Supreme Court No. _____
Court of Appeals No. 31892-3-III

91151-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALFONSO CERDA SALAZAR,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Alfonso Cerda Salazar asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4(b)(1), (2), and (3).

B. COURT OF APPEALS DECISION

Mr. Cerda seeks review of the Court of Appeals decision filed November 13, 2014. Copy attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The federal and state constitutions guarantee an accused the right to present a defense and to a fair trial. Moreover, under the rules of evidence, relevant evidence is presumptively admissible and experts may present information from a learned treatise, such as a medical atlas, to explain the basis of their opinion. Mr. Cerda defended this assault charge by calling a forensic pathologist to counter the complainant's claim he was bitten, but the trial court refused to let the defense expert show the jury why the complainant's claim was untrue.

Did the trial court violate Mr. Cerda's rights in refusing to let the defense display at trial photographs of known bite marks the doctor relied upon in reaching his opinion that the injury on the complainant's arm was not a bite?

Because these images went to the heart of the disputed facts, should the Court grant review to correct this constitutional error and also remind the lower courts of established precedent holding that photographs are not subject to exclusion just because the opposing party can call them "gruesome"?

2. The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution. Under the First Amendment, the public has a right of access to trial proceedings. Criminal proceedings, including jury selection, may be closed to the public only when the trial court performs an on-the-record weighing test, as outlined in *State v. Bone-Club*[1]. Violation of the right to a public trial is presumptively prejudicial. Where peremptory challenges were conducted in written form, removed from public scrutiny, without considering the *Bone-Club* factors, was Mr. Cerda's and the public's right to an open trial violated, requiring reversal?

3. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions, even if no single error requires

[1] 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

reversal standing alone. In light of the cumulative effect of the right to present a defense error and others, was Mr. Cerda denied a fundamentally fair trial?

D. STATEMENT OF THE CASE

This case arises out of a traffic stop in Quincy, Washington. Alfredo Cerda and his wife were passengers in a car driven by their son when Officer Westby pulled them over. 1 RP 81-82; 2 RP 253-54, 277. The officer wanted to arrest Mr. Cerda on an outstanding warrant. 1 RP 83. Mr. Cerda asked to be allowed to continue on his way to the court in Ephrata. 1 RP 110-12; 2 RP 255-57, 260, 276. Officer Westby could have, but did not, agree to this. 1 RP 116.

Mr. Cerda did not want to leave his family. 1 RP 83-84; 2 RP 287-88. Officer Westby forcibly pulled him out the passenger door. Then, Officer Westby kneed Mr. Cerda in the stomach and twice punched Mr. Cerda in the head. 1 RP 83-85, 88-92, 116-17. When Officer Westby pulled Mr. Cerda out of the car, the two went into a ditch on the side of the road. 1 RP 93-94, 119; 2 RP 281. With the

assistance of a second officer, Officer Westby held Mr. Cerda to the ground and handcuffed him. 1 RP 94-95; 2 RP 205-07, 281.[2]

Officer Westby claimed he was bitten on the arm by Mr. Cerda, supposedly after Officer Westby kneed Mr. Cerda but before punching him twice in the head. 1 RP 91; 2 RP 234. Officer Westby's upper arm was photographed and these images show what looks to be a single puncture wound. 1 RP 106-08, 110; 2 RP 211-12; Exhibits 13-16.

The State charged Mr. Cerda with resisting arrest and assault in the third degree. CP 1-2. Mr. Cerda asserted that the injury Officer Westby received was not from a bite, but perhaps from contact with brush, debris or the ground when Officer Westby wrestled Mr. Cerda into the ditch. *E.g.*, 5/1/13 RP 8, 11-12; 1 RP 119-20.

