

NO. 46348-2-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MANUEL JAVIER URRIETA, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Vicki L. Hogan, Judge

No. 14-1-00259-1

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether Defendant's right to present a defense was sustained where the trial court properly excluded irrelevant evidence.
2. Whether Defendant failed to meet his burden of showing prosecutorial misconduct by failing to show improper conduct.
3. Whether evidence of a DUI arrestee's refusal to take a breath test pursuant to Washington's implied consent statute is properly admissible, and was properly admitted here, and even if such evidence was admitted in error, any error was harmless.
4. Whether, where there was no error committed, the cumulative error doctrine is inapplicable, and Defendant's convictions should be affirmed.
5. Whether Defendant's right to a public trial was sustained where the *Sublett* experience and logic test confirms that the trial court did not close the courtroom in hearing peremptory challenges in this case.

B. STATEMENT OF THE CASE.

1. Procedure

On January 21, 2014, the State charged Manuel Javier Urrieta, hereinafter referred to as "Defendant," by information with first degree unlawful possession of a firearm in count I, alteration of identifying marks in count II, driving under the influence of alcohol (DUI) in count III, and

third degree driving while in suspended or revoked status in count IV. CP 1-5.

On May 15, 2014, the State filed an amended information, which eliminated count II. CP 10-12; RP<sup>1</sup> 10, 12. Defendant pleaded guilty to counts III and IV of that amended information the same day. CP 13-25; RP 7-15. However, he proceeded to trial on count I. *See* RP 10-25.

The parties selected a jury on May 15 and 19, 2014, RP 20-21, RP (VD&O) 7-50.

The court administered the oath to the jury and gave it general instructions. RP (VD&O) 71-77.

The parties then gave their opening statements. RP (VD&O) 80-85 (State's opening); RP (VD&O) 85-87 (Defendant's opening).

The State called Puyallup Police Officer Daniel John Drasher, RP 21-43, Puyallup Police Officer Mathew Hurley, RP 43-79, and Puyallup Police Department Evidence Technician Sherie Theuerkauf, RP 79-87.

The parties stipulated to Defendant's prior conviction of a serious offense and that the firearm found under his seat in this case was "a weapon or device from which a projectile may be fired by an explosive

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<sup>1</sup> The verbatim report of proceedings consists of "Volume I," herein cited as RP [Page Number], and a second volume reporting voir dire and opening statements made May 15 and 19, 2014, herein cited as RP (VD&O) [Page Number].

such as gun powder,” and those stipulations were read to the jury. RP 87-88. *See* RP 19; CP 26.

The State then rested. RP 88.

The defendant called Francisco Santiago Araujo, RP 94-109, and then testified himself. RP 109-24.

The defendant then moved to re-call Drasher to establish the foundation to admit the Computer Aided Dispatch (CAD) log, but that motion was denied. RP 124-28. *See* § C(1) *infra*. He then moved to admit that log without calling Drasher, and that motion was denied. RP 128.

The defendant rested, RP 135, *see* RP 128-29, and the State offered no rebuttal. RP 135.

The parties took no exception to the court’s instructions to the jury, RP 129-30, 134, and the court read those instructions to the jury. RP 135-36.

The parties gave their closing arguments. RP 136-54 (State’s closing argument); RP 155-67 (Defendant’s closing argument); 167-77 (State’s rebuttal argument).

On May 20, 2014, the jury returned a verdict of guilty of first degree unlawful possession of a firearm as charged in Count I of the amended information. CP 47; RP 181-83.

On May 30, 2014, the court sentenced Defendant to 28 months in total confinement on count I, 364 days with 229 days suspended on count III, and 90 days with all 90 suspended on count IV. CP 50-62, 63-64; RP 201-04.

On June 5, 2014, Defendant filed a timely notice of appeal. CP 70. *See* RP 204; CP 65-69.

## 2. Facts

Around 2:09 in the morning of January 18, 2014, Puyallup Police Officer Daniel Drasher was on patrol in the South Hill area of Puyallup when he noticed a 1992 Ford Explorer that was “having a difficult time maintaining its driving lane.” RP 23-26, 36, 62. The vehicle drifted into an adjoining lane several times. RP 26. It was also traveling significantly below the posted speed limit at 27 miles per hour in a 35-mile-per-hour zone. RP 26. When it turned onto 23<sup>rd</sup> Street from South Meridian, the vehicle drifted into the oncoming lane before correcting into the proper lane of travel. RP 26-27.

Officer Drasher then stopped the vehicle, which pulled into a doctor’s office parking lot. RP 27. According to Drasher, there were four people in the vehicle: two in the front and two in the back. RP 27. As the vehicle was stopping, Officer Drasher noticed some movement inside the vehicle that prompted him to call for a second police unit at 2:13AM. RP 28-29, 36-37, 41.

When Drasher approached the vehicle, he smelled the odor of intoxicants from the driver's window. RP 29. He noticed that the defendant, who was driving, *see* RP 29-32, 96-98, had bloodshot eyes, slurred speech, and a "droopy" face. RP 29. The defendant also seemed to suffer a reduction in "fine motor skills" as he searched for his documents. RP 29.

Officer Drasher asked the defendant to exit the vehicle, and the defendant was off-balance as he stepped out. RP 29. He apparently had to use the door to balance himself, then fell back into the vehicle, before standing up again. RP 29-30. Officer Drasher asked Defendant to walk with him to the front of the officer's patrol car, and noticed that Defendant was using his arms for balance as he walked. RP 30.

Officer Drasher arrested Defendant for driving under the influence and driving in suspended or revoked status. RP 30, 37, 46. *See* RP 66-67. At trial, Defendant admitted that he had been drinking and driving that night and driving while his license was suspended. RP 110-11.

Puyallup Police Officer Hurley arrived to assist at 2:15 AM. RP 30, 37, 46. He contacted the passengers in Defendant's vehicle. RP 48. In doing so, he did not see anyone with a weapon or anything that caused him concern for his safety. RP 48-49. The officers allowed and/or told the passengers to leave the scene, and they did so on foot. RP 30-31, 49-50,

63-64, 75, 99. Neither officer noticed any of the occupants leave a weapon as they left the vehicle. RP 31-32, 52, 64.

Officer Hurley then prepared Defendant's vehicle for impound by conducting an inventory of the vehicle. RP 49-51. During that inventory, he saw a firearm and a magazine, the latter loaded with one cartridge, under the center of the driver's seat. RP 51-52, 55-56, 59-60. The firearm itself was a semiautomatic, 9mm pistol, from which the serial numbers had apparently been filed. RP 51, 58-60, 62. Officer Hurley testified that a person sitting in the driver's seat of that vehicle, as the Defendant was at the time of his arrest, could have reached under that seat and immediately grabbed that firearm. RP 61.

Puyallup Police Department Evidence Technician Sherie Theuerkauf examined the firearm and magazine found under Defendant's seat for fingerprints, but did not find any. RP 82-86.

However, neither the registered owner of the vehicle nor anyone else contacted Officer Hurley regarding the firearm found under Defendant's seat. RP 64-65.

The parties stipulated "that the firearm examined in this case is a weapon or device from which a projectile may be fired by an explosive such as gun powder." RP 87-88.

Officer Hurley also found an illegal butterfly knife on the rear, passenger-side floorboard. RP 53, 67-68, 77. He noted that, given the

knife's position, it would have been out of the driver's reach. RP 53.

