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NO. 51174-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH EDWARDS,

Appellant.

BRIEF OF RESPONDENT

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for Respondent

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The manner in which the court conducted for-cause challenges at sidebar did not violate Edwards's right to a public trial.

2. The trial court did not err by admitting coconspirator statements. Error, if any, was harmless.

3. Defense counsel was not ineffective for not objecting to certain testimony.

4. The trial court did not violate Edwards's right to an impartial jury by not dismissing a juror who was not biased.

5. Error in instructing the jury was harmless.

6. A. The State agrees that either Count 4 or Count 5 should be vacated.

   B. If the court affirms the convictions on counts 1 and 2 the State agrees that because the court exercised its discretion and merged count 3 with counts 1 and 2 count 3 should be vacated. The term of confinement imposed for the deadly weapon enhancement on count 3 was improper.

7. The State agrees that several legal financial obligations should be stricken.

II. <u>ISSUES PERTAINING TO ASSIGNMENT OF ERROR</u>

1. Was Edwards's right to a public trial violated where the court conducted an unrecorded sidebar in open court addressing peremptory

and for cause challenges, where all of the juror information related to those challenges was heard and recorded in open court?

2. Was it error to admit statements under the exception for coconspirator statements solely on the grounds that the statements were made after an arrest? If so, was the error harmless?

3. Was defense counsel ineffective for failing to object to testimony that was not inadmissible hearsay?

4. Was the court required to dismiss a juror who disclosed to the court during the trial having a memory which was either a dream or real concerning events a State witness testified to?

5. Was it harmless error for the court to instruct the jury on uncharged alternative means in counts 1 and 2?

6. A. The State agrees that either Count 4 or Count 5 should be vacated.

B. If the court affirms the convictions on counts 1 and 2 the State agrees that because the court exercised its discretion and merged count 3 with counts 1 and 2 count 3 should be vacated. If there is a new sentencing hearing, should the trial court retain its discretion to apply the burglary anti-merger statute?

7. The State does not dispute the claim that several legal financial obligations should be stricken.

III. STATEMENT OF THE CASE

The State supplements appellant's statement of the case as follows. Alexander Salzman, his wife Heather and their three-year-old child were at their home in Kelso Washington on October 28, 2016. Mr. Salzman's mother was helping them with babysitting and was staying in an RV at the residence. RP 80-82. About 3 AM he heard his dog growling and a knock at the front door. He looked out and saw a woman who he did not recognize. He asked if he could help her and she said someone was trying to hurt her. He had the idea someone was trying to rape her so he let her in the house. When she came in he closed and locked the door. At that point his wife Heather entered the dining room and let the woman use her cell phone. RP 83.

Mr. Salzman walked away but returned just moments later. The woman and Heather were talking and Mr. Salzman said he thought they needed to call the police. Mr. Salzman went to the bathroom and as he returned heard arguing. He now saw that there were four strangers, two women and two masked men standing in his front room in addition to his wife. RP 84, 85. He did not see how they entered. One of the two masked men was Caucasian, wore red shoes, baggy pants, a hoodie, and had a red bandanna across his face. This man mostly kept his hands in his pockets but he noticed he had a glove on. RP 139. The second man was African-

American, tall and thin, wearing a hoodie, a Seahawks hat, and had on a black ski mask with the eyes and mouth showing. He wore vinyl type gloves that could be partially seen through. This second African-American man had a lighter skin tone. Mr. Salzman noticed metal material on his teeth. RP 86-88.

The two men were demanding to know where Michael Woods was. They evidently believed Woods, who owed somebody $10,000, lived there. RP 89. Mr. Salzman told them that he was not Michael Woods, he didn't know who this person was, and he did not have $10,000. Mr. Salzman identified exhibit #3 as the type of glove the taller African-American man wore. RP 90. The taller African-American man with the gloves took Mr. Salzman's wallet which was sitting on file cabinet. RP 92 -95. The taller man held up a crowbar in a threatening manner and Mr. Salzman was waiting for the man to swing it at him. RP 97. He described the crowbar or nail puller as being yellow and gray. RP 96. The gray and yellow crowbar stood out to Mr. Salzman so he included the information in his written statement. RP 106, 107. The defendant stood up in court and Mr. Salzman testified he was of the same height and weight, and skin tone as the masked man wielding the crowbar. RP 96, 97.

The other man wearing the red bandanna mask asked where Mr. Salzman's child was. Mr. Salzman replied he was in the RV with his grandmother. Worried that the men were about to demand access to the RV, Mr. Salzman recalled that they had earlier demanded their phones, so he told the intruders where the phones were. RP 93, 94. This was in an effort to distract them from searching the RV. RP 94. Both of the masked men accompanied Mr. Salzman into the bedroom where they took his cell phone. The group then left. RP 97.

Kelso Police Department officer John Croco found a glove on the side of the road just down from the Salzman's house and showed it to Mr. Salzman. RP 100, 116, 117. Mr. Salzman testified the glove was similar to that worn by the taller African American male. Mr. Salzman identified the two females from photographs the police showed him and was in court when one of the two, Kelsie Lee, pled guilty and apologized to him and his wife. RP 100,101. He later identified 2 iPhones which the police recovered as the ones taken from he and his wife. RP 101.

Heather Salzman testified similarly to Alexander. About 3 AM on October 28, 2016, there was a knock at the door. Mr. Salzman answered the door. The woman outside said somebody had attempted to rape her and she asked for a phone to call a friend. Mrs. Salzman let her use her phone and

got her a shirt to put on because her clothes looked like they had been ripped. While Mr. Salzman had briefly stepped away another woman came to the door. Mrs. Salzman assumed it was the first woman's friend so she let her in and closed the door behind them. Moments later two masked men came barging into the house. One held a crowbar up in the air. RP 122-125. The crowbar was 12 to 16 inches long, and yellow and gray or faded black. RP 129. She described one of the two men as Caucasian wearing a red bandanna across his face and slightly taller than 5'3". The second man was above 6 foot tall, wore a black ski mask and gloves, and had dark skin. This second taller man was the one holding up the crowbar. This man was demanding where "Michael" was because he owed $10,000. RP 126, 127. This second man with the crowbar had something shiny in his teeth like silver or gold. The two men were demanding the Salzman's phones and Mr. Salzman at first denied knowing where the phones were. But when the shorter man wearing the red bandanna mask asked where their son was, Mr. Salzman distracted them saying that he knew where the phones were and took them to their room. RP 128.

During the incident she was pregnant. She was scared and worried about her son and mother-in-law who were in the motorhome. The group were in the house for 5 to 6 minutes. When they left, the taller man stuck the crowbar up the sleeve of his sweatshirt. RP 129, 130. The taller man

with the crowbar took Mr. Salzman's wallet. RP 131. She later identified her and Mr. Salzman's iPhones as the ones taken. RP 132, 133. Mrs. Salzman testified that the defendant was approximately the same height as the man with the ski mask and the crowbar. RP 134.

Jessica Collazo lived with her husband Alexander and their five children in Kelso. She had known Mescha Johnson for about two years. Johnson lived with her in the house in Kelso but moved out before October 28. She knew Edwards by the nickname "New York." She had seen Johnson and Edwards together, and knew Edwards had a gold tooth. RP 144-147.

On October 28, 2016, around 8 AM, Alexander Collazo got the kids ready for school and to the bus stop directly in front of their house. Jessica, Alexander and their three-year-old daughter then went back to bed. The three-year-old woke up and was watching cartoons and came into the bedroom saying there were strangers. She looked up to see a man and two women come rushing in the room behind her daughter. One of the two women was Mescha Johnson. Ms. Collazo was hit in the head with something and felt something like water running down her legs, and noticed her hand covered in blood. The defendant was beating her husband with a crowbar while her daughter was crying and screaming. Edwards kept hitting her husband in the head, while repeating "give me everything, give me

everything." RP 147-149, 156. During the assault she heard Johnson saying, "New York." She recognized Edward's voice as "New York's." RP 156, 157. Edwards turned away from her husband and hit Ms. Collazo again with the crowbar. She testified, "when they all came in, they all had masks, but when he turned around and hit me, there was nothing, it was just straight down on his neck." RP 151. Alexander Collazo managed to escape through the bedroom window. Edwards and the third woman left but Johnson remained in her bedroom. RP 151. Her husband was later taken to the hospital. RP 153. After the attack, she discovered that two of her laptops and some other electronics were missing from the house. RP 157.

Heather Delagasse knew Alexander and Jessica Collazo and lived across the street from them on October 28, 2016. On that date she was outside and saw her's and the Collazo's children get on the school bus right in front of the Collazo's house. While outside, Delagasse saw three people, one male and two females, running from the alley behind the Collazo's house and up onto their front porch. The male ran up on the front porch and waited for the other two to follow. She recognized the male as Edwards and one of the females as Mescha Johnson, but did not know the second female. She noticed Edwards had distinctive gold teeth. She knew him as "Joe." She also noticed Edwards kept his arm straight with his sleeve down over his hand like he had something up his sleeve. Sensing something was wrong,

she went in her house to call Alexander to tell him some people were in his house but he did not answer. When she went back outside she saw Alexander stumbling in the middle of the street covered in blood yelling for help. She called the police. Ms. Johnson was still in the front yard when the police arrived. RP 170-176, 180.

