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NO. 51174-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH EDWARDS,

Appellant.

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

The Honorable Michael Evans, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Joseph Edwards's constitutional right to a public trial during the jury selection process.

2. The trial court erred in admitting several hearsay statements that were not made during or in furtherance of a conspiracy.

3. Defense counsel was ineffective in failing to object to testimonial hearsay statements by a nontestifying codefendant.

4. The trial court violated Edwards's constitutional right to an impartial jury by refusing to dismiss a juror who was biased as a matter of law.

5. The trial court erred in instructing the jury on an uncharged alternative means of committing first degree robbery.

6. The trial court erred in failing to vacate two burglary convictions after concluding they violated double jeopardy.

7a. The \$200 criminal filing fee, \$250 jury demand fee, and \$100 DNA fee should be stricken from the judgment and sentence.

7b. The extradition expenses imposed are discretionary and should be stricken.

7c. Defense counsel was ineffective in agreeing to the imposition of discretionary extradition expenses.

Issues Pertaining to Assignments of Error

1. Is reversal necessary where the trial court violated Edwards's public trial right by considering for-cause challenges at a sidebar conference that was not recorded or memorialized?

2. Is reversal necessary where the trial court erroneously admitted several harmful hearsay statements by a codefendant, made after everyone was arrested and the conspiracy had ended?

3. Is reversal necessary where defense counsel was ineffective in failing to object to a highly damaging testimonial hearsay statement by a nontestifying codefendant?

4. Is reversal necessary where the trial court violated Edwards's right to an impartial jury by refusing to dismiss a juror who suffered both actual and implied bias because he was likely a witness to the criminal transaction?

5. Is reversal of Edwards's first degree robbery convictions necessary where the to-convict instructions contained an uncharged alternative means of committing the crimes?

6. Is remand necessary where the trial court determined one burglary conviction violated double jeopardy and another burglary conviction merged into the robbery offenses, but then failed to vacate those convictions and one corresponding sentence enhancement?

7a. Is remand necessary for the trial court to strike several legal financial obligations (LFOs) from the judgment and sentence under State v. Ramirez, __ Wn.2d __, 426 P.3d 714 (2018)?

7b. Is remand necessary for the trial court to strike discretionary extradition expenses, imposed in a separate order after sentencing?

7c. Alternatively, is remand also necessary for the trial court to strike extradition expenses, where defense counsel was ineffective in agreeing to the discretionary costs?

B. STATEMENT OF THE CASE¹

The State charged Joseph Edwards by amended information with two counts of first degree robbery, three counts of first degree burglary, and two counts of second degree assault, all with deadly weapon enhancements. CP 10-12. All the charges arose from two burglaries allegedly committed by Edwards, Kelsie Lee, and Mescha Johnson on October 28, 2016: one against Alexander and Heather Salzman (counts 1-3), and one against Alexander and Jessica Collazo (counts 4-7). CP 10-12.

Edwards's case was severed from Lee's and Johnson's. CP 144. Edwards proceeded to a jury trial in July of 2017. 1RP 32.² Johnson

¹ Given the length of the brief, this section summarizes mostly substantive evidence. The relevant procedural facts are contained in their corresponding argument sections.

testified for the State. 4RP 337. Lee did not testify. Edwards's defense was identity. 5RP 478.

The Salzmans lived in Kelso, Washington, with their young son. 3RP 79-81. Around 3:00 a.m. on October 28, 2016, Mr. Salzman awoke to his dog growling and heard a light knock at the front door. 3RP 82. Outside was an unfamiliar woman claiming she had been raped. 3RP 82-83. Mr. Salzman let the woman inside while Ms. Salzman let the woman use her iPhone to call a friend. 3RP 82-83, 124. Another woman followed the first woman inside. 3RP 125.

Seconds later, two masked men barged in the front door (count 3, burglary against the Salzmans). 3RP 125. One was shorter and appeared to be Caucasian, with a red bandana covering his face. 3RP 86-87, 125-26. The other was taller and appeared to be a light-skinned African American man, wearing a dark hoody and black ski mask. 3RP 87-88, 125-27. The taller man wielded a crowbar-type object—a nail puller as Mr. Salzman specified—that was about 12 to 16 inches in length. 3RP 85, 94-96, 125-29. Both men wore opaque vinyl or latex gloves. 3RP 87-88, 127, 130.

The two masked intruders demanded a man named Michael Woods, who apparently owed them a large sum of money. 3RP 89, 127-28. The

² This brief refers to the verbatim reports of proceedings as follows: 1RP – July 6, 11, 2017; 2RP – July 11, 12, 2017; 3RP – July 12, 2017; 4RP – July 13, 2017; 5RP – July 14, October 3, 2017.

Salzmans denied they knew any such person. 3RP 90-92, 128. At one point during this exchange, the taller man noticed Mr. Salzman's wallet on a nearby cabinet and pocketed it. 3RP 92. Later, to divert the men's attention from the Salzmans' child, Mr. Salzman offered them his iPhone. 3RP 93-94, 128. All four intruders left shortly thereafter with Mr. Salzman's cellphone and wallet (count 1, robbery), and Ms. Salzman's cellphone (count 2, robbery). 3RP 92, 97-98, 131. The taller man put the crowbar in his sweatshirt sleeve as he left. 3RP 129.

At trial, both Mr. and Ms. Salzman testified the taller man had noticeable metallic dental work. 3RP 88, 128. However, neither of them included this salient fact in their written statements to police, given right after the burglary. 3RP 110-11, 135, 138. Both acknowledged they read news stories about the burglary, which described Edwards's metallic teeth. 3RP 111, 138-39. When Edwards was compelled to stand at trial, the Salzmans confirmed he was approximately the same height and build as the taller masked man. 3RP 97, 134. However, neither could positively identify Edwards as the intruder. 3RP 111-12, 140.

The Salzmans' cellphones were later recovered from Edwards's wife, Yolanda Edwards, in Seattle. 3RP 101-03, 132-33, 206. Mr. Salzman testified he was able to identify "[t]wo females" in photographs police showed him. 3RP 100. Mr. Salzman said one of the women was Lee, who

he later saw plead guilty, at which time Lee apologized to the Salzmans. 3RP 100-01. Defense counsel did not object to this testimony about Lee's apology. 3RP 101. Ms. Salzman likewise testified she identified two women in photographs the police showed her. 3RP 132. However, Ms. Salzman did not specify these women were Lee and Johnson. 3RP 132. No police witnesses testified they showed the Salzmans photographs of Lee or Johnson, or that the Salzmans positively identified the women.

The Collazos also lived in Kelso, Washington, with their five children. 3RP 145. Mr. Collazo did not testify at trial. Ms. Collazo testified, on October 26, 2016, her husband saw their older children off to school around 8:00 a.m., then went back to sleep with her and their three-year-old daughter. 3RP 147. Ms. Collazo testified she awoke to their daughter saying, "Mommy, there's strangers, there's strangers." 3RP 148. Ms. Collazo opened her eyes to see three masked intruders—two women and one man—rushing into their bedroom (counts 4 and 5, burglary against the Collazos). 3RP 148-50, 169. Ms. Collazo remembered being hit in the head with something. 3RP 148.

Ms. Collazo tried to fight one of the women while the man attacked Mr. Collazo with a crowbar. 3RP 149. Ms. Collazo testified she ripped the mask off the woman and recognized her as Johnson. 3RP 149-50. Ms. Collazo and Johnson were friends, and Johnson previously lived with the

Collazos. 3RP 145-46. Ms. Collazo explained Johnson and Edwards, whom she knew as “New York,” formerly dated and had a child together. 3RP 145-47. Ms. Collazo had met New York only twice before, but recalled he has gold teeth. 3RP 145-47, 164. Ms. Collazo claimed she recognized the masked man as New York. 3RP 149-50, 156-57.

As the struggle continued, Ms. Collazo attempted to get a gun from the closet, which prompted Johnson to call for the man’s help. 3RP 150. Ms. Collazo testified the man then hit her in the head with the crowbar, causing her to lose consciousness. 3RP 150. Eventually, Ms. Collazo explained, her husband was able to unlatch their bedroom window and flee. 3RP 150-51. The man and other woman followed Mr. Collazo, while Johnson stayed behind. 3RP 151. Both Mr. and Ms. Collazo were injured from the incident (counts 6 and 7, assault). 3RP 151-53. Ms. Collazo also testified a bag of small electronics was missing afterwards. 3RP 157.

Ms. Collazo admitted at trial that she did not identify New York in her written statement to the police or note that he has gold teeth. 3RP 161, 164. Ms. Collazo further acknowledged the man was masked, but claimed she recognized New York by his voice. 3RP 166. Ms. Collazo alleged she heard Lee’s name used during the incident, but she does not know Lee. 3RP 166, 168-69. She claimed she later identified Lee on Facebook, even though the woman was masked. 3RP 168-69.

The Collazos' neighbor, Heather Delagasse, testified that around 8:15 a.m. that day, she was standing outside when she saw two women and one man run up to the Collazo doorstep from the alley behind their house. 3RP 171-72. Delagasse recognized one of the women as Johnson and the man as Edwards, both of whom she had met before. 3RP 173. Delagasse testified Edwards was wearing a dark hooded sweatshirt and looked like he had something in his sleeve. 3RP 174. Delagasse went inside her house to call Mr. Collazo, who did not answer. 3RP 175. When Delagasse went back outside, she saw Mr. Collazo stumbling down the street, covered in blood. 3RP 175. Delagasse called the police. 3RP 175.