The defendant's cousin, Francisco Santiago Araujo, was a passenger in the car, and testified that the group had been coming home from a party in South Hill when stopped. RP 96-97. Santiago Araujo testified that his friends, "**Jay** Boyd and Aaron Letho," were the other passengers. RP 97 (emphasis added). He then testified that "**Jake** Boyd" was seated in the rear passenger seat behind the defendant with Aaron Letho to his right, and that he himself was sitting in the front passenger seat. RP 98 (emphasis added). Santiago Araujo testified that "Jake" had a gun in his hand when police stopped the car, and that he put it "under the seat" at that time. RP 98.

Santiago Araujo also testified that he had talked to the defendant on the telephone just before his testimony, and that the first time he had told anyone about "Jake Boyd" was during the court recess taken between the time at which the State rested its case and the time at which he testified. RP 100-01,104. The defendant agreed that this conversation took place minutes before Santiago Araujo's testimony. RP 116-17.

Santiago Araujo testified that he told no one about Jake Boyd, including the defendant, until after the State had rested its case. RP 101. However, he later testified that he had actually told the defendant about Boyd over the prior weekend. RP 104-05.

On re-direct, Santiago Araujo testified that the defense had been trying to get in touch with him for a long time, RP 106, but on re-cross, he testified, as he did on direct, that he had hung out with Defendant, that Defendant came to his house every day, and that he was not hiding and was not hard to find. RP 108, 95-96. The defendant testified that he had not given his defense attorney Santiago Araujo's contact information, including name, number, and birth date until the day before Santiago Araujo testified. RP 124.

Santiago Araujo testified that he and the defendant were related by blood, RP 96-97, but the defendant testified that he had only known Santiago Araujo for seven years. RP 112.

Santiago Araujo testified that he loved the defendant, RP 101-03, and the defendant agreed that Santiago Araujo would do anything for him. RP 112.

The defendant admitted that he had been "around a gun that night," but testified that he did not know it at the time. RP 112. However, he also testified that he had never heard the name Jake Boyd until the day Santiago Araujo testified at his trial. RP 117. The defendant then testified that he had heard of Jacob the previous weekend, "on Sunday, yesterday." RP 121-22.

Officer Hurley investigated whether Defendant was allowed to possess a firearm. RP 65. A records check indicated that Defendant had

previously been convicted of a felony, RP 66-67, and the parties stipulated that “Defendant on or after January 18<sup>th</sup>, 2014, had previously been convicted of a serious offense.” RP 87. Defendant also testified that he was “a convicted felon.” RP 110.

C. ARGUMENT.

1. DEFENDANT’S RIGHT TO PRESENT A DEFENSE WAS SUSTAINED BECAUSE THE TRIAL COURT PROPERLY EXCLUDED IRRELVANT EVIDENCE.

The Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution “grant criminal defendants two separate rights: (1) the right to present testimony in one’s defense, and (2) the right to confront and cross-examine adverse witnesses.” *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983) (internal citations omitted). See *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)(citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)(citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967))).

Although a defendant “does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence.” *State v. Aguirre*, 168 Wn.2d 350, 362-

63, 229 P.3d 669 (2010). Criminal “[d]efendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence.” *Jones*, 168 Wn.2d at 720 (citing *Chambers*, 410 U.S. at 294). See *State v. Rafay*, 168 Wn. App. 734, 795, 285 P.3d 83 (2012) (quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)); *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (quoting *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983))); *Washington*, 388 U.S. at 16.

If properly preserved for appeal, a trial court’s decision regarding the admissibility of testimonial evidence will only be reversed for a manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). However, such a decision may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Moreover, “[a]n erroneous ruling with respect to such questions requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of trial.” *Aguirre*, 168 Wn.2d at 361.

In the present case, after the defendant cross-examined Officer Drasher, RP 35-43, agreed that Drasher may be excused as a witness, RP 43, and after the State subsequently rested, RP 88, he moved to re-call

Drasher. RP 124-27. Defendant argued that he needed Drasher's testimony to establish the foundation to admit the CAD log, which referenced Aaron Letho, in an attempt to rehabilitate the credibility of Santiago Araujo. RP 124-27.

The court found that such testimony would be irrelevant rehabilitation on a collateral issue, and denied the motion. RP 128 (emphasis added).

Now, the defendant argues that by excluding "Officer Drasher's testimony and the dispatch report [or "CAD" log] corroborating that Letho was one of the back seat passengers," the "court denied [his] constitutional right to present a complete defense". Brief of Appellant (BOA), p. 13-14. The problem with this argument is that it ignores the fact that Defendant had already had the opportunity to present this testimony and the defense it supported.

Indeed, the court gave the defendant the opportunity to elicit evidence from Drasher, and from Hurley, that the CAD "corroborat[ed] that Letho was one of the back seat passengers." BOA, p.13-14; RP 35-43, 65-78.

In his direct examination, the prosecutor had specifically asked Officer Hurley whether the officers had obtained any of the passenger's names, to which Officer Hurley responded:

I don't recall getting their names. I *think that Officer Drasher did. One person was, I believe, identified. I don't know how, but I remember going through the CAD and the CAD showed that one of the occupants was identified.*

RP 64 (emphasis added). Hence, the State elicited evidence from Officer Hurley that Officer Drasher had identified at least one passenger and that this person's name appeared in the CAD log. The defendant thereafter had the opportunity to cross-examine this witness about this and to elicit the name of the occupant that was identified in the CAD log. RP 65-78. The defendant had a similar opportunity to elicit this information from Drasher himself. RP 35-43. He chose not to do so. *See* RP 35-43, 65-78.

In other words, the court afforded the defendant two opportunities to elicit exactly the information he now claims was improperly excluded. RP 35-43, 65-78. It just didn't afford him a third opportunity to do so. RP 128. Simply because Defendant chose not to elicit such testimony when he had the chance does not mean that his right to do so was deprived or otherwise abridged. To the contrary, the court granted Defendant multiple opportunities to elicit exactly the evidence he now claims was excluded. *See* RP 35-43, 65-78.

Therefore, the court could not have violated his right to present a defense, and should be affirmed.

Even were one to exclude these earlier opportunities to elicit the evidence from consideration, Defendant was not denied his right to present a defense when the court denied his motion to re-call Drasher because the proffered testimony would have been irrelevant or otherwise inadmissible. *See, e.g., Jones*, 168 Wn.2d at 720; *Aguirre*, 168 Wn.2d at 362-63.

Indeed, if, as Defendant argued to the trial court, the testimony he sought from Drasher was offered solely as foundation for admission of the CAD log, RP 124-27, that testimony was properly excluded for at least two reasons.

First, it was not relevant, *see* ER 401, and hence, not admissible. *See* ER 402.

“Relevant evidence” is “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 the evidence,” ER 401, and only “relevant evidence is admissible[.]” ER 402. “Evidence which is not relevant is not admissible.” ER 402.

Given that the court found that the CAD log was inadmissible because it contained hearsay, RP 128, *see* ER 801, ER 802, and that Drasher’s proposed testimony could only have provided foundation testimony for that log, that testimony would have done nothing to clear the

hearsay bar. *Compare* ER 901 *with* ER 801. Therefore, it would not have been sufficient to gain admission of the CAD log and would have been of no independent value. *See* RP 124-27.

