW 4.44.180(4) if he or she has “[i]nterest on the part of the juror in the event of the action, or the principal question involved therein.”

Washington courts have not considered whether this subsection encompasses a juror who was a witness to some part of the criminal transaction. But courts have “a measure of discretion in determining what constitutes an ‘interest’ within the meaning of RCW 4.44.180(4).” Carle v. McChord Credit Union, 65 Wn. App. 93, 108, 827 P.2d 1070 (1992). This Court has held that an “interest” is one sufficient to cast a reasonable doubt as to whether that trial was fair, as opposed to a minute or remote possibility of prejudice. Rowley v. Group Health Coop. of Puget Sound, 16 Wn. App. 373, 377, 556 P.2d 250 (1976).

Certainly a juror’s personal knowledge of the crime falls within an interest in the event or the principal question involved. Here, Juror No. 10’s memory went to the principal question at trial: Edwards’s identity. Reading RCW 4.44.180(4) in such a way is also consistent with Washington’s

adoption of Justice O'Connor's concurrence in Smith v. Phillips, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (juror is impliedly biased if he or she "was a witness or somehow involved in the criminal transaction"). Am. Br. of Appellant, 43 (citing cases).

Federal circuit courts have applied the doctrine of implied bias. In United States v. Allsup, 566 F.2d 68, 71-72 (9th Cir. 1977), for instance, the Ninth Circuit reversed where two prospective jurors worked for the bank the defendant allegedly robbed, even though they stated they could decide the case fairly.<sup>2</sup> See also Dyer v. Calderon, 151 F.3d 970, 981-82 (9th Cir. 1998) (en banc) (reversing murder conviction for implied bias where prospective juror concealed the murder of her brother during voir dire); United States v. Torres, 128 F.3d 38, 43 (2d Cir. 1997) ("We, like most of the circuits, have repeatedly recognized the category of implied bias. And we have held that if a prospective juror falls within this category, that juror must be excused." (footnote omitted) (citation omitted)).

So, too, should this Court, where Juror No. 10 was likely a witness to part of the alleged criminal transaction. The State makes much of the fact that the juror ultimately could not say whether his memory of Edwards was real or a dream. But, in so emphasizing, the State ignores clear law that

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<sup>2</sup> The Allsup court held the jurors demonstrated actual bias. Allsup, 566 F.2d at 71-72. The Ninth Circuit has subsequently recognized, though, that Allsup involved implied bias. United States v. Kechedzian, 902 F.3d 1023, 1028 (9th Cir. 2018).

“[d]oubts regarding bias must be resolved against the juror.” State v. Cho, 108 Wn. App. 315, 330, 30 P.3d 496 (2001); accord Kechedzian, 902 F.3d at 1027. In order to safeguard Edwards’s right to trial by an unbiased and impartial jury, Juror No. 10 should have been excused.

5. THE DEFECTIVE ROBBERY INSTRUCTIONS WERE NOT HARMLESS WHERE IT REMAINS POSSIBLE THE JURY CONVICTED EDWARDS BASED ON AN UNCHARGED ALTERNATIVE MEANS.

The State appropriately concedes the robbery to-convict instructions were faulty because they contained an uncharged alternative means—that Edwards displayed what appeared to be a firearm or other deadly weapon. Br. of Resp’t, 57. The State contends, however, that the instructional error was harmless beyond a reasonable doubt. Br. of Resp’t, 57-58. In so arguing, the State misapprehends the harmless error analysis applicable to uncharged alternative means.

Such error is not harmless where it remains possible that the jury convicted based on the uncharged alternative. State v. Chino, 117 Wn. App. 531, 540-41, 72 P.3d 256 (2003). The jury clearly could have done so here, where the State’s evidence supported both means. The robber was both armed with a deadly weapon—the nail puller—and displayed the same deadly weapon. By its nature, the nail puller was and appeared to be a deadly weapon.