When the police responded, Johnson was still at the Collazo house. 3RP 197. Johnson showed the police her car parked nearby and gave them permission to search it. 3RP 197-98. The police collected several latex gloves from Johnson's car, including two on the backseat, as well as several more in the door pockets. 3RP 198-204. Police also found an identification card belonging to Lee in a backpack in the car. 3RP 205. Johnson was arrested at the scene. 3RP 197.

Police also collected one latex glove discarded on the side of the road near the Salzman home. 3RP 116-17. The Salzmans confirmed the glove looked similar to those the male intruders wore. 3RP 100, 130. Two more latex gloves were found at the Collazo home—one inside near the television

and one outside in the grass. 3RP 118-19, 189-91. All the gloves were tested for Edwards's DNA. 3RP 229-38. The only gloves that could be matched to Edwards were the two from the backseat of Johnson's car. 3RP 231-34; 4RP 305-06. The forensic scientist could not say when Edwards's DNA was deposited. 4RP 300-01.

Arrest warrants issued for Edwards and Lee on October 31, 2016. 3RP 207. An Ohio state trooper pulled Edwards and Lee over for speeding on November 9, 2016. 4RP 289-91. After initial questioning, Edwards admitted he gave the trooper a false name because he wanted "to avoid going to jail on outstanding warrants." 4RP 292. Edwards and Lee were arrested and transported back to Washington. 3RP 207-08; 4RP 292.

Johnson testified at trial that she and Edwards, whose nickname is New York, previously dated and have a child together. 4RP 337-38. She explained Edwards and Lee have been in a relationship since June of 2016. 4RP 338. Johnson pleaded guilty to the burglaries and agreed to testify against Edwards in exchange for a favorable sentence recommendation of only 48 months in prison and the promise to get her children back. 4RP 350, 362. Johnson acknowledged she had been convicted of theft four times since 2014. 4RP 360.

Johnson testified she, Edwards, and Lee were involved in two burglaries on October 28, 2016. 4RP 341-42. The group drove Johnson's

car to the first house where, Johnson explained, Edwards and the other unidentified male demanded money from “Mike,” whom the homeowners did not know. 4RP 342-44. The group left in Johnson’s car, dropped off the other man, hung out for a short time, and then ate at McDonald’s. 4RP 345-46. They then went to the Collazo home, where Johnson testified Edwards beat Mr. Collazo with a crowbar. 4RP 346-48. Johnson admitted she told the police “Shameek” was involved in the burglaries, but claimed Shameek is also one of Edwards’s nicknames. 4RP 349-50.

Later, after her arrest, Johnson testified she saw Lee at the Cowlitz County Jail. 4RP 356. Over a standing defense objection, Johnson testified Lee told her, after the Collazo burglary, she and Edwards stole a car and fled to Seattle, where Edwards’s wife, Yolanda, lives. 4RP 356-57. Lee told Johnson they left the Salzman phones with Yolanda. 4RP 356. Johnson further testified Lee talked about needing to keep their stories straight and stick together. 4RP 357.

Finally, the State introduced three jail letters, one purportedly from Edwards to Johnson and two from Lee to Edwards, sent after all three were arrested. 4RP 332-35. In Edwards’s letter to Johnson, he wrote “48 months is really not that long . . . But me, I’m going straight to prison . . . I’ll be gone for at least 11 years.” Ex. 47. In Lee’s first letter, she discussed writing in code and stated, “listen we have to make sure your [sic] still married to

Yolanda @ trial.” Ex. 46. In Lee’s second letter, she begged for Edwards’s advice after being told by the trial court she would receive the maximum sentence if she did not reveal the identity of the fourth participant in the Salzman burglary. Ex. 48.

The jury returned guilty verdicts on all seven counts, along with deadly weapon enhancements for each count. CP 51-64; 5RP 533-36. At sentencing, the trial court concluded the two Collazo burglaries (counts 4 and 5) violated double jeopardy and further concluded the Salzman burglary (count 3) merged into the two Salzman robberies (counts 1 and 2). 5RP 580-81. The court nevertheless sentenced Edwards to an exceptional sentence of 327 months—36 months above the standard range—based on the aggravating factor that Edwards’s high offender score and multiple current offenses resulted in some of the current offenses going unpunished. CP 103-05, 110; 5RP 589. Edwards timely appealed. CP 117.

C. ARGUMENT

1. CONSIDERING FOR-CAUSE CHALLENGES AT AN UNRECORDED, UNMEMORIALIZED SIDEBAR VIOLATED EDWARDS’S RIGHT TO A PUBLIC TRIAL.

Jury selection began on July 6, 2017 and continued on July 11, 2017. 1RP 20, 32; 2RP 3. Prospective jurors were questioned on the record in the courtroom. 2RP 5 (court), 40 (prosecutor), 64 (defense counsel). The trial court asked the parties to reserve their for-cause challenges until a sidebar

conference at the end of voir dire. 2RP 41-42. At the end of questioning, the court “invite[d] the attorneys forward to exercise their challenges.” 2RP 79-80. The court did not dismiss the jury, but noted they should “feel free to carry on conversations.” 2RP 80.

The clerk’s minutes show the parties exercised their juror challenges at sidebar for approximately 22 minutes, from 11:27 a.m. to 11:49 a.m. CP 151. The sidebar was not contemporaneously recorded or reported, so no transcript is available. Following the sidebar, the trial court read aloud in open court the excused jurors’ names and numbers. 2RP 80-81. The court then read the numbers of the 13 empaneled jurors. 2RP 80-82. At no time did the trial court memorialize the content of the sidebar on the record.

A written struck juror list was filed the same day. CP 146-49. The list includes a voir dire code with “Pla” for the State’s peremptory challenges, “Def” for the defense peremptories, “Cs” for for-cause challenges, “NR” for not reached, “Sw” for sworn jurors, and “Alt” for alternate jurors. CP 147-49. According to the struck juror list, the trial court granted 12 for-cause challenges. CP 147-49. The list does not specify which party exercised which challenge, nor does it state the basis for each challenge. CP 147-49. Neither the clerk’s minutes nor the struck juror list elucidate whether the trial court denied any for-cause challenges. CP 150-51, 147-49.

Recent Washington Supreme Court jurisprudence, State v. Whitlock, 188 Wn.2d 511, 522-23, 396 P.3d 310 (2017), holds that proper sidebars must be recorded or promptly memorialized on the record. Because jury selection implicates the public trial right and the trial court considered for-cause challenges at an unrecorded, unmemorialized sidebar conference, reversal of Edwards’s convictions is necessary.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Article I, section 10 of the Washington Constitution also provides “[j]ustice in all cases shall be administered openly.” This gives the press and public a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The public trial right is a core safeguard in our justice system. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps ensure fair trials, deters perjury and other misconduct, and tempers biases and undue partiality. Id. at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id.

A trial court may restrict the public trial right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before closing any part of trial, therefore, the court must apply the five Bone-Club factors on the record. Id. at 258-59. Courts employ a three-step test for determining whether the public trial right is violated: “(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) if so, was the closure justified?” Whitlock, 188 Wn.2d at 520 (quoting State v. Smith, 181 Wn.2d 508, 521, 334 P.3d 1049 (2014)). Whether the public trial right has been violated is a question of law reviewed de novo, and may be raised for the first time on appeal. Wise, 176 Wn.2d at 9.

The Washington Supreme Court reiterated in State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015), that the public trial right attaches to jury selection, including for-cause and peremptory challenges. Therefore, the sidebar conference at issue here implicated the public trial right. The trial court did not conduct a Bone-Club analysis before hearing for-cause challenges at sidebar, so any closure that occurred was not justified. 2RP 80. As such, the question presented in this case is whether a courtroom closure occurred when the trial court considered for-cause challenges at an unrecorded, unmemorialized sidebar.

In Smith, 181 Wn.2d at 512, the trial court heard evidentiary objections at multiple sidebars, held in the hallway outside the courtroom.

The supreme court held evidentiary sidebars do not implicate the public trial right. Id. at 519. “Proper sidebars,” the court explained, “deal with the mundane issues implicating little public interest.” Id. at 516. “[E]videntiary rulings that are the subject of traditional sidebars do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness.” Id. at 518.

But the Smith court also emphasized, “[c]ritically, the sidebars here were contemporaneously memorialized and recorded, thus negating any concern about secrecy. The public was not prevented from knowing what occurred.” Id. The court further cautioned “that merely characterizing something as a ‘sidebar’ does not make it so.” Id. at 516 n.10. Therefore, “[t]o 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.” Id. The Smith court ultimately did not decide whether a sidebar constitutes a courtroom closure. Id. at 520.

In Love, the court considered whether exercising for-cause challenges orally at the bench and peremptory challenges silently using a “struck juror sheet” violated the public trial right. 183 Wn.2d at 601-02. While the proceeding implicated the public trial right, the court held that no courtroom closure occurred. Id. at 606.

The Love court reasoned no portion of the jury selection process was concealed from the public. Id. at 607. Rather, “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.” Id. And, as in Smith, “[t]he transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publicly available.” Id. The public could therefore scrutinize jury selection from start to finish, affording Love “the safeguards of the public trial right missing in cases where we found closures of jury section.” Id.