As a result, it would not have had “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 the evidence,” and hence, would not have been relevant under ER 401. Because “[e]vidence which is not relevant is not admissible,” ER 402, Drasher’s testimony regarding the CAD log would not have been admissible.

Second, even assuming *arguendo* that there was no hearsay bar and that Drasher’s testimony would have been otherwise sufficient to admit the CAD log, that CAD log would have been properly excluded under ER 403.

This is because there was simply no issue as to whether Letho was in the car or not. Santiago Araujo testified that Letho was in the car, RP 97, and no one and nothing disputed that. *See* RP 1-207. Hence, any additional testimony or evidence on this point would have been properly excluded as “needless presentation of cumulative evidence” under ER 403, particularly given that there was no allegation from either party that Letho ever possessed the firearm in question. Therefore, given that Drasher’s

testimony was offered for no other purpose, RP 124-27, it was also inadmissible under ER 403.

Because “the scope of [the constitutional] right [to present a defense] does not extend to the introduction of otherwise inadmissible evidence.” *Aguirre*, 168 Wn.2d at 362-63, and criminal “[d]efendants have... no constitutional right to present irrelevant evidence,” *Jones*, 168 Wn.2d at 720, Defendant here had no right to re-call Drasher.

Therefore, the trial court could not have violated his right to present a defense by excluding such testimony and should be affirmed.

2. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT BY FAILING TO SHOW IMPROPER CONDUCT.

“Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial.” *State v.*

*Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899, 903 (2005).

Prosecutorial misconduct violates this duty and deprives a defendant of his right to a fair trial. *See Boehning*, 127 Wn. App. at 518.

However, “[w]ithout a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice.” *State v. Curtiss*,

161 Wn. App. 673, 250 P.3d 496 (2011); *State v. Larios-Lopez*, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998))). Thus, “the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012)(quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (emphasis in original).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). *See State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529,

561, 940 P.2d 546 (1997)); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Hence, a reviewing court must first evaluate whether the prosecutor's comments were improper. *Anderson*, 153 Wn. App. at 427.

"The State is generally afforded wide latitude in making arguments to the jury, and prosecutors are allowed to draw reasonable inferences from the evidence." *Anderson*, 153 Wn. App. at 427-28, 220 P.3d 1273.

It is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546); *Fisher*, 165 Wn.2d at 747.

"A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks 'in the context of the total argument,

the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561); *State v. Johnson*, 158 Wn. App. 677, 683, 243 P.3d 936 (2010).

“[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); *Larios-Lopez*, 156 Wn. App. at 261.

Prosecutorial misconduct may be neutralized by a curative jury instruction, *Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court’s instructions. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

In the present case, Defendant argues that the deputy prosecutor committed misconduct in four ways. BOA, p. 22-30. The record shows otherwise.

First, Defendant challenges four statements made by the deputy prosecutor during his cross-examination of Santiago Araujo. Just prior to these statements, Santiago Araujo testified on direct that Jake Boyd had placed the pistol under Defendant’s seat, and in thus, in effect, that Defendant was not guilty of the crime charged. RP 98. However, Santiago Araujo admitted on cross-examination that he testified that the first time he had told anyone this was during the court recess taken between the time the State rested its case and the time at which he testified. RP 100-01,104.

It was in this context that the following four statements, now at issue, were spoken during the State's cross-examination of Santiago

Araujo:

Q ... Were you aware that your cousin[, the defendant,] was charged with unlawful possession of a firearm?

A Yes, I was.

Q Were you aware that he was put in jail?

A Yes, I was.

Q Were you aware that he was in jail for two months?

A Yes.

Q And you never said anything. Is that what you want us to believe, that *you knew this the whole time and you wait until after I rested and my officers leave and then you come here?*

A Yeah.

Q *My officers leave and now you have it.* You said that you were scared [i.e., to report what you knew, see RP 100] That's what you said. You gave the jury two explanations, right? First you said that you were scared, right?

A I was scared.

....

Q We never – *I'm learning this right now.* So you, Jake Boyd and Aaron, you said this, they are your friends. You told the jurors that, right? So what are you scared of? These are your friends. Tell them what you are scared of. Look at the jurors and answer the questions. What are you scared of?

A I just didn't want to be involved in nothing.

....

Q Because you weren't communicating this information to the attorneys. You were talking to your cousin, weren't you?

A And his attorney.

Q You didn't talk to him until today about this Jacob fellow; isn't that true?

A I talked to him over the weekend.  
Q Did you talk to his attorney about Jacob?  
A No.  
Q And you brought that up today after the officers left, correct?  
A Yes.  
Q So he[, i.e., the defense attorney] didn't know about it. In fact, defense counsel didn't even know that you had been talking on the phone together, did he?  
A No.  
Q No. *And you expect to come in here after all that's been said and done and just tell the jurors whatever you want?*  
[DEFENSE ATTORNEY]: I'm going to object at this point. It's argumentative.  
THE COURT: Sustained. Rephrase, Mr. [Deputy Prosecutor].  
Q Well, let's just clear something up. We know about Jacob and these other guys, your friends, right? You are willing to admit the gun didn't belong to his dad, right? The gun didn't belong to his dad, right?  
A No.

RP 102-05 (challenged statements set forth here in bold and italics).

Defendant also challenges the following three sentences, set forth below in bold and italics below, uttered by the deputy prosecutor during the following portion of his closing argument:

He [ie., Santiago Araujo] came here and he had a story. What was his story? And I know I was hard on him. I know that I was probably overly passionate, but I had to get to it because this was new information. *You don't get to do this*, and you know what? They truly underestimate you. They underestimate you. They think that they can come in here and change the game, change the analysis, attack that knowing [element] because that's the only issue, right? Knowing. He didn't know.

Everything else is there. We are going to concede everything else, but he didn't know it. They can't prove it. They want to create some doubt so someone can go back there in that jury room and say, well, Santiago [Araujo] said it, but we have to look at his testimony. He said that that is his cousin, his blood cousin, and that he loves him. They hang out every single day. They hang out every single day. That was his words. I love him, he is my blood.

The instructions tell[] you that you are the judge of credibility, and you get to look at the reasonableness of the testimony. Is it reasonable for someone that you love, let's put yourself in the place of Mr. Santiago [Araujo], your cousin who you love.

....

But Mr. Santiago [Araujo] would tell you he saw someone put the gun there [under Defendant's seat], and he kept it a secret from his cousin that he had been hanging out with every single day. He even knew that his cousin was in-custody for over two months. He didn't say anything. His cousin was in jail for two months and he isn't going to say anything? Really? They underestimate you.

....

Remember, defense counsel didn't mention this story during opening because he didn't know about it. It's not credible.

....

Put it on someone else. We will make up a name, Jacob. We will make this guy up. ***It's too late for the State to do anything. They can't go out and conduct their investigation.*** They already rested their case.

RP 147-51 (challenged statements set forth in bold and italics).

Defendant argues that, through these seven statements, "the State improperly sought [(1)] to penalize [his] constitutional right to present witnesses in his defense and [(2)] to arouse the jury's anger about the last-

minute disclosure of the defense witness[,Santiago Araujo,] and the hardship that created for the State.” BOA, p. 22-26.