Kelso Police Department Detective Craig Christiansen responded to the Collazo home on October 28, 2016. He saw Alexander Collazo covered in blood, and Jessica Collazo who also had blood on her. While at their residence he spoke with Mescha Johnson. He drove her to the Kelso Police Department. On the way she showed him where her car was parked, about 30 yards from the Collazo home. She permitted him to search the car, and he found three latex gloves inside. RP 195--204. He also found identification belonging to Kelsie Lee. RP 205. On December 1, 2016, in connection with an earlier home invasion involving the Salzman's, he recovered iPhones from defendant's wife, Yolanda Edwards in Seattle. RP 206. Arrest warrants were issued for Kelsie Lee and Joseph Edwards on October 31, 2016. Lee and Edwards were apprehended pursuant to those warrants on November 9, 2016. Christiansen transported Edwards and Lee back to Washington from Ohio. While in transport Christiansen observed that Edwards had metallic dental work. A photograph of Edwards showing his metallic dental work was admitted as Exhibit 36. RP 207, 208.

Kelso police officer Tim Gower showed two iPhones to Mr. and Mrs. Salzman. He also took a DNA sample from the defendant which was sent to the Washington State patrol crime lab for testing. RP 183-185. Kelso police officer Aaron Marthaller responded to the Collazo's home where he saw blood staining throughout the house and a white, clear color glove in the living room, admitted as Exhibit 45. He saw the same type of glove laying in a grassy strip in front of the Collazo's house. RP 188-191, 194.

Brad Dixon, supervising forensic scientist with the Washington State patrol crime laboratory compared a reference sample taken from Edwards ndant with the gloves found by Detective Christiansen in Johnson's car. RP 215, 229. He concluded that Edwards was the major contributor to DNA found on two of the gloves. RP 230-234.

On November 9, 2016, Ohio State trooper Joshua Smith stopped a car in Ohio driven by Edwards for going 103 mph in a 70 mph zone. Kelsie Lee was the passenger in the vehicle. Edwards initially gave trooper Smith a false name and said he did that to avoid going to jail on outstanding warrants. RP 289-292.

On October 28, 2016, Kelso police officers were looking for the people involved in the assault. Deputy O'Neill responded to assist them with containment. Around 8:30 AM Deputy O'Neill drove towards the

Kelso Police Department and saw a person riding a bicycle who was wearing a dark hooded jacket and blue jeans. This clothing matched the description he had been given of a possible suspect. When O'Neill noticed the bicycler, he started peddling away quickly. O'Neill tried to circle around to find him but could not. At 12: 30 p.m. that day Sgt. Blaine showed him a picture of Edwards. The person deputy O'Neill saw on the bicycle matched the picture Sgt. Blaine showed him of Edwards. RP 321-326, 328.

Cowlitz County corrections officer Blaine Lux searched Edwards and found letters on him. RP 331, 332. On April 13, Cowlitz County corrections officer John Sutton was given two letters which officer Blaine Lux found on Edwards or in his cell. The letters were admitted as Exhibits 46 and 48. RP 333-335.

Mescha Johnson testified as follows. She knew Edwards for about five years and for some of that time was in a romantic relation with him. They had one child together. Johnson also knew Kelsie Lee for about a year and a half. Johnson broke up with Edwards about two years prior, after which Lee and Edwards began a relationship. Edwards had a number of nicknames, the most common of which was "New York." RP 336-338. On October 28, 2016 Edwards came up with the plan to go to a particular house because someone owed them money and they were going to collect.

Johnson, Edward, Lee, and an unidentified man all drove to the house in Johnson's car. The unidentified man appeared to be a friend or known to the Edwards. Edwards and the other man told Johnson to knock on the door and get into the house. RP 365. Johnson knocked on the door saying she was sexually assaulted and asked to use the phone. She was let in and went to use their phone when Edwards, Lee, and the other man came busting in the door. The others were yelling about Mike owing them money and where he was at. Edwards and the other man went to the back of the house so Johnson did not see what they were doing. They took a wallet and something else on a TV stand. RP 341-345.

Later that morning, Johnson, Lee, and Edwards drove to the Collazo's house. Edwards and Lee brushed past Johnson when they entered. Johnson told Edwards and Lee to get out of the house and stop doing what they were doing. She saw Edwards had a crowbar in his hand and they were rummaging through the kitchen. She next saw Edwards beating Alex with the crowbar in their bedroom. Johnson yelled "New York, stop, New York, stop." Alex was covered in blood from head to toe. Edwards and Lee ran out of the house. RP 346-348, 370,372. Johnson took a bag of property belonging to the Collazo's. The police were there when Johnson got outside. RP 349.

Johnson was charged with crimes and entered into an agreement where she got a break for cooperating and testifying. RP 350. While she was in jail with Lee, Lee told her that after Edwards and Lee left the Collazo's they stole a car and drove to Seattle to Edward's wife's house where they left the phones from the first house. Edwards told his wife what happened at both of the houses and asked to borrow money. Lee also told her that the three of them needed to stick together and get their story straight. Johnson received a letter, Exhibit 47, about three weeks prior to the trial. RP 350, 351, 355-357. Johnson recognized Edwards's handwriting on the letter. RP 339-340.

IV. ARGUMENT

I. THE COURT'S RULINGS IN EXCUSING A NUMBER OF JURORS DID NOT VIOLATE EDWARDS'S RIGHT TO A PUBLIC TRIAL. EACH JUROR WHO WAS EXCUSED FOR CAUSE ANSWERED QUESTIONS IN OPEN COURT WHICH FORMED THE BASIS FOR THEIR BEING EXCUSED.

Procedural background

The State agrees with Edward's procedural summary regarding jury selection at pages 11-13 of appellant's brief.

Factual background/Voir dire of challenged jurors

The jurors challenged for cause were #'s 1, 3, 8, 9, 10, 12, 15, 17, 20, 24, 33, and 42. CP 43.

- Juror #1 said that her son had a fever seizure a couple days ago and had a doctor's appointment the next day. RP 35.
- Juror #3 was questioned by the court when the panel was asked if they knew of any particular witness. The court read the name, John Croco, and juror #3 responded that she was his mother. She responded that she would be biased towards what would say because of the way he was raised. The court inquired if either the state or the defense had any objection to excusing #3, and both parties had no objection RP 5-7.
- Juror #8 indicated he was a victim of a crime, that he had a lot of strong feelings because of this, and the experience left him with anger, frustration, and harsh feelings. RP 12-13.
- Juror #9 said that some of the things that were stolen from her home left her with strong feelings and that would be to defendant's disadvantage. RP 39.
- Juror #10 indicated he was a victim of a burglary, and when asked by the court if that posed any issues for him and serving today, he replied "I don't know." RP 15.
- Juror #12 said that a friend of his was assaulted, suffered long-term permanent damage, and absolutely had strong feelings about what happened to his friend. RP 23, 24. He also said he knows people in

the corrections and law enforcement field and he would "probably go with law enforcement more than a person." RP 32.

- Juror #15 indicated he was the victim of a robbery and he was still angry about it, and that he had no patience for that type of action by anybody. RP 15, 16. He also said that his brother-in-law was with the Longview Police Department and he had nephews in the Washington State patrol and he would give credit to what they say. RP 31.
- Juror #17 said that he had surgery scheduled for the next day. RP 34.
- Juror #20 said he knew several people in the law department and police department including a judge and multiple attorneys, and that they attend church and Sunday school together. He continued "knowing the people and the standards they have, I would believe what – my leaning would be that if there is a reason for someone [unintelligible] true." RP 30. He also said that his responsibilities as a camp director and working 10-12 hours a day would make it hard to be focused on what was happening in the courtroom. RP 35, 36.
- Juror #24 said he had twice been the victim of a home burglary, that it still really bothers him, and that he did not think that he could be impartial and fair to both sides. RP 18, 19. He also said that his work

schedule only allows him four hours of sleep before court sessions begin. RP 36.

- Juror #33 said that she had a doctor's appointment tomorrow which included lab work that she would like to know the results of because prior tests did not come out good. RP 37, 38.
- Juror #42 indicated that she knew witness Jessica Collazo and that would influence the consideration of her testimony. RP 9.

Legal principles

The right to a public trial is guaranteed by article I, sections 10 and 22 of the state constitution. When reviewing a public trial claim, our courts follow a three-step analysis, asking: (1) whether the public trial right attaches to the proceeding at issue, (2) if so, whether the courtroom was closed, and (3) whether the closure was justified. "The appellant carries the burden on the first two steps; the proponent of the closure carries the third." *State v. Crowder*, 196 Wash. App. 861, 866, 385 P.3d 275, 278 (2016), citing *State v. Love,* 183 Wash.2d 598, 604–05, 354 P.3d 841 (2015), *cert. denied*, —— U.S. ——, 136 S.Ct. 1524, 194 L.Ed.2d 604 (2016). A courtroom closure that implicates public trial rights occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave. A closure may also occur when "a

portion of a trial is held someplace 'inaccessible' to spectators, usually in chambers." *State v. Love*, 183 Wn.2d 598, 606, 354 P.3d 841 (2015). Whether the right to a public trial has been violated is a question of law reviewed de novo. *State v. Lormor*, 172 Wash. 2d 85, 257 P.3d 624 (2011).

Analysis

Regarding the first step of the three-step analysis, it is well settled that for cause and peremptory challenges implicate the public trial right.[1] As to the second step the State argues that there was no courtroom closure in this case. Lastly, even assuming there was a courtroom closure in this case, it was a de minimis violation.