Following Love, this Court held a courtroom closure does not occur when for-cause challenges conducted at sidebar are not recorded. State v. Effinger, 194 Wn. App. 554, 561-62, 375 P.3d 701 (2016), review denied, 187 Wn.2d 1008 (2017); State v. Anderson, 194 Wn. App. 547, 377 P.3d 278 (2016). The Anderson court reasoned the public could still “(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.” 194 Wn. App. at 552. The Effinger court likewise found the lack of recording to be “inconsequential” to its analysis. 194 Wn. App. at 563-64.

The Washington Supreme Court’s more recent decision in Whitlock, however, demonstrate Effinger and Anderson are no longer good law. In

Whitlock, the parties discussed and the trial court in chambers ruled on the proper extent of cross-examination of a confidential informant. 188 Wn.2d at 514. The Whitlock court held this proceeding violated the public trial right because it “was definitely not a ‘[p]roper sidebar.’” Id. at 522 (alteration in original) (quoting Smith, 181 Wn.2d at 516). There were three reasons the in-chambers proceeding was not a proper sidebar.

First, “proper” sidebars deal with “mundane issues” such as “scheduling, housekeeping, and decorum.” Id. at 514. A confidential informant’s potential bias did not meet that standard. Id. at 523. Second, chambers are, by definition, closed to the public. Id. at 522. And, third, the in-chambers proceeding “was not recorded or promptly memorialized.” Id. The proceeding was belatedly memorialized after nearly 100 pages of transcript. Id. at 519. The Whitlock court emphasized “there was no reason for any delay in memorialization at all here,” where the defendants were tried by the bench rather than a jury. Id. at 523.

Here, the sidebar conference, at which the trial court considered and ruled on for-cause challenges, was not a proper sidebar, as defined by Smith and Whitlock. The sidebar did not deal with mundane issues, but rather for-cause challenges, which are critical to preserving the accused’s right to a fair trial by an impartial jury. For-cause challenges must be made for specific reasons, as provided in chapter 4.44 RCW. “In order to remove a juror for

cause, a party must be able to state on the record a legally sufficient reason for the challenge.” State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905 (2000). For-cause challenges are distinct from peremptory challenges, for which no reason need be given.³ Id.; RCW 4.44.140.

Most significantly, the sidebar conference in Edwards’s case was not contemporaneously recorded or promptly memorialized, as required by Whitlock. In Love, the public could learn exactly what happened at the sidebar because it was reported and transcribed. Contrary to Effinger and Anderson, Whitlock holds a recording or memorialization is a critical component of a proper sidebar.

The struck juror sheet here was not a satisfactory replacement for the court considering for-cause challenges in open court, or at least with a contemporaneous recording. The sheet specified 12 jurors who were struck for cause. CP 147-49. However, the sheet does not specify which party challenged those jurors or on what basis. Nor does the sheet specify whether the trial court denied any for-cause challenges. This lack of a record effectively insulates jury selection from public scrutiny and from appellate review. It is impossible to tell whether the trial court impermissibly denied or granted for-cause challenges by either party.

³ For this reason, and based on Love, this brief does not challenge the exercise of peremptory challenges at sidebar, because the struck juror sheet was filed the same day. CP 147-49.

And, just as in Whitlock, the record shows no justification for the court's failure to timely memorialize jury selection. The court may not have wanted to excuse the large panel of potential jurors from the courtroom as it considered the parties' for-cause challenges. However, the court excused all the struck and sworn jurors from the courtroom within 10 minutes of the sidebar. 1RP 85; CP 151. With the jury excused, the court could have easily—and promptly—memorialized the sidebar on the record in open court.

Effinger and Anderson can no longer be sustained in the wake of Whitlock, which holds a *proper* sidebar is one that is contemporaneously recorded or promptly memorialized. Neither occurred here. The sidebar therefore constituted an improper courtroom closure that implicated Edwards's public trial right. Generally, a violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Wise, 176 Wn.2d at 13-15.

Recently, five justices agreed a public trial violation may be a de minimis error when applied to certain proceedings that involve “no juror questioning, witness testimony, or presentation of evidence.” State v. Schierman, __ Wn.2d __, 415 P.3d 106, 126 (2018) (lead opinion); id. at 190 (Madsen, J., concurring in lead opinion); id. at 191 (Yu, J., concurring in part and dissenting in part). “[T]he de minimis error inquiry asks to what extent

the particular closure in question undermined the values furthered by the public trial right.” Id. (lead opinion). Factors to consider are (1) the length of and reason for the closure, e.g., whether it was inadvertent; (2) the substance of the closed proceedings; and (3) whether the substance was contemporaneously transcribed or timely memorialized in open court. Id. A de minimis public trial violation does not require reversal. Id.

In Schierman, a closure occurred when the court considered some for-cause and hardship challenges in chambers. Though the closure was not inadvertent, it was brief—only 10 minutes in the context of a months-long aggravated murder trial. Id. The proceeding was also “simultaneously transcribed and then immediately memorialized again in open court.” Id. While these measures were “not a substitute for real-time public observation,” they still “served to remind the court and counsel of their responsibilities and provide a check on possible bias, thereby ensuring the fairness of the proceedings.” Id. The public trial violation was therefore de minimis and did not require reversal. Id. at 126-27.

Edwards’s case is distinguishable from Schierman. First, Edwards’s trial was four days long and the jury heard only two days of testimony. 3RP 79 (testimony begins on July 12, 2017); 4RP 378-82 (State and defense rest on July 13, 2017). The 22-minute closure was both lengthier and more

significant relative to the 10-minute closure in Schierman's months-long death penalty trial.

Second, the trial court in Edwards's case heard every one of the parties' for-cause challenges at sidebar. In Schierman, by contrast, the trial court heard the parties' for-cause challenges in open court and then ruled on them in chambers. 415 P.3d at 118-19.

Third, the sidebar here was not contemporaneously transcribed or immediately memorialized in open court. And, even in Schierman, where the proceeding was closed but recorded, the court emphasized "real-time observation is certainly a better outlet for community 'concern, outrage, and hostility,' than review of a cold record is." Id. (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). Here, there is not even a cold record to review, particularly where it is impossible to tell whether any for-cause challenges were denied. The error was not de minimis.

The unrecorded, unmemorialized sidebar at which the trial court considered for-cause challenges was not a proper sidebar and therefore constituted a courtroom closure absent any Bone-Club analysis. The closure was structural error, necessitating reversal. Whitlock, 188 Wn.2d at 524.

2. THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS THAT WERE NOT MADE DURING OR IN FURTHERANCE OF A CONSPIRACY.

Before trial, the State sought to admit statements Lee made to Johnson after they were both arrested and incarcerated. 3RP 45-47; CP 163-68. The State also sought to admit two letters Lee purportedly wrote to Edwards while both were in jail. 3RP 47-49; 4RP 332-35. The State contended the statements were not hearsay because they were made by a coconspirator “during the course and in furtherance of conspiracy” under ER 801(d)(2)(v). 3RP 45. Defense counsel objected to admission of the statements. 3RP 51-52.

The trial court admitted Lee’s statements, finding “Ms. Lee is clearly a co-conspirator.” 3RP 53. The court reasoned “the conspiracy continues after the commission of any alleged crime.” 3RP 52. The court found Lee’s statements to Johnson in the jail were in furtherance of the conspiracy, noting “there’s an admission of the invasion, that there’s disposal of cellphones that could tie them to any home invasion, about not talking and sticking together.” 3RP 53. The court also found portions of Lee’s letters furthered the conspiracy. 3RP 53.

At trial, Johnson testified she was arrested at the Collazo house while Lee and Edwards fled the scene. 3RP 197, 4RP 348-49. Johnson explained she was charged and had been in jail since November 3, 2016. 4RP 350.

Edwards was likewise charged on October 31, 2016, and an arrest warrant for Edwards and Lee issued the same day. CP 1; 3RP 207. Edwards and Lee were arrested on November 9, 2016. 3RP 206-07; 4RP 261, 291-92.

Johnson claimed she spoke with Lee at the Cowlitz County Jail sometime after they were both arrested.⁴ 4RP 350, 356. Johnson explained:

[Lee] said that her and Joseph stole a car, drove to Seattle to Joseph's wife's house, Yolanda Jackson Edwards, and they stayed there for a couple days. They ended up Joseph told his wife what happened at both the houses, what they had done. They had -- he asked her to borrow \$550 or \$600 or something and she said no.

4RP 356. Johnson testified Lee said she and Edwards took the Salzman phones to Seattle and left them with Edwards's wife. 4RP 356-57.

Johnson responded "[y]es" when the prosecutor asked if Lee talked to her "about the need for all three of you to get your stories straight and stick together or anything like that." 4RP 357. Johnson hedged when the prosecutor asked if she felt like Lee was trying to intimidate her, explaining it was "more like, yeah, intimidate, but maybe like trying to see whether if I was being cooperative with you guys." 4RP 357.

Cowlitz County Jail officers testified they found two letters during a search of Edwards's person and cell. 4RP 332-35; Ex. 46, 48. The letters

⁴ Defense counsel objected to Johnson's testimony on hearsay grounds, but withdrew the objection after being reminded of the court's ruling. 4RP 352-54. The State noted there was a continuing objection from the defense. 4RP 353. Regardless, the party who loses a motion in limine has a standing objection and does not need to make further objections. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

were purportedly from Lee to Edwards while both were incarcerated. 5RP 457. The first, dated February 8, 2017, stated, “listen we have to make sure your [sic] still married to Yolanda @ trial.” Ex. 46. The letter further discussed writing in code about the story “we are using.” Ex. 46.