As described above, *see* § C(1) *supra*, a defendant “does have a constitutional right to present a defense[,]” *Aguirre*, 168 Wn.2d at 362-63, and “the State may not penalize someone for exercising a constitutional right” by “impermissibly comment[ing]” on the exercise of that right. *State v. Mecham*, 181 Wn. App. 932, 946-47, 331 P.3d 80 (2014).

Moreover, “[a] prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider,” *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), and “the State commits misconduct by asking the jury to convict based on their emotions, rather than the evidence.” *State v. Fuller*, 169 Wn. App. 797, 821, 282 P.3d 126, 139 (2012) (*citing State v. Bautista–Caldera*, 56 Wn. App. 186, 194–95, 783 P.2d 116 (1989)).

However, in this case, the deputy prosecutor did none of this. Indeed, not once did he assert that Defendant “should not have been permitted to present Santiago[ Araujo]’s testimony at all.” BOA, p. 23. *See* RP 136-54, 167-77. While the deputy prosecutor discussed that Defendant called Santiago Araujo as a witness only after the State had rested its case, RP 147-51, the prosecutor did *not* do so to penalize Defendant for exercising his “constitutional right to present witnesses in

his defense” or “to arouse the jury’s anger about the last-minute disclosure of the defense witness and the hardship that created for the State,” BOA, p. 23. He did so only to argue that one could reasonable infer from the evidence that Santiago Araujo’s testimony was not credible. *See, e.g.*, RP 147-48.

“In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including [inferences] about credibility based on evidence in the record.” *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (*citing State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)).

Here, the prosecutor did no more than this, by recounting the evidence from which one could reasonably infer that Santiago Araujo’s testimony was not credible. *See* RP 147-51. He reminded the jurors, referring to the court’s instructions, CP 29-45 (court’s instruction no. 1), that “you are the judge of credibility, and you get to look at the reasonableness of the testimony.” RP 147-48. He noted that Santiago Araujo had testified that the defendant was “his blood cousin, and that he loves him,” and that “[t]hey hang out every day,” RP 147, but that despite knowing “that his cousin was in-custody [on this case] for over two months” he “didn’t say anything” about Boyd placing the pistol under Defendant’s seat. RP 148-49. The deputy prosecutor concluded, that this

was evidence from which one could reasonably infer that Santiago Araujo's testimony was "not credible." RP 150. This was especially true given that Santiago Araujo didn't testify until after the State rested its case, at a time when the State could do nothing to disprove Santiago Araujo's contention because it couldn't "go out and conduct [an] investigation" it had already finished. RP 151.

In this context, the deputy prosecutor's questions to Santiago Araujo, including (1) "you expect to come in here after all that's been said and done and just tell the jurors whatever you want," RP 105, (2) "you knew this whole time and you wait until after I rested and my officers leave and then you come here," RP 102, (3) "[my] officers leave and now you have it," and (4) "[w]e never talked about this, right? .... I'm learning this right now, " RP 103, could not reasonably be construed as comments on Defendant's right to present a defense or as questions designed "to arouse the jury's anger." BOA, p. 23. Rather, they were, in context, simple questions that properly highlighted a reasonable inference that Santiago Araujo's testimony was not credible.

Similarly, the deputy prosecutor's statements during closing argument that Santiago Araujo shouldn't "get to do this," RP 147, that the State had "rested [its] case," and it was "too late for the State to do anything," such as "go out and conduct their investigation," RP 151, could

not reasonably be considered comments on the Defendant's exercise of his right to present a defense or statements made "to arouse the jury's anger." BOA, p. 23. They simply were statements of the evidence supporting an inference that Santiago Araujo's testimony was not credible.

While Defendant seeks to escape this conclusion by arguing that the cross-examination questions and closing argument statements at issue "improperly urged the jury to revisit the court's decision [to allow Santiago Araujo to testify] or penalize [Defendant] for it," BOA, p. 24-26, the trial court never explicitly made such a decision because the deputy prosecutor never opposed Santiago Araujo's testimony. *See* RP 1-207.

He did no more than, through proper cross-examination and closing argument, draw and later express a reasonable inference from the evidence that such testimony was not credible. *See* RP 102-05, 147-51.

Because "a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including [inferences] about credibility based on evidence in the record," *Millante*, 80 Wn. App. at 250, these questions and statements were proper, and not misconduct.

Second, Defendant challenges three statements made by the deputy prosecutor as improper expressions of "personal opinion[] on the guilt of the defendant or the credibility of witnesses." BOA, p. 26-28.

It is improper for a prosecutor to “assert[ her or] his personal opinion of the credibility of the witness and the guilt or innocence of the accused.” *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). *See State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016 (2011).

However, “[i]n closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including [inferences] about credibility based on evidence in the record.” *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (*citing State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)).

In this case, two of the statements now challenged by Defendant were made during closing argument: (1) the deputy prosecutor’s argument that Santiago Araujo’s testimony included “mistakes,” RP 138, and (2) his statement that he “went after [the defendant on cross-examination] because [he] wanted the truth.” RP 150, BOA, p. 26-28. The third was what Defendant terms the deputy prosecutor’s “insinuat[ion that] Santiago[ Araujo] was making up the fact that Letho was in the back seat.” RP 103, 108; BOA, p. 27.

These statements were not expressions of the prosecutor’s personal opinion but proper efforts to “draw[] and express[] reasonable inferences

from the evidence... about [the] credibility [of Araujo and Defendant].”

*Millante*, 80 Wn. App. at 250.

The deputy prosecutor’s statement that Santiago Araujo’s testimony included “mistakes,” RP 138, was not, as Defendant now argues, an effort by the prosecutor to imply that he “kn[ew] what the truth [wa]s and [wa]s assuring its revelation,” BOA, p. 26 (*quoting State v. Ish*, 170 Wn.2d 186, 197, 241 P.3d 389 (2010) (*quoting United States v. Roberts*, 618 F.2d 530, 533 (9<sup>th</sup> Cir. 1980))). Rather, because Santiago Araujo had testified that he saw Boyd place only a pistol under Defendant’s seat, RP 98, the deputy prosecutor’s statement was nothing more than an argument that this testimony was inconsistent with the fact that Officer Hurley found not just a pistol but also a pistol magazine, under defendant’s seat. RP 51-52, 55-56, 59-60. Given that the physical evidence in the record was inconsistent with Santiago Araujo’s testimony on this crucial point, one may reasonably infer that Santiago Araujo had either made a “mistake” in testifying or that his testimony was not credible. Hence, the prosecutor did no more than “draw[] and express[ a] reasonable inference[] from the evidence... about [the] credibility [of Santiago Araujo],” and this is proper. *Millante*, 80 Wn. App. at 250.

Likewise, the deputy prosecutor’s statement that he “went after [the defendant] because I wanted the truth” RP 150, does not imply that

“the prosecutor knew the truth,” BOA, p. 26, or that the defendant lied in direct examination. It simply communicates that, because Defendant was the only person to truly know whether he knowingly possessed a firearm, he is the only source of “truth” on that element of the charged crime. *Cf.* CP 10-12. Simply because the prosecutor went on to discuss evidence in the record suggesting that the defendant’s testimony was not credible does not mean the prosecutor expressed his personal opinion in this regard. Rather, he simply and properly “dr[ew] and express[ed a] reasonable inference[] from the evidence... about [the] credibility [of Defendant].” *Millante*, 80 Wn. App. at 250.

