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SUPREME COURT NO. 97449-7

COURT OF APPEALS NO. 76858-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

GARY RICHARDS,

Appellant.

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

The Honorable Alan Hancock, Judge  
The Honorable Vickie Churchill, Judge

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PETITION FOR REVIEW

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KEVIN A. MARCH  
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Gary Michael Richards, the appellant below, seeks review of the Court of Appeals decision in State v. Richards, noted at \_\_\_ Wn. App. 2d \_\_\_, 2019 WL 1772360 (Apr. 22, 2019) (Appendix A), following denial of his motion for reconsideration on June 19, 2019 (Appendix B).<sup>1</sup>

B. ISSUES PRESENTED FOR REVIEW

1. Three sidebars conducted in the course of Richards's trial were never memorialized on the record. Although the subjects of the sidebars are not known because no record was made, they at least appeared to pertain to issues that were accessible to the public and would benefit from public scrutiny. Should the Court of Appeals decision, which paradoxically holds both that the sidebars were improper and that the sidebars did not implicate the public trial right, be reviewed?

2. The Court of Appeals agreed with Richards that the trial court erred in admitting ER 404(b) evidence. However, in its discussion of harmless error, the Court of Appeals did not address the impact of the erroneously admitted evidence or the instruction to the jury that the erroneously admitted evidence could be used to consider Richards's intent,

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<sup>1</sup> While Richards's motion for reconsideration was pending, the Court of Appeals issued the mandate in error. The court issued a ruling recalling the mandate on June 19, 2019 contemporaneously with its order denying Richards's motion for reconsideration.

motive, and the absence of self-defense. Because it is inconsistent with this court's jurisprudence, should the Court of Appeals' harmless "analysis" be reviewed?

3. Does the trial court have discretion under the Sentencing Reform Act of 1981, chapter 9.94A RCW, to impose an exceptional sentence below a RCW 9.94A.533 firearm enhancement?

C. STATEMENT OF THE CASE

The State charged Richards with second degree assault, which included a firearm enhancement and a domestic violence allegation, following an October 18, 2015 incident involving his brother Harry Richards.<sup>2</sup> CP 74-76.

Harry visited Richards in the shop at the other end of the property they both lived on. RP 149. Harry spoke to Richards about moving into a trailer on their property; at some point Richards learned that moving was their mother's idea, prompting Richards to call their mother names. RP 157, 311. Harry did not approve of the insult to their mother and stepped closer to Richards. RP 131. Richards kicked towards Harry's groin area but did not make contact; Harry grabbed Richards's foot, knocking him down head first. RP 141, 158. Harry punched Richards repeatedly, requiring that Richards

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<sup>2</sup> To avoid confusion, this brief refers to the petitioner as Gary Richards or Richards and to his brother as Harry Richards or Harry.

later be hospitalized. RP 102-03, 105, 140-41, 192, 312-14. Harry also pinned Richards down as Richards cried and yelled for Harry to “get the ‘F’ out of here. Leave me alone.” RP 158, 192. Harry eventually let Richards out and left Richards’s shop. RP 141, 158.

Richards was in pain, dazed, afraid, and felt unsafe, so he grabbed his rifle. RP 316-17. He went outside, and initially did not see Harry; when he saw Harry, Richards stated he believed Harry was turning back for him, did not want another physical altercation, and thus fired the gun three times into the air. RP 143-44; 316-17. When Harry saw Richards had his rifle, he hid behind a tree and phoned police. RP 141-42, 162, 319. Police arrived and arrested Richards. RP 88, 90-91.

Prior to trial, the State sought to admit a 2007 incident between Richards and his neighbor, Diane Curtis. Curtis was outside playing with her dog, which was making noise when it continually went through a fence. RP 26-27, 233-34; CP 124-25. Curtis stated she suddenly heard gunshots and Richards yelling, “You’re out of here.” RP 28, 234; CP 124. Curtis said she did not think Richards was trying to harm her, but she was afraid of the gunshots and crawled back to her house on her hands and knees and called police. RP 29-30, 234-35; CP 124-25. No charges were ever filed against Richards for this incident.

The trial court admitted Curtis's testimony regarding the 2007 incident under ER 404(b). Although the trial court rejected the evidence as a common scheme or plan, the trial court stated it was "relevant to the Defendant's motive and intent in committing the currently charged offenses." CP 125 (conclusion of law 2); CP 126-27 (conclusions of law 7-8, rejecting common scheme or plan). The trial court also noted that because Richards intended to argue self-defense at trial, "the Defendant's acts are highly probative to show the absence of self-defense and also highly probative to show intent and motive." CP 125-26 (conclusion of law 2). Despite the fact that the trial court heard no testimony suggesting Richards acted in self-defense with regard to the 2007 Diane Curtis incident, the trial court concluded, "the Defendant is free to argue that the March 2007 incident was also self-defense. The Defendant could also argue that the 2015 incident had a different motive th[a]n the 2007 incident." CP 126 (conclusion of law 5).

The trial court also concluded that it would provide a limiting instruction to the jury. CP 127 (conclusion of law 9). The limiting instruction the trial court gave to the jury read,

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony regarding the 2007 incident involving Diane Curtis and may be considered by you only for the purpose of determining the defendant's motive, intent, and whether the defendant acted in self-defense on October 18, 2015. You may not consider it for



any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 63.

The trial court also admitted evidence of the state of Richards's residence. During Harry's testimony, Harry described the shop: "my first reaction was probably disgust and unsanitary and then sad." RP 150. Defense counsel objected to the relevance of such evidence, but the objection was overruled. RP 151. The State proceeded to elicit additional testimony and admitted photographic evidence that showed the "filth," "garbage," and containers Richards used to urinate into near his bed. RP 151-55.

During the trial, the trial court and counsel participated in four sidebars, all of which were requested by the prosecutor. RP 112, 131-32, 141, 151. For all the sidebars, the record reflects there was a "Bench Conference, off the record and out of the hearing of the jury." RP 112, 132, 141, 151. None of the sidebars was recorded and only one of them was ever memorialized. RP 112-13.

The jury returned a guilty verdict for the second degree assault and also concluded that Richards was armed with a firearm at the time of the offense and that Richards and Harry were family or household members. CP 41-43; RP 408-12.

At sentencing, defense counsel pointed to the concurrence in State v. Houston-Sconiers, 188 Wn.2d 1, 34-40, 291 P.3d 409 (2017) (Madsen, J., concurring), to request that the trial court exercise discretion to impose an exceptional sentence below RCW 9.94A.533's three-year firearm enhancement. RP 431-34. The trial court declined, indicating it had no discretion to do so. RP 437.