In *State v. Crowder*, the court addressed a similar claim. During voir dire, a prospective juror indicated he had been a child sex abuse victim. Defense counsel moved to strike the juror for cause. The State indicated it had no objection, but asked to approach the bench. A bench conference occurred off the record. When the conference ended the court excused the juror. *Crowder*, at 866. The Court held, "An off-the-record sidebar discussion engaged in between the trial court and counsel following the court's ruling on a juror challenge did not constitute a closure of the

[1] *State v. Love,* 183 Wash.2d 598, 604–05, 354 P.3d 841 (2015).

courtroom, and therefore, did not violate defendant's right to a public trial, as guaranteed under state constitution; while in open court, the juror was questioned, defense counsel made a motion for cause, and the State concurred, which completed the challenge, leaving nothing further to make public, and while it would have been preferable for the court to record the sidebar discussion, it simply addressed procedural matters regarding the trial court's motions practice." *Crowder*, headnote 3. The court further explained,

> "Mr. Crowder's public trial argument would only have traction *if he could show something substantive occurred during the off-the-record side bar*. Our courts utilize the "experience and logic" test to determine whether a particular court procedure implicates the public trial right. *Id.* at 605, 354 P.3d 841. Side bar conferences generally do not meet this test because they historically have been closed to the public and because public access would not positively enhance the proceedings. *State v. Smith,* 181 Wash.2d 508, 511, 334 P.3d 1049 (2014). Mr. Crowder fails to meet his burden of establishing that the side bar in his case falls outside the general rule. The State proffers the side bar discussion simply addressed non-substantive procedural matters regarding the trial court's motions practice. Mr. Crowder does not contest this proffer and nothing in the record suggests it is inaccurate. While it would have been preferable for the court to have ensured the side bar was recorded, *see id.* at 518, 334 P.3d 1049, we are satisfied the present circumstances do not permit Mr. Crowder's public trial challenge. *Crowder*, at 867. (Emphasis added).

Following the analysis in *Crowder*, the court in *State v. Payne*[2], No. 75503-0-I, 2018 WL 1472708, (Wash. Ct. App. Mar. 26, 2018), review denied, 191 Wash. 2d 1007, 424 P.3d 1210 (2018), held the trial court's failure to memorialize a sidebar discussion, by itself, does not carry Payne's burden of proving the sidebar was improper and violated his right to a public trial."

In the case at bar, all of the excused jurors answered questions and provided information in open court. These jurors' responses clearly indicated why they were excused. Several jurors had work-related or medical issues (#'s 1, 17, 33, 42). Other jurors knew witnesses and/or were biased (#'s 3, 20). Some of these jurors had been crime victims and explained why they were biased (#'s 8, 9, 10, 12, 15, 24). Importantly, defense counsel did not object to any of these jurors being excused and never requested to have the sidebar discussion memorialized on the record or made any other statement about the sidebar. Defense counsel had every reason to know whether the sidebar involved disputed issues and could implicate the public trial right. Here, all that occurred at the sidebar

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[2] *State v. Payne* is an unpublished opinion filed in 2018. Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.GR 14.1

conference was the recording on the "struck juror list," (CP 43), designating these particular jurors as being excused for cause.

Here, like *Crowder*, the jurors' statements which provided the basis for their removal occurred in open court. At the sidebar the court simply facilitated the procedure of recording the reason (cause, or "Cs" under the *voir dire code* on the struck juror list). This did not constitute a courtroom closure.

Edwards uses the term "challenge" for cause, implying one side argued for a particular juror being excused and the other side argued against it. The record does not support that this occurred. Had that been the case, it is reasonable to assume the court would have made a record of the arguments and the court's analysis. But here, Edwards understandably did not oppose excusing any of these particular jurors. It is understandable he did not object because the excused jurors were either clearly biased against him or had valid medical or work-related issues. Thus, there was no reason to object and no reason for the court to see the need to make a record. Since the substance underlying why each of these jurors were excused was made known in open court, with no objection from defendant, there was no improper courtroom closure.

Like *Crowder*, Edwards has not shown that something substantive occurred during the off-the-record side bar. Like *Payne*, Edwards has not carried his burden of proving the sidebar violated his right to a public trial simply because it was unrecorded.

State v. Effinger, 194 Wash. App. 554, 375 P.3d 701 (2016) is directly on point. There, during voir dire, the trial court first asked the potential jurors several questions regarding their ability to remain fair and impartial. The potential jurors answered these questions in open court. Many of the potential jurors were either in law enforcement or had family members who were. The attorneys then conducted voir dire. The court invited the attorneys up to the sidebar where an unreported discussion was held. After conducting a sidebar and after asking the venire another question, the trial court conducted another sidebar to allow the parties to exercise for cause challenges and to excuse jurors for hardship. That procedure was not transcribed, but it occurred in open court. After the sidebar, the trial court announced in open court that nine jurors were excused. The trial court then conducted another unrecorded sidebar to allow the parties to exercise their peremptory challenges. Following the third sidebar, the trial court announced the composition of the jury. The trial court then swore in the jurors who were to hear the case. All of the sidebars were

memorialized on a case information sheet. The sheet indicated that jurors 4, 6, 12, 13, 18, and 22 were excused for cause. It also indicated that the trial court excused juror 23 for cause, but the court did not announce that result in open court. The sheet showed that jurors 9 and 26 were struck for hardship and that 35 was struck because the number was not reached; however, the trial court had already excused juror 35 after the second sidebar. The trial court filed the case information sheet, and it was a part of the record. *Effinger*, at 559.

The *Effinger* Court held "no closure occurred, in violation of defendant's public trial right, when the parties struck jurors at sidebars, which were not transcribed; parties silently exercised peremptory challenges at sidebar so people in the courtroom could not hear, and record included the case information sheets showing those jurors who were excused, questioning of the potential jurors took place in open court for everyone to hear and observe, and jurors' answers to the questions occurred in open court."

The court found Effinger's case similar to *Love*, noting that in both cases questioning of the potential jurors took place in open court for everyone to hear and observe; the jurors' answers to the questions occurred in open court; the court held a sidebar to discuss for cause challenges; the

sidebar was visible to observers in the courtroom; although the record was silent as to what the public could hear, the trial court did not ask anybody to leave the courtroom; after the sidebars, both courts excused jurors who had been questioned in front of the defendant and the public; in open court and on the record, both courts read the names of some of the jurors who were excused; and both courts empaneled the jury in open court.

The *Effinger* court adopted the reasoning of *Love*, "Observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury selection. We hold the procedures used at Love's trial comport with the minimum guarantees of the public trial right and find no closure here." *Love,* at 607.

The *Effinger* court recognized that in *Love*, the sidebar was recorded and the public would have access to a transcript of what transpired. That circumstance, *Effinger* held, was not dispositive of whether or not an open court violation occurred. "The fact that the sidebars in Effinger's case were

not recorded, therefore, is inconsequential to our analysis and decision. *Effinger,* at 563–64.

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

State v. Anderson, 194 Wash. App. 547, 549, 377 P.3d 278, 279–80 (2016) presented a similar situation. There, during voir dire, the questioning of jurors occurred in open court. Anderson challenged four prospective jurors for cause at a sidebar conference, which the judge told the jurors they would not be able to hear. At the sidebar conference, the trial court dismissed the four challenged prospective jurors. The trial court later dismissed a fifth prospective juror for cause on its own initiative at a second

sidebar conference. The trial court then announced in open court which prospective jurors would be serving on the jury. The sidebar was unrecorded, but the trial court later noted the challenges and resulting dismissals for the record stating, "At a sidebar before we took the morning recess, I excused for cause, based upon the challenge by [defense counsel], for cause Jurors 5, 15, 18 and 34. Following the second questioning period by [defense counsel], and before we selected the jury, I excused Juror No. 27 for cause."

Upon reconsideration in light of *Love*, the Anderson court held that no courtroom closure occurred. The Anderson court noted the distinction that the sidebar challenges were recorded in *Love*. Despite that difference the Anderson court observed "The court in *Love* did not hold that the presence of a court reporter at a sidebar conference was required in order to avoid a courtroom closure. The key factors for the court were that the public could (1) hear the voir dire questioning that provided the basis for the challenges for cause and (2) observe the sidebar conference while it was occurring. Further, anyone listening to the questioning of the jurors would have been able to easily discern why the trial court dismissed the five jurors for cause." *Anderson* at 607.

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

Edwards cites *State v. Whitlock*, 188 Wash. 2d 511, 520, 396 P.3d 310, 314 (2017) and makes the sweeping statement, "the Washington Supreme Court's more recent decision in Whitlock, however, demonstrate *Effinger* and *Anderson* are no longer good law," and "can no longer be sustained in the wake of *Whitlock*." The State replies that *Effinger* and *Anderson* are readily distinguishable from, and not overruled by *Whitlock*.

In *Whitlock*, during a bench trial the State objected to a question regarding an informant and asked for a sidebar. Instead of holding a sidebar, the court called counsel *into chambers* and met with them there, with no reporter or the defendant present. The discussion lasted 10 minutes. *Whitlock*, at 516.

Analyzing the three-part inquiry,[3] the court held that the proceeding was certainly a closure since it occurred in the judge's chambers, a private and closed setting, and the closure was not justified since trial court did not conduct a Bone-Club analysis. *Whitlock*, at 520. To answer the first question, (whether the proceeding at issue implicates the public trial right) the court looked to *State v. Smith*, 181 Wash. 2d 508, 334 P.3d 1049 (2014). *Whitlock* explained that the Smith ruling that sidebars do not implicate the public trial right under the experience and logic test were limited to "proper sidebars," that is, proceedings that "deal with the mundane issues implicating little public interest[,] ... done only to avoid disrupting the flow of trial, and ... either ... on the record or ... promptly memorialized in the record. With these principles in mind *Whitlock* concluded the in-chambers proceeding was definitely not a "proper sidebar." This was so *because it occurred in chambers which by definition was closed to the public*, and was not recorded or promptly memorialized. (Emphasis added).