Finally, Defendant’s contention that the deputy “prosecutor actively misled the jury by insinuating Santiago[ Araujo] was making up the fact that Letho was in the back seat,” RP 27-29, is simply not supported by the record. RP 103, 108.

The statements challenged by Defendant as so insinuating are as follows:

Q You were scared. But you just told the jurors that Jake, Jake Boyd, ***and what’s the other guy’s name?***

A ***Aaron.***

Q We have never talked about this, right?

A Right.

Q We never – I’m learning this right now. So you, Jake Boyd and Aaron, you said this, they are your friends. You told the jurors

that, right? So what are you scared of?  
These are your friends. Tell them what you  
are scared of. Look at the jurors and answer  
the questions. What are you scared of?

A I just didn't want to be involved in nothing.

RP 103 (emphasis added).

Q And you didn't —and what's the other—*I  
keep forgetting the other guy's name.*

A Aaron.

Q Aaron. And this guy, Aaron, right,  
let me guess, both of these guys were in the  
backseat?

A Yes.

Q And you were in the front seat?

A Yes.

RP 108 (emphasis added).

There is nothing about any of these questions that states, implies,  
or insinuates that Santiago Araujo made up either Letho himself or “the  
fact that Letho was in the back seat.” BOA, p. 27. The deputy prosecutor  
asked Araujo to repeat Aaron Letho's name because, as he explained to  
the court and jury, he “ke[pt] forgetting the other guy's name.” RP 108.  
Given this explanation, the jury could not reasonably have inferred that the  
prosecutor believed Araujo was lying on this point. Beyond that, the  
prosecutor did no more than confirm that Aaron Letho and Jacob Boyd  
were seated in the back of the car and that Santiago Araujo and the  
defendant were in the front. RP 108. Because Santiago Araujo had  
testified on direct examination that all four of them were in the vehicle, RP

97, these were proper matters for cross-examination. *See, e.g., Baxter v. Jones*, 34 Wn. App. 1, 658 P.2d 1274 (1983). Therefore, the deputy prosecutor did not commit misconduct and Defendant's convictions should be affirmed.

Defendant's third argument regarding prosecutorial misconduct is that the prosecutor's statements during closing argument that "[t]hey underestimate you" were improper emotional appeals. BOA, p. 28-30. The record shows otherwise.

The challenged comments were as follows:

He [ie., Santiago Araujo] came here and he had a story. What was his story? And I know I was hard on him. I know that I was probably overly passionate, but I had to get to it because this was new information. You don't get to do this, and you know what? ***They truly underestimate you. They underestimate you. They think that they can come in here and change the game, change the analysis, attack that knowing [element] because that's the only issue, right?***

RP 147 (emphasis added).

***But Mr. Santiago would tell you he saw someone put the gun there, and he kept it a secret from his cousin [the defendant] that he had been hanging out with every single day. He even knew that his cousin was in-custody for over two months. He didn't say anything. His cousin was in jail for two months and he isn't going to say anything? Really? They underestimate you.***

RP 148-49 (emphasis added).

And then I kept questioning him[ i.e., the defendant], and I was going after him, I said, why did you want your cousin[, i.e., Santiago Araujo] here if you don't know what he was going to say? Why did you want him there? And then he just looked up and said, oh, he is going to say I didn't have the gun. And I say, how did you know that if you didn't speak to him about the facts? And he said, well, I spoke to him on Sunday. ***He [the defendant] told you this, I spoke to him on Sunday.***

***If he spoke to him on Sunday, that means his cousin lied when he said he didn't speak to him at all. They can't do this to you. They underestimate you.***

RP 151 (emphasis added).

Thus, the context in which each of these statements was made was one in which the deputy prosecutor was discussing the testimony of Defendant and Santiago Araujo, and the reasons why the testimony of each was either internally inconsistent, *see* RP 148-49, 151, or inconsistent with the testimony of the other. RP 151. From that discussion, the prosecutor did no more than draw the reasonable inference that the testimony of Defendant and Santiago Araujo was not credible, and hence, that “they[ i.e., Defendant and Santiago Araujo] underestimate you,” in so testifying. RP 147, 149, 151. At no point did the deputy prosecutor ever encourage[] the jury to be angry with [Defendant]” or “create[] an us-against-them dynamic[.]” BOA, p. 29. He simply and properly “dr[ew] and express[ed a] reasonable inference[] from the evidence... about [the]

credibility [of Defendant and Santiago Araujo].” *Millante*, 80 Wn. App. at 250.

Defendant’s fourth and final argument concerning prosecutorial misconduct is that the prosecutor’s introduction of evidence of Defendant’s refusal to submit to a breath test was improper because such evidence was, he contends, inadmissible. BOA, p. 38. However, because as explained below, *see* § C(3)(a)-(c) *infra*, such evidence was admissible and properly admitted, the deputy prosecutor’s introduction of that evidence was not proper.

Therefore, Defendant cannot show prosecutorial misconduct, and his convictions should be affirmed.

3. EVIDENCE OF A DUI ARRESTEE’S REFUSAL TO TAKE A BREATH TEST PURSUANT TO WASHINGTON’S IMPLIED CONSENT STATUTE IS PROPERLY ADMISSIBLE, AND WAS PROPERLY ADMITTED HERE, AND EVEN IF ADMITTED IN ERROR, ANY SUCH ERROR WAS HARMLESS.
  - a. A DUI arrestee has no constitutional right, either under the Fourth Amendment to the United States Constitution or Article I, section 7 of the Washington State Constitution, to refuse a breath test given under Washington’s Implied Consent Statute.

The Fourth Amendment to the United States Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”

Similarly, article I, section 7 of the Washington State Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

“As a general rule, [courts] presume that warrantless searches are unreasonable and violate both constitutions,” unless the search in question “falls within one of the narrow exceptions to the warrant requirement.”

*State v. Mecham*, 181 Wn. App. 932, 331 P.3d 80 (2014), review granted by *State v. Mecham*, 337 P.3d 325 (2014). See also, e.g., *State v. Swetz*, 160 Wn. App. 122, 129, 247 P.3d 802 (2011); *State v. Greenwood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); *State v. Day*, 161 Wn.2d 889, 893-94, 168 P.3d 1265 (2007).

Where a search is reasonable because supported by a warrant or an exception thereto, a “defendant ha[s] no constitutional right to refuse consent” to that search, and hence, the State may, during trial on a related offense, comment on such refusal without penalizing the defendant for exercising a constitutional right. *Mecham*, 181 Wn. App. at 945-4.

Washington’s implied consent statute provides, in relevant part that

***[a]ny person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration, THC concentration, or presence of any drug in his or her breath if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in***

***actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503.*** Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

RCW 46.20.308(1) (emphasis added).

Assuming *arguendo* that a breath test pursuant to this statute constitutes a search under both the Fourth Amendment and Article I, section 7, such a search is reasonable and valid under the search incident to an arrest exception to the warrant requirement.

“The search incident to arrest [exception to the warrant requirement] embraces not one but two analytically distinct concepts under Fourth Amendment and article 1, section 7 jurisprudence.” *State v. Byrd*, 178 Wn.2d 611, 617, 310 P.3d 793, 617 (2013). “The first of these propositions is that ‘a search may be made of the area within the control of the arrestee.’” *Byrd*, 178 Wn.2d at 617 (citing *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L.Ed.2d 427 (1973)). “Under the second proposition of the search incident to arrest, ‘***a search may be made of the person of the arrestee by virtue of the lawful arrest.***’” *Id.* (citing *Robinson*, 414 U.S. at 224, 94 S. Ct. 467) (emphasis added).