The trial court imposed a low-end standard range sentence of three months and a 36-month sentencing enhancement for a total of 39 months. CP 14; RP 437.

Richards appealed. CP 136. Among other things, he asserted that (1) the lack of sidebar memorialization violated his public trial right, (2) erroneous admission of ER 404(b) evidence deprived him of a fair trial, and (3) the trial court had discretion to impose an exceptional sentence below a 36-month firearm enhancement. Br. of Appellant at 7-22, 27-43.

The Court of Appeals acknowledged that the sidebars were improper but also held they did not implicate the public trial right because they pertained to evidentiary matters. Slip op. at 21-22. Of course, because the sidebars were never memorialized, the appellate record does not show what was discussed during the sidebars.

The Court of Appeals agreed with Richards in every respect that the trial court erred in admitting ER 404(b) evidence. Slip op. at 4-13. However,

the Court of Appeals held the errors were harmless by only addressing the strength of the remaining evidence; the court's decision never analyzed the impact of the erroneously admitted evidence on the outcome of trial. Slip op. at 13-14.

The Court of Appeals also held it did not have authority to overrule Washington Supreme Court precedent on the question of whether sentencing courts have discretion to impose exceptional sentences below a firearm sentencing enhancement. Slip op. at 22-23.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S PUBLIC TRIAL-SIDEBAR JURISPRUDENCE, MERITING REVIEW

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guaranty the accused a public trial. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Article I, section 10 of the Washington Constitution also mandates that “[j]ustice in all cases shall be administered openly.”

This court has established clear rules governing sidebars to ensure that they comport with the right to a public trial. In State v. Smith, 181 Wn.2d 508, 511, 334 P.3d 1049 (2014), the court held that “[p]roper sidebars” did not implicate the public trial right “because allowing public access would have no

positive role in the proceeding.” However, this holding depended on the fact that “[c]ritically, the sidebars here were contemporaneously memorialized and recorded, thus negating any concern about secrecy” and “[t]he public was not prevented from knowing what occurred.” Id. at 518.

In State v. Whitlock, Smith’s holding was discussed in detail and this court decided that its holding that sidebars did not implicate the public trial right was limited to “[p]roper sidebars” —those “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.’” 188 Wn.2d 511, 522, 396 P.3d 310 (2017) (alterations in original) (quoting Smith, 181 Wn.2d at 516 & n.10). Smith was also limited to “particular proceedings at issue in that case—all addressing legal challenges and evidentiary rulings that were so devoted to legal ‘complexities’ as to be ‘practically a foreign language.’” Whitlock, 188 Wn.2d at 522 (quoting Smith, 181 Wn.2d at 518-19).

Whitlock involved an in-chambers proceeding where the parties discussed the scope of a confidential informant’s cross examination. 188 Wn.2d at 514, 516. The in-chambers proceeding was initiated at the State’s request upon defense counsel’s elicitation of information pertaining to the CI’s role. Id. at 516. After the in-chambers proceeding, the CI finished testifying, another witness testified, and then it was lunchtime. Id. Just before recess,

the court and parties made a detailed record of their respective legal positions regarding the scope of the CI's testimony. Id. at 516-17.

The in-chambers conference that was tardily memorialized violated the right to a public trial under Smith because it was neither promptly recorded nor memorialized and, although it was eventually memorialized, there was no reason for this delay. Id. at 522-23. In addition, the Whitlock court reversed because the discussion about the CI “was not purely technical or legalistic. It was about a matter easily accessible to the public: informants and their motives to curry favor with authority.” 188 Wn.2d at 523.

Unlike Smith and Whitlock, no memorialization occurred for three sidebars in this case.

First, when Harry began to state that Richards's residence was “disgust[ing],” “unsanitary,” and “sad,” defense counsel objected and the State requested a sidebar. RP 150-51. Then a “Bench Conference, off the record and out of the hearing of the jury” occurred, and then “[t]he objection [wa]s overruled.” RP 151. The State proceeded to question Harry, using photographic evidence over defense objection, about how “filthy,” full of “garbage,” and “unsanitary” the conditions were and also elicited testimony that Richards apparently urinated into propane containers near his bed. RP 151-55. This sidebar was never memorialized, promptly or otherwise.

Second, a sidebar occurred after the State's hearsay objection during defense counsel's cross examination of Deputy Haugen, where counsel questioned the officer about Harry's statements to police and drew a hearsay objection. RP 131. Defense counsel made a completeness argument: "I think it's full cross-examination when he's talking about statements that he's made on Direct." RP 131. The State requested a sidebar and a bench conference was held off the record. RP 131-32. This sidebar was never memorialized, promptly or otherwise.

Third, also during cross examination of Haugen, counsel questioned the officer regarding Richards's statements during a police interview. RP 140-41. The State requested a sidebar for a reason that is unclear from the record, and then a sidebar was held off the record. RP 141. This sidebar was never memorialized, promptly or otherwise.

Given that none of these sidebars was ever memorialized, these sidebars were improper under Whitlock and Smith. The Court of Appeals agreed that the sidebars were improper under Smith yet also held that the public trial right does not attach to discussions about evidentiary rulings. Slip op. at 21-22.

The Court of Appeals decision conflicts with Smith and Whitlock regarding the constitutional public trial right, meriting review under RAP 13.4(b)(1) and (3).

There is no record of what was discussed during the sidebars because they were never memorialized. The Court of Appeals simply made up the fact that the sidebars pertained only to evidentiary matters given that there is no support for this proposition anywhere in the appellate record. The Court of Appeals seemingly missed the whole point of requiring memorialization: it creates a record of what was discussed and, *because of that record*, the public trial right is not implicated. Without a record, part of the trial was rendered nonpublic. Contrary to the Court of Appeals decision, this does implicate the right. Smith, 181 Wn.2d at 518 (under logic prong of experience and logic test, emphasizing memorialization is required to negate concerns of secrecy and enable the public to know what occurred). Sidebars cannot at once be improper under Smith and not improper under Smith because they involve evidentiary matters, as the Court of Appeals claimed. The decision under review conflicts with Smith and Whitlock. RAP 13.4(b)(1).

And, even assuming the sidebars only pertained to evidentiary matters, the Court of Appeals decision much too broadly claimed that evidentiary rulings are always “a subject of traditional sidebars to which the public trial right does not attach.” Slip op. at 21. True, mundane issues implicating little public interest that are purely technical or legalistic do not implicate the right. Whitlock, 188 Wn.2d at 522; Smith, 188 Wn.2d at 516 & n.10. But other matters that are “easily accessible to the public” implicate the right. Whitlock,

188 Wn.2d at 523. Where openness enhances both the fairness of the criminal proceeding and the appearance of fairness essential to public confidence in the proceeding, the public trial right is implicated. Id. at 521; Smith, 181 Wn.2d at 514-15.