Contesting the felony assault charge, Mr. Cerda presented an expert with experience studying human bite marks on human skin. Dr. Carl Wigren, a forensic pathologist. 2 RP 137, 145-48. Dr. Wigren testified that in his opinion, the photographs of Officer Westby's injury are inconsistent with a human bite. 2 RP 141-42, 148-49, 166-69. In reaching this conclusion, Dr. Wigren relied on his experience as a

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[2] Exhibit 19 contains relevant portions of the video from Officer Westby's dashboard camera, which captured some of the interaction. 1 RP 96-99; 2 RP 226-29, 355-56.

forensic pathologist and also on having compared photographs of Officer Westby's arm against known bite marks included in medical learned treatises. The trial court did not let him show to the jury these photographs of known bite marks. *E.g.*, 1 RP 19-27; 2 RP 171-82; Exhibits 1-4. The court only allowed him to sketch his own simplistic drawing of a bite mark and the jurors had to take him at his word that his analysis was correct. Exhibit 18.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **Review should be granted and judgment below reversed because the trial court denied Mr. Cerda's constitutional right to present a defense and abused its discretion by excluding evidence relied on by the defense expert.**

   a. A trial court's discretion to admit or exclude evidence cannot override the accused's right to present a defense.

"Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (emphasis added). The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1110, 39 L.

Ed. 2d 347 (1974). Article 1, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn. 2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014) (reversing for exclusion of other suspect evidence.) *State v. Cuthbert*, 154 Wn. App. 318, 225 P.3d 407 (2010) (reversing for exclusion of court order that arguably showed the accused was legally entitled to the monies he was charged with taking from the complainant.)

These provisions require that an accused receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (emphasis added); *accord Washington*, 388 U.S. at 19. *See also State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002) ("We hold a defendant's confrontation right to challenge the accuracy and veracity

of a key witness for the State triumphs over the State's asserted interest to not reveal the precise location of an observation post.")

Although the trial court generally has discretion to determine whether evidence is admissible, an accused's inability to present relevant evidence implicates the fundamental fairness of the proceedings and the error must be analyzed as a due process violation. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924.

b. The photographs of typical known bite marks were critical to Mr. Cerda's defense; gruesome or not, they should have been admitted.

Mr. Cerda sought to introduce through Dr. Wigren photographs of typical known human bite marks on human skin. *See* Exhibits 1-4; 1 RP 19-27; 2 RP 171-82. The photographs derived from learned treatises, which Dr. Wigren testified is a typical resource for disseminating, researching and acquiring information in forensic pathology. Exhibits 1-4; 1 RP 19; 2 RP 171, 174. As Dr. Wigren testified, he consulted the four excerpted photographs in forming his opinion in this case – that Officer Westby had not been bitten as alleged in the assault third degree charge. 2 RP 172; *see* 2 RP 174 (common in field to consult such resources).

The evidence was not just relevant, it was central to Mr. Cerda's defense that he had committed a felony assault. The State alleged that Mr. Cerda had bitten Officer Westby, but Dr. Wigren's testimony was critically important in that it countered the officer's subjective belief that is what happened. Dr. Wigren's testimony gave credence to the explanation that the injury was a puncture wound or other injury obtained while the two men tussled in the ditch or on the roadside.

Mr. Cerda asked for the exhibits to be used simply as illustrative evidence, even just one or two of the four proposed photograph, but the court refused that too. 1 RP 19, 22; 2 RP 177, 179-80.

The Court of Appeals opinion unjustifiably defends the trial court's ruling by arguing that the "gruesome nature" of the atlas photographs was a tenable basis for excluding the photographs and that the trial court acted within its discretion in "its management of the trial evidence." Opinion at 4-5. However, the ruling below was utterly at odds with historical precedent finding time and time again in favor of admission of relevant photographs, no matter how "gruesome."