In *Robinson*, the [United States Supreme] Court held that under “the long line of authorities of this Court dating back to *Weeks* [ *v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) ]” and “the

history of practice in this country and in England,” searches of an arrestee's person, including articles of the person such as clothing or personal effects, require “no additional justification” beyond the validity of the custodial arrest. 414 U.S. at 235, 94 S. Ct. 467. Instead, a search of the arrestee's person is “not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” *Id.* at 617-18.

“Because this exception is rooted in the arresting officer's lawful authority to take the arrestee into custody, rather than the ‘reasonableness’ of the search, it also satisfies article I, section 7's requirement that incursions on a person's private affairs be supported by ‘authority of law.’” *Id.* at 618.

Thus, “‘a peace officer, when [she or] he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from [her or] him any evidence.’” *Id.* at 619 (quoting *State v. Hughlett*, 124 Wash. 366, 370, 214 P. 841 (1923), *overruled on other grounds by State v. Ringer*, 100 Wash.2d at 695, 699, 674 P.2d 1240).

A defendant offered a breath test pursuant to the implied consent statute must, by terms of the statute, be under lawful arrest at the time of that offer. RCW 46.20.308(1). Because “‘a search may be made of the person of the arrestee by virtue of [such a] lawful arrest,’” *Byrd*, 178

Wn.2d at 617, a search may be made of the breath of the arrestee. This is especially true given the noninvasive nature of breath testing.

As a result, a breath test conducted pursuant to the implied consent statute, even if a search under both the Fourth Amendment and Article I, section 7, is “a ‘reasonable’ search under th[e Fourth] Amendment” and “satisfies article I, section 7's requirement that incursions on a person's private affairs be supported by ‘authority of law.’” *Byrd*, 178 Wn.2d at 618.

Therefore, a DUI arrestee “ha[s] no constitutional right to refuse consent” to such a breath test. *Mecham*, 181 Wn. App. at 945-47.

- b. Because a DUI arrestee does not have a constitutional right to refuse a breath test, *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013), is inapposite, and evidence of such a defendant's refusal to take that breath test is properly admissible at trial.

Because a breath test conducted pursuant to the implied consent statute is reasonable and valid under both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution, a “defendant ha[s] no constitutional right to refuse consent” to that test, and hence, the State may, during trial on a related offense, comment on such refusal without penalizing the defendant for exercising a constitutional right.<sup>2</sup> *Mecham*, 337 P.3d at 945-47.

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<sup>2</sup> The Supreme Court seems to have accepted review of this issue in *State v. Baird*, No. 90419-7. Oral argument in that case is currently scheduled for May 12, 2015 at 0900.

Although Defendant cites *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013), for the opposite conclusion, *Gauthier* is inapposite.

In *Gauthier* Division One of this Court held “that the prosecutor’s use of *[a defendant]’s invocation of his constitutional right to refuse consent to a warrantless search* [of his DNA] as substantive evidence of his guilt was manifest constitutional error[.]”*State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126, 132 (2013) (emphasis added). “In other words,” it held that “the State may not penalize someone for exercising a constitutional right.” *Mecham*, 181 Wn. App. at 946.

By contrast, in this case, as in *Mecham*, which Division One decided just a little over a year after *Gauthier*, the defendant “did not have a constitutional right to refuse consent[.]” *Id.*

Hence, here, the State could not have “impermissibly comment[ed] on [Defendant]’s refusal... because there was no constitutional right for [Defendant] to refuse the test.” *Id.* at 947. *See also State v. Nordlund*, 113 Wn. App. 171, 187, 53 P.3d 520 (2002); *South Dakota v. Neville*, 459 U.S. 553, 566, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) (*holding* that due process was not violated when the government commented on the defendant’s refusal to submit to a blood alcohol test, because the government did not mislead the defendant into believing his refusal could not be used against him in a later trial).

Therefore, evidence of Defendant's refusal to submit to a breath test pursuant to the implied consent statute was admissible, and the trial court and Defendant's convictions should be affirmed.

c. Such evidence was relevant under ER 401 and properly admitted under ER 402.

Although not argued by Defendant, *see* BOA, p. 1-50, it may be contended that because he pleaded guilty to the DUI charge prior to trial of this case, CP 13-25; RP 7-15, evidence of his refusal to submit to a breath test was not relevant and therefore, not admissible.

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action to the determination of the action more probable or less probable than it would be without the evidence." ER 401. While relevant evidence is generally admissible, "[e]vidence which is not relevant is not admissible." ER 402.

If properly preserved for appeal, a trial court's decision regarding the admissibility of testimonial evidence will only be reversed for a manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). However, such a decision may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. *Costich*, 152 Wn.2d at 477.

In the present case, in cross-examination, the deputy prosecutor inquired of the Defendant if he had been “asked to engage in a field sobriety test,” which drew an objection from defendant’s attorney. RP 114. The prosecutor argued that “[i]t goes to the fact that he talked about the DUI during his – that he admitted that he was drinking.” RP 114. The trial court then ruled

THE COURT: Yeah. Those questions I would allow. Not the field sobriety test.

The deputy prosecutor then conducted the following cross-examination:

Q At some point you were asked to take a breathalyzer test?

A Yes.

Q What was your response when you were asked?

A My response was, “Can I call my lawyer?”

Q Okay. And then you had that opportunity, right?

A I just kept on saying to call my lawyer, call my lawyer.

[DEFENSE ATTORNEY]: Objection. He has the right to remain silent. He can’t ask that.

[DEPUTY PROSECUTOR]: I can ask that. It’s a DUI. I can ask that question.

THE COURT: Well, the question and answer can stand. Overruled.

[BY DEPUTY PROSECUTOR]:

Q I didn’t get an answer, so I’m going to ask you, when you were asked to take the breath test, did you say yes or no?

A I said –

Q Did you refuse to take the breath test?

A Yeah.

Q Yes, you did. And you refused to take the breath test even though you knew that your driver’s license would be suspended for up to a year, correct?

A Yes.  
Q You knew that. He informed you of that, right?  
A Yes.

RP 114-15.

Given that the deputy prosecutor's stated objection in seeking admission of this evidence was to demonstrate that the defendant "was drinking," RP 114, it is reasonable to infer that he offered such testimony for the inference that, because defendant refused to submit to a breath test, he had consumed and was probably under the influence of alcohol at the time of the events in question.

"It is well settled in Washington that evidence of drug use is admissible to impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony." *State v. Thomas* , 150 Wn.2d 821, 83 P.3d 970 (2004) (citing *State v. Russell*, 125 Wn.2d 24, 83, 882 P.2d 747 (1994)).

As a result, despite Defendant's guilty plea to the DUI offense, evidence of his refusal to submit to a breath test pursuant to the implied consent statute was relevant to Defendant's credibility, and specifically to whether he was under the influence of alcohol at the time of the underlying events.

Therefore, such evidence was admissible under ER 402, there was no abuse of discretion in admitting it here, and the trial court and defendant's convictions should be affirmed.

- d. Even if admission of evidence of Defendant's refusal to submit to a breath test pursuant to the Implied Consent statute could be considered error, any such error was harmless.