Thus, even assuming that all that was discussed at the sidebars was a relevancy objection to Richards's living conditions and an objection about the scope of cross-examining a police witness, the Court of Appeals provided no analysis as to how these matters are not easily accessible to the public or how they do not implicate fairness or the appearance of fairness. The public can easily understand questions of relevancy and unfair prejudice when it comes to admitting evidence of Richards's living conditions, complete with urine containers, garbage, and all. The public can also understand why it might be unfair or appear to be unfair to limit the scope of the defense's cross examination of a police witness where the State elicited similar testimony on direct. The Court of Appeals failed to address these questions and instead held that such evidentiary questions *never* implicate the public trial right, contravening both Smith and Whitlock. Slip op. at 21-22. RAP 13.4(b)(1) and (3) review is warranted.



2. DESPITE AGREEING THAT THE TRIAL COURT COMMITTED MULTIPLE ER 404(b) ERRORS IN ADMITTING EVIDENCE OF AN EIGHT-YEAR-OLD INCIDENT, THE COURT OF APPEALS HELD THE ERRORS HARMLESS WITHOUT ADDRESSING THE PREJUDICIAL IMPACT OF THE EVIDENCE AT ALL

The trial court admitted evidence that Richards shot his gun into the air in 2007 in the presence of his neighbor Diane Curtis because such evidence would assist the prosecution in proving Richards's intent, motive, and the absence of self-defense when he shot his gun into the air in 2015 after having an injurious physical altercation with his brother Harry. CP 125-26. Not only did the trial court admit such evidence, it also expressly instructed the jury that it could consider the evidence "for the purpose of determining the defendant's motive, intent, and whether the defendant acted in self-defense on October 18, 2015." CP 63.

The Court of Appeals correctly agreed with Richards that none of the stated bases for admission of the ER 404(b) evidence was met and therefore the trial court repeatedly erred. Slip op. at 4-13. However, the Court of Appeals held the errors were harmless. Slip op. at 13-14.

In reaching this conclusion, the Court of Appeals stated that testimony from Richards, Harry, and the responding officer showed that Harry was walking away from Richards when Richards shot his rifle into the air to scare

Harry and Harry hid behind a tree and called police.<sup>3</sup> Slip op. at 13-14. In addition, the court noted that Richards later reported to his neighbor that he fired his rifle into the air after his argument with Harry because he “got pissed off.” Slip op. at 14. According to the Court of Appeals, “This evidence strongly supports the jury verdict.” Slip op. at 14.

The Court of Appeals failed to address the only legally pertinent question in a harmless analysis: what was the impact of the erroneously admitted evidence? In determining whether improper admission of ER 404(b) evidence requires reversal, the inquiry is not whether there is sufficient evidence to convict without the inadmissible evidence. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). “Rather, the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence.” Id.

Contrary to this authority, the Court of Appeals nowhere addressed the impact of the inadmissible evidence. Its decision did not discuss how introduction of the 2007 incident painted Richards as an angry, gun-toting hothead who fired his gun in the air to frighten people over the smallest of transgressions. Nor did its decision discuss the impact of the jury instruction

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<sup>3</sup> Notably, the Court of Appeals failed to address how badly Harry beat Richards, which required the police to take Richards to the hospital rather than jail following arrest. RP 104-05, 135. And the Court of Appeals also neglected Richards’s testimony that he saw Harry turning back around and shot the gun to avoid further violent confrontation. RP 143-44, 316-17.

that the 2007 incident should be considered for Richards’s intent, motive, and whether Richards acted in self-defense. CP 63. Indeed, the jury was expressly told that the 2007 incident *should* affect the outcome of trial, which all came down to whether Richards acted in self-defense. The Court of Appeals’ refusal to address this instruction or the evidence of the 2007 incident in its harmlessness “analysis” shows that its decision is nothing other than result-oriented nonsense. Because the Court of Appeals’ harmless error analysis conflicts with Gower, RAP 13.4(b)(1) review is warranted.<sup>4</sup>

3. THIS COURT SHOULD GRANT REVIEW TO RECONSIDER WHETHER THE SENTENCE REFORM ACT PERMITS DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE BELOW A FIREARM ENHANCEMENT

Richards expressly requested an exceptional sentence below the three-year firearm enhancement. RP 431-35. Counsel pointed out that Richards was 66 years old, feeble, in poor health, and was a “tiny little person” weighing “maybe 90 pounds now.” RP 433. Counsel also pointed out that, although Richards fired a gun, he never pointed the gun at anyone or intended anyone

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<sup>4</sup> This court was recently willing to grant review and reverse solely on the issue of harmlessness when it was the State that filed the petition. See State v. Romero Ochoa, noted at 1 Wn. App. 2d 1059, 2017 WL 6616736 (2017), review granted, 191 Wn.2d 1005, 424 P.3d 1224 (2018), rev’d \_\_\_ Wn.2d \_\_\_, 440 P.3d 994 (2019). The Court of Appeals’ harmless error “analysis” in this case is every bit as untenable as and far less thorough than it was in Romero Ochoa, 2017 WL 6616736, at \*8-9. With respect to granting review of incorrect harmlessness analyses, the defense should be placed on equal footing with the prosecution.

physical harm. RP 433-34. The complaining witness did not want to see his brother in prison but just wanted him to get help. RP 425.

It serves no end of justice not to recognize the plain discretion the SRA provides to impose an exceptional sentence below a standard range firearm enhancement and instead require an elderly man to serve an automatic three years because he made a poor decision, never had the intent to harm anyone, and never actually did harm anyone. This court's decision in State v. Brown, 139 Wn.2d 20, 983 P.3d 608 (1999), overruled in part by Houston-Sconiers, 188 Wn.2d 1, should be fully overturned to permit trial courts discretion to impose exceptional sentences below standard range sentence enhancements.

Brown is incorrect and harmful and should be fully overruled. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (holding that stare decies requires "a clear showing that an established rule is incorrect and harmful before it is abandoned").

Brown is incorrect for several reasons. Nowhere in the SRA does it state that enhancements under RCW 9.94A.533 cannot be modified under the exceptional sentence provision, RCW 9.94A.535. Where the legislature has otherwise chosen to exempt sentencing provisions from RCW 9.94A.535, it has explicitly stated as much. RCW 9.94A.540 ("the following minimum terms of total confinement are mandatory and shall not be varied or modified

under RCW 9.94A.535”); accord Houston-Sconiers, 188 Wn.2d at 36-37 (Madsen, J., concurring).