The medical text photographs, which were in fact, not even all that unsightly, were needed to give life to Dr. Wigren's testimony. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 284, 840 P.2d 860

(1992). As our Supreme Court has recognized, photographs are helpful because "[m]uch that sounds cold coming from a witness may be better conveyed by a photograph." *Id.* (quoting *Parson v. Chicago*, 117 Ill. App. 3d 383, 390, 453 N.E.2d 770 (1983)). "Accurate photographic representations are admissible, even if gruesome, if their probative value outweighs their prejudicial effect." *State v. Whitaker*, 133 Wn. App. 199, 227, 135 P.3d 923 (2006). Some crimes "cannot be explained to a jury in a lily-white manner." *Id. See also State v. Fraser*, 170 Wn. App. 13, 29-30, 282 P.3d 152 (2012) (affirming admission of autopsy photographs showing victim with a rod through her head and damaged mouth because they helped illustrate medical examiner's testimony about damage caused by and trajectory of the bullet); *Kinney v. State*, 315 Ark. 481, 868 S.W.2d 463 (1994) (No error in admission as a demonstrative exhibit of a photograph of bite marks on one child's penis where the proponent-state expert relied on the known bite photograph to say the victim in the case was also bitten in his penis.)

Here, the jury saw the State's photographs of Officer Westby's wound and was unlikely to have been inflamed or prejudiced if they saw a medical text photograph on the same subject matter. Mr. Cerda even offered to limit the number of images to be shown and should

have been allowed to do so. "The law requires an exercise of restraint, not a preclusion simply because other less inflammatory testimonial evidence is available." *Whitaker*, 133 Wn. App. at 227.

The photographs were "clearer and more accurate depiction[s]" of Dr. Wigren's testimony than the sketch and would have assisted the jury just as they assisted the expert. *State v. Stevens*, 58 Wn. App. 478, 493, 794 P.2d 38 (1990); *see State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991) (discussing probative value of photographs); *cf. In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 708, 286 P.3d 673 (2012) (discussing power of images).

This evidence was central to Mr. Cerda's defense that Officer's Westby injury was not from a bite. Forcing this expert to make the cartoon-like drawing at Exhibit 18 was like making him testify with one hand tied behind his back. The trial judge impeded Mr. Cerda's constitutional right to present a defense by determining the manner in which Mr. Cerda could put on his case.

c. <u>This constitutional error requires reversal.</u>

The Court of Appeals writes that there is "no constitutional right to present irrelevant evidence." Opinion at 4. But, the excluded expert

testimony was relevant. The trial court made that finding by allowing the forensic pathologist to testify in the first place.

Review should be granted because the Court of Appeals decision is at odds with long-standing precedent in the Washington Supreme Court and the United States Supreme Court. Constitutional due process demands an accused be permitted to present evidence that is relevant and of consequence to his theory of the case. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924. The error requires reversal unless the State can prove beyond a reasonable doubt that it "did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The State cannot meet its burden in this case. The photographs of Officer Westby's arm injury do not resemble the bite marks in the excluded exhibits. *Compare* Exhibits 13-16 *with* Exhibit 1-4. The excluded photographs support Dr. Wigren's expert conclusion that Officer Westby's injury is consistent with a blunt object force injury, where an object came perpendicular to the skin to create an abrasion, but not a bite mark. 2 RP 166-67. The drawing did not have the same

persuasive value. *See* Exhibit 18. In fact, it might have served to discredit Dr. Wigren's expertise in its simplicity. *See id.*

The error was not harmless and requires reversal with remand for a new trial. *Id.*; *Maupin*, 128 Wn.2d at 924.

2. Mr. Cerda and the public's rights to a public trial were violated by the non-public process employed for peremptory challenges.

This Court reviews violations of the public trial right de novo. *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013). "A defendant does not waive his public trial right by failing to object to a closure during trial." *Id.* (*But see In re Coggin,* No. 89694-1, 2014 WL 7003796 (Wash. Dec. 11, 2014).

The Washington Constitution mandates that criminal proceedings be open to the public without exception. Article I, section 10 requires that "Justice in all cases shall be administered openly." Article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend.

VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

The public trial guarantee ensures "that the public may see [the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*). Open public access provides a check on the judicial process that is necessary for a healthy democracy and promotes public understanding of the legal system. *State v. Sublett*, 176 Wn.2d 58, 142 n.3, 292 P.3d 715 (2012) (Stephens, J. concurring); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *Globe*

Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).

To protect this constitutional right to a public trial, Washington courts have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enterprise I*, 464 U.S. at 510).

The right to a public trial includes the right to have public access to jury selection. *E.g., Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *Sublett*, 176 Wn.2d at 71-72; *Wise*, 176 Wn.2d at 11-12; *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009).

Peremptory and for-cause challenges are an integral part of voir dire. *E.g., Batson v. Kentucky*, 476 U.S. 79, 98, 106 S. Ct. 1712, 90

L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures); *Wilson*, 174 Wn. App. at 342 (noting peremptory and for cause challenges are part of voir dire); *New York v. Torres*, 97 A.D.3d 1125, 1126-27, 948 N.Y.S.2d 488 (2012) (closure of courtroom to defendant's wife while initial jury selection held, including exercise of 16 peremptory challenges, is erroneous). Indeed, "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury." *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923 (2001).

There are important limits on both parties' exercise of peremptory challenges that must be enforced in open court, subject to public scrutiny. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury selection, including in exercise of peremptory challenge, and critical role of public scrutiny). Like the questioning of prospective jurors, such challenges to the venire must be held in open proceedings absent an on-the-record consideration of the public trial right, competing interests, alternatives to closing the proceeding and the other *Bone-Club* considerations. *See Jones*, 175 Wn. App. at 98-99 (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950).

repealed by Laws of 1984, ch. 76, § 30 (6) as requiring peremptory challenges to be held in open court); *cf. State v. Saintcalle*, 178 Wn.2d 34, 41-42, 309 P.3d 326 (2013) (discussing important public interest in proper exercise of juror challenges: "Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin."); *id.* at 44 ("peremptory challenges have become a cloak for race discrimination").

Here, for-cause challenges were conducted in open court but the trial court unilaterally directed that peremptory strikes would be exercised in silence, on paper. *Compare* Voir Dire RP 463-65 (peremptories) *with, e.g.*, Voir Dire RP 404-06, 447 (cause challenges). Thus, at the conclusion of the parties' rounds of interviewing the venire, the attorneys shuffled paper between them. *See* Voir Dire RP 463-65. Although not explicitly excluded from the courtroom where this occurred, the public did not see or hear which party struck which jurors or in what order. *Cf. State v. Leverle*, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to

public). In that moment, the public had no basis upon which to discern which jurors had been struck and which were simply excused because the panel had been selected. There was no public check on the non-discriminatory use of peremptories.

This Court cannot ascertain whether the same jurors would have been stricken if the parties had been required to face the public scrutiny of open proceedings. The subsequently-filed record does not absolve the constitutional violation. *See* CP 49-51 (jury panel information sheet); *People v. Harris*, 10 Cal. App.4th 672, 12 Cal. Rptr. 2d 758 (1992).[3]

When the record "lacks any hint that the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted" and reversal is required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181 ("The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis."). "If the trial court failed to [conduct a *Bone-Club*

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[3] *But see State v. Filitaula*, No. 72434-7-I, 2014 WL 6896867, at *1 (Wash. Ct. App. Dec. 8, 2014)("Allowing litigants to exercise peremptory challenges in writing does not implicate the public trial right when a public record is kept showing which jurors were challenged and by which party.")

inquiry] then a 'per se prejudicial' public trial violation has occurred "even where the defendant failed to object at trial." *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18). *But see In re Coggin*, No. 89694-1, 2014 WL 7003796 (Wash. Dec. 11, 2014).

As the trial court conducted peremptory challenges in outside the eyes and ears of the public without considering the *Bone-Club* factors, Mr. Cerda's conviction should be reversed and the matter remanded for a new, fully public trial.