Even assuming *arguendo* that admission of evidence of Defendant's refusal to submit to a breath test was error, that error was harmless under either the nonconstitutional or the constitutional harmless error analysis.

A nonconstitutional error is harmless if “within reasonable probabilities, had the error not occurred, the outcome of the trial” would not “have been materially affected.” *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207, 219 (2012).

Appellate courts “find constitutional error harmless only if convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Gauthier*, 174 Wn. App. 257, 270, 298 P.3d 126, 133 (2013) (citing *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008)).

In the present case, alcohol consumption was not directly relevant to the one charge at issue: first degree unlawful possession of a firearm. *See* CP 10-12, 47; RP 10-25. It was a factor the jury could consider in determining whether Defendant was under the influence of alcohol at the time of the events about which he testified, and thus, credible in such testimony. However, this was a fact the jury already knew by virtue of the defendant's admission that he had been drinking at the time, RP 110-11, and the testimony of the officer who arrested him for driving under the influence. *See, e.g.*, RP 30, 37, 46, 66-67. Therefore, evidence of the defendant's refusal to submit to a breath test could have added little, if anything, to the credibility determination, and thus, virtually nothing to the probability of conviction.

As a result, even had such evidence not been admitted, “the outcome of the trial” would not “have been materially affected,” *State v. Gresham*, 173 Wn.2d 405, and “any reasonable jury would [have] reach[ed] the same result absent the error.” *Gauthier*, 174 Wn. App. at 270.

Therefore, even were admission of the evidence of Defendant's refusal to submit to a breath test pursuant to the Implied Consent statute considered error, that error was harmless, and the trial court should be affirmed.

- e. Defendant cannot show ineffective assistance of counsel because he cannot show deficient performance.

Finally, although Defendant argues that his “[c]ounsel’s performance in failing to object [to the testimony now at issue] was unreasonably deficient in light of *Gauthier*[,]” BOA, p. 38-40, the record shows otherwise.

To show ineffective assistance of counsel, a defendant must meet both prongs of a two-prong test. *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also, e.g., State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687. “A failure to establish either element of the test defeats an ineffective assistance of counsel claim.” *Riofta v. State*, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

Trial counsel’s “decision of when and whether to object is a classic example of trial tactics” and “[o]nly in egregious circumstances” relating to evidence “central to the State’s case, will the failure to object constitute incompetent representation that justifies reversal.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)). To prevail on a

claim of ineffective assistance of counsel based on a failure to object to or otherwise “challenge the admission of evidence, the defendant must show (1) “the absence of legitimate strategic or tactical reasons supporting the challenged conduct,” (2) “that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted.” *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (emphasis added).

In the present case, the defendant cannot meet this burden for at least three reasons.

First, because the issue at trial was unlawful possession of a firearm, CP 29-45, evidence of a refusal to take a breath test pursuant to the Implied Consent statute was not evidence “central to the State’s case.” *Madison*, 53 Wn. App. 754, 763. Therefore, a failure to object to such evidence cannot “constitute incompetent representation that justifies reversal.” *Id.*

Second, even if it had been evidence central to the State’s case, counsel could, at least arguably, have been construed to have objected to the testimony at issue, RP 115, as Defendant admitted at one point in his brief. BOA, p. 33. If counsel objected, his performance could not have been deficient for failing to do so.

Finally, as demonstrated above, evidence of Defendant’s refusal to submit to the breath test was properly admitted, and hence, Defendant

cannot show “that an objection to the evidence would likely have been sustained[.]” *Saunders*, 91 Wn. App. at 578.

As a result, Defendant cannot show deficient performance. Therefore, he cannot show ineffective assistance of counsel, and his convictions should be affirmed.

4. BECAUSE THERE WAS NO ERROR COMMITTED, THE CUMMULATIVE ERROR DOCTRINE IS INAPPLICABLE, AND DEFENDANT’S CONVICTIONS SHOULD BE AFFIRMED.

Under the cumulative error doctrine a court “may reverse a defendant’s conviction when the combined effect of errors during trial effectively denied the defendant her [or his] right to a fair trial, even if each error standing alone would be harmless.” *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

However, the “cumulative error doctrine” is “limited to instances 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.” *State v. Greiff*, 141 Wn. 2d 910, 929, 10 P.3d 390 (2000). Hence, “[t]he doctrine does not apply where the errors are few and have little or no effect on the trial’s outcome.” *Venegas*, 155 Wn. App. at 520.

As explained in the argument above and below, *see* §§ C(1)-(3), *supra*, & C(5), *infra*, there was no error committed in the present case.

Because there was no error, there can be no cumulative error.

Therefore, the cumulative error doctrine is inapplicable, and the defendant's convictions should be affirmed.

5. THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL WAS SUSTAINED WHERE THE ***SUBLETT*** EXPERIENCE AND LOGIC TEST CONFIRMS THAT THE TRIAL COURT DID NOT CLOSE THE COURTROOM IN HEARING PEREMPTORY CHALLENGES IN THIS CASE.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington State Constitution, and the Sixth Amendment to the United States Constitution: both provide a criminal defendant the right to a "public trial by an impartial jury."

The state constitution also provides that "[j]ustice in all cases shall be administered openly." Wash. Const. article I, section 10.

This provision grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. *State v. Lormor*, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The public trial right “serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). “There is a strong presumption that courts are to be open at all trial stages.” *Lormor*, 172 Wn.2d at 90. The right to a public trial includes *voir dire*. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

However, “case law does not hold that a defendant’s public trial right applies to every component of the broad ‘jury selection’ process,” but “only to a specific component of jury selection –i.e., the ‘voir dire’ of prospective jurors who form the venire.” *State v. Wilson*, 174 Wn. App. 328, 338, 298 P.3d 148 (2013). *See State v. Love*, 176 Wn. App. 911, 309 P.3d 1209, 1213, fn 5 (2013).

The right to a public trial is violated when: (1) the public is fully excluded from proceedings within a courtroom, *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); (2) the entire *voir dire* is closed to all spectators, *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); and (3) when individual jurors are

privately questioned in chambers, *see State v. Momah*, 167 Wn.2d 140, 146, 217 P.3d 321 (2009), and *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the Bone–Club factors).

In contrast, conducting individual *voir dire* in an open courtroom without the rest of the venire present does not constitute a closure. *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008).

“The right to a public trial, however, is not absolute, and a trial court may close the courtroom under certain circumstances.” *Wilson*, 174 Wn. App. at 334. “To protect the public trial right and to determine whether a closure is appropriate, Washington courts must apply the *Bone-Club* factors and make specific findings on the record to justify the closure.” *Id.* at 334-35.

The *Bone–Club* factors are as follows:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

*State v. Wilson*, 174 Wn. App. 328, 335, fn 5, 298 P.3d 148 (2013)  
(quoting *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325  
(1995) (quoting *Allied Daily Newspapers of Washington v. Eikenberry*,  
121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

“Failure to conduct a *Bone-Club* analysis before closing a proceeding required to be open to the public is a structural error warranting a new trial.” *Wilson*, 174 Wn. App. at 335.

However, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” *Sublett*, 176 Wn.2d at 71. Rather, as this Court has noted, the Supreme Court’s decisions in *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012), *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), and *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012),

appear to articulate two steps for determining the threshold issue of whether a particular proceeding implicates a defendant's public trial right, thereby requiring a *Bone-Club* analysis before the trial court may “close” the courtroom: First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy *Sublett*’s “experience and logic” test?