Contrary to the State’s claim, the robber was not armed with a deadly weapon, to the exclusion of displaying what appeared to be a deadly weapon. Br. of Resp’t, 61 (“There was no evidence or claim that the robber used something appearing to be a firearm or other deadly weapon.”). The supreme court in In re Personal Restraint of Brockie, 178 Wn.2d 532, 538, 309 P.3d 498 (2013), explained the outer bounds of the two alternative means.

For instance, “one may display what *appears* to be a deadly weapon without being armed with an actual deadly weapon (such as when a person displays a realistic-looking toy gun).” Id. On the other hand, “a person may be armed with, but not display, a deadly weapon (such as a gun hidden in a person’s pocket).” Id. Here, the robber did neither—he displayed an actual deadly weapon, thereby also being armed with it. Such conduct encompasses both means.

For this reason, the special verdicts do not establish harmlessness. As Edwards discussed in the opening brief, the jury considered the deadly weapon enhancements only after finding Edwards guilty of robbery. CP 48; Am. Br. of Appellant, 51-52. The jury therefore could have convicted Edwards based on the uncharged alternative means and almost certainly did, where the robber displayed a deadly weapon.

This was precisely the scenario in State v. Brewczynski, 173 Wn. App. 541, 294 P.3d 825 (2013). There, despite special verdicts on firearm enhancements, “it remain[ed] possible that the jury convicted Mr. Brewczynski on the basis of the uncharged alternative.” Id. at 550. The State contends Edwards’s case “is much closer to the facts in [State v. Nicholas, 55 Wn. App. 261, 776 P.2d 1385 (1989)] than Brewczynski.” Br. of Resp’t, 65. But the only distinction between Brewczynski and Edwards’s case is Brewczynski involved alternative means of committing burglary rather than robbery. This is a distinction without a difference—the rule and the result apply with equal force to robbery.

Nicholas is, at best, ambiguous as to whether it applies here. There, the court emphasized, in finding the instructional error harmless, “the jury returned a special verdict in connection with Count I . . . that Nicholas was ‘armed with a deadly weapon at the time of the commission of the crime.’” Nicholas, 55 Wn. App. at 273. The court did not specify whether this was a special verdict on the alternative means or a special verdict on a deadly weapon enhancement. See 11A WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 190.09 (4th ed. 2016) (pattern special verdict form for elements with alternative means). A special verdict on the alternative means would be the only way to guarantee the jury did not rely on the uncharged alternative, making Nicholas distinguishable.

Brewczynski, on the other hand, clearly involved a special verdict on the firearm enhancement, not a special verdict on the alternative means. 173 Wn. App. at 549-50. Brewczynski is therefore directly analogous to Edwards's case. It is also consistent with the clear rule of law that such error requires reversal where it remains possible the jury convicted based on an uncharged alternative means. State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007) ("The error was necessarily prejudicial because, under the instructions given, the jury could have convicted Mr. Laramie of second degree assault based on either the charged or the uncharged alternative means.").

And, though the State now minimizes its closing argument, Br. of Resp't, 62, the State clearly pointed to both means as a basis to convict Edwards of robbery: "And that in the commission of these acts the defendant was armed with a deadly weapon or that in the commission of these acts the defendant displayed what appeared to be a firearm or other deadly weapon." 5RP 471 (emphasis added).

For all these reasons, the State has failed to carry its burden of demonstrating the instructional error was harmless beyond a reasonable doubt. This Court should reverse Edwards's two robbery convictions and remand for a new trial.

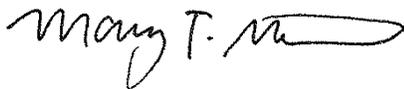
B. CONCLUSION

For the reasons discussed here and in the opening brief, this Court should reverse Edwards's convictions and remand for a new trial. Alternatively, this Court should accept the State's concessions and remand for the trial court to vacate the two convictions that violate double jeopardy, as well as strike the challenged LFOs.

DATED this 16th day of May, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a horizontal line extending to the right from the end of the signature.

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