Edwards relies upon the language in *Whitlock* concerning a "proper sidebar" (asserting *Whitlock held* "that proper sidebars must be recorded or promptly memorialized on the record," appellant's brief, page 13). Edwards

[3] (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?

asserts the sidebar here was not proper because juror challenges are not mundane issues, and the sidebar was not recorded. Therefore, reasons Edwards, the sidebar was an improper courtroom closure.

Edwards is wrong. First, *Whitlock* did not specifically state it was overruling *Effinger* and *Anderson*, which it certainly would have if that were the case. Second, *Whitlock* is readily distinguishable from this case as well as *Effinger* and *Anderson*. The key distinguishing fact is in *Whitlock* the proceeding occurred *in chambers*, not in an open courtroom. That is why it was held to be a courtroom closure (an improper one because there was no Bone-Club analysis). That fact alone renders *Whitlock* inapposite to *Effinger, Anderson*, and the case at bar. The proceeding here, like *Effinger* and *Anderson*, occurred in open court. The substance of the excused jurors' answers which led to their dismissal occurred in open court and provided an obvious basis for their removal.

Under the above authorities, the courtroom was not closed in this case. Even assuming arguendo it was closed, this would be at most a de minimis violation. *State v. Schierman*, 415 P.3d 106, 126 (2018) held the doctrine of de minimis error applies in the public trial right context. A de minimis violation occurs when a closure *implicates* the values underlying the public trial right—when it involves proceedings to which that right

attaches—but does not *undermine* those values to an extent that warrants the remedy of automatic reversal. *Schierman* held the trial court's ruling on for cause challenges *in chambers*, was an erroneous courtroom closure, but a de minimis violation of defendant's constitutional right to public trial. Thus it did not warrant automatic reversal.

The de minimis error inquiry asks to what extent the particular closure in question undermined the values furthered by the public trial right. While *Schierman* did not articulate a rigid test based on specific factors, it did state "the inquiry is necessarily case specific, courts applying it have considered the length of and reason for the closure; the substance of the closed proceedings; and whether that substance was contemporaneously transcribed or timely memorialized in open court." (Citations omitted).

The court reasoned the proceeding lasted only 10 minutes, involved no witness testimony, no questioning of potential jurors, and no presentation of evidence, no objection was raised, and the proceeding was simultaneously transcribed and then immediately memorialized again in open court." The court held the closure, although error—did not fundamentally taint the process by which the court established the facts necessary to assemble the jury or decide the case. *State v. Schierman*, 415 P.3d 106, 125 (Wash. 2018).

Edwards attempts to distinguish this case from *Schierman* discussing three factors. He first contends the sidebar in this case lasted 22 minutes, significantly longer than the 10 minute closure in *Schierman*. The State replies since the attorneys addressed both peremptory challenges and for cause challenges during this 22 minute period, all 22 minutes could not have been devoted solely to the for cause challenges, especially given the information garnered from the jurors, and that Edwards did not object to the jury's composition. RP 84. Edwards next contends the trial court heard every one of the parties for cause challenges at sidebar where in *Schierman* the court heard the challenges in open court and then ruled on them in chambers. The State replies that Edwards is making an assumption that either the State or Edwards presented any arguments for or against any of the for-cause challenges. This assumption is unwarranted given that Edwards did not object to the rulings, and given the information the dismissed jurors gave in open court. Lastly, Edwards contends the sidebar here was not transcribed or immediately memorialized in open court, unlike *Schierman.* The State replies that under *Effinger* the lack of a transcription is not dispositive, and further, all of the questions and answers that formed the basis of the court's ruling on the challenges occurred in open court and was transcribed. The record amply demonstrates an appropriate reason why each juror was dismissed.

Like *Schierman*, the procedure here (even assuming it amounted to a closure), did not fundamentally taint the process of appropriately assembling a jury. The core values underlying the public trial right include ensuring a fair trial, reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions, encouraging witnesses to come forward, discouraging perjury, promoting confidence in the judiciary and providing an outlet for the public's "concern, outrage, and hostility. *Schierman* (citations omitted). Just as in *Schierman* the procedure here clearly did not *undermine* these values to an extent that warrants automatic reversal. *Schierman* was more egregious given the complained of procedure occurred in chambers, not in open court.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING LEE'S STATEMENTS AS A COCONSPIRATOR. THE STATEMENTS WERE MADE DURING OR IN FURTHERANCE OF A CONSPIRACY, DESPITE HAVING BEEN MADE AFTER HER ARREST. ERROR, IF ANY, WAS HARMLESS IN LIGHT OF OVERWHELMING EVIDENCE AGAINST EDWARDS.

A trial court's interpretation of the rules of evidence is a question of law we review de novo. *State v. DeVincentis*, 150 Wash. 2d 11, 74 P.3d 119 (2003). Its application of the rules to particular facts is reviewed for abuse of discretion. A trial court abuses its discretion when its evidentiary decision

is manifestly unreasonable or based on untenable grounds. *State v. Foxhoven*, 161 Wash. 2d 168, 163 P.3d 786 (2007).

Under ER 801(d)(2)(v), a statement is not hearsay if it is offered against a party and is a statement by a coconspirator made "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 that the defendant was a member of the conspiracy. *State v. Halley*, 77 Wn. App. 149, 152, 890 P.2d 511 (1995). Where, as here, Washington's rules of evidence mirror their federal counterparts, we may look to federal case law interpreting the federal rules as persuasive authority. *In re Detention of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010). *State v. Berniard*, 197 Wash. App. 1040, review denied, 188 Wash. 2d 1007, 393 P.3d 347 (2017).[4]

Conspiracy may be proven by the declarations, acts, and conduct of the parties, or by a concert of action. *Barnes,* 85 Wash.App. at 664, 932 P.2d 669. The State can demonstrate concert of action by showing the

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[4] *State v. Berniard* is an unpublished opinion filed in 2017. Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.GR 14.1

parties working understandingly, with a single design for the accomplishment of a common purpose. *State v. Embry*, 171 Wash. App. 714, 743, 287 P.3d 648, 663 (2012), citing *State v. Casarez–Gastelum,* 48 Wash.App. 112, 116, 738 P.2d 303 (1987) (citing *Marino v. United States,* 91 F.2d 691, 694 (9th Cir.1937), *cert. denied sub nom., Gullo v. United States,* 302 U.S. 764, 58 S.Ct. 410, 82 L.Ed. 593 (1938)). Co-conspirator statements do not run afoul of Crawford. The *Crawford* Court itself assumed that statements made in furtherance of a conspiracy "by their nature [are] not testimonial." 541 U.S. at 56, 124 S.Ct. 1354; *accord United States v. Sanchez-Berrios,* 424 F.3d 65, 75 (1st Cir.2005); *United States v. Lee,* 374 F.3d 637, 644 (8th Cir.2004). *United States v. Larson*, 460 F.3d 1200, 1213 (9th Cir. 2006), on reh'g en banc, 495 F.3d 1094 (9th Cir. 2007).

Courts generally interpret the "in furtherance" requirement broadly. *State v. Baruso,* 72 Wn. App. 603, 615, 865 P.2d 512 (1993). A statement meant to induce further participation in the conspiracy or to inform a coconspirator about the status of the conspiracy is sufficient. *State v. Israel*, 113 Wash. App. 243, 280. *See United States v. Herrero,* 893 F.2d 1512 (7th Cir.1990) (listing examples of furtherance including, *inter alia,* "statements made to keep coconspirators advised as to the progress of the conspiracy"); *United States v. Miller,* 664 F.2d 94 (5th Cir.1981) ("Puffing, boasts, and

other conversation ... are admissible when used by the declarant to obtain the confidence of one involved in the conspiracy."). *United States v. James,* 510 F.2d 546, 549 (5th Cir.), *cert. denied,* 423 U.S. 855, 96 S.Ct. 105, 46 L.Ed.2d 81 (1975) ("This court applies a liberal standard in determining whether a statement is made in furtherance of a conspiracy.")

Statements made by a coconspirator in "an effort to conceal the conspirators' illegal activities" are made in furtherance of the conspiracy. *United States v. Williams*, 989 F.2d 1061, 1069 (9th Cir. 1993). *See United States v. Sears*, 663 F.2d 896, 905 (9th Cir. 1981) (holding that statements made while the defendants were escaping from a robbery were in the course of and in furtherance of the conspiracy because the statements served to further the objectives of the conspiracy—to rob and escape successfully); *Atkins v. United States*, 307 F.2d 937, 940 (9th Cir. 1962) (holding that statements relating to the division of profits were admissible because the criminal aim of the conspiracy was not to commit robbery but to make a profit by illegal means).

State v. Berniard, is a case very similar to the one at bar. There, four defendants participated in a home invasion/robbery. Two participants obtained entrance to the victim's home posing as potential buyers of a ring advertised on craigslist. Then two additional intruders wearing masks and

armed with guns entered the home. Afterwards one of the four intruders (Higashi) spoke to a person (Ford) not involved in the home invasion, telling her about the crime. Ford and Higashi then spoke about what they would all have to do to get away with the crime, like getting together and making up a story, and disposing of any evidence that may link them to the crime. The State moved to admit Higashi's statements to Ford as statements of a coconspirator. The trial court granted the State's motion, stating:

> There's no question we have a conspiracy. The conspiracy is to commit robbery. But the robbery just doesn't stop. It's what you do after the robbery is still part of the conspiracy of what they were trying to do ....
>
> "And the statement in question describes the defendant's role in the conspiracy or implicates the defendant in some manner. ..."

