

**FILED**  
APR 11, 2014  
Court of Appeals  
Division III  
State of Washington

No. 31892-3-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

State of Washington, Respondent

v.

Alfonso Cerda Salazar, Appellant

---

BRIEF OF RESPONDENT

---

GRANT COUNTY PROSECUTOR'S OFFICE  
P.O. BOX 37  
Ephrata, WA 98823-0037  
(509) 754-2011

## Table of Contents

Statement of the Issues.....	1
Statement of the Case.....	1
Argument .....	4
A. <u>The court properly denied Mr. Cerda’s motion to admit photographs because they were not helpful to the trier of fact</u> .....	4
B. <u>The trial court did not abuse its discretion by denying Mr. Cerda’s motion for a mistrial because no error occurred</u> .....	6
C. <u>The peremptory challenge process did not violate Mr. Cerda’s right to a public trial</u> .....	7
D. <u>The court properly instructed the jury on the State’s burden of proof when it used WPIC 4.01</u> .....	8
E. <u>Mr. Cerda failed to demonstrate that he is entitled to a new trial for cumulative error because he has not shown that any prejudicial errors occurred</u> .....	9
Conclusion .....	9

## Table of Authorities

### Cases

<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	8
<i>State v. Donald</i> , 178 Wn. App. 250, 316 P.3d 1081 (2013) .....	4
<i>State v. Dunn</i> , ___ Wn. App. ___, ___ P.3d ___, No. 43855-1-II, 2014 Wn. App. Lexis 786 (April 8, 2014).....	7
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	9
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983) .....	4
<i>State v. Lane</i> , 56 Wn. App. 286, 786 P.2d 277 (1989) .....	8
<i>State v. Love</i> , 176 Wn. App. 911, 309 P.3d 1209 (2013) .....	7
<i>State v. Mabry</i> , 51 Wn. App. 24, 751 P.2d 882 (1988).....	8
<i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	6
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	5
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	4
<i>State v. Perez-Valdez</i> , 172 Wn.2d 808, 265 P.3d 853 (2011).....	6
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	8
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	4
<i>State v. Price</i> , 33 Wn. App. 472, 655 P.2d 1191 (1982).....	8
<i>State v. Stevens</i> , 58 Wn. App. 478, 794 P.2d 38 (1990) .....	9
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	7

**Federal Cases**

*Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)...9  
*Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503  
(2006).....4

**Constitutional Provisions**

Const. art. 1, § 22.....7

**Evidence Rules**

ER 602 .....6  
ER 701 .....6  
ER 702 .....4-5

**Other Authorities**

WPIC 4.01.....8-9

## **I. STATEMENT OF THE ISSUES**

- A. Pursuant to the rules of evidence, did the trial court properly exclude bite mark photographs that were not helpful to the jury?
- B. Pursuant to the rules of evidence, did the trial court properly allow the victim to testify how Mr. Cerda appeared to him?
- C. Did the trial court comply with WA Const. art. 1, § 22 when it conducted the peremptory challenge process by having the parties mark their challenges on a juror list that was passed between the parties in open court?
- D. Did the court properly instruct the jury as to the burden of proof when it used the standard WPIC language that has previously been upheld as constitutional by the Washington State Supreme Court?
- E. Under the cumulative error doctrine, was there even a single error, let alone multiple prejudicial errors constituting “severe trial errors” that would warrant the exceptional remedy of reversal?

## **II. STATEMENT OF THE CASE**

### **A. Statement of Facts:**

On October 29, 2012, Officer Joseph Westby stopped a vehicle that Mr. Cerda was riding in (as a passenger) to arrest him on an active warrant. 1RP 82. After stopping the vehicle, Officer Westby attempted to

effectuate the arrest of Mr. Cerda, but he resisted. 1RP 82-8. Mr. Cerda resisted his arrest by (1) refusing to open the vehicle door when Officer Westby asked him to, 1RP 83, (2) locking the vehicle's door, preventing Officer Westby from opening it, 1RP 84, and (3) physically holding onto the vehicle to prevent Officer Westby from removing him, 1RP 90-91.

In his effort to remove Mr. Cerda from the vehicle, Officer Westby applied a "softening blow" to Mr. Cerda in the hope that this would get Mr. Cerda to release his grip on the vehicle. 1RP 91. Shortly after applying this softening blow, Officer Westby reached his arm around Mr. Cerda's head and shoulder area in an attempt to pull him from the vehicle. 1RP 91. At this point, Officer Westby observed Mr. Cerda turn his head down and felt a small pinch on his arm as Mr. Cerda bit him. 1RP 91.