The second, undated letter was written after Lee had a court appearance and the Salzmans were present. Ex. 48. Lee explained the court threatened to impose the maximum sentence of 10 years if she did not expose the fourth unidentified participant from the Salzman burglary. Ex. 48. Lee pleaded for Edwards’s advice, “What do I do [please write back] now. I need to know what to do . . . Please tell me ASAP.” Ex. 48.

A trial court’s interpretation of the rules of evidence is a question of law reviewed de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Its application of the rules to particular facts is reviewed for abuse of discretion. Id. A trial court abuses its discretion if its decision is manifestly unreasonable, is based on untenable grounds or reasons, or is contrary to the law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Hearsay is an out-of-court statement “offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is inadmissible except as provided by the rules of evidence, other court rules, or by statute. ER 802. Under ER 801(d)(2)(v), a statement is not hearsay if it is offered against a

party and was made by a coconspirator “during the course and in furtherance of the conspiracy.”

Before admitting coconspirator statements, the trial court must make an independent determination that a conspiracy existed and the accused was a member of the conspiracy. State v. Halley, 77 Wn. App. 149, 152, 890 P.2d 511 (1995). Where, as here, a Washington rule of evidence mirrors its federal counterpart, courts may look to federal case law interpreting the federal rule as persuasive authority. In re Detention of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010); Fed. R. Evid. 801(d)(2)(E).

A conspiracy requires “concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.” State v. Sanchez-Guillen, 135 Wn. App. 636, 643, 145 P.3d 406 (2006) (quoting State v. Barnes, 85 Wn. App. 638, 664, 932 P.2d 669 (1997)). A conspiracy ends when its objectives have either failed or been achieved. Krulewitch v. United States, 336 U.S. 440, 442-43, 69 S. Ct. 716, 93 L. Ed. 790 (1949).

In admitting Lee’s statements, the trial court relied on the general rule that “[a] statement meant to induce further participation in the conspiracy or to inform a coconspirator about the status of the conspiracy is sufficient” for the hearsay exemption. State v. Israel, 113 Wn. App. 243, 280, 54 P.3d 1218 (2002). A statement made in “an effort to conceal the

conspirators' illegal activities" may also be sufficient. United States v. Williams, 989 F.2d 1061, 1069 (9th Cir. 1993).

However, the trial court overlooked the additional rule that "[a] coconspirator's participation in a conspiracy ends with his [or her] arrest, and therefore his [or her] postarrest statements are not made during the course of the conspiracy." 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).

In Krulewitch, the U.S. Supreme Court held a conspiracy ends when a coconspirator is arrested, because the objectives of the conspiracy have failed. 336 U.S. at 442-43. The Court rejected the notion that "an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective." Id. at 443. Otherwise, the exemption would encompass "all criminal conspiracy cases," creating "a further breach of the general rule against the admission of hearsay evidence." Id. at 444.

Consistent with Krulewitch, our own state supreme court has held "[s]tatements made after the conspiracy has ended or following the arrest of one of the alleged coconspirators are not within this exemption." State v. St. Pierre, 111 Wn.2d 105, 119, 759 P.2d 383 (1988).

Under this case law, both controlling (St. Pierre) and persuasive (Krulewitch and other federal cases), Lee's statements were inadmissible

hearsay. Lee's in-person statements to Johnson and written statements to Edwards were made after all three coconspirators had been arrested. 4RP 350, 4RP 291-92. Johnson had already confessed to the police and been charged. 4RP 349-50. Edwards, too, was charged on October 31 and arrested with Lee on November 9, 2016. 3RP 207; CP 1. Upon their arrest, the conspiracy ended. Their objective of completing the burglaries and then escaping detection had failed. Because the conspiracy was over, Lee's statements were not made during or in furtherance of a conspiracy. The trial court therefore erred in admitting Lee's jail statements to Johnson, as well as Lee's jail letters to Edwards.

Below, the State relied heavily on an unpublished case, State v. Berniard, No. 47726-2-II, 2017 WL 205522 (Jan. 18, 2017), to argue Lee's statements furthered the conspiracy. 3RP 46; CP 166-67. But the statements at issue in Berniard were all made before any of the coconspirators were arrested, in an attempt to dispose of evidence and escape detection. Berniard, 2017 WL 205522, at *7. Lee's statements are readily distinguishable, as they were made after everyone's arrest, when the conspiracy had failed.

Evidentiary error requires reversal when there is a reasonable probability the outcome of the trial would have been different without the

inadmissible evidence. State v. Grower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

There can be little dispute Lee's statements were harmful to Edwards's identity defense. Neither of the Salzmans could identify Edwards. 3RP 111-12, 140. Only Mr. Salzman could identify Lee, who he later saw plead guilty. 3RP 100-01, 132. But Edwards and Lee obviously associated with each other—Johnson testified they were dating and participated in the burglaries. 4RP 338, 341-42. Edwards and Lee were arrested together in Ohio. 3RP 206-07; 4RP 291-92.

Lee's hearsay statements to Johnson further established she and Edwards initially fled to Seattle, to see Edwards's wife Yolanda. 4RP 356-57. Lee's statements directly connected her and Edwards to the stolen Salzman phones, which were recovered from Yolanda. 3RP 206; 4RP 356-57. This caused particular damage to Edwards's identity defense on the weaker Salzman charges. The statements further amounted to a direct concession of guilt by Edwards—"Joseph told his wife what happened at both the houses, what they had done." 4RP 356. Lee's letters to Edwards likewise suggested knowledge of the crimes and a guilty conscience. Given Edwards's and Lee's association, Edwards's defense rose and fell with Lee and her statements.

Lee's hearsay statements were key components of the State's case and the State repeatedly emphasized them closing argument. See, e.g., 5RP 456 (emphasizing Lee's statements to Johnson), 457-60 (emphasizing Lee's letters to Edwards and reading both aloud to the jury), 461 (again emphasizing Lee's statements, arguing "[a]ll of these things connect with each other"), 467-68 (discussing Lee's statements), 521 (same in rebuttal). After summarizing Lee's statements at length, the State argued, "Now, does that sound like the type of stuff that goes on and this is really a case of mistaken identity?" 4RP 461. The State's closing arguments demonstrate the harmfulness of the evidence. They also exacerbated it.

This Court should reverse Edwards's convictions and remand for a new trial. Grower, 179 Wn.2d at 859.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO TESTIMONIAL HEARSAY BY A NONTESTIFYING CODEFENDANT.

Edwards's codefendant Lee did not testify at Edwards's trial. CP 107. On direct-examination, however, Mr. Salzman testified he was present in court when Lee pleaded guilty. 3RP 100. At that time, Mr. Salzman explained, Lee apologized to him and his wife for the burglary. 3RP 100-01. Defense counsel did not object to this testimony. 3RP 100-01. Counsel was ineffective in failing to object to Lee's out-of-court apology to the Salzmanns, which was both hearsay and testimonial.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) defense counsel's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

To establish ineffective assistance of counsel based on a failure to object, the appellant must demonstrate the objection “would likely have been successful.” State v. Gerdtz, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). Here, a timely objection by defense counsel would or should have been sustained because Lee’s apology to the Salzmans was hearsay. Lee’s apology was an out-of-court statement offered to prove the truth of the matter asserted—that Lee participated in the Salzman burglary. ER 801(c).

But Lee’s apology was not admissible under ER 801(d)(2)(v) as a statement made “during the course and in furtherance of the conspiracy.” The objectives of the conspiracy had unquestionably failed by the time Lee pleaded guilty. The U.S. Supreme Court has held:

[C]onfession or admission by one coconspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it . . . So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators.

Fiswick v. United States, 329 U.S. 211, 217, 67 S. Ct. 224, 91 L. Ed. 196 (1946).⁵ Once she was arrested and then pleaded guilty, Lee ceased being a coconspirator. Lee’s apology to the Salzmans at her plea hearing was an

⁵ See also United States v. Blakey, 960 F.2d 996 (11th Cir. 1992) (“[S]tatements that implicate a coconspirator, like statements that ‘spill the beans’ concerning the conspiracy, are not admissible under [the comparable federal rule.]”); Sanchez-Guillen, 135 Wn. App. at 644 (recognizing holding of Fiswick).

admission of guilt. It was clearly not a statement in furtherance of any conspiracy, but in frustration of it.

Nor was Lee's apology admissible under ER 804(b)(3) as a statement against penal interest. A hearsay statement against penal interest is admissible only if (1) the declarant is unavailable to testify, (2) the statement tends to subject the declarant to liability, and (3) the statement is trustworthy. State v. Jordan, 106 Wn. App. 291, 300, 23 P.3d 1100 (2001). For the purposes of argument, this brief assumes the State could have established Lee's unavailability, though the record is silent on this point. But Lee's apology fails the second two requirements for the hearsay exception.

By the time Lee apologized to the Salzmans for the burglary, she had already reached a plea agreement with the State and pleaded guilty. She was therefore not subject to additional criminal liability for an admission of guilt. St. Pierre, 111 Wn.2d at 118 (holding statements made in the context of a plea bargain were not against penal interest); United States v. Rhodes, 713 F.2d 463, 473 (9th Cir. 1983) (holding statements made after guilty plea were not against penal interest).

