

FILED
SUPREME COURT
STATE OF WASHINGTON
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No. 103510-1

**THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

JOEL DUANE ZWALD, Appellant.

**ANSWER TO PETITION FOR REVIEW
& RESPONSE TO MOTION TO CONSOLIDATE**

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A. IDENTITY OF RESPONDENT

Respondent, State of Washington, by Kimberly Thulin, Appellate Deputy Prosecutor for Whatcom County, seeks the relief designated in Part B.

B. DECISION AND RELIEF REQUESTED

Respondent asks this Court to deny Petitioner Zwald's Motion to Consolidate this case with the pending petitions for review in State v. Rohleder, S.Ct. No. 103265-0, and State v. Kovalenko, S.Ct. No. 103024-0 and his corresponding Petition for further review of the Court of Appeals decision in State v. Joel Zwald, __ Wn. App. 2d __, 555 P.3d 467 (2024).

C. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should deny Zwald's Corrected Motion to Consolidate this case with the pending petitions for review in State v. Rohleder, S.Ct. No. 103265-0, and State v. Kovalenko, S.Ct. No. 103024-0 to review the non-corroboration jury instruction, when Zwald relies on an alleged error - that the trial court abused its discretion giving the instruction, when Zwald did not assert this issue until he filed his reply brief, where Zwald affirmatively stated in the trial court

that he was not taking exception to this instruction and agreed the instruction accurately stated the law.

2. Whether Zwald demonstrates further review of prosecutor error in closing is warranted where he fails to offer adequate grounds to justify discretionary review of the alleged errors under RAP 13.4(b), he failed to object to any of the arguments he complained of on appeal and where, Zwald now argues the Court of Appeals disregarded this Court's opinion in Loughblom, when Zwald did not rely on Loughblom to argue in the Court of Appeals that the prosecutor's arguments deprived him of a fair trial. *See*, Corrected Pet. for Rev. at 19.

D. STATEMENT OF THE CASE¹

Zwald appealed his jury convictions for child molestation in the third degree, child molestation in the second degree, and rape of a child in the second degree. He argued in the Court of Appeals that the trial court commented on the evidence instructing the jury that to convict Zwald, it need not

¹ This summarizes in part, the verbatim statement of facts set forth in the Court of Appeals Opinion; a more complete version is set forth in the State's Response Brief.

corroborate the victim's testimony and asserted the prosecutor committed misconduct during closing argument. After considering his arguments in the context to the trial court record and applicable law, the Court of Appeals rejected Zwald's arguments and affirmed his convictions.

Zwald now seeks further review and to consolidate this case with other cases where Petitions for Review are pending, to challenge the non-corroboration jury instruction. Zwald also seeks further review of the Court of Appeals decision rejecting Zwald's claims that prosecutor error in closing deprived him of a fair trial. For the reasons set forth below, the State opposes consolidation and opposes granting review of this case.

**E. ARGUMENT IN OPPOSITION TO
DISCRETIONARY REVIEW**

A careful review of the Court of Appeals decision demonstrates the Court appropriately considered Zwald's arguments in context to all of the evidence, jury instructions, closing arguments and applicable law to

determine Zwald was not deprived of a fair trial. Further discretionary review of Zwald's case is not warranted.

Zwald requests this Court consolidate this case with other pending cases so it can review the non-corroboration instruction given in this case. Zwald specifies that consolidation would be appropriate because 'the trial court gave this instruction because it believed appellate courts require this instruction.' *See*, Corrected Motion to Consolidate at 2. But Zwald did not raise this issue on direct appeal. *See*, Slip. Op. at 2, 2-10. He only raised it in his reply brief. Compare Br. of App. with Reply Br. "A reply brief must be limited to a response to the issues to which the reply brief is directed." RAP 10.3(c). The court will not review an issue raised and argued for the first time in a reply brief. Matter of Rhem, 188 Wn.2d 321, 327, 394 P.3d 367 (2017).

Consolidation and further review of the non-corroboration jury instruction is also not warranted because the record reflects Zwald agreed below that the instruction given

accurately states the law, affirmatively stated he was not taking exception to the trial court giving the instruction, and not only didn't challenge that the trial court abused its discretion giving the instruction, but also did not make a due process challenge in the trial court or argue in the court of appeals that this alleged due process issue is a manifest error of constitutional magnitude that required appellate review. Further review and consolidation of this case with other petition for review cases pending, to review the non-corroboration instruction, is not warranted under these circumstances.

Zwald also requests this Court grant further review of the Court of Appeals decision as to errors Zwald claimed the prosecutor made during closing arguments; arguments Zwald did not object to below. Zwald argues further review is warranted because the Court of Appeals disregarded this Court's opinion in Loughblom and other cases to find the errors he alleged for the first time in the Court of Appeals, were not so prejudicial as to have deprived Zwald of a new trial. While

Zwald's Corrected Petition for Review argues the Court of Appeals disregarded this Court's opinion in Loughblom in rejecting his arguments below, a review of his brief reflects Zwald did not rely on Loughblom to argue below that the prosecutor's arguments deprived him of a fair trial. *See*, Corrected Pet. for Rev. at 19. Zwald only referenced Loughblom in passing in his opening brief in the Court of Appeals, to simply assert the standard of review applicable where prosecutor error in closing is alleged. *See*, Br. of App. at 27. Its inexplicable why Zwald now essentially asserts for the first time, that the Court of Appeals "[refused] to acknowledge" the alleged "harmful impact" of the prosecutor's arguments "contrary to Loughblom" when Zwald did not rely on Loughblom to argue prosecutor error below. *See*, Corrected Pet. for Rev. at 19. The Court of Appeals' analysis reveals the court carefully considered Zwald's arguments in context to all of the evidence and closing arguments made to determine the alleged errors did not deprive Zwald of a fair trial. Further

review of the prosecutorial error in closing alleged in this case is not warranted. The State therefore respectfully requests this Court deny Zwald's motion for consolidation and request for further review of the errors Zwald alleges, some of which are being asserted for the first time in his petition.

F. CONCLUSION

Based on the preceding analysis, the Court of Appeals opinion, and the State's briefing below, the Respondent respectfully requests that Zwald's Corrected Motion for Consolidation and Corrected Petition for Review be denied.

This document contains 1,118 words, excluding parts of the document exempted from the word count by RAP 18.17(b).

DATED this 1st day of November, 2024.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Thulin', is written over a horizontal line.

Kimberly Thulin, WSBA 21210
Appellate Deputy Prosecutor
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WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

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Appellate Court Case Title: State of Washington v. Joel Duane Zwald
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Answer to Petition for Review & Response to Motion to Consolidate

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