A standard range sentence with a sentence enhancement is not somehow two separate aspects of the sentence but all part of the standard range. The legislature has indicated precisely this given that RCW 9.94A.533(3) reads, “The following additional times shall be added to the standard range for felony crimes . . . .” (Emphasis added.) Generally, “[i]f the statute’s meaning is plain on its face, we give effect to that plain meaning as the expression of what was intended.” TracFone Wireless, Inc. v. Dep’t of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010) (citing Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). RCW 9.94A.533(3)’s meaning is clear: enhancements are additional times added to standard range sentences; they do not stand on their own separate and apart from the standard range sentence. Brown’s contrary reading is divorced from clear statutory text. Per the statutory language,

[t]here is no reason why a sentencing court, which has the discretion to depart from a standard range sentence, loses that discretion when imposing an exceptional sentence that increases the standard range. Even with the enhancement, the sentence is still simply a standard range sentence. The enhancement does not transform that sentence into a mandatory minimum.

Houston-Sconiers, 188 Wn.2d at 37-38 (Madsen, J., concurring). Richards agrees and asks that this sound reasoning, consistent with RCW 9.94A.533's language, become Washington law.

Richards also adopts and incorporates by reference all the other points made in the Houston-Sconiers concurrence that support the proposition that trial courts have discretion to impose exceptional sentences below standard range sentences that include sentence enhancements.

Brown is not only incorrect; it is also harmful. It removes important discretion from those who know the most about the defendants before them, sentencing judges. It also leads to sentences that conflict with the aims of the SRA. It leads to disrespect of the legal system and law enforcement: victims who know a family member might face an inflexible, draconian sentencing regime merely because they were armed when they committed crimes might think twice about involving law enforcement in the first place. It certainly seemed that Harry Richards, the complaining witness here, was thinking twice after learning that the trial court would be imposing a minimum 39-month prison term. RP 425.

Brown is incorrect, harmful, and its continuing vitality should be addressed by granting review of this issue pursuant to RAP 13.4(b)(4) as a matter of substantial public importance.

E. CONCLUSION

Because he satisfies RAP 13.4(b)(1), (3), and (4), Richards respectfully requests that this petition for review be granted.

DATED this 18th day of July, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

KEVIN A. MARCH

WSBA No. 45397

Office ID No. 91051

Attorneys for Petitioner

# APPENDIX A



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	No. 76858-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
GARY MICHAEL RICHARDS,	)	
	)	
Appellant.	)	FILED: April 22, 2019
_____	)	

LEACH, J. — Gary Michael Richards appeals his conviction for assault in the second degree and his sentence. He challenges a number of the trial court’s evidentiary rulings and claims that three off-the-record sidebars violated his right to a public trial. He also asserts that the trial court mistakenly believed it did not have discretion to impose an exceptional sentence downward on a firearm enhancement. But Richards does not show that any alleged evidentiary errors prejudiced him or that the public trial right attached to the questioned sidebars. And binding precedent holds that the language of the firearm enhancement statute deprives sentencing courts of the discretion to impose an exceptional sentence for a firearm enhancement. We affirm.

## FACTS

Harry Richards<sup>1</sup> owns about 13 acres of land containing his house and a galvanized building or “shop,” among other structures. Harry’s brother, Gary Richards, has lived in the shop “off and on” and was living there in 2015. Harry testified that Richards’s living conditions were poor. He stated that Richards had had a difficult time the previous winter because he had to pack propane into the shop for heat.

On October 18, 2015, Harry went to the shop to speak with Richards about the possibility of Richards moving into a trailer on the property for the winter. Harry asked Richards, “[W]hat do you think about moving into a nice trailer like the one I have? You’ve seen my trailer. It’s got a tip-out. It’s comfortable.” Harry testified that Richards initially reacted positively. But when Harry told Richards that their mother had offered to buy the trailer, Richards insulted their mother. Harry, who had been leaning against a sawhorse, stood up and told Richards not to “talk about mom like that.” Richards attempted to kick Harry in his groin. Before Richards’s foot made contact, Harry grabbed his foot and took him to the ground. Harry then grabbed Richards by his shirt collar and said it was not acceptable to disrespect their parents. Richards was “very angry[,] . . . kind of spitting,” and trying to hit Harry. Harry hit Richards in the

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<sup>1</sup> For purposes of clarity, we refer to Harry Richards as Harry and Gary Richards as Richards.

head and told Richards not to hit him. Richards began crying and told Harry to get out and leave him alone.

Harry let go of Richards and started walking back to his house. When Harry was 50 to 75 feet away he heard metal on metal like the shop door opening and looked back to see Richards holding a rifle. Harry dialed 911 as he quickly walked to a tree to take cover. Harry "peeked out" from behind the tree long enough to see that Richards saw him and was beginning to move his rifle upward from its vertical, downward position. Harry told police, "I'm getting shot at here and I need some help." He identified the shooter as Richards. While Harry was talking with police, he heard three quick gunshots.

Responding Officer Leif Haugen testified that upon detaining Richards, Richards stated that he and Harry had gotten into an argument and Harry had hit him on the left side of his temple, causing him to fall back and cut his head open. Richards told Haugen that after he fell, Harry "kept hitting me in the head. And I told him to leave." After Harry left, Richards stated, "I walked back to where we had the argument. I told him to leave me alone and I fired three rounds into the trees above him, way above him. He hid behind a tree. I wasn't shooting at him." Richards stated that he was only trying to scare Harry. At trial, Richards testified that he shot three times in the air toward the trees because he was afraid of Harry and did not want Harry "beating [him] more."

Richards told Haugen that after the incident, he "walked off by Misty Meadows with [his] dog." Richards said that he had fired a .22 caliber Lever-Action rifle, which Haugen later found in a chicken coop on Harry's property. Richards also told police that he thought the magazine was in the barbecue. Police did not find the magazine in the barbecue and never recovered it.

Police took photographs of a red mark on the left side of Richards's face and a cut on the top of his head. Haugen testified that he took Richards to a hospital to have his cut examined.

In an amended information, the State charged Richards with assault in the second degree and a firearm sentencing enhancement. The jury found Richards guilty as charged and that he was armed with a firearm at the time of the offense. The trial court imposed a low-end standard range sentence of 3 months for the second degree assault conviction and 36 months for the firearm enhancement for a total of 39 months. Richards appeals.

## ANALYSIS

### Admission of Evidence

Richards challenges select evidentiary rulings on the grounds that the evidence was either inadmissible propensity evidence or irrelevant. Richards shows error but not prejudice.