Nor was Lee's apology trustworthy or reliable. The Washington Supreme Court has held "[a] confession made by a person in custody and in the context of a plea bargain is inherently untrustworthy; even though part of the statement on its face is against the declarant's interest, the statement may

actually have been made to gain advantage.” St. Pierre, 111 Wn.2d at 118; see also State v. Parris, 98 Wn.2d 140, 151, 654 P.2d 77 (1982) (expressing concern about the reliability of statements made as part of a plea bargain); United States v. Bailey, 581 F.2d 341, 350 (3d Cir. 1978) (holding statements made during plea negotiations were not trustworthy). An apology to the Salzmans, even if hollow or untrue, may have curried favor with the sentencing court and garnered Lee a more favorable sentence. Because Lee’s out-of-court apology does not meet a hearsay exception, it should have been objected to and excluded.

Lee’s apology is additionally problematic because it was testimonial. A person accused of a criminal offense has the right to confront the witnesses against him. U.S. CONST. amend. VI; CONST. art. I, § 22. The confrontation clause bars admission of testimonial statements by a witness who does not appear at trial, unless the witness is unable to testify and the accused had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

In Crawford, the U.S. Supreme Court defined “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Id. at 51 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). The Court explained “[a]n accuser who makes a formal statement to government officers bears

testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Id. Thus, statements in furtherance of a conspiracy are typically not testimonial, while confessions, prior testimony, formal statements to police, and the like are testimonial. Id. at 51-52, 56; State v. Wilcoxon, 185 Wn.2d 324, 334-35, 373 P.3d 224 (2016).

Under the Crawford standard, Lee’s out-of-court apology, made at her plea hearing, was testimonial. It was a formal statement, made on the record, akin to a confession or live testimony. 3RP 100-01. Federal circuit courts hold a plea allocution by a coconspirator is testimonial, in part because “it is formally given in court.” United States v. McClain, 377 F.3d 219, 221-22 (2d Cir. 2004); see also United States v. Lopez-Medina, 596 F.3d 716, 734 (10th Cir. 2010). Thus, Lee’s apology was the functional equivalent of live testimony, without a previous opportunity for Edwards to cross-examine her.

The trial court should have sustained a defense objection had it been made, where Lee’s apology was both hearsay and testimonial. Under the same reasoning, defense counsel did not make a legitimate tactical choice in failing to object.⁶ Defense attorneys have a duty to know the law and object

⁶ Defense counsel made few objections throughout the course of trial. Counsel did not file a single motion in limine. 3RP 74. Nor did counsel file a sentencing memorandum, despite the State’s request for an exceptional sentence. Even in opposing the State’s motions in limine, counsel largely objected just “for the record,” without stating much basis for doing so. 3RP 51, 56, 67, 71. Counsel made only

accordingly. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009).

Where a failure to object is unjustified on grounds of trial tactics, it constitutes deficient performance. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (counsel deficient for failing to object to defendant's prior drug convictions); State v. C.D.W., 76 Wn. App. 761, 764, 887 P.2d 911 (1995) (counsel deficient for failing to object to defendant's confession). There is no reasonable strategy in allowing the jury to hear an inadmissible confession by a codefendant. This is particularly true where Lee and Edwards were romantic partners and were arrested together shortly after the burglaries.

For the same reason defense counsel's failure to object constituted deficient performance, that failure was also prejudicial to the outcome of Edwards's trial. The State alleged Lee and Edwards acted in concert to commit the burglaries. The jury was instructed on accomplice liability. CP 23. Lee's apology to the Salzmans meant she accepted responsibility for the burglaries and expressed remorse for them. An apology was significantly more probative than a simple guilty plea, which may be entered to avoid a

three contemporaneous objections during trial, one of which he withdrew. 3RP 212-13, 351, 352-54. At sentencing, Edwards expressed frustration regarding his attorney's lack of investigation and preparation. 5RP 569-71. Consistent with this, defense counsel admitted during his cross-examination of Delagasse—a critical eyewitness to the Collazo burglary—that he never interviewed her. 3RP 177-78.

harsh prison sentence and not necessarily out of real remorse.⁷ Ergo, Edwards must also be guilty of the burglaries, as Lee's partner and coconspirator. See United States v. Hardwick, 523 F.3d 94, 99 (2d Cir. 2008) (recognizing coconspirator's plea allocation was a direct admission of guilt and therefore "almost certainly contributed to the jury's verdict").

Like Lee's other hearsay statements, the State repeatedly emphasized Lee's apology in closing argument. 5RP 455 ("And Kelsie Lee even apologized as Mr. Salzman testified in court when she pled guilty."), 460 ("The Salzmans explained to the court she even apologized."). There is a reasonable probability that, but for defense counsel's failure to object and obtain exclusion of Lee's apology to the Salzmans, the outcome of Edwards's trial would have been different. This Court should reverse Edwards's convictions and remand for a new trial because he was denied effective assistance of counsel.

4. THE TRIAL COURT VIOLATED EDWARDS'S RIGHT TO AN IMPARTIAL JURY BY REFUSING TO DISMISS A JUROR WHO WAS BIASED AS A MATTER OF LAW.

The trial court seated only one alternate juror. CP 147-49.

⁷ Indeed, Edwards stated at sentencing that Lee entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). 5RP 570-71. "In an Alford plea, the accused technically does not acknowledge guilt but concedes there is sufficient evidence to support a conviction." In re Pers. Restraint of Cross, 178 Wn.2d 519, 521, 309 P.3d 1186 (2013).

On the second day of testimony, Sheriff's Deputy Danny O'Neill testified he responded to a containment call following the burglaries. 4RP 324. Around 8:30 a.m., near the Kelso Police Station, O'Neill saw a man matching Edwards's description, riding a bicycle. 4RP 323-25. O'Neill testified they made eye contact, which caused the man to start "pedaling away pretty quick." 4RP 325. O'Neill was later shown a picture of Edwards and recognized him as the man on the bicycle. 4RP 321-26. The State and defense both rested their cases that same day. 4RP 378, 382.

As the parties reconvened the next morning, the trial court informed them that a juror had been taken to the hospital after suffering an anxiety attack and seizure. 5RP 415-16. The bailiff also alerted the court to an issue with another juror, Juror No. 10, who wanted to speak privately with the court. 5RP 416-17. The court called in Juror No. 10 for a colloquy. 5RP 417. The juror told the court, "Actually, I'd like to do that in private if that would be possible," which the court refused. 5RP 417. The following occurred:

JUROR: I've either had in the past a dream or a memory of this case.

COURT: All right.

JUROR: I believe I received a phone call from my brother within the past two years where he asked me to come to his house and help him move some goods that he had. It was in the morning. I don't remember -- I remember

arriving and was nervous. My brother lives in South Kelso. And as I came to house to help me, and I thought he had some boxes that were in the street that needed to be moved or something akin to that.

COURT: Uh-huh.

JUROR: I don't know. Anyway, as I came there, a fellow came riding up on a bike and I hadn't remembered anything about this until there was a discussion about a fellow riding on a bike, but it was a fellow that had tattoos on his hands and he was talking to my brother and said -- they were discussing and didn't want me to hear, and so eventually he came over and there was a discussion about possibly somebody needed to change their ID or something, and he's got tattoos on your hand, you need to have your hands removed because it's obvious that somebody could identify you from that.

And there was a little more discussion about -- with him and my brother and then he rode down the road and my brother said, well, I don't need you anymore, and I left.

And I only brought that up because I felt that now my -- I'm clouded with this thinking that perhaps I'm involved somehow with this case.

COURT: Okay. And you said that was sometime in the past two years or so?

JUROR: It's been in the past. I can't remember the time. That's -- you know, memory is, you know, sometimes a bad thing.

COURT: Sure.

JUROR: But, yes, it has been within the past two years.

COURT: So do you feel that the man on the bike was somebody involved in this case or not?

JUROR: I believe the man on the bike was the defendant.

5RP 418-19.

Juror No. 10 explained he “could not swear to” whether his memory was a dream or “something that actually occurred.” 5RP 419-20. The court asked whether the memory was something the juror “could separate and put to the side and not consider.” 5RP 420. The juror replied, “I believe I could, but -- I could focus on the facts of the trial.” 5RP 420. The juror further explained, “But I don’t believe because I cannot tell you whether it was a dream or whether it was a reality, then I can’t -- I don’t allow that to affect me . . . Because it’s so faded I don’t believe it will affect.” 5RP 420. When asked if he had any positive or negative feelings about the interaction, he said it “caused me to be nervous, but other than that I don’t really have any feeling one way or the other.” 5RP 421.

The prosecutor declined to ask the juror any questions. 5RP 421. Defense counsel asked the juror if he had talked to anyone about his memory. 5RP 421. The juror responded, “No, because the nature of it I didn’t want to be made fun of.” 5RP 421. When asked if the memory would influence his verdict at all, the juror answered:

I don’t believe so. You know, as far as -- as far as thoughts, memories affecting the person, I don’t know. Honestly, you know, I can’t -- can’t say whether the weather

affects me or not. You understand what I'm saying? I doubt that it would affect any thought I would have on it. I think I can judge the -- judge the evidence as it is.

5RP 422. The court allowed the juror to return to the jury room and instructed him, “[d]on’t convey that to any of the jury members.” 5RP 422.

Defense counsel moved to excuse the juror. 5RP 423. The trial court denied the motion, reasoning the juror could not recall whether it was an actual memory or a dream. 4RP 424. The court also believed the juror could set aside the information, remain neutral, and would not share the memory with any other jurors. 4RP 424.

The trial court then stated its wish to excuse the other juror who was undergoing medical treatment. 4RP 425-26. Defense counsel again expressed concern, given Juror No. 10’s unique memory of the case. 4RP 426-27. The court nevertheless designated the ill juror as the one alternate and excused her. 4RP 428. The court read the jury instructions and the parties gave their closing arguments. 5RP 430, 451. Juror No. 10 remained on the jury, deliberated, and reached a guilty verdict. 4RP 428, 538.