On appeal, Berniard argued the trial court abused its discretion by admitting Higashi's statements to Ford because the statements were not made during the course of or in furtherance of a conspiracy – that the criminal act of robbery was complete at the time of the statements. The appellate court disagreed, stating, "Although the criminal act of robbery was complete at the time of Higashi's statements, the criminal objectives of the conspiracy—to successfully escape and make a profit by illegal means—were not yet achieved. As a result, Higashi's statements to Ford were made in the course of the conspiracy," and "it is reasonable to interpret Higashi's

statements to Ford about the crimes he and his coconspirators committed as an attempt to encourage her participation in the conspiracy. Higashi's retrospective account of the crime may have been made to encourage Ford to help him and his codefendants successfully escape and make a profit from the items stolen from the Sanderses' home."

All of the above cited authorities stand for the proposition that a conspiracy does not simply end when the crime is completed. In the case at bar, Lee's statements to Johnson that she and Edwards went to the home of Edwards's wife, and left the two cell phones taken from one of the burglaries was informing Johnson of the status of the conspiracy and how they had disposed of evidence linking them to the crime. Further, Lee's statements to Johnson that they all needed to get their stories straight and stick together were efforts to conceal the conspiracy and evade getting caught. The note Lee wrote to Edwards seeking his advice on how she could implicate someone in order to get a lesser sentence were efforts to minimize the consequences of the conspiracy and potentially conceal the identity of the fourth coconspirator who had not yet been arrested. Given the defense was identity the fact that Lee wrote the note *to Edwards* is also relevant to the issue of his participation.

Edwards's key contention is what he characterizes as "the additional rule" that a co-conspirator's participation in a conspiracy *ends with his or her arrest*, and since Lee's statements were made after her arrest they were not made during the course of the conspiracy. To this point Edwards cites to several federal authorities and the Washington case of *State v. St. Pierre,* 111 Wash. 2d 105, 108–09, 759 P.2d 383, 386 (1988). However, other federal authorities hold that postarrest statements of a co-conspirator are admissible. As to *St. Pierre*, it is questionable whether that case creates the bright line rule Edwards asserts.

The *St. Pierre* court did write, "Statements made after conspiracy has ended or following arrest of one of the alleged coconspirators are not within exemption for statements made during course of and in furtherance of conspiracy. In support of this statement St. Pierre cited *State v. Dictado,* 102 Wash.2d at 283, 687 P.2d 172 (1984), which in turn cited *State v. Goodwin,* 29 Wash.2d 276, 186 P.2d 935 (1947). However, the hearsay statement at issue in St. Pierre was not improperly admitted because it was made by a coconspirator *after his arrest*. Rather, the statement was improperly admitted as a statement against interest. The appellate court then rejected the State's alternative theory that the statement was admissible as a coconspirators statement because the declarant simply was not a

coconspirator. Further, neither *Dictado* nor *Goodwin* actually involved statements made after the arrest of a coconspirator.

In *St. Pierre* the trial court admitted a statement of Andrew Webb, a nontestifying codefendant. The trial court did not admit the statement as one of a coconspirator. On appeal our Supreme Court concluded that admitting Webb's uncorroborated statement violated St. Pierre's sixth amendment right of confrontation because it lacked the necessary indicia of reliability. *St. Pierre*, at 115–16. On appeal the State argued the statement was nevertheless admissible on the alternative theory as a coconspirator's statement. The court rejected the argument, writing, "Independent of Webb's statement, there is no evidence to support a finding that Andrew Webb and Christopher St. Pierre were involved in a conspiracy to murder John Achord; in fact, Webb declares that he had nothing to do with Achord's death and the prosecution apparently believed him. Webb's statement regarding this murder was not that of a coconspirator." *St. Pierre*, at 119.

Likewise the issue in *Dictado* was not whether a coconspirator statement was improperly admitted *because* it was made *after an arrest*. Rather, defendant argued that the trial court improperly admitted coconspirator statements because he was *not charged with conspiracy*. The court wrote, "Specifically, he asserts that unless conspiracy is charged in

the information, coconspirator statements are inadmissible. We hold otherwise." Dictado, at 282–83.

Similarly, *Goodwin* did not address the specific issue of the admissibility of co-conspirators statements made after an arrest. There, a codefendant's confession was admitted. Goodwin objected to its admission "unless the jury was instructed that it be not considered against 'defendant Goodwin.'" The trial court admitted "the exhibit for all purposes." *Goodwin,* at 280. The appellate court reversed, writing, "It is our conclusion that confessions of one defendant, jointly tried with another, may be introduced in evidence, but that in such cases, the defendant, or defendants, who did not make the confession, should be protected by proper statements to the jury that the confession should not be considered as against him, or them. It follows that the trial court committed error in admitting the confession of Milsaps for all purposes, and in refusing to give the instruction proposed by appellant." *Goodwin,* at 289-90. Essentially the Goodwin court was addressing the same issue_*Bruton v. United States* resolved 20 years later, not the specific issue of admissibility of postarrest coconspirator statements. [5]

[5] 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

The State argues that because *St. Pierre, Dictado,* and *Goodwin* did not address the specific issue of admissibility of postarrest coconspirator statements, Edwards is incorrect that *St. Pierre* establishes a bright line rule in Washington prohibiting statements of a coconspirator solely on the grounds that the statements were made after the declarant was arrested. The State suggests it makes no sense that a coconspirators statement made moments before being arrested would be admissible but the same statement made moments after being arrested would not.

Federal authorities

A number of federal circuits allow postarrest statements of a coconspirator. In *United States v. Apodaca*, 275 F. Supp. 3d 123 (D.D.C. 2017), the court addressed whether an arrest triggers an end to a conspiracy such that statements made after the arrest are not admissible as coconspirator statements. The *Apodaca* court stated,

> "The law is well-established that "[c]onspiracy is a crime that presumes continuity until accomplishment or termination; once a defendant becomes a member of a conspiracy, he remains a member until he affirmatively withdraws or the conspiracy ends." *United States v. Moore*, 651 F.3d 30, 90 (D.C. Cir. 2011) (citing *Hyde v. United States*, 225 U.S. 347, 368–70, 32 S.Ct. 793, 56 L.Ed. 1114 (1912)). As a result, "once the government proves that a defendant was a member of an ongoing conspiracy, it has proven the defendant's continuous membership in that conspiracy unless and until the defendant withdraws." *Id.* Contrary to Agustin's assertion of the applicable law, **the mere fact that a defendant is arrested does not, without more, demonstrate withdrawal from a conspiracy.**

> Instead, the D.C. Circuit has made clear that "[t]o establish withdrawal, a defendant may show that it has taken '[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators.' *United States v. Apodaca*, at 134. (Emphasis added).

See also *United States v. Harris*, 542 F.2d 1283, 1301 (7th Cir. 1976) (The arrest or incarceration of a conspirator may constitute a withdrawal for a conspirator, but it does not as a matter of law.); *United States v. Agueci*, 310 F.2d 817, 838-39 (2d Cir. 1962), cert. denied, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963). (The law is clear, however, that while arrest or incarceration may constitute a withdrawal from a conspiracy, it does not follow that in every instance it must.); *United States v. Medina*, 761 F.2d 12, 18 (1st Cir. 1985) (statements were admissible because the conspiracy continued so long as the conspirators were acting together to destroy incriminating evidence.)

Edwards relies on *Krulewitch v. United States* (citation omitted) for the proposition that a conspiracy ends when the co-conspirator is arrested. But in *United States v. Perholtz*, 842 F.2d 343, 357 (D.C. Cir. 1988), the court rejected that same reliance, stating the defendants, "...rely on *Krulewitch v. United States,* 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949), and its progeny, for the proposition that statements made "during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise," are inadmissible as they are

not in furtherance of the conspiracy." The court went on to explain that the *Krulewitch line of cases* "does not "mean that acts of concealment can never have significance in furthering a criminal conspiracy." *Grunewald v. United States,* 353 U.S. 391, 405, 77 S.Ct. 963, 974, 1 L.Ed.2d 931 (1957). The *Grunewald* decision indicates that "acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy" may be considered to be in furtherance of the conspiracy within the meaning of the co-conspirator hearsay exemption. *Id.* (emphasis in original)." *United States v. Perholtz*, at 356–57.

Harmless error

Here, the court did not abuse its discretion in admitting Lee's statements. Assuming arguendo the court did err, it was clearly harmless. It is well-established under federal and state law that a violation of the confrontation clause is subject to harmless error analysis. *State v. Watt*, 160 Wash. 2d 626, 633, 160 P.3d 640, 643 (2007). Constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. The "overwhelming

untainted evidence" test is the standard for determining whether constitutional error is harmless error, and under that test, appellate court looks only at untainted evidence to determine whether untainted evidence is so overwhelming that it necessarily leads to finding of guilt. *State v. Guloy*, 104 Wash. 2d 412, 705 P.2d 1182 (1985). Whether Confrontation Clause error is harmless in a particular case depends upon a host of factors, including the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. *State v. Wilcoxon*, 185 Wash. 2d 324, 373 P.3d 224 (2016).

In *St. Pierre,* a codefendant's uncorroborated out-of-court statement regarding defendant's involvement in murder was *the only evidence* from which the jury could conclude that defendant aided or abetted a murder, and thus was not harmless error. In *United States v. Medina*, finding error harmless, the court stated, "there was a plethora of evidence, totally independent of the coconspirators' statements, proving that defendant was a member of the conspiracy to kidnap Mario Consuegra. As already noted, defendant was identified by three F.B.I. agents as the driver of the ransom

pickup car and most damning of all, his voice was positively identified by several witnesses as the one who spoke on the telephone to the victim's parents demanding the ransom and giving instructions for its payments. This was a classic open and shut case for the government. The testimony of the coconspirators only added frosting to a well-baked cake."