Eventually, Officer Westby was able to separate Mr. Cerda from the vehicle, and the two tumbled to the ground. 1RP 94. Once on the ground, Mr. Cerda continued to resist by keeping his hands tucked under his body despite Officer Westby's commands to remove them. 1RP 95. This temporarily prevented Officer Westby from placing Mr. Cerda into restraints, and it was not until another officer arrived to help (Officer Paul Snyder) that Mr. Cerda was finally handcuffed. 1RP 95.

In addition to Officer Westby and Officer Snyder's testimony regarding what happened, the State also introduced a video showing the incident as well as photographs of the bite injury. Exhibits 13-17.

During Mr. Cerda's case in chief, Dr. Carl Wigren testified that the injury in the photographs was inconsistent with a human bite. 2RP 141-42. The court prohibited the defense from introducing photographs of typical bite marks (Exhibits 1-4), ruling that they would not be helpful to the finder of fact. 1RP 181-82. However the court did admit Dr. Wigren's own drawings of typical bite marks into evidence for illustrative purposes. Exhibit 18.

At the end of voir dire, peremptory challenges were exercised by each party marking their challenge on a juror list that was passed between the parties. Voir Dire RP 463-65; CP 49-51.

As part of its instructions to the jury, the court used WPIC 4.01 to define the State's burden of proof and included the optional bracketed "abiding belief" language:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 57.

Eventually, the jury found Mr. Cerda guilty of Assault in the Third Degree and Resisting Arrest. This appeal followed.

### **III. ARGUMENT**

A. The court properly denied Mr. Cerda's motion to admit photographs because they were not helpful to the trier of fact.

Although a defendant has a constitutional right to present a defense, the evidence used for this purpose is still governed (and limited) by the rules of evidence. *State v. Maupin*, 128 Wn.2d 918, 924–25, 913 P.2d 808 (1996) (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). A “defendant’s right to present a defense also has limits. The defendant’s right is subject to reasonable restrictions and must yield to ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *State v. Donald*, 178 Wn. App. 250, 264, 316 P.3d 1081 (2013) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

Trial court decisions on the admissibility of evidence are reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court does not abuse its discretion unless its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.* To admit expert testimony, the proponent must show that (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory



generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact. ER 702; *State v. Mak*, 105 Wn.2d 692, 715, 718 P.2d 407 (1986).

In the present case, Dr. Wigren was allowed to testify that Officer Westby's injury was inconsistent with a human bite. 1RP 166. Furthermore, Dr. Wigren was allowed to testify as to what information he relied upon in reaching this conclusion and was allowed to illustrate what a typical human bite mark looked like. 1RP 167-71.

The trial court did not abuse its discretion by excluding photographs of human bite marks. The court properly ruled that showing the jury these gruesome photographs of human bite marks would not help them in determining whether Mr. Cerda had assaulted Officer Westby. 1RP 180-182. It appears the court was also concerned that because the injuries in the photographs were so gruesome, they could improperly diminish the injury that was sustained in the present case (i.e., the severity of the injury was not an issue for the trier of fact). 1RP 181. Finally, the photographs used by Dr. Wigren were solely to assist in forming his opinion and had no direct relationship to the facts in Mr. Cerda's case.

Based on the gruesome nature of the photographs and their extremely attenuated connection to Mr. Cerda's case, the trial court properly excluded the photographs from evidence.

B. The trial court did not abuse its discretion by denying Mr. Cerda's motion for a mistrial because no error occurred.

Courts evaluate three factors to determine whether an error warrants a new trial: (1) the seriousness of the error, (2) whether the improper statement was cumulative of evidence properly admitted, and (3) whether the error could have been cured by an instruction. *State v. Perez-Valdez*, 172 Wn.2d 808, 265 P.3d 853 (2011). Implicit in this analysis is that an error occurred.

In the present case, there was no error. The trial court found no error in admitting Officer Westby's testimony describing how Mr. Cerda looked. 1 RP 86-88. A lay witness may testify to matters that he has personal knowledge of and may state opinions that are rationally based on his perceptions. ER 602, 701. Specifically, testimony regarding another person's appearance or demeanor is normally admissible. *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008) (holding that testimony from an officer that the alleged victim was "obviously traumatized" and that "something was terribly wrong" was proper).

Because the court did not abuse its discretion in admitting Officer Westby's testimony regarding the look Mr. Cerda gave him, no error occurred. Therefore, the court did not abuse its discretion in denying Mr.

Cerda's motion for a mistrial. Even if the court finds an error occurred, it wasn't serious and could have easily been cured by an instruction.