An appellate court reviews a trial court's evidentiary rulings for an abuse of discretion.<sup>2</sup> A trial court abuses its discretion when it makes a manifestly unreasonable decision or it bases its decision on untenable grounds or reasons.<sup>3</sup> For example, a court's decision is manifestly unreasonable if it "relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law."<sup>4</sup>

*A. Propensity Evidence*

Richards claims that the trial court should not have admitted evidence of a 2007 incident in which he shot a rifle into the air to scare his neighbor's dog. He asserts that the State used it to show his propensity to fire firearms into the air as a scare tactic in violation of ER 404(b). We agree but decide that this error did not prejudice Richards.

ER 404(b) prohibits evidence of prior bad acts to show propensity to commit a crime.<sup>5</sup> But this rule authorizes its admission for certain purposes, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>6</sup> "To use prior acts for a nonpropensity based theory, there must be some similarity among the facts of the acts themselves."<sup>7</sup>

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<sup>2</sup> State v. Slocum, 183 Wn. App. 438, 449, 333 P.3d 541 (2014).

<sup>3</sup> Slocum, 183 Wn. App. at 449.

<sup>4</sup> Slocum, 183 Wn. App. at 449 (quoting State v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009)).

<sup>5</sup> State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

<sup>6</sup> DeVincentis, 150 Wn.2d at 17 (quoting ER 404(b)).

<sup>7</sup> State v. Wade, 98 Wn. App. 328, 335, 989 P.2d 576 (1999).

Then, intent or motive can logically flow from introduction of the prior acts.<sup>8</sup> “It is the facts of the prior acts, not the propensity of the actor, that establish the permissive inference admissible under ER 404(b).”<sup>9</sup>

Before admitting evidence of a prior bad act, a trial court must (1) find by a preponderance of the evidence that misconduct occurred, (2) determine that the prior act is relevant to a material issue, (3) state on the record the purpose for which the evidence is admitted, and (4) determine that the danger of undue prejudice is outweighed by the probative value of the evidence.<sup>10</sup> “When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.”<sup>11</sup> This court resolves doubtful cases in favor of the defendant.<sup>12</sup>

Here, the trial court admitted testimony of Richards’s neighbor, Diane Curtis, about an incident in 2007. Curtis described a day when she was throwing a ball for her dog near Richards’s shop. When her dog went through a fence, it made noise. She then heard gunshots coming from near Richards’s shop and heard Richards say, “You’re out of here.” This scared her. She crawled back to her house on her hands and knees because she did not know where the bullets were going. She called 911. Richards testified that he shot his rifle into the air to

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<sup>8</sup> Wade, 98 Wn. App. at 335.

<sup>9</sup> Wade, 98 Wn. App. at 336.

<sup>10</sup> State v. Vars, 157 Wn. App. 482, 495, 237 P.3d 378 (2010).

<sup>11</sup> Wade, 98 Wn. App. at 334 (quoting Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 78 L. Ed. 196 (1933)).

<sup>12</sup> Wade, 98 Wn. App. at 334.

scare Curtis's dog away from him because her dog "was constantly coming over everyday eating [his] dog's dog food" and growled at him when he left his motor home.

At trial, the State offered this evidence to show a common scheme or plan, Richards's state of mind and his motive, and the absence of self-defense. After an ER 404(b) hearing, the trial court denied the State's request to admit Curtis's testimony to show a common scheme or plan because the evidence was too remote. But the court admitted this evidence for purposes of showing Richards's intent and motive and an absence of self-defense. The court concluded that Richards's actions in 2007 and 2015 had the requisite similarity to allow admission of the 2007 incident because "[t]he Defendant is alleged to have been angry and discharged a firearm to scare someone in both cases." The court noted Richards could argue to the jury that he had a different motive in 2015 than in the 2007 incident and that his actions in 2015 were in self-defense.

During trial, the trial court told the jury,

I'm allowing . . . evidence [of the 2007 incident], coming from [Curtis], but you may consider the evidence only for the purpose of determining the Defendant's motive, intent, and whether the Defendant acted in self-defense on October 18, 2015.

You may not consider the evidence for any other purpose.

The court also gave a limiting instruction to that effect.

I. Intent

First, Richards claims that the trial court abused its discretion by admitting evidence of the 2007 incident under an intent theory. We agree.

When the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act “goes to intent” is not a “magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].”<sup>13</sup>

Richards relies on State v. Wade<sup>14</sup> to show that the circumstances surrounding the 2007 and 2015 incidents were not sufficiently related to allow admission of the 2007 incident as evidence of his intent in 2015.<sup>15</sup> In Wade, the trial court admitted evidence of Wade’s prior sales of cocaine, which the State offered to prove intent to deliver cocaine.<sup>16</sup> Division Two of this court held that the trial court erred in admitting this evidence because the facts of the charged offense differed significantly from the facts of the previous offenses.<sup>17</sup> Division

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<sup>13</sup> Wade, 98 Wn. App. at 334 (alterations in original) (quoting State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)).

<sup>14</sup> 98 Wn. App. 328, 989 P.2d 576 (1999).

<sup>15</sup> Richards also claims that the 2007 incident is too remote to be admissible as evidence of intent. But remoteness is relevant to whether a prior bad act is probative of a common scheme or plan, not whether it is probative of intent. “[T]o be admissible, evidence of a defendant’s prior sexual misconduct offered to show a common plan or scheme must be sufficiently similar to the crime with which the defendant is charged and not too remote in time.” State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

<sup>16</sup> Wade, 98 Wn. App. at 333.

<sup>17</sup> Wade, 98 Wn. App. at 337.



Two stated that the prior sales involved police observation of Wade trafficking in drugs and selling drugs to an undercover officer, while in the current case, Wade saw an officer, emptied his pocket, and ran.<sup>18</sup> The court concluded that the admission of evidence about Wade's prior sales allowed the improper inference that "[b]ecause the previous convictions are for the same type of crime, including the requisite intent, Wade was predisposed to have that same intent on the current occasion."<sup>19</sup>

Similarly, Richards contends that here, the 2007 and 2015 incidents are too distinct for the 2007 incident to be admissible as evidence of intent. Richards reasons that in 2007, he fired his rifle into the air to scare a dog. In 2015, he fired a gun into the air after an argument with Harry during which Harry injured him. Richards claims that the only similarities are that he fired a gun into the air, which purposefully or inadvertently scared the person nearby. He asserts that admission of the 2007 incident supports only the improper inference that he was predisposed to have the same assaultive intent in 2015.

In response, the State asserts that in both instances, Richards responded to a perceived intrusion into his domain by firing his rifle into the air to scare the intruder. And after both incidents, Richards minimized his actions by telling Curtis that she had "turned his dad against him" because she told his father what

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<sup>18</sup> Wade, 98 Wn. App. at 337.