*State v. Wilson*, 174 Wn. App. 328, 337, 298 P.3d 148 (2013).

The *Sublett* “experience and logic” test, first formulated by the United States Supreme Court in *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), proceeds as follows:

The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” If the answer to both is yes, the public trial right attaches and the Waller or Bone–Club factors must be considered before the proceeding may be closed to the public.

*Sublett*, 176 Wn.2d at 73.

Applying that test, the *Sublett* Court held that no violation of the right to a public trial occurred when the trial court considered a jury question in chambers. *Id.* at 74–77. “None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record.” *Id.* at 77.

The defendant has the burden to satisfy the “experience and logic” test. See *In re Personal Restraint of Yates*, 177 Wn.2d 1, 29, 296 P. 3d 872 (2013); *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209, 1214 (2013).

“Whether a defendant’s constitutional right to a public trial has been violated is a question of law, which [appellate courts] review de novo on direct appeal.” *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013); *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court’s ruling, not by the ruling’s actual effect. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

In the present case, the defendant argues that the trial court violated his right to a public trial by conducting peremptory challenges on paper, which, he contends, was a procedure “closed to the public just as if it had taken place in chambers.” BOA, p. 48, 41-50. The record shows otherwise.

It shows that, prior to *voir dire*, the court explained in open court that peremptory challenges would be made “on paper.” RP 7. Then, after both parties had finished questioning the panel, they exercised peremptory challenges as follows:

All right. Then what’s going to happen now, ladies and gentlemen, is the attorneys are going to exercise their challenges and it’s based on your juror number so I would ask that you remain in your area. ***Do not leave the courtroom.*** This normally takes about ten minutes or so.

You are free to stand if you would like,. You are free to visit among yourselves. ***I just ask that you not leave the courtroom.*** All right.

[Attorneys], I need you to come back up to the lower bench.

[Defense Attorney]: Okay. I'm sorry. I am just going to draw this line. Just a second.

THE COURT: Here is the first 12 and then I excused 13 and 7 [for cause].

... That's what I needed to see. So when you flip the page up when [the deputy prosecutor] gets done, Mr. [defense attorney], that brings us up to that for the first 12. So when you get done with your challenges, just step back up so I can verify the 12.

RP (VD&O) 69-70 (emphasis added).

The parties then recorded their peremptory challenges in open court on a document titled "peremptory challenges," which was filed in open court the same day. CP 78. *See* RP (VD&O) 69-70. The court then read the list of venire members who were selected for the jury in open court. RP (VD&O) 70-71.

Thus, the record shows that, after *voir dire*, the parties exercised peremptory challenges in open court by writing them on a piece of paper, and handing it to the court. RP 69-71. The courtroom was never closed. *See* RP 69-71. The sheet upon which the parties recorded their challenges was filed in open court the same day. CP 73 (peremptory challenges). A jury was then empanelled, sworn, and given initial instructions, all in open court. RP 69-71.

Hence, there was no closure and, contrary to Defendant's argument, the court was not required to conduct a *Bone-Club* analysis.

Indeed, Division Three of this Court has very recently considered and rejected an argument similar to that made by the defendant here. In *State v. Love*, 176 Wn. App 911, 309 P.3d 1209 (2013), *review granted in part by State v. Love*, 181 Wn.2d 1029, 340 P.3d 228 (2015), it applied the "experience and logic" test of *Sublett* and held "that the trial court did not erroneously close the courtroom by hearing the defendant's for cause challenges at sidebar, nor would it have been error to consider the peremptory challenge in that manner if the court had done so." *Love*, at 1213-1214.

With respect to the experience prong of the *Sublett* test, the Court in *Love* found no authority to require challenges for cause to be conducted in public. Indeed, it found that "there is no evidence suggesting that historical practices required these challenges to be made in public." *Love*, 309 P.3d at 1213. Hence, the Court concluded that "[o]ur experience does not require the exercise of these challenges," whether for cause or peremptory, "be conducted in public." *Id.* at 1214.

With respect to the logic prong, the Court found that the purposes of the public trial right

[s]imply are not furthered by a party's actions in exercising a peremptory challenge or in seeking a cause challenge of a potential juror. The first action presents no questions of public oversight, and the second typically presents issues of law for the judge to decide.

*Love*, 309 P.3d at 1214<sup>3</sup>.

Thus, the Court in *Love* concluded, “[n]either prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public.” *Id.*

This Court “agree[d] with Division Three that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right.” *State v. Dunn*, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014), *review denied by State v. Dunn*, 181 Wn.2d 1030, 340 P.3d 228 (2015).

It affirmed this position in *State v. Webb*, rejecting a defendant's “argu[ment] that his right to a public trial was violated because counsel conducted peremptory challenges on paper,” and holding, as it held in *Dunn*, “that the trial court did not violate a defendant's right to a public trial when the attorneys exercised peremptory challenges at a side bar.” 183 Wn. App. 242, 246-47, 333 P.3d 470, 472-73 (2014), *review denied by State v. Webb*, 182 Wn.2d 1005, 342 P.3d 327 (2015).

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<sup>3</sup> Defendant's argument that “the Peremptory Challenges document” filed in this case” is insufficient because “it does not reveal race,” BOA, p. 46, does not necessitate a contrary conclusion. The race of venire members would not necessarily be demonstrated by an oral exercise of peremptory challenges or any other readily available means, either. Nor, perhaps, given that race should be irrelevant to jury selection, *see, e.g., Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), should it be identified by venire members.

This Court again reached this same conclusion in *State v. Marks*, 184 Wn. App. 782, 339 P.3d 196 (2014).

Finally, Division One has taken this position as well, holding that “[a]llowing 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.” *State v. Filitaula*, 184 Wn. App. 819, 821-24, 339 P.3d 221 (2014). *See also State v. Schumacher*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2015) (WL 1542526).

Therefore, exercise of peremptory challenges on paper at sidebar, as was done in this case, does not implicate and could not have violated Defendant’s right to a public trial, and his convictions should be affirmed.

D. CONCLUSION.

Defendant’s right to present a defense was sustained because the trial court properly excluded irrelevant evidence.

Defendant failed to meet his burden of showing prosecutorial misconduct by failing to show improper conduct.

Evidence of a DUI arrestee’s refusal to take a breath test pursuant to Washington’s implied consent statute is properly admissible, and was properly admitted here. Even if such evidence was admitted in error, any error was harmless.

Defendant's right to a public trial was sustained because the *Sublett* experience and logic test confirms that the trial court did not close the courtroom in hearing peremptory challenges in this case.

Because there was no error committed, the cumulative error doctrine is inapplicable.

Therefore, Defendant's convictions should be affirmed.

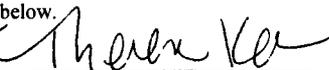
DATED: April 17, 2015.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
Brian Wasankari  
Deputy Prosecuting Attorney  
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by  e-mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-17-15   
Date Signature

**PIERCE COUNTY PROSECUTOR**

**April 17, 2015 - 11:53 AM**

**Transmittal Letter**

Document Uploaded: 3-463482-Respondent's Brief.pdf

Case Name: State v. Urrieta

Court of Appeals Case Number: 46348-2

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Therese M Kahn - Email: [tnichol@co.pierce.wa.us](mailto:tnichol@co.pierce.wa.us)

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