3. Other cumulative trial errors denied Mr. Cerda his constitutional right to a fair trial

The "constitutional floor" established by the Due Process Clause "clearly requires a fair trial in a fair tribunal" before an unbiased court. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (improper evidentiary rulings deprive a defendant of due process where it is so unfair as to "violate[ ] fundamental conceptions of justice").

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. 1, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, the trial court's error in limiting how Mr. Cerda's expert could testify merits reversal standing alone. However, that error was compounded by the trial court denying Mr. Cerda's motion for a mistrial when the arresting officer violated an unrelated pretrial ruling. Officer Westby testified Mr. Cerda "became upset," "[h]e was again

very upset," and "[h]e gave me what you'd call a thousand-yard stare." 1 RP 83, 85. This occurred in violation of a pretrial ruling and impermissibly painted Mr. Cerda as aggressive toward the complainant. Mr. Cerda's convictions should be reversed because the cumulative effect of the errors denied him a constitutionally fair trial.

F. CONCLUSION

The error below that deprived Mr. Cerda of his constitutional right to present a defense and due process involves a significant question of law under the state and federal constitutions. RAP 13.4(3). The decision below is also in conflict with long-standing precedent regarding the constitutional right to present a defense and the evidentiary admissibility of photographic evidence. RAP 13.4(1) and (2). For all of the above reasons, review should be granted.

DATED this 15th day of December, 2014.

Respectfully submitted,

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APPENDIX:

STATE OF WASHINGTON V. ALFONSO CERDA SALAZAR

Court of Appeals Opinion Issued 11/13/14

No. 318923

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

STATE OF WASHINGTON, Respondent, v. ALFONSO CERDA SALAZAR, Appellant.	)	No. 31892-3-III UNPUBLISHED OPINION

KORSMO, J. — Alfonso Cerda Salazar challenges his convictions for third degree assault and resisting arrest, contending that various alleged errors deprived him of a fair trial. Finding no error, we affirm the convictions.

FACTS

The incident giving rise to the charges at issue in this case occurred when Quincy Police Department Officer Joseph Westby attempted to arrest Mr. Cerda Salazar on an outstanding warrant. Mr. Cerda Salazar refused to leave his car. A struggle ensued between the two men; much of it was recorded. The officer struck Mr. Cerda Salazar several times in the head and stomach, while Mr. Cerda Salazar bit the officer on the arm. Charges of resisting arrest and third degree assault were filed from the incident.

Prior to trial, the defense moved in limine to prohibit the officer from testifying that the defendant displayed "a thousand-yard stare" at the officer. The court ruled that the phrase was not helpful because it was unclear what was meant and directed the officer to describe the behavior with more detail. At trial, the officer described the defendant's behavior and again characterized it as "a thousand-yard stare."

The defense moved for a mistrial, arguing that the testimony violated the order in limine. The trial court disagreed, concluding that the officer described what he saw. The motion for a mistrial was denied.

The defense called an expert, forensic pathologist Dr. Carl Wigren, to testify concerning bite marks. He opined that the mark captured in a photo of Officer Westby's arm was not a bite mark and drew an illustration of a typical bite mark. The defense then offered four photographs of human bite marks from forensic atlases. The trial court excluded the photographs as substantive evidence on the basis that they constituted hearsay. When the defense offered them as illustrative exhibits, the court excluded them on the basis that they were prejudicial and cumulative.

The court instructed the jury on the reasonable doubt standard using the pattern instruction form that describes the concept in terms of jurors having an "abiding belief in the truth of the charge." Clerk's Papers at 16. The jury ultimately convicted Mr. Cerda Salazar as charged. He then timely appealed to this court.

ANALYSIS

This appeal presents challenges to the trial court's exclusion of the four defense photographs, the denial of the mistrial motion, the method of exercising peremptory challenges, and the pattern jury instruction.[1] We will address the claims in the order noted.