C. The peremptory challenge process did not violate Mr. Cerda's right to a public trial.

Although, the Washington Constitution guarantees a defendant the right to public trial, this right is not violated unless it fails the "experience and logic" test. Const. art. I, § 22; *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012).

[T]he 'experience and logic' test requires courts to assess the necessity for closure by consideration of both history (experience) and the purposes of the open trial provision (logic) . . . The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. If both prongs are answered affirmatively, then the *Bone-Club* test must be applied before the court can close the courtroom.

*State v. Love*, 176 Wn. App. 911, 916, 309 P.3d 1209 (2013) (citing *Sublett*, 176 Wn.2d at 73).

Two recent cases address the right to a public trial in the context of peremptory challenges, and both of them hold in favor of the State. *Love*, 176 Wn. App. 911; *State v. Dunn*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, No. 43855-1-II, 2014 Wn. App. Lexis 786 (April. 8, 2014) (holding that conducting peremptory challenges at the clerk's station do not violate the defendant's right to a public trial).

In *Love*, the court held that under the “experience and logic” test, the right to a public trial did not require peremptory challenges to take place in public. *Love* at 920. With respect to the experience prong, the court reasoned that there was “no evidence suggesting that historical practices required these challenges to be made in public.” *Love* at 918. Similarly, in finding the defendant had not met the logic prong, the court reasoned that peremptory challenges present no question of public oversight that would be necessary to (1) ensure a fair trial, (2) remind the officers of the court of the importance of their functions, or (3) to encourage witnesses to come forward and testify truthfully. *Id.* at 919-20.

Because the peremptory challenge process does not need to take place in public (even though the entire process in the present case did occur in a public and open courtroom), Mr. Cerda’s right to a public trial was not violated by passing a juror list between the parties to make the challenges.

D. The court properly instructed the jury on the State’s burden of proof when it used WPIC 4.01.

The optional “abiding belief” language of WPIC 4.01 has been upheld as constitutional in several cases. *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007); *State v. Pirile*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn. App. 286, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn. App. 24, 751 P.2d 882 (1988); *State v. Price*, 33 Wn. App. 472, 655

P.2d 1191 (1982). The U.S. Supreme Court has also upheld the use of the abiding-belief instruction. *See Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Because the trial court used WPIC 4.01, which has been approved and upheld by the Washington Supreme Court, no error occurred.

E. Mr. Cerda failed to demonstrate that he is entitled to a new trial for cumulative error because he has not shown that any prejudicial errors occurred.

The cumulative error doctrine is reserved for “severe trial errors” that do not warrant a reversal alone, but deny the defendant a fair trial when combined. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). When determining whether the errors denied defendant a fair trial, the court only considers prejudicial errors. *See State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

Mr. Cerda failed to demonstrate that any errors occurred, let alone prejudicial ones that constituted “severe trial errors.” Therefore, this Court should deny his claim of cumulative error.

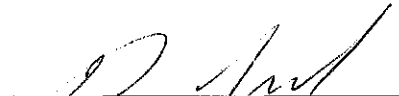
#### **IV. CONCLUSION**

Based on the foregoing analysis, no errors occurred that would warrant reversal. First, the trial court properly (1) excluded gruesome photographs that were not helpful to the jury, and (2) admitted Officer Westby’s description of Mr. Cerda’s stare. Second, Mr. Cerda’s right to a public trial

was not violated because the peremptory challenge process does not need to be conducted in public. And third, the court did not misstate the State's burden of proof because it used WPIC 4.01, which has been repeatedly upheld as constitutional. Because no errors were present warranting reversal, Mr. Cerda's convictions should be affirmed.

DATED: April 11, 2014

Respectfully submitted:  
D. ANGUS LEE,  
Prosecuting Attorney



---

Ryan Valaas, WSBA # 40695  
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31892-3-III
	)	
v.	)	
	)	
ALFONSO CERDA SALAZAR,	)	DECLARATION OF MAILING
	)	
Appellant.	)	
_____	)	

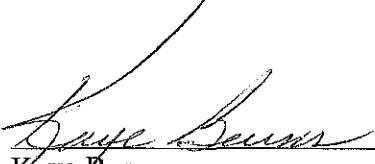
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and his containing a copy of the Brief of Respondent in the above-entitled matter.

Alfonso Cerda Salazar  
514 G Street SE  
Quincy WA 98848

Marla L. Zink  
Washington Appellate Project  
701 Melbourne Tower  
1511 Third Avenue  
Seattle WA 98101

Dated: April 11, 2014.

  
\_\_\_\_\_  
Kaye Burns