Both our state and federal constitution guarantee the right to trial by an impartial jury, which “requires a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct.” State v. Boiko, 138 Wn. App. 256, 260, 156 P.3d 934 (2007); U.S. CONST. amend. VI; CONST. art. I, § 21. An impartial jury is one “capable and willing to decide the case solely on the

evidence before it.” Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). “Even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury.” Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir. 1990) (internal quotations marks omitted).

In Washington, dismissal of a sitting juror is also controlled by statute and rule:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110; see also CrR 6.5 (requiring court to discharge a juror “found unable to perform the duties” at “any time before submission of the case to the jury”). “Together, the statute and rule ‘place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.’” State v. Van Elsloo, __ Wn.2d __, 425 P.3d 807, 815 (2018) (lead opinion) (quoting State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000)). A trial court’s decision to remove or retain a juror is reviewed for abuse of discretion. Jorden, 103 Wn. App. at 226.

A juror may be excused for actual or implied bias. RCW 4.44.170; “Actual bias differs from implied bias in that where implied bias exists, it is

conclusively presumed from the facts shown; whereas, in cases where actual bias is claimed it must be established by proof.”⁸ State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991); accord State v. Cho, 108 Wn. App. 315, 325, 30 P.3d 496 (2001). Any doubt regarding juror bias must be resolved against the juror. Cho, 108 Wn. App. at 330.

Some circumstances will necessarily give rise to a presumption of bias. Cho, 108 Wn. App. at 325 & n.5. In her concurrence in Smith, Justice O’Connor detailed “extreme situations that would justify a finding of implied bias.” 455 U.S. at 222 (O’Connor, J., concurring). Some examples she gave were “the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.” Id. (emphasis added). Justice O’Connor believed, even if the lower court found such a juror unbiased, “the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.” Id.

⁸ “Actual bias” is defined as “the existence of a state of mind on the part of the juror in reference . . . to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). “Implied bias” has several definitions, including “(1) Consanguinity or affinity within the fourth degree to either party”; “(3) Having served as a juror on a previous trial in the same action”; and (4) “Interest on the part of the juror in the event of the action, or the principal question involved therein.” RCW 4.44.180.

Justice O'Connor's concurring opinion in Smith now has majority force in that it was relied upon by the five concurring justices in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984). Cho, 108 Wn. App. at 325 n.5. Washington courts have accordingly followed Justice O'Connor's Smith concurrence.⁹ See, e.g., In re Pers. Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013); Cho, 108 Wn. App. at 325 & n.5; Boiko, 138 Wn. App. at 261-62.

Until the recent decision in State v. Winborne, 4 Wn. App. 2d 147, 420 P.3d 707 (2018), very few Washington cases addressed juror bias when a juror "was a witness or somehow involved in the criminal transaction." Winborne was charged with several crimes, including two counts of attempting to elude a police vehicle. Id. at 154. During deliberations, the jury informed the court that a juror realized he was a witness to one of the eluding incidents. Id. at 155. The trial court declined to question the juror and denied Winborne's motion to dismiss the juror. Id. at 156.

A majority of the Winborne panel concluded "[t]he seating of a juror with percipient knowledge of facts comprising the criminal charges compromises" the right to an unbiased and impartial jury. Id. at 160. The

⁹ See also Solis v. Cockrell, 342 F.3d 392, 395 & n.6 (5th Cir. 2003) (discussing doctrine of implied bias and noting McDonough affirmed its "continuing vitality"); Tinsley, 895 F.2d at 528 (applying implied bias doctrine).

court believed “[a] juror’s witness to some of the litigated events implicates actual bias, not implied bias.” Id. at 159.

The court found controlling State v. Stentz, 30 Wash. 134, 70 P. 241 (1902), abrogated on other grounds by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001), “despite its age.” Winborne, 4 Wn. App. 2d at 164. The Stentz court held a juror with personal knowledge of incriminating facts “should be removed even if he declares that he will not allow his knowledge to influence him but will reach a verdict solely on the evidence presented during trial.” Winborne, 4 Wn. App. 2d at 166. The Winborne court found persuasive the fact that Stentz relied on a definition of actual bias that echoes the current statutory definition in RCW 4.44.170. Id. at 165-66.

Applying Stentz to Winborne’s case, the court concluded reversal was necessary. The juror “held percipient knowledge of the events, about which the State prosecuted [Winborne].” Id. at 168. Most worrisome was the “juror had knowledge relating to disputed facts.” Id. The Winborne court found the error to be structural because, “[u]nder Washington case law, a determination of actual juror bias cannot be harmless.” Id. at 172.

Here, the trial court understandably did not want to dismiss Juror No. 10 because the already planned to designate the ill juror as an alternate and excuse her. The jury was reduced to 12 members, with no alternate. The

trial court would have been compelled to grant a mistrial. But Edwards's right to an impartial, unbiased jury demanded dismissal of Juror No. 10.

Both Smith and Winborne are on point. Deputy O'Neill's testimony about seeing Edwards riding a bicycle shortly after the Collazo burglary jogged the juror's memory of his own interaction with Edwards. 5RP 418-19. The juror described what appeared to be an event he knew was real—helping his brother moving boxes in South Kelso, which made him “nervous.” 5RP 418. The juror recalled Edwards was riding a bicycle and had tattoos on his hands. 5RP 418-19. Significantly, during voir dire, a juror mentioned a tattoo on Edwards's hand: “I noticed he had two lines on the back of his left hand.” 2RP 67.

The juror remembered his brother and Edwards talking “about possible somebody needed to change their ID or something,” but noting Edwards would have to remove his hands given the obvious tattoos. 5RP 418. The juror stated, unequivocally, “I believe the man on the bike was the defendant.” 5RP 419. Juror No. 10 was therefore “a witness or somehow involved in the criminal transaction,” resulting in implied bias.

Though the juror could not swear whether the described incident was a memory or a dream, the incident was entirely consistent with the evidence. It seems exceedingly unlikely, if not impossible, that the juror has a specific memory about an interaction with Edwards, consistent with the evidence,

that was actually a dream. The juror told the court he “either had in the past a dream or a memory of this case.” 5RP 418. How could an individual have a past dream about a person he did not know, unless the interaction was real? The juror further noted his thoughts were “clouded” with worry and he felt “nervous.” 5RP 419, 421. The juror correctly feared he was “involved somehow with this case.” 5RP 419. And, perhaps mostly significantly, “[d]oubts regarding bias must resolved against the juror.” Winborne, 4 Wn. App. 2d at 172. Thus, any lingering doubt as to whether the juror recalled an actual memory rather than a dream must be resolved against the juror.

The juror’s memory also implicates actual bias, as in Winborne. He had personal knowledge of disputed facts—specifically, Edwards’s identity, which was the key disputed issue at trial. 5RP 451 (State arguing “[i]t’s just a question of who those people were”), 478 (defense counsel asserting, “[i]t’s identification, all right, and me and [the prosecutor] agree on that. It’s really just did Mr. Edwards do this?”). Juror No. 10 knew Edwards talked about needing to change his identification, implying Edwards was on the run and corroborating the State’s allegations that Edwards burglarized the Salzman and Collazo homes. Juror No. 10 also possessed unique insight into the truthfulness of Deputy O’Neill’s testimony.

As Winborne holds, the juror’s protestations of fairness and promise to disregard his memory of the incident are irrelevant. The Winborne court

held a juror with percipient knowledge of the crime “should be removed even if he declares that he will not allow his knowledge to influence him but will reach a verdict solely on the evidence presented during trial.” 4 Wn. App. 2d at 175. “[S]uch a juror is not an impartial one, even though he says he is.” Id. The law deems it impossible for Juror No. 10 to set aside his personal knowledge of the crime and deliberate impartially.

With his personal knowledge of the crime, Juror No. 10 was impliedly biased under Smith and actually biased under Winborne. Violation of the right to an impartial jury is “classic structural error.” State v. Berniard, 182 Wn. App. 106, 123-24, 327 P.3d 1290 (2014). As such, “[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice. State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015).

A biased juror sat on Edwards’s jury, deliberated, and found him guilty. The error is structural, requiring reversal of Edwards’s convictions. Winborne, 4 Wn. App. 2d at 170; Irby, 187 Wn. App. at 197.

5. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF FIRST DEGREE ROBBERY.

A person is guilty of first degree robbery if, in the commission of a robbery or immediate flight therefrom, he “(i) Is armed with a deadly weapon; or (ii) Displays what appears to be a firearm or other deadly

weapon.” RCW 9A.56.200(1)(a). Being armed with a deadly weapon and displaying what appears to be a deadly weapon are alternative means of committing first degree robbery. In re Pers. Restraint of Brockie, 178 Wn.2d 532, 538, 309 P.3d 498 (2013).

Edwards was charged with two counts of first degree robbery—one against Mr. Salzman for stealing his cellphone and wallet (count 1), and one against Ms. Salzman for stealing her cellphone (count 2). CP 11. The charges contained identical language and alleged only the alternative that “the defendant was armed with a deadly weapon,” citing RCW 9A.56.200(1)(a)(i). CP 11. The information did not allege the alternative that Edwards displayed what appeared to be a deadly weapon. CP 11.

The to-convict instructions for both charges, however, contained the uncharged alternative means of committing first degree robbery:

(6)(a) That in the commission of these acts the defendant was armed with a deadly weapon; or

(b) That in the commission of these acts the defendant displayed what appeared to be a firearm or other deadly weapon.