<sup>19</sup> Wade, 98 Wn. App. at 337.

had happened and by commenting that his assault against Harry was not a “big deal.”

Consistent with Richards’s argument, the 2007 and 2015 incidents have limited similarities. The incidents are more factually connected than those in Wade. But because Richards fired a gun into the air to scare something or someone near his residence does not make the similarities between the incidents sufficiently plentiful or the incidents sufficiently unique to outweigh the potential prejudice to Richards. And a court should resolve doubtful cases in favor of the defendant. We conclude that the trial court abused its discretion by admitting evidence of the 2007 incident to show intent. But, as discussed below, this error is harmless.

## II. Motive

Next, Richards claims that the trial court abused its discretion by admitting evidence of the 2007 incident to show motive. We agree.

“Motive” means “[a]n inducement, or that which leads or tempts the mind to indulge a criminal act.”<sup>20</sup> Richards relies on State v. Saltarelli<sup>21</sup> to support that the 2007 incident does not establish any motive for the 2015 incident. There, our Supreme Court held that the trial court erred in admitting evidence of Saltarelli’s previous assault of a woman because it could not show a motive for his alleged

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<sup>20</sup> Saltarelli, 98 Wn.2d at 365 (alteration in original) (quoting BLACK’S LAW DICTIONARY 1164 (4th ed. 1968)).

<sup>21</sup> 98 Wn.2d 358, 655 P.2d 687 (1982).

rape of a different woman five years later.<sup>22</sup> Richards also relies on cases in which our Supreme Court upheld the admission of prior acts to show motive when the previous conduct involved the same victim as the victim in the case at bar.<sup>23</sup>

Here, the 2007 incident involved Curtis and her dog, while the 2015 incident involved Harry. Because Richards's motivation for shooting his rifle in Curtis's presence is unrelated to his motivation for shooting his rifle in Harry's presence, the trial court erred in admitting evidence of the 2007 incident under ER 404(b) for purposes of establishing motive. But again, we conclude that this error was harmless.

### III. Absence of Self-Defense

Richards also claims that the trial court abused its discretion by admitting evidence of the 2007 incident to show an absence of self-defense. We agree.

Richards relies on State v. Thompson<sup>24</sup> to show what type of 404(b) evidence may be used to rebut a self-defense claim. There, a jury found Thompson guilty of manslaughter in the first degree and assault in the second

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<sup>22</sup> Saltarelli, 98 Wn.2d at 365.

<sup>23</sup> See State v. Hoyer, 105 Wash. 160, 163, 177 P. 683 (1919) (in Hoyer's appeal of his conviction for murder in the first degree, our Supreme Court did not "find any error in the admission of testimony as to the details of the quarrels [between Hoyer and the victim] which preceded the homicide"); see also State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995) (in Powell's appeal of his conviction for murdering his wife, our Supreme Court upheld the trial court's admission of evidence of Powell's prior assaults of his wife).

<sup>24</sup> 47 Wn. App. 1, 733 P.2d 584 (1987).

degree while armed with a deadly weapon.<sup>25</sup> This court upheld the trial court's admission of evidence showing that Thompson exhibited aggressive, violent behavior within a few hours of the shooting at issue; it reasoned that the testimony was "relevant to show the absence of self-defense by showing a continuing course of provocative conduct."<sup>26</sup>

The State relies on State v. Turner,<sup>27</sup> involving defense of property, in which a jury convicted Turner of three counts of second degree assault and reckless endangerment for shooting at teenagers who threw eggs at his house. Division Two of this court held, "Because defendant's prior hypothetical question [to an officer] regarding the firing of warning shots in defense of his property indicated a frame of mind relevant to proof of intent in the present case, . . . testimony regarding [this] incident[ ] was proper."<sup>28</sup>

Unlike in Thompson, where the earlier conduct occurred within hours of the incident, here, the 2007 incident occurred eight years before Richards's argument with his brother. And, unlike in Turner, here, the circumstances surrounding the earlier conduct were much different than those surrounding the incident at issue. Consistent with Richards's argument, Curtis's testimony does not support that Richards took any self-defense actions in the 2007 incident. As

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<sup>25</sup> Thompson, 47 Wn. App. at 5.

<sup>26</sup> Thompson, 47 Wn. App. at 2-4, 12.

<sup>27</sup> 29 Wn. App. 282, 284-86, 627 P.2d 1324 (1981).

<sup>28</sup> Turner, 29 Wn. App. at 290.

discussed above, in 2007, Richards shot his rifle into the air to scare Curtis's dog, and in 2015, Richards shot his rifle into the air after a physical fight with his brother. The 2007 incident was thus too remote from and dissimilar to the 2015 incident to show an absence of self-defense. But this error was harmless.

#### IV. Harmless Error

Richards contends that the trial court's error in admitting the 2007 incident to show intent, motive, and an absence of self-defense resulted in prejudice. We disagree.

A reviewing court will not reverse due to error in admitting evidence that does not result in prejudice to the defendant.<sup>29</sup> “[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.”<sup>30</sup>

Richards claims that admission of the 2007 incident prejudiced him for two reasons: (1) it led jurors to believe that because he acted wrongfully in shooting his rifle for purposes unrelated to self-defense in 2007, he did the same in 2015, and (2) it undermined his self-defense claim. But testimony from Richards, Harry, and responding officer Haugen established that following Richards's and Harry's dispute, as Harry was walking away from Richards's shop, Richards shot his rifle into the air to scare Harry. Harry hid behind a tree and called the police,

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<sup>29</sup> State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

<sup>30</sup> Thomas, 150 Wn.2d at 871 (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

stating that Richards was shooting at him. Richards later told Curtis that he fired his rifle into the air after his argument with Harry because he “got pissed off.” This evidence strongly supports the jury verdict. Richards does not establish, within reasonable probabilities, that error in admitting evidence of the 2007 incident materially affected the outcome of the trial. Admission of Curtis’s testimony about this incident was harmless.

*B. Living Conditions*

Richards also claims that the trial court abused its discretion by admitting evidence of his living conditions because it was irrelevant and unfairly prejudicial. We disagree.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without [that] evidence.”<sup>31</sup> Only relevant evidence is admissible.<sup>32</sup>

Here, Harry testified about the state of Richards’s shop. He stated, “If I had to describe it, I would say my first reaction was probably disgust and unsanitary and then sad. Sad because a guy would be able to live in those conditions, somebody that’s as capable as my brother Gary is.” The State asked what Harry meant by “capable.” Richards’s trial counsel objected on the basis of

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<sup>31</sup> ER 401.