Here, the court admitted Lee's statement to Johnson that she and Edwards went to his wife's house where they told her what happened and left the stolen phones there, and they needed to get their stories straight and stick together. The court also admitted a letter written from Lee to Edwards about sentencing and how revealing the identity of the second man in the Salzman crimes could help her. Lee's statements went to the issue of identity. This was hardly crucial evidence in light of all of the untainted evidence in this case. Since the police recovered the stolen iPhones from Edward's wife the jury could reasonably infer that Edwards brought them to her. Thus there was evidence corroborating Lee's statement on this point. Aside from Lee's statements, there was overwhelming untainted evidence that Edwards was the robber.

Heather and Alexander Salzman testified that Edwards was approximately the same height, weight, and had the same skin tone and distinctive metallic dental work as the masked robber. They testified the robber was armed with a crowbar, was with Lee and another woman, and

wore latex gloves. Their stolen IPhones were later recovered from Edward's wife. Lee pleaded guilty to the Salzman burglary. Johnson testified that Edwards came up with the idea to go to the house to collect a debt. She, Edwards, Lee, and another man drove to the Salzman's home in her car, and Edwards went inside demanding money. Johnson further testified that she, Lee, and Edwards went to the Collazo's home just hours later, again in her car. There, Edwards assaulted Alexander and Jessica Collazo with a crowbar. Jessica Collazo testified that Edwards assaulted her and Alexander with a crowbar. Heather Delagasse identified Edwards as the man who entered the Collazo home with Johnson and another woman shortly before she saw Alexander Collazo covered in blood. Deputy O'Neill saw Edwards nearby later that day. Forensic evidence connected Edwards to the Salzman crimes. Two gloves, just like those worn by the man with the crowbar, were found in Johnson's car outside of the Collazo's home, with Edwards's DNA on them. Edwards was arrested less than two weeks later speeding through Ohio with Lee. He initially lied about his identity because he was wanted in Washington. While in jail Edwards wrote a letter to Johnson saying he was going to go to prison.

The fact that Lee's statement was made after her arrest does not automatically make it inadmissible. St. Pierre does not create the bright line rule Edwards asserts. Like *United States v. Medina* the untainted evidence

that Edwards was the crowbar wielding robber was overwhelming. Unlike *St. Pierre,* Lee's coconspirator's statement was certainly not the only evidence of Edwards's involvement in the crimes. Therefore error, if any, was harmless.

III. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO LEE'S OUT-OF-COURT APOLOGY TO THE SALZMANS. THIS STATEMENT WAS NOT OFFERED FOR THE TRUTH IT ASSERTED AND WAS ONE OF IDENTIFICATION. THUS IT WAS NOT OBJECTIONABLE AS HEARSAY.

"[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted." *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

Edwards' ineffective assistance claim fails on each of these three grounds. First, there were legitimate or tactical reasons why defense counsel did not object to the testimony. Edwards' defense was that he was not a participant in the crimes, not that Lee was not a participant in the crimes. In light of the testimony from the Salzmans and Johnson that Lee participated

in both home invasions, it would not have furthered Edwards' identity defense to challenge that Lee was a participant in the crimes.

Second, an objection to Lee's apology would not likely have been sustained. ER 801(c) defines "hearsay" as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Lee's apology to the Salzmans was not offered for its truth i.e. that she was truly sorry. As such, the statement was not hearsay at all. Mr. Salzman testified he identified the two females who entered his home from photographs the police showed him and later was in court when one of the two, Lee, pled guilty and apologized to him and his wife. ER 801(d)(1) provides in relevant part: A statement is not hearsay if--The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (iii) one of identification of a person made after perceiving the person. Thus, Mr. Salzman properly testified that he identified Lee as one of the two women who entered his home from photographs the police showed him, and that he later saw her in court. Lastly, Edwards has not shown that the result of the trial would have been different had the evidence not been admitted.

IV. THE TRIAL COURT DID NOT VIOLATE EDWARDS' RIGHT TO AN IMPARTIAL JURY BY NOT DISMISSING JUROR #10. THE JUROR DID NOT DEMONSTRATE IMPLIED OR ACTUAL BIAS. THE COURT DID NOT ABUSE ITS DISCRETION.

In addition to the questions and answers between the court and juror #10 recounted in appellant's brief at pages 37-39, were the following:

THE COURT: Okay. And did you talk to him or did you just – other than making that comment about, you know, if you want to change identity, you have to remove your hands?

JUROR: I don't believe I talked to him about any other thing, no.

THE COURT: Okay. And this memory you have, is it a distinct memory of something that actually occurred, or is it something that you mentioned that it might have been a dream?

JUROR: And that I could not swear to.

THE COURT: Okay. All right. So let me ask you this question. Whether that is a memory or an actual event, do you think that's something that you could separate and put to the side and not consider, and if thoughts about that particular episode came to your mind you could keep them off to the side and just focus on the facts that were presented during the trial?

JUROR: I believe I could, but – I could focus on the facts of the trial.

THE COURT: Okay.

JUROR: But I don't believe because I cannot tell you whether it was a dream or whether it was a reality, that I can't – I don't allow that to affect me.

THE COURT: Okay. Is it something that you would be able to control –

JUROR: Yes.

THE COURT: – and would not affect –

JUROR: I believe I could because of the nature of the memory or the dream. Because it's so faded I don't believe it will affect.

THE COURT: Do you have a feeling as to positive, negative, neutral feelings as a result of that real or dreamed interaction?

JUROR: This caused me to be nervous, but other than that I don't really have any feeling one way or the other. RP 419-421.

Defense counsel stated, "I think his answers were appropriate, and I guess I'm just going to probably in an abundance of caution just make a motion to exclude juror 11." Defense counsel then clarified it was juror 10 that he was referring to. RP 424. Juror 11 was excused based on a medical condition and juror 10 remained on the jury. RP 428.

Authorities

A trial court's decision to excuse a juror is reviewed for abuse of discretion. *State v. Jorden,* 103 Wash. App. 221, 226-27, 11 P.3d 866, 869 (2000). A trial court abuses its discretion if its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." A decision is manifestly unreasonable if it is outside the range of acceptable choices given the facts and the legal standard. *State v. Rohrich,* 149 Wash. 2d 647, 654, 71 P.3d 638, 642 (2003).

RCW 2.36.110 provides, 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.

CrR 6.5 states that: "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.

RCW 4.44.170 provides, Particular causes of challenge are of three kinds:
(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.
(2) For the existence of a state of mind on the part of the juror in reference to the action, or 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, and which is known in this code as actual bias.
(3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

RCW 4.44.190 addresses "actual bias:"
A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

RCW 4.44.180 defines "implied bias" as:
A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:
(1) Consanguinity or affinity within the fourth degree to either party.
(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

Edwards argues juror 10 demonstrated both implied and actual bias and cites *State v. Winborne*, 420 P.3d 707, 713–14 (Wash. Ct. App. 2018) in support of his argument that juror 10 was actually biased. The State replies that under the above statutes and case law, and considering the totality of juror 10's answers (1) he was not impliedly or actually biased, and (2) *Winborne* is distinguishable and does not support the proposition that juror 10 was actually biased. The court did not abuse its broad discretion in declining to excuse juror 10.

Edwards asserts "juror 10 was therefore a witness or somehow involved in the criminal transaction," (appellants' brief, p. 45) and argues this resulted in implied bias. First, his claim that juror 10 "was a witness" completely ignores the fact that the juror repeatedly told the court he was unsure whether his "memory" was the result of an actual event or a dream. Second, Edwards provides no analysis as to how juror 10 was impliedly biased under RCW 4.44.180 or the cases he cites for implied bias. Juror 10 did not demonstrate an *interest in the event* of the action (RCW 4.44.180, subsection 4), and clearly none of the other subsections apply.

Edwards argues juror 10 was impliedly biased under *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 941, 71 L. Ed. 2d 78 (1982) and its

progeny. *Smith v. Phillips* presented a completely different factual scenario and is distinguishable. There, during the trial a juror submitted an application for employment as an investigator in the District Attorney's Office, and that the prosecuting attorneys, upon being informed of the juror's application, withheld the information from the trial court and respondent's defense counsel until after the trial. The court held Respondent was not denied due process of law either by the juror's conduct or by the prosecutors' failure to disclose the juror's job application.

Justice O'Connor writing a concurring opinion, stated, "While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that 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. *Smith v. Phillips*, at 222.

Edwards also cites to *Solis v. Cockrell*, 342 F.3d 392, 396 (5th Cir. 2003) in his discussion of implied bias. There, the court stated, "Following Justice O'Connor's concurrence in *Smith* our circuit has recognized the implied bias doctrine, albeit with carefully watched limits. In *United States v. Scott,* 854 F.2d 697, 699-700 (5th Cir.1988), we quoted Justice O'Connor's formulation of implied bias and went on to presume bias on the part of a

juror who failed to disclose during voir dire that his brother was a deputy sheriff in the sheriff's office that had performed some of the investigation in the case. In *Andrews v. Collins*, 21 F.3d 612 (5th Cir. 1994) however, we cautioned that "the [Supreme] Court has not looked favorably upon attempts to impute bias to jurors," and that only "*extreme situations*" would justify such a finding. *Solis v. Cockrell*, at 396.