CP 38-41 (Instructions 22 and 23). The jury was instructed it did not need to be unanimous as to which of these alternatives means had been proved beyond a reasonable doubt. CP 38-41.

“Failing to properly notify a defendant of the nature and cause of the accusation of a criminal charge is a constitutional violation.” Brockie, 178 Wn.2d at 536. An information may allege alternative means of committing the charged crime, “provided the alternatives are not repugnant to one another.” State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). However, “[i]t is error to instruct the jury on alternative means that are not contained in the charging document,” regardless of the strength of the trial evidence. State v. Brewczynski, 173 Wn. App. 541, 549, 294 P.3d 825 (2013); State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

State v. Nicholas, 55 Wn. App. 261, 776 P.2d 1385 (1989), is on point. There, the State charged Nicholas with first degree robbery based only on the means of being armed with a deadly weapon. Id. at 273. The trial court therefore erred in instructing the jury on the additional, uncharged means of displaying what appeared to be a deadly weapon. Id. at 272-73.

Just like in Nicholas, the State did not charge Edwards with the alternative means of displaying what appeared to be a deadly weapon, yet the trial court instructed on that uncharged means. This was error under clear and controlling case law. Although defense counsel did not object, instruction on an uncharged alternative means is an error of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). 4RP 410; Chino, 117 Wn. App. at 538.

“An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless.” Bray, 52 Wn. App. at 34-35. Because a jury instruction that contains uncharged alternative means is presumed prejudicial, “[o]n direct appeal, it is the State’s burden to prove that the error was harmless.” Brockie, 178 Wn.2d at 536.

Such an error may be harmless “if the other instructions clearly limit the crime to the charged alternative.” Brewczynski, 173 Wn. App. at 549. The error may also be harmless “if other instructions clearly and specifically define the charged crime.” Chino, 117 Wn. App. at 540. The error is not harmless, however, where it remains possible the jury convicted the accused based on the uncharged alternative. Id. at 540-41.

Here, none of the remaining instructions limited the jury to considering only the charged “armed with a deadly weapon” alternative of committing first degree robbery. The definitional instruction included both the charged and uncharged alternative means. CP 28. Likewise, in closing argument, the State urged the jury to consider both alternative means. 5RP 471; Brewczynski, 173 Wn. App. at 549 (considering this significant in the harmless error analysis).

The State may argue the error was harmless because the jury returned special verdict forms on the deadly weapon enhancements, finding

Edwards was armed with a deadly weapon during all the offenses, including the robberies. CP 58-59. Any such argument should be rejected.

In Nicholas, the court held the instructional error harmless because the jury returned a special verdict form on the charged crime, finding Nicholas guilty of the charged means (armed with a deadly weapon). 55 Wn. App. at 273. It was therefore impossible that the jury convicted Nicholas based on the uncharged means. Id.

Not so in Brewczynski. There, the State charged Brewczynski with first degree burglary based only on the means that he was armed with a deadly weapon (a handgun). 173 Wn. App. at 548-49. The to-convict instruction erroneously included the uncharged alternative means of assaulting any person. Id. at 549. The jury returned a general verdict form on the burglary and a special verdict form on a firearm enhancement, finding Brewczynski was armed with a firearm during the burglary. Id. Despite the firearm enhancement finding, the court held the error was not harmless—“it remain[ed] possible that the jury convicted Mr. Brewczynski on the basis of the uncharged alternative.” Id. at 550.

Edwards’s case is akin to Brewczynski rather than Nicholas. There are no special verdicts forms related to the robbery alternative means, as there was in Nicholas. Rather, there are general verdict forms where the jury found Edwards guilty of both counts of robbery, without specifying which

means it relied on, just as in Brewczynski. CP 51-52. Edwards's jury was instructed to consider the enhancement special verdict forms only *after* a finding of guilt on the robberies. CP 48. The special verdict forms establish only that the jury found Edwards was armed with a deadly weapon for purposes of the deadly weapon enhancement. They do not establish the jury relied only on the charged means of first degree robbery.

Thus, unlike Nicholas, no special verdict in Edwards's case ensured the jury reached a verdict based solely on the charged alternative means of robbery. It remains possible the jury convicted based on the uncharged alternative means, making the error not harmless. Reversal of Edwards's two robbery convictions is required. Brewczynski, 173 Wn. App. at 550.

6. TWO BURGLARY CONVICTIONS THE TRIAL COURT DETERMINED VIOLATED DOUBLE JEOPARDY MUST BE VACATED.

Double jeopardy prohibits a person from being "twice put in jeopardy for the same offense." CONST. art. I, § 9; see also U.S. CONST. amend. V. While a defendant may face multiple charges arising from the same conduct, the double jeopardy prohibition forbids a trial court from entering multiple convictions for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). When two convictions violate double jeopardy, the proper remedy is to vacate the lesser offense. State v. Turner, 169 Wn.2d 448, 466, 238 P.3d 461 (2010).

The State obtained two convictions for first degree burglary with deadly weapon enhancements against Mr. Collazo (count 4) and Ms. Collazo (count 5), for the same act of entry into the Collazo home. CP 11-12, 43-44, 54-55, 61-62. First degree burglary is a class A felony, so the deadly weapon enhancement for each burglary conviction is two years. RCW 9A.52.020(2); RCW 9.94A.533(4)(a). Deadly weapon enhancements must be run consecutively to one another. RCW 9.94A.533(4)(e).

At sentencing, the State conceded and the trial agreed the two Collazo burglary convictions violated double jeopardy. 5RP 548, 580; State v. Brooks, 113 Wn. App. 397, 53 P.3d 1048 (2002) (holding two burglary convictions arising from “only one act of entering [a] building” violates double jeopardy). In calculating Edwards’s offender score, the State properly included only one of these burglary convictions. CP 99, 182; 5RP 582. The State also correctly included only one corresponding deadly weapon enhancement in adjusting Edwards’s standard range sentence. CP 103-04; 5RP 581-82.

However, the judgment and sentence still reflects the entry of a conviction for both burglary offenses, despite the double jeopardy finding. CP 100-05. This is error. A “[c]onviction in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect.” State v. Calle, 125 Wn.2d 769, 774, 888 P.2d 155 (1995) (quoting State v.

Johnson, 92 Wn.2d 671, 679, 600 P.2d 1249 (1979)). Therefore, the supreme court has held, “[t]o assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction.” Turner, 169 Wn.2d at 464.

This Court should accordingly remand for the trial court to vacate one of the Collazo burglary convictions (count 4 or 5) and strike all reference to it in the judgment and sentence. Id. at 466.

Regarding the Salzmans, the State obtained three convictions: one first degree robbery against Mr. Salzman (count 1), one first degree robbery against Ms. Salzman (count 2), and one first degree burglary for entry into the Salzman home (count 3), all with two-year deadly weapon enhancements. CP 11, 38-42, 51-53, 58-60.

The trial court determined the first degree burglary against the Salzmans (count 3) merged into the two counts of first degree robbery. 5RP 580-81. In other words, the burglary conviction merged while the two robbery convictions remained. 5RP 580-81. The State properly reduced Edwards’s offender score by two points, noting the court’s decision “would eliminate one other current offense.” 5RP 581; CP 103-04.

Like the Collazo burglary convictions, however, the judgment and sentence still reflects entry of the Salzman burglary (count 3). CP 100-05. The court also failed to remove the corresponding two-year deadly weapon

enhancement from the standard range sentence for each remaining offense.¹⁰
CP 100-04. This, again, is error.

Merger is essentially an operation of double jeopardy. Freeman, 153 Wn.2d at 772. “Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, [courts] presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” Id. at 772-73. Following a determination that two offenses merge, the proper remedy is to vacate the lesser offense. In re Pers. Restraint of Francis, 170 Wn.2d 517, 525, 242 P.3d 866 (2010) (holding, where two offenders merged, “the trial court violated double jeopardy when it entered convictions on both offenses”); State v. Chesnokov, 175 Wn. App. 345, 349, 355-56, 305 P.3d 1103 (2013).

The trial court correctly determined the Salzman burglary was the lesser offense of the two robbery convictions because it carries a lesser sentence.¹¹ RCW 9.94A.510, .515; State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006) (“[W]e follow the straightforward approach of vacating

¹⁰ The two first degree robberies and two first degree burglaries (class A felonies with two-year enhancements), plus the two second degree assaults (class B felonies with one-year enhancements), added up to a total of 120 months. CP 103-04, 185-86; RCW 9.94A.533(4)(a), (b).

¹¹ Under the burglary anti-merger statute, the trial court could have, but obviously did not, exercised its discretion not to merge the burglary and robbery offenses. RCW 9A.52.050; 5RP 549 (State discussing burglary anti-merger statute). The State has not appealed the trial court’s determination of merger.

the offense that carries the lesser sentence as the lesser offense.”). This Court should accordingly remand for the trial court to vacate the Salzman burglary (count 3) and strike all reference to it in the judgment and sentence. Turner, 169 Wn.2d at 466.

Additionally, this Court should remand for the trial court to vacate the corresponding deadly weapon enhancement for the Salzman burglary. Given the trial court’s merger ruling, the Salzman burglary conviction no longer exists and so cannot carry a sentence enhancement. RCW 9.94A.533(4) (enhancement mandatory “for all offenses sentenced under this chapter” (emphasis added)); State v. Davis, 177 Wn. App. 454, 465 n.10, 311 P.3d 1278 (2013) (“If an offense is vacated and the defendant is not sentenced for it, RCW 9.94A.533 does not provide a basis for imposing a term for the corresponding firearm enhancement.”).