Exclusion of Photographs

Mr. Cerda Salazar first argues that the court erred by excluding defense exhibits 1-4, the photographs of bite marks from a forensic atlas, thereby denying him the right to present his defense. He was allowed to present his defense and the trial court did not abuse the discretion it is accorded on evidentiary rulings.

Although the trial court cited multiple reasons for excluding the evidence, it appears that ER 403 was the primary basis. ER 403 authorizes trial courts to exclude otherwise relevant evidence if the probative value of the evidence is significantly outweighed by the danger of unfair prejudice or other interference with the fact-finding function of the jury. *Carson v. Fine*, 123 Wn.2d 206, 222-23, 867 P.2d 610 (1994). A trial judge's decision to admit or exclude evidence under these provisions is reviewed for abuse of discretion. *Diaz v. State*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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[1] Appellant also presents a cumulative error argument that we need not address in view of our determination that there was no error.

In some circumstances the constitution requires that state evidentiary rules give way to the constitutional right to present a defense. *E.g.*, *State v. Jones*, 168 Wn.2d 713, 719-21, 230 P.3d 576 (2010). There is, however, no constitutional right to present irrelevant evidence. *Id.* at 720. If a court excludes relevant evidence to the point where it effectively prevents presentation of the defense, the constitutional right is violated. *Id.* at 721. Mr. Cerda Salazar contends that is the case here. We disagree.

The defense was able to present its theory that the mark on the officer's arm was not a bite mark. An expert testified to that effect. The expert also prepared an illustration for the jury depicting a typical human bite mark. Ex. 18. It was only when the defense offered "gruesome" photographs that the court limited the evidence. Equating the effort to a movie[2] scene, the court noted the effect of the exhibits would be to diminish the officer's injury, which was not at issue in the case, by comparing it to much more significant injuries illustrated by the atlas photographs. The gruesome nature of the photographs and the cumulative nature of the evidence, following as it did upon the expert testimony and the exhibit depicting a "typical" bite mark, were tenable bases for excluding the additional exhibits under ER 403.

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[2] The trial court likened the exhibits to a scene in the film "Crocodile Dundee" where, in response to someone else's small knife, Mick Dundee pulls out a giant knife and says, "That's not a knife. THAT's a knife." Report of Proceedings (RP) at 181.

The trial court did not abuse its significant discretion in its management of the trial evidence. The defense was permitted to put forth evidence in support of its theory of the case. There was no impingement on the constitutional right to present a defense.

Mistrial

Mr. Cerda Salazar also argues that the court erred in denying his mistrial motion over the alleged violation of the pretrial ruling. Again we conclude that there was no abuse of discretion.

Well settled law also governs review of this issue. When inadmissible testimony is put before the jury, the trial court should declare a mistrial if the irregularity, in light of all of the evidence in the trial, so tainted the proceedings that the defendant was deprived of a fair trial. *State v. Weber*, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). A ruling on a motion for a mistrial is reviewed for abuse of discretion. *Id.* at 166.

As noted previously, the trial court found no violation of its pretrial order since the officer described the defendant's behavior, thus curing the ambiguity of the statement. Testimony found not to violate an order in limine cannot be an "irregularity" or constitute the basis for a mistrial.

But, even if the trial judge erred in interpreting his own pretrial ruling, the error did not justify a mistrial. The concern at the pretrial hearing with the phrase "thousand-yard stare"

was that the officer's meaning[3] was unclear, not that it was somehow a significantly prejudicial comment. Here, the officer described the behavior that led to his characterization. Any error from the admission of the statement to characterize that behavior was slight, and certainly did not justify a mistrial.

The court did not abuse its discretion in denying the mistrial.

Jury Selection

Mr. Cerda Salazar also argues that the court erred in "closing" the courtroom when it allowed the attorneys to exercise peremptory challenges in writing. In view of recent authority against this position, we only briefly discuss this contention.