<sup>32</sup> ER 402.

relevance and improper opinion. After a sidebar conducted off the record, the trial court overruled the objection. The State asked to admit two photographs Harry took of the inside of the shop. Richards's defense counsel objected based on relevance. The trial court overruled the objection. Harry described the photo, stating that it showed "the bed where Gary slept and a propane heater, and filth, garbage." He described "more garbage." The State asked Harry if he knew what liquid was in the bottles pictured in the photographs. Harry stated, "I believe that they're urine." Richards's counsel objected. The court sustained this objection.

Richards asserts that his living conditions were not on trial and they did not make it more or less likely that he committed any element of assault against Harry. But Richards's living conditions were the reason that Harry went to Richards's shop to talk to him. The status of Richards's poor living conditions, which required him to pack propane into the shop the previous winter, caused Harry to suggest that Richards move into a trailer. During their discussion about this suggestion, Richards insulted their mother, which led to their argument.

In addition, evidence of Richards's living conditions was relevant to rebut Richards's argument that malice or greed motivated Harry's presence at the shop or that Harry was a trespasser. During closing argument, Richards's counsel stated, "You heard Harry. Counsel says, 'Well, Harry's a credible witness.' Harry doesn't have anything to lose. Well, wait a minute. Harry's got everything to

gain. [Richards] was the guy that was living in the shop, and he's the guy that's not living in there anymore." Also, to support Richards's defense of property claim in his trial brief, Richards stated, "The facts at trial will show that [he] was in rightful possession of his property and used reasonable force to prevent a malicious trespass or other interference with such property rights."

The State also contends that Richards's living conditions were relevant to his motive. It asserts that Richards shot his rifle into the air, in part, because his living conditions made him feel powerless. Although the State advanced this theory during the ER 404(b) hearing, because it did not do so at trial, Harry's trial testimony about Richards's living conditions is not probative of this theory.

Last, Richards claims that evidence of his living conditions was inadmissible under ER 403 because the risk of unfair prejudice outweighed any probative value. But Richards did not object on this basis at trial. Generally, this court does not consider claims of error raised for the first time on appeal.<sup>33</sup> We decline to consider Richards's ER 403 claim.

The trial court did not abuse its discretion by admitting evidence of Richards's living conditions.

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<sup>33</sup> State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); RAP 2.5(a).



*C. Cumulative Error*

Richards asserts that cumulatively, the alleged evidentiary errors require a new trial. “The cumulative error doctrine applies ‘when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.’”<sup>34</sup> The trial court did not abuse its discretion by admitting evidence of Richards’s living conditions. It erred only in admitting evidence of the 2007 incident under ER 404(b). And because the trial court’s error was harmless, it does not require a new trial.

Right to a Public Trial

Richards contends that the trial court’s three off-the-record sidebars violated his constitutional right to a public trial. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a right to a public trial.<sup>35</sup> Article I, section 10 of the Washington Constitution mandates that “[j]ustice in all cases shall be administered openly,” which entitles the public and the press to openly administered justice.<sup>36</sup> Violation of the public trial right is a

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<sup>34</sup> In re Pers. Restraint of Morris, 176 Wn.2d 157, 172, 288 P.3d 1140 (2012) (quoting State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)).

<sup>35</sup> Presley v. Georgia, 558 U.S. 209, 212, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995).

<sup>36</sup> Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

structural error that a reviewing court presumes is prejudicial.<sup>37</sup> We review constitutional issues de novo.<sup>38</sup>

To evaluate an alleged public trial right violation, a reviewing court conducts a three-part inquiry: (1) whether the proceeding at issue implicates the public trial right, (2) if so, whether there was a closure, and (3) if there was a closure, whether the closure was justified.<sup>39</sup> The appellant has the burden of proving the first two prongs, and the proponent of the closure carries the third.<sup>40</sup> Richards claims that the sidebars at issue implicate his public trial right. We disagree.

The experience and logic test determines whether the proceeding at issue implicates the public trial right.<sup>41</sup> “The guiding principle is ‘whether openness will enhance[ ] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.’”<sup>42</sup> In State v. Smith,<sup>43</sup> our Supreme Court held that “sidebars do not implicate the public trial right.” The court reasoned that sidebars “have not historically been open to the public

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<sup>37</sup> State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

<sup>38</sup> State v. Armstrong, 188 Wn.2d 333, 339, 394 P.3d 373 (2017).

<sup>39</sup> State v. Smith, 181 Wn.2d 508, 521, 334 P.3d 1049 (2014).

<sup>40</sup> State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015).

<sup>41</sup> Smith, 181 Wn.2d at 514.

<sup>42</sup> Smith, 181 Wn.2d at 514-15, (alteration in original) (internal quotation marks omitted) (quoting State v. Sublett, 176 Wn.2d 58, 75, 292 P.3d 715 (2012)).

<sup>43</sup> 181 Wn.2d 508, 511, 334 P.3d 1049 (2014).

and . . . allowing public access would play no positive role in the proceeding.”<sup>44</sup> The court defined “proper sidebars” as those that are “(1) ‘limited in content to their traditional subject areas,’ (2) necessary to ‘avoid disrupting the flow of trial,’ and (3) contemporaneously transcribed or ‘promptly memorialized in the record.’”<sup>45</sup> It stated that sidebars “deal with the mundane issues implicating little public interest.”<sup>46</sup> It distinguished proper sidebars dealing with issues like evidentiary rulings at issue in Smith from a pretrial suppression hearing.<sup>47</sup> It reasoned, “[E]videntiary rulings that are the subject of traditional sidebars do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness.”<sup>48</sup> Proper sidebars deal with issues that are “so devoted to legal ‘complexities’ as to be ‘practically a foreign language.’”<sup>49</sup> The court also noted that the sidebars at issue were contemporaneously memorialized and recorded, which negated any concern about secrecy.<sup>50</sup>

Richards relies on State v. Whitlock<sup>51</sup> to show that the challenged sidebars were improper, so the public trial right attaches. Whitlock involved a ten-minute

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<sup>44</sup> Smith, 181 Wn.2d at 511.

<sup>45</sup> State v. Whitlock, 188 Wn.2d 511, 519, 396 P.3d 310 (2017) (internal quotation marks omitted) (quoting Smith, 181 Wn.2d at 519).

<sup>46</sup> Smith, 181 Wn.2d at 516.

<sup>47</sup> Smith, 181 Wn.2d at 516-19.

<sup>48</sup> Smith, 181 Wn.2d at 518.

<sup>49</sup> Whitlock, 188 Wn.2d at 522 (quoting Smith, 181 Wn.2d at 519).

<sup>50</sup> Smith, 181 Wn.2d at 518.