In light of these cases, what happened in this case was not such an extreme situation. This was not a case where the juror was in fact a witness or involved in the criminal transaction. There is no reason or authority to extend *Smith v. Phillips* to situations like this case where a juror discloses an incident which even the juror could not say was a dream or not.

Edwards's claim that juror 10 was "actually biased" is equally unsupported by the record. When the court asked juror 10 if he felt "positive, negative, or neutral" as a result of his real or dreamed interaction, he said he "did not have any feeling one way or the other." When the court asked the juror if he could separate and put to the side and not consider the dreams or actual event and just focus on the facts that were presented during the trial, he said he could focus on the facts of the trial. RCW 4.44.190 (addressing actual bias) requires the juror to express *an opinion* upon what he may have heard or read, and that *such opinion shall not of itself be*

sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot *disregard such opinion and try the issue impartially*. Here, juror 10 did not have an opinion, much less one that in the court's view could not be disregarded. The concern at the heart of RCW 4.44.190 is a juror's ability to be impartial. Juror 10's answers satisfied the court that he could be impartial. Given the facts and the legal standard, the court's decision to keep juror 10 was clearly not outside the range of acceptable choices, and therefore not an abuse of its broad discretion.

In *Winborne* the defendant was on trial for theft of a motor vehicle, attempting to elude a police vehicle, and second and third degree assault. During deliberations, the trial court received a note from the jury, which read: A juror now realizes he was a witness to some of the events of August 5th. Does this disqualify him?

Concerned about the juror's ability to separate personal observations from evidence presented during trial Winborne moved for the juror to be excused and an alternate seated. In the alternative, he asked the court to remind the jury that it must base its decision only on evidence heard during trial. The State suggested that the trial court respond to the juror question by questioning the juror about what he witnessed. The trial court denied Winborne's motion to dismiss the juror and rejected the State's suggestion.

The only action the court took was to instruct the jury to review each of the jury instructions provided by the court. One such instruction read, in part: The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict. *Winborne*, at 712.

The court noted that because the juror witnessed some of the litigated events this implicate actual bias, not implied bias. Critical to the court's decision was the fact that the trial court never questioned the juror to determine if he could disregard any opinion based upon his observations. The court wrote, "because no one questioned juror whether his recall, during the course of the trial, of events on August 5 might impact his verdict, *the trial court never resolved whether the juror could disregard any opinion based on his remembrance of his observations.* Therefore, under Washington's statutory scheme, juror w's observation of a portion of the alleged crime implicates actual, not implied, bias." (Emphasis added)

The present case is distinguishable from *Winborne* on two important points. First, in *Winborne* the juror actually witnessed the events in question. There was no dispute about that. Here the juror did not know

whether he had witnessed events or dreamed about events. The "event" was dreaming or seeing Edwards on a bicycle in South Kelso sometime within the past two years. Juror 10 did not "have personal knowledge of *the crime*" as Edwards asserts. Although Edwards challenged the sufficiency of the evidence as to identity, he put forth no testimony that he could not have committed the crime because he was not in the area. Second, the court in *Winborne* did not question the juror at all. Here the trial court here questioned juror #10 extensively. The court noted that the juror did not recall if it was an actual memory or if it was an actual dream. Further, the court noted that the juror indicated he could set aside any thoughts or memory of the dream or actual event. The court also felt it was important that the juror's feelings were neutral. Not only did the court question this juror, the court made a record of its analysis.

Edwards contends it is "exceedingly unlikely, if not impossible," that juror 10's memory was a dream. It is noteworthy that juror 10 recalled that the fellow on the bike "had tattoos on his hands" and the discussion with the juror's brother included him needing "to have your hands removed because it's obvious that somebody could identify you from that." RP 418. Such a bizarre comment is far more suggestive of a dream than reality. Even defense counsel stated, "I'm concerned about the other fella, No. 10, and I just don't want this dream to become a reality and then, you know all of a

sudden were faced – didn't give juror 11 enough time may be to get back from the hospital." RP 426.

The distinctions between this case and *Winborne* are significant. Unlike *Winborne*, the facts did not require the court to excuse juror 10. The court did not abuse its discretion. Reversal is not required.

V. IT WAS HARMLESS ERROR FOR THE COURT TO INSTRUCT THE JURY ON THE UNCHARGED ALTERNATIVE OF DISPLAYING WHAT APPEARED TO BE A DEADLY WEAPON ON COUNTS 1 AND 2. OTHER JURY INSTRUCTIONS GIVEN MAKE IT CLEAR COUNTS 1 AND 2 – ROBBERY IN THE FIRST DEGREE, WERE BASED ONLY ON THE CHARGED ALTERNATIVE OF BEING ARMED WITH A DEADLY WEAPON. THERE WAS NO TESTIMONY OR ARGUMENT THAT COULD HAVE CONCEIVABLY SUPPORTED A GUILTY VERDICT BASED UPON DISPLAYING WHAT APPEARED TO BE A DEADLY WEAPON.

The State charged Edwards in counts 1 and 2 with first degree robbery based solely on the alternative of being armed with a deadly weapon. However, the court instructed the jury in counts 1 and 2 with both the charged alternative of being armed with a deadly weapon as well as "displaying what appears to be a firearm or other deadly weapon." The State agrees these instructions were faulty. However, the State argues even assuming the error was of constitutional magnitude it was harmless beyond

a reasonable doubt. Based upon the evidence, other instructions, and argument, the jury could not have found Edwards guilty on counts 1 and 2 based upon the uncharged alternative of displaying something that appeared to be a firearm or other deadly weapon.

On direct appeal, it is the State's burden to prove that the error in instructing the jury on uncharged alternative means was harmless. *In re Brockie*, 178 Wash. 2d 532, 309 P.3d 498 (2013). *State v. Guloy,* 104 Wash.2d 412, 425, 705 P.2d 1182 (1985) (constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless). We find a constitutional error harmless only if convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. *State v. Mata*, 180 Wash. App. 108, 120, 321 P.3d 291, 297 (2014) citing *Guloy,* 104 Wash.2d at 425, 705 P.2d 1182.

State v. Nicholas, 55 Wash. App. 261, 272, 776 P.2d 1385, 1391 (1989), is directly on point. There, defendant was charged with four counts of first-degree robbery. One of the counts alleged only the alternative of being armed with a deadly weapon. The jury instruction however included the uncharged alternative *of displaying* what appeared to be a firearm or other deadly weapon. Defendant argued the faulty instruction permitted him to be convicted of an uncharged crime.

Nicholas held that even assuming the error in the instruction was of constitutional magnitude, it was harmless beyond a reasonable doubt. The court explained, "An error in instructing on an uncharged means of committing a crime may be harmless if, for example, "in subsequent instructions the crime charged was clearly and specifically defined to the jury." *State v. Severns, supra* 13 Wash.2d at 549, 125 P.2d 659 (1942). In the instant case, the jury returned a special verdict in connection with Count I (and in connection with the other three counts) that Nicholas was "armed with a deadly weapon at the time of the commission of the crime ..." The jury was instructed that the State had to prove this fact beyond a reasonable doubt. In light of these circumstances, there is no possibility that Nicholas was impermissibly convicted on the basis of RCW 9A.56.200(1)(b)." *Nicholas,* at 273.

Other jury instructions given in this case made it clear the two counts of first degree robbery involving the Salzman's were based only on the charged alternative of being armed with a deadly weapon. As in *Nicholas*, here the jury returned special verdicts on counts 1 and 2 that Edwards was "armed with a deadly weapon at the time of the commission of the crime ..." The jury was instructed that the State had to prove this fact beyond a reasonable doubt. Jury instruction #29 stated, in relevant part, "... The state must prove beyond a reasonable doubt that the defendant was armed with a

deadly weapon at the time of the commission of the crime of robbery in the 1st degree is charged in counts 1 and 2..., a person is armed with *a deadly weapon* if at the time of the commission of the crime, *the weapon* is easily accessible and readily available for offensive or defensive use, the state must prove beyond a reasonable doubt that there was a connection between *the weapon* and the defendant. The state must also prove beyond a reasonable doubt that there was a connection between *the weapon* and the crime. In determining whether these connections existed, you should consider among other factors the nature of the crime and the circumstances surrounding the commission of the crime, including the location of *the weapon* at the time of the crime and the *type of weapon.* A *deadly weapon* is an implement or instrument that has the capacity to inflict death and from the manner in which it is used is likely to produce or may easily produce death." Jury instruction # 24, outlined the elements of the associated charge of burglary in the first degree pertaining to the Salzman's (Count 3): "1. That on or about October 28, 2016, the defendant entered or remained unlawfully in a building of Alexander Salzman. 2. That the entering remaining was with intent to commit a crime against a person or property therein. 3. That and so entering or while in the building or in immediate flight from the building, the defendant *was armed with a deadly weapon...*" (Emphasis added).

In addition to the jury instructions, harmlessness is shown here because all of the evidence at trial went to the masked robber wielding a crowbar while in the Salzman's house, not something that *appeared to be a firearm* or other deadly weapon. There was no evidence or claim that the robber used something appearing to be a firearm or other deadly weapon. Mr. Salzman testified, the taller man held up a crowbar in a threatening manner and he was waiting for the man to swing it at him. RP 97. He described the crowbar or nail puller as being yellow and gray. RP 96. The gray and yellow crowbar stood out to Mr. Salzman so he included the information in his written statement. RP 106, 107. Mrs. Salzman testified that two masked men came barging into the house. One held a crowbar up in the air. RP 122-125. The crowbar was 12 to 16 inches long, and yellow and gray or faded black. RP 129. The second man was above 6 foot tall, wore a black ski mask and gloves, and had dark skin. This second taller man was the one holding up the crowbar. This second man with the crowbar had something shiny in his teeth like silver or gold. When they left, the taller man stuck the crowbar up the sleeve of his sweatshirt. RP 129, 130. The taller man with the crowbar took Mr. Salzman's wallet. RP 131. The defendant was approximately the same height as the man with the ski mask and the crowbar. RP 134.