Here, counsel exercised peremptory challenges by marking them on a sheet of paper and passing it back and forth. This court faced a factually similar practice, although conducted at sidebar, in *State v. Love*, 176 Wn. App. 911, 914 n.1, 309 P.3d 1209 (2013). Applying the experience and logic test, we determined that the practice of conducting peremptory challenges at sidebar did not constitute a closure of the courtroom. *Id.* at 920. *Accord*, *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014). Subsequently, this court held that conducting peremptory challenges "on paper" did not constitute a closure of the courtroom. *State v. Webb*, --- Wn. App. ---, 333 P.3d 470 (2014).

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[3] The trial judge explained that the phrase came from World War II and was used to describe shell-shocked soldiers. RP at 87. The judge believed the officer's use of the phrase was inaccurate in this context which was why the court required a description of the behavior the officer was relating to the jury.

In light of these authorities, we can conclude that the exercise of peremptory challenges in writing does not close a courtroom. There was no error in the peremptory challenge process.

Abiding Belief Instruction

Mr. Cerda Salazar also argues that the pattern instruction wrongly refers to "an abiding belief in the *truth* of the charge," contending that use of the word "truth" is improper. Our precedent rejects his argument, which is lifted from an entirely different context.

"Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). An instruction that relieved the State of its burden would constitute reversible error. *Id.* This type of challenge is reviewed de novo "in the context of the instructions as a whole." *Id.*

The challenged sentence has been upheld against numerous claims that the "abiding belief" portion either dilutes the State's burden of proof or shifts the burden of proof to the defendant. *Pirtle*, 127 Wn.2d at 656-58; *State v. Lane*, 56 Wn. App. 286, 299-301, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); *State v. Price*, 33 Wn. App. 472, 475-76, 655 P.2d 1191 (1982). Based on a case raising the issue in a different context, Mr. Cerda Salazar now challenges the "belief in the truth" portion of the sentence as confusing or misleading to the jury.

In *State v. Emery*, the prosecutor during closing argument told the jury that the Latin root from which we get the word "verdict" means to "speak the truth" and that "[y]our verdict should speak the truth." *State v. Emery*, 174 Wn.2d 741, 751, 278 P.3d 653 (2012). The Supreme Court held that it is misconduct for a prosecutor to tell the jury that its job is to "speak the truth":

> We hold that the prosecutor's truth statements are improper. The jury's job is not to determine the truth of what happened; a jury therefore does not "speak the truth" or "declare the truth." Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.

Id. at 760 (citations omitted). The court explained that such statements could have "confused the jury about its role and the burden of proof." *Id.* at 763.

Seizing on this language, Mr. Cerda Salazar argues that the "abiding belief in the truth" language is the equivalent of telling the jury that its job is to "determine the truth of what happened." We disagree.

Problems with "search for the truth" instructions arise only when the instructions misdirect or redirect the jury's focus. *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). Our Supreme Court has expressly approved the use of this instruction. *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007). On that basis, this court has recently rejected the same challenge Mr. Cerda Salazar brings here. *State Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 (2014).

These cases convince us that the "belief in the truth" language in Washington Pattern Jury Instruction 4.01 is sufficient under the constitution because it properly directs the jury's attention to its constitutional task by anchoring its search for the truth to the truth of the charges. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). WPIC 4.01 directs the jury to determine the truth of the charges (i.e. every element of the crimes charged) and to do so after "such consideration," which means "after fully, fairly, and carefully considering all of the evidence or lack of evidence." In context, the language does not misdirect the jury or otherwise changes its focus from its constitutional obligation to determine whether the elements of the crime have been proven beyond a reasonable doubt. The instruction is not constitutionally deficient.

This final challenge also is without merit.

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31892-3-III
	)	
ALFONSO SALAZAR,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RYAN VALAAS, DPA GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ALFONSO SALAZAR 514 G STREET SE QUINCY, WA 98848	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF DECEMBER, 2014.

X_____

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Seattle, Washington 98101
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