<sup>51</sup> 188 Wn.2d 511, 396 P.3d 310 (2017).

discussion in chambers about the scope of cross-examination related to “informants and their motives to curry favor with authority.”<sup>52</sup> Two hours after this discussion and outside of the presence of the defendants, the court and counsel placed on the record a description of the in-chambers proceeding.<sup>53</sup> Our Supreme Court held that this discussion violated the defendants’ public trial right because it was in-chambers, meaning it was closed, it was not recorded or promptly memorialized, and it concerned issues easily accessible to the public.<sup>54</sup>

Here, the first sidebar that Richards challenges occurred during Harry’s testimony about Richards’s living conditions. Richards’s defense counsel objected “to the relevance of this testimony and the opinion evidence as to capability.” The trial judge told counsel to “[c]ome up” to the bench. The court then overruled the objection after a “Bench Conference, off the record and out of the hearing of the jury.” Another sidebar occurred after the State’s hearsay objection during Richards’s trial counsel’s cross-examination of Deputy Haugen about Harry’s description of the incident. The trial court sustained the objection after holding another “Bench Conference, off the record and out of the hearing of the jury.” The third sidebar also occurred during Richards’s trial counsel’s cross-examination of Haugen when counsel was questioning Haugen about Richards’s description of the incident. Without any objection, the State asked, “Your Honor,

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<sup>52</sup> Whitlock, 188 Wn.2d at 516, 523.

<sup>53</sup> Whitlock, 188 Wn.2d at 516.

<sup>54</sup> Whitlock, 188 Wn.2d at 522-23.

can we approach?” After another “Bench Conference, off the record and out of the hearing of the jury,” the trial court stated, “The objection is overruled.” The parties do not dispute that these sidebars were not memorialized.

Richards claims that the public trial right attached to the first two sidebars because his living conditions and the scope of Haugen’s cross-examination are publically accessible topics and worthy of public scrutiny. He maintains that because the State did not object before asking for the third sidebar, he “can only speculate that the State might have lodged a rule of completeness objection under ER 106,” which would have benefited from public oversight.

Because these sidebars were not contemporaneously transcribed or promptly memorialized in the record, they were improper sidebars under Smith. But consistent with Smith, the public trial right generally does not attach to discussions about evidentiary rulings because they do not implicate the concerns that the right is meant to protect. As stated above, the first sidebar involved a relevancy objection and the second involved a hearsay objection. Both of these sidebars involved evidentiary rulings, a subject of traditional sidebars to which the public trial right does not attach.

In addition, the record does not support that the third sidebar implicated Richards’s trial right because the State does not state the nature of its request to approach the bench. And as Richards speculates, because the State asked to

approach during Haugen's testimony about Richards's statement to police, it was likely an evidentiary objection. These off-the-record discussions about evidentiary matters do not implicate concerns about fairness that underpin the public trial right. So, the public trial right does not attach to them. Richards does not show that these improper sidebars violated his right to a public trial.

#### Firearm Sentencing Enhancement

Last, Richards contends that the trial court mistakenly believed that it did not have discretion to impose an exceptional sentence downward from the required term of confinement for a firearm enhancement, which requires remand for resentencing. We disagree.

This court reviews questions of law de novo.<sup>55</sup>

RCW 9.94A.533(3)(e) states firearm enhancements are "mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." In State v. Brown,<sup>56</sup> our Supreme Court held that this statutory language deprives sentencing courts of the discretion to impose an exceptional sentence with regard to firearm enhancements. Richards asserts that for the reasons Justice Madsen asserts in her concurring opinion in State v. Houston-Sconiers,<sup>57</sup> this

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<sup>55</sup> State v. Reeves, 184 Wn. App. 154, 158, 336 P.3d 105 (2014).

<sup>56</sup> 139 Wn.2d 20, 21, 29, 983 P.2d 608 (1999), overruled in part by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).

<sup>57</sup> 188 Wn.2d 1, 391 P.3d 409 (2017).

court should reexamine our Supreme Court's holding in Brown. In Houston-Sconiers, our Supreme Court held,

[S]entencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system . . . . To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA [Sentencing Reform Act of 1981, ch. 9.94A RCW] range and/or sentence enhancements.<sup>[58]</sup>

In her concurring opinion, Justice Madsen stated, "I would resolve this case by holding that sentencing courts have the discretion to depart from the mandatory firearm enhancements when imposing exceptional sentences."<sup>59</sup>

First, Houston-Sconiers overruled the holding in Brown for juveniles only. Richards is a 66-year-old man who is subject to the Brown decision. The trial court correctly stated that it did not have discretion to impose an exceptional sentence downward from the term of confinement the firearm enhancement requires. Second, "[O]nce [our Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by [the Supreme Court]."<sup>60</sup> This court does not have the authority to reexamine Brown. We reject Richards's claim.

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<sup>58</sup> Houston-Sconiers, 188 Wn.2d at 21.

<sup>59</sup> Houston-Sconiers, 188 Wn.2d at 40 (Madsen, J., concurring).

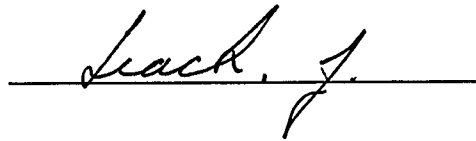
<sup>60</sup> State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Statement of Additional Grounds for Review

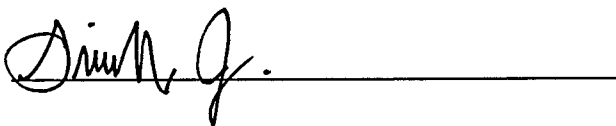
Richards submitted a statement of additional grounds for review. Because he asserts no legal grounds for his appeal that he did not raise in his appellate brief,<sup>61</sup> we decline to review it.

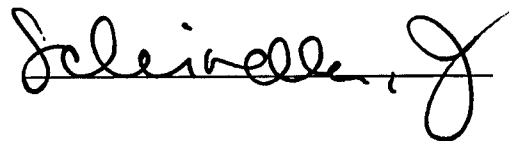
CONCLUSION

We affirm. Richards does not show that any evidentiary errors caused prejudice. In addition, because the public trial right did not attach to the sidebars at issue, these sidebars did not violate Richards's public trial right. And the trial court correctly stated that it did not have discretion to impose an exceptional sentence for the firearm enhancement.



WE CONCUR:





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<sup>61</sup> RAP 10.10(a).



# APPENDIX B


**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	No. 76858-1-I
Respondent,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
GARY MICHAEL RICHARDS,	)	
	)	
Appellant.	)	
_____	)	

The appellant, Gary Michael Richards, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

  
\_\_\_\_\_  
Judge

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**July 18, 2019 - 4:12 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 76858-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Gary Michael Richards, Appellant  
**Superior Court Case Number:** 15-1-00209-1

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