The standard range sentence for each remaining crime should accordingly be reduced by 24 months (from 120 to 96 months). CP 103-04. The trial court should be allowed to consider whether this reduction in the standard range impacts its ultimate sentence determination. See 5RP 588-89 (trial court adding 36 months to the top of the standard range); State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (holding resentencing based on offender score miscalculation unnecessary only where it is apparent the trial court would impose the same sentence).

7. SEVERAL LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN BASED ON EDWARDS'S INDIGENCY AT THE TIME OF SENTENCING.

In Ramirez, 426 P.3d at 717, 722, the Washington Supreme Court discussed and applied House Bill (HB) 1783, which took effect on June 7, 2018 and applies prospectively to cases on direct appeal. HB 1783 amended RCW 10.01.160(3) to mandate: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Laws of 2018, ch. 269, § 6. The bill also amended RCW 36.18.020(2)(h) to prohibit imposing the \$200 criminal filing fee on indigent defendants. Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(c), a person is “indigent” if he or she receives an annual income after taxes of 125 percent or less of the current federal poverty level.

This amendment “conclusively establishes that courts do not have discretion to impose such LFOs” on individuals “who are indigent at the time of sentencing.” Ramirez, 426 P.3d at 723. In Ramirez, the court struck discretionary LFOs and the \$200 criminal filing fee because Ramirez was indigent at the time of sentencing. Id.

- a. The \$200 criminal filing fee, \$250 jury demand fee, and \$100 DNA fee should be stricken from the judgment and sentence.

At sentencing, Edwards was ordered to pay the \$200 criminal filing fee, a \$250 jury demand fee, and the \$100 DNA collection fee. CP 106-07.

The trial court, however, found Edwards to be indigent and allowed him to seek appellate review at public expense. CP 114-16. HB 1783 applies prospectively to Edwards because his direct appeal is still pending. Because Edwards was indigent at the time of sentencing, the trial court improperly imposed the \$200 criminal filing fee. Ramirez, 426 P.3d at 723.

Although not explicitly addressed by Ramirez, the jury fee statute, RCW 10.46.190, was also amended by HB 1783. Laws of 2018, ch. 269, § 9. RCW 10.46.190 now reads, “Every person convicted of a crime or held of bail to keep the peace may be liable to all the costs of the proceedings against him or her, including, when tried by a jury.” (Emphasis added.) The jury demand fee is therefore discretionary, as “the word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Under the current version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants. Ramirez, 426 P.3d at 722-23. The trial court therefore improperly imposed the discretionary \$250 jury demand fee under Ramirez.

HB 1783 also amended RCW 43.43.7541 to read, “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction.” Laws of 2018, ch. 269, § 18 (emphasis

added). This amendment “establishes that the DNA database fee is no longer mandatory if the offender’s DNA has been collected because of a prior conviction.” Ramirez, 426 P.3d at 721.

Prior to amendment, former RCW 43.43.7541(2015) required collection of a biological sample for purposes of DNA identification analysis from every adult convicted of a felony. See Laws of 2002, ch. 289, §§ 2, 4 (mandatory biological sampling took effect on July 1, 2002). Edwards has several prior felony convictions. CP 102. The record shows Edwards was assessed the \$100 DNA fee for these convictions and ordered to submit to biological sampling. CP 73, 78, 83, 88, 93, 98. He therefore would necessarily have had his DNA sample collected pursuant to former RCW 43.43.7541 (2015).

Because Edwards’s DNA sample was previously collected, the DNA fee in the present case is no longer mandatory under RCW 43.43.7541. The court therefore improperly imposed the discretionary \$100 DNA fee.

This Court should remand for the \$200 criminal filing fee, \$250 jury demand fee, and \$100 DNA fee to be stricken from the judgment and sentence based on Edwards’s indigency. Ramirez, 426 P.3d at 723.

- b. The extradition costs are discretionary and should be stricken based on Edwards's indigency.

Edwards was arrested in Ohio and then extradited to Washington for trial. 3RP 207-08, 4RP 292. At sentencing, the trial court inquired whether extradition expenses were mandatory or discretionary. 5RP 577. The State did not have an answer, so the parties agreed to set the matter over for additional research. 5RP 577-78. Over a month later, the trial court entered an ex parte order signed by the prosecutor and defense counsel, agreeing to \$5,862.22 in extradition expenses. CP 134-35.

The statutory authority to impose extradition expenses comes from RCW 10.01.160(2), which specifies “[c]osts shall be limited to expenses specially incurred by the state in prosecuting the defendant.” The court in State v. Cawyer, 182 Wn. App. 610, 623, 330 P.3d 219 (2014), held this clause includes extradition expenses.

However, extradition costs are not mandatory. RCW 10.01.160(1) states, “[e]xcept as provided in subsection (3) of this section, the court may require a defendant to pay costs.” (Emphasis added.) “May” is a discretionary term. Staats, 139 Wn.2d at 789. RCW 10.01.160(2) does not thereafter mandate imposition of “expenses specially incurred by the state in prosecuting the defendant.” Rather, it specifies that costs “shall be limited” to those expenses, which means only that costs cannot exceed those specified

expenses. RCW 10.01.160(2). This discretionary language is in contrast to the still-mandatory \$500 victim penalty assessment, which “shall be imposed” and “shall be five hundred dollars” following any criminal conviction in superior court. RCW 7.68.035(1)(a). Indeed, this Court has held “expenses specially incurred by the state in prosecuting the defendant” are discretionary costs. In re Pers. Restraint of Dove, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016).

Under Ramirez, then, the trial court lacked statutory authority to impose discretionary extradition costs on Edwards, where he was indigent at the time of sentencing. 426 P.3d at 722-23. The fact that defense counsel agreed to the costs does not control. A defendant cannot agree to or waive an unlawful sentence.¹² In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002); State v. Crawford, 164 Wn. App. 617, 624, 267 P.3d 365 (2011). This Court should accordingly remand for the \$5,862.22 in extradition expenses to be stricken because Edwards was indigent at the time of sentencing. Ramirez, 426 P.3d at 723.

¹² Courts distinguish between a legal error, which cannot be waived, and a factual error, which can. Goodwin, 146 Wn.2d at 873-74. The error here was a legal one, because a sentencing court’s authority to impose costs is statutory. Cawyer, 182 Wn. App. at 619. A sentence imposed in excess of the court’s statutory authority is legal error. Goodwin, 146 Wn.2d at 875-76.

- c. Defense counsel was ineffective for agreeing to costly extradition expenses.

Finally, if this Court concludes Edwards waived his challenge to extradition cost because his attorney agreed to them, then his attorney was ineffective in doing so. As discussed, a defense attorney has a duty to know the law and object accordingly. Kyllo, 166 Wn.2d at 862.

Cawyer was decided by this Court in 2014, well before defense counsel agreed to extradition expenses in November of 2017. CP 134-35. Cawyer held the statutory authority for extradition costs comes from RCW 10.01.160(2). 182 Wn. App. at 623. Even before HB 1783 and Ramirez, former RCW 10.01.160(1) (2015) provided that such costs were discretionary. Furthermore, any doubt as to whether the costs were discretionary was resolved by the Dove court in 2016. Dove, 196 Wn. App. at 155. Thus, even before Ramirez, the trial court needed to consider Edwards's current and future ability to pay before imposing discretionary costs. Former RCW 10.01.160(3) (2015); State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

At sentencing, the court specified, "I'm imposing the standard mandatory costs. I'm not imposing any additional or any discretionary fees." 5RP 580. The court expressed concern about whether the extradition costs were mandatory or discretionary. 5RP 579. Given its waiver of

discretionary costs, the court did not conduct any ability to pay inquiry. 5RP 580. The court thereafter found Edwards to be indigent. CP 114-15.

There can be no legitimate strategic reason for defense counsel's subsequent agreement for Edwards to pay nearly \$6,000 in discretionary extradition costs. Edwards was indigent and the court wished to impose only mandatory costs. The court had already sentenced Edwards when his attorney agreed to the costs, so there was no promise to pay in exchange for a more lenient sentence. Edwards was 40 years old at the time of sentencing and is now serving a 27-year sentence. CP 100, 105. Neither ignorance of the law nor agreement to saddle one's client with nearly \$6,000 in debt is a reasonable choice.

Counsel's agreement to the extradition costs is also prejudicial. The hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. In a remission hearing to set aside LFOs, Edwards will bear the burden of proving manifest hardship (now, fortunately, defined as indigency), and he will have to do so without appointed counsel. RCW 10.01.160(4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina has been the law in Washington for several years now. It demonstrates there is no strategic reason to agree to extensive costs, particularly after the judgment and sentence has been entered. Edwards incurs no possible benefit from LFOs. His right to effective assistance of counsel was violated. On this alternative basis, then, this Court should remand for the trial court to strike the extradition costs.

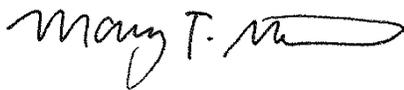
D. CONCLUSION

For the reasons discussed above, this Court should reverse Edwards's convictions and remand for a new trial. Alternatively, this Court should remand for resentencing for the court to vacate the two convictions that violate double jeopardy and strike several LFOs.

DATED this 17th day of January, 2019.

Respectfully submitted,

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