The idea that a simulated handgun or other deadly weapon was displayed was never so much as even suggested. Edwards' defense was to deny any involvement in the robberies-- someone else committed the crimes. He did not challenge the evidence that the robber was armed with a crowbar. His position was the evidence did not prove he was that robber. Given that the only evidence presented and argued by the State was evidence of an actual crowbar, not a simulated firearm or deadly weapon the error in instructing the jury was harmless.

Edwards argues that "the state *urged* the jury to consider both alternative means." Appellant's brief page 50. This is incorrect. The State did not *urge* the jury to consider both alternative means. The only mention of the alternative of displaying what appeared to be a weapon was when the State merely read jury instruction # 22 which included that language. The State neither argued nor urged the jury to consider both alternative means. Rather, the argument focused on the overarching issue of identity – that Edwards was the robber with the crowbar.

For example, the State argued, "so this case raises a question of identity… So let's start with Mr. and Mrs. Salzman… They both testified that four people entered their home, two women and then two men wearing masks burst in… One an unknown shorter white guy with a bandanna and

red sneakers…, and the second man, a taller African-American male, wearing a ski mask and gloves and *wielding a crowbar* or as he called it a prybar. They both testified in court that the defendant fit the general description of the man wearing the mask, wearing the gloves, and *having the crowbar*…" RP 452, 453. The State further argued, "how else do we know that it was the defendant wearing the mask, *wielding the crowbar*, and wearing the gloves? So what that tells us is, defendant's DNA is on those gloves, the same type of gloves that the Salzman's saw on the hands of the person, the taller African-American male with gold or shiny, metallic teeth wearing the ski mask and *wielding the crowbar*…; And, remember, how the Salzman's testified about, you know, *the crowbar, the prybar*, being up like this and then zip, up the sleeve…" RP 461, 463, 464. Again, the prosecutor referenced the crowbar as being a heavy, metallic object, and that the pictures of the injuries to the victim "will tell you all you need to know about whether that *crowbar or prybar* was a deadly weapon in the sense that it's capable of causing death or substantial bodily injury." RP 472. There simply was no argument that the robber displayed a simulated firearm or other deadly weapon.

Edwards cites to *State v. Brewczynski*, 173 Wash. App. 541, 549, 294 P.3d 825, 828 (2013), arguing the case at bar is more similar to *Brewczynski* than *Nicholas*. Brewczynski was charged by amended

information with premeditated first degree murder with aggravating circumstances, first degree burglary and theft of a firearm. The jury convicted him of all charges and found by special verdict that he was armed with a firearm and committed the murder "in the course of, in furtherance of, or in immediate flight from" first degree burglary.

The first degree burglary alleged defendant entered or remained unlawfully in Mr. Cross's building and, while in the building and in immediate flight from the building, was armed with a handgun. *Brewczynski,* at 548–49. The court gave a jury instruction that stated that "[a] person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person is armed with a deadly weapon *or* assaults any person." The court also gave the "to convict" instruction that required the jury to find beyond a reasonable doubt that the defendant either was armed with a deadly weapon *or* assaulted a person. *Brewczynski*, at 549.

The court noted that although it is error to instruct the jury on alternative means that are not contained in the charging document, such error may be harmless if other instructions clearly limit the crime to the charged alternative. The court ruled that because none of the remaining

instructions limited the jury to consider solely the "armed with a deadly weapon" alternative of first degree burglary and the prosecutor in closing argument urged the jury to consider both alternatives the error was not harmless. Under those facts it was possible that the jury convicted Brewczynski on the basis of the uncharged alternative. *Brewczynski,* at 549–50.

The case at bar is much closer to the facts in *Nicholas* than *Brewczynski*. Here, as in *Nicholas*, defendant was charged with first degree robbery where the information alleged the sole alternative of being armed with a deadly weapon. Here, as in *Nicholas* the court instructed the jury on the both the charged alternative of being armed with a deadly weapon and the uncharged alternative *of displaying* what appeared to be a firearm or other deadly weapon. Here, like *Nicholas*, the jury returned a special verdict form that the defendant was "armed with a deadly weapon at the time of the commission of the crime." Like *Nicholas*, the jury was instructed the State had to prove this fact beyond a reasonable doubt. In addition to the special verdicts Edwards was also convicted of the associated charge in Count 3 of burglary in the first degree involving the Salzman's. On that charge, the jury was instructed only as to the element of being *armed with a deadly weapon,*

not as to the uncharged alternative of displaying what appeared to be a firearm or other deadly weapon.

Edwards attempts to distinguish his case from *Nicholas*. He argues that the jury answered the special verdict forms only *after* a finding of guilt on the robberies. (Appellants' brief, page 52). Of course they did. They were instructed to complete the special verdict form *if* they found defendant guilty of robbery in the first degree. (Jury instruction #29) What is important is that they *did* find that he was armed with a deadly weapon on the special verdict form, not the order in which they made their findings.

Based upon the evidence, other instructions, and argument, the jury could not have found Edwards guilty on counts 1 and 2 based upon the uncharged alternative of displaying what appears to be a firearm or other deadly weapon. Like *Nicholas*, the error in the jury instructions was harmless.

VI. A. THE STATE AGREES THAT THE ETHER COUNT 4 OR COUNT 5 SHOULD BE VACATED.

B. IF THE COURT AFFIRMS THE CONVICTIONS ON COUNTS 1 AND 2 THE STATE AGREES THAT BECAUSE THE COURT EXERCISED ITS DISCRETION AND MERGED COUNT 3 WITH COUNTS 1 AND 2 COUNT 3 SHOULD BE VACATED. THE TERM OF CONFINEMENT IMPOSED FOR THE DEADLY WEAPON ENHANCEMENT ON COUNT 3 WAS IMPROPER.

The jury found Edwards guilty of all counts. With the jury's verdicts, the court exercised its discretion in applying the burglary anti-merger statute such that Count 3 merged with counts 1 and 2. Edwards seeks reversal on counts 1 and 2. If this court affirms the convictions on counts 1 and 2 the State agrees that Count 3 should be vacated and thus the corresponding 24 month deadly weapon enhancement was improper. However, if there were a future sentencing hearing the court should retain its discretion regarding the application of the burglary anti-merger statute.

VII. THE STATE AGREES THAT THE LEGAL FINANCIAL OBLIGATIONS EDWARDS IDENTIFIES AS DISCRETIONARY SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS

I. EDWARDS'S CONTENTION THAT THERE WAS INSTRUCTIONAL ERROR WAS RAISED IN APPELLANT'S BRIEF.

II. EDWARDS HAS NOT SHOWN HIS ATTORNEY WAS INEFFECTIVE FOR THE REASONS HE PROVIDES.

Here, Edwards argues that his attorney was ineffective for not making a motion in limine to exclude certain evidence and not moving to suppress evidence. He does not explain what motions in limine should have been made or how the failure to make such motions prejudiced him. As such, the court should decline to address his claim. With respect to his claim that his attorney was ineffective for not bringing a suppression motion, this is redundant. The State addresses it in his third claim of error below.

III. EDWARDS HAS NOT SHOWN HIS ATTORNEY WAS INEFFECTIVE FOR NOT MAKING A SUPPRESSION MOTION.

"[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have

been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted." *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

Edwards has not shown that a motion to suppress would have been granted much less how the results of the trial would have been different if it were. *State v. McFarland,* 127 Wash.2d 322, 337, 899 P.2d 1251 (1995) (failure to challenge search does not constitute ineffective assistance unless suppression motion would have been granted and outcome would have been different). The law is well-settled that inmates have a diminished expectation of privacy. See *United States v. Carrozza*, 2 F. Supp. 2d 126 (D. Mass. 1998). (Under plain view doctrine, prison officials, who had right to open and read letters to inmates, were justified in copying and forwarding letter to law enforcement officials; knowing that letter would likely be read by prison officials, inmates could not reasonably expect officials to keep contents of letter private.)

IV. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

Edwards contends that certain statements made during closing argument were improper, citing to RP 521, and the State's argument, "they drove there in the car. The car contained the gloves. The gloves had the DNA that belonged to the defendant, gloves used in the first instant (sp) of

the Salzman's." The State argues that this was not a statement of personal belief of the defendant's guilt or innocence, as Edwards contends. Rather, the statement was supported by the evidence in the case. Further, the court instructed the jury that, "the lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It's important, however for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." (Instruction 1.)

In order to demonstrate prosecutorial misconduct, one must show that "the prosecuting attorney's conduct was both improper and prejudicial." In the context of closing arguments, misconduct includes making arguments that are unsupported by the admitted evidence. However, "the prosecuting attorney has 'wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.' " The prosecutor's conduct is reviewed in its full context. *In re Yates*, 177 Wash. 2d 1, 58, 296 P.3d 872, 900 (2013). Here the statements were supported by the evidence and were not a personal expression of guilt.

V. CONCLUSION

For the above stated reasons Edward's convictions should be affirmed. The conviction on either count 4 or 5 should be vacated. If all of the convictions are affirmed, count 3 should be vacated and the sentence reduced by 24 months which is the corresponding term of confinement for the deadly weapon enhancement imposed on count 3.

Respectfully submitted this 11 day of April, 2019

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By:

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Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on April 11th, 2019.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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