

NO. 31892-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ALFONSO CERDA SALAZAR,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENTIN REPLY

Mr. Cerda set forth several bases requiring reversal of his convictions and remand for a new trial in his opening brief. He targets this reply on three of those bases and relies on his opening brief regarding the additional errors raised there.

- 1. The trial court's exclusion of photographs from learned treatises, relied on by the defense expert, violated Mr. Cerda's constitutional right to present a defense and is not supported by evidentiary rules.**

Mr. Cerda's defense to the allegation that he bit Officer Westby was that Officer Westby's puncture wound did not stem from a human bite but from contact with some other object. Mr. Cerda relied on an expert who opined that Officer Westby's injury did not resemble a human bite mark. Dr. Wigren reached that conclusion, in part, by comparing Officer Westby's injury to a typical bite mark as portrayed through photographs in learned treatises. The State presented photographs of Officer Westby's injury. But the court ruled that the photographs from the treatises would not be helpful to the jury to compare with the photographs of Officer Westby. The court limited the defense to having the expert draw a simplistic bite mark, which was admitted at trial.

The trial court's ruling unconstitutionally hamstrung Mr. Cerda's defense. The State responds that the ruling did not abuse the court's discretion under the rules of evidence. Resp. Br. at 4-5. But the State cites only to ER 702, which regulates when an expert may testify. Resp. Br. at 5. The trial court did not rely on ER 702 in excluding the defense photographs.

As set forth in Mr. Cerda's opening brief, the evidentiary bases for excluding the photographs from learned treatises were improper. The excerpted treatises were not hearsay because ER 803(a)(18) allows the admission of learned treatises relied upon by an expert witness on direct examination. Foundation was not an issue, and the State's response brief does not challenge it. Dr. Wigren testified that the exhibits are excerpts from learned treatises, that he relied on the excerpted treatises in forming his opinion, and that it is a common practice in his field to rely on these treatises.

Nonetheless, the trial court ruled that not even one of the exhibits could be admitted for even illustrative purposes because it would not be helpful to the jury. In so ruling, the trial court abused its discretion and violated Mr. Cerda's right to present a defense. The exhibits would have been helpful to the jury because they provide a

direct point of comparison between the photographs of Officer Westby's wound and typical bite marks on human skin. If anything, the drawing of typical bite marks, which the court allowed Dr. Wigren to make in lieu of the photographs, was the exhibit that should have been excluded as not helpful to the jury as it is simplistic and incongruent to the State's evidence. *Compare* Exhibit 18 *with* Exhibits 1-4, 13-16. In contrast, the photographic exhibits were "clearer and more accurate depiction[s]" of Dr. Wigren's testimony than the cartoon-like drawing at Exhibit 18. *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).

The photographs were helpful in making Dr. Wigren's testimony more clear. *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)). Just as the photographs assisted the expert in making his findings, they would have assisted the jury in analyzing Dr. Wigren's testimony. *Id.*

The State tries to rely on its characterization of the expert photographs as “gruesome.” Resp. Br. at 4-5. Mr. Cerda disagrees that the photographs were gruesome, and at trial he offered to admit only one set of photographs. Further, even if the photographs can be considered gruesome, exclusion is improper. “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.* Mr. Cerda did not seek admission of the exhibits to inflame the jury, which had already heard descriptions of Officer Westby’s wound and Dr. Wigren’s knowledge of bite marks. *See 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). Further, Mr. Cerda offered to limit the number of photographs exposed to the jury. “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.

Mr. Cerda's inability to present the most compelling evidence of his defense requires reversal and remand for a new trial. *See* Op. Br. at 11-13.

**2. When the State's witness violated a pretrial ruling, the court should have declared a mistrial, or at least stricken the testimony.**

In the alternative, Mr. Cerda is entitled to a new trial because Officer Westby violated a pretrial ruling by testifying to Mr. Cerda's emotional and mental state, of which he had no personal knowledge, and characterized Mr. Cerda's look as "a thousand-yard stare." Op. Br. at 13-17.

The State responds only briefly to this argument and relies on *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008). Resp. Br. at 6-7. *Magers* is inapposite to the issues Mr. Cerda raises. The appellant in *Magers* challenged a police officer's testimony as an opinion on the defendant's guilt. 164 Wn.2d at 190. In turn, our Supreme Court found the statements were not comments on the defendant's guilt or credibility. *Id.* Mr. Cerda raises different issues. He argues the officer's testimony violated a pretrial ruling. *See* Op. Br. at 14-17. The trial court held the testimony inadmissible because the officer did not have personal knowledge of Mr. Cerda's actual emotional state, the

officer's comparison to "martial arts or his dojo or instructor or master" was irrelevant, and it was not helpful to the jury.

Because the State violated the pretrial ruling when the officer testified to Mr. Cerda's emotional state and having given a "thousand-yard stare," Mr. Cerda's mistrial motion should have been granted. Instead, the court denied a mistrial and allowed the jury to consider the evidence. The ruling was incorrect and requires remand for a new trial.

**3. Cumulative trial errors denied Mr. Cerda his constitutional right to a fair trial.**

Mr. Cerda is entitled to a new trial because of the combined effect of each of the assigned trial errors, which collectively denied a fair trial. *See* Op. Br. at 30-31. The State's response claims that "The cumulative error doctrine is reserved for 'severe trial errors' . . . ." Resp. Br. at 9 (citing *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). Mr. Cerda cannot find the State's quoted language in the opinion to which the State cites. *See Greiff*, 141 Wn.2d at 929. The closest language Mr. Cerda finds supports reversal under the cumulative error doctrine: where significant trial errors cause a severe cumulative impact, reversal is required. *State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010). The errors set forth here and

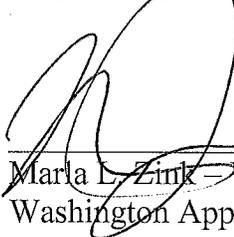
in the opening brief caused an unfair trial in violation of due process; reversal is required.

B. CONCLUSION

The convictions should be reversed and remanded for a new trial because (1) the trial court excluded persuasive evidence supporting his defense and expert testimony in support of that defense, (2) the State's main witness was allowed to testify prejudicially and in violation of a pretrial ruling on which Mr. Cerda was entitled to rely, (3) the right to a public trial was violated when the public was excluded from portions of voir dire, and (4) the reasonable doubt instruction contained improper language. Standing alone or in combination, these errors deprived Mr. Cerda of a constitutionally fair trial.

DATED this 8th day of May, 2014.

Respectfully submitted,



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v.	)	NO. 31892-3-III
	)	
ALFONSO CERDA SALAZAR,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8<sup>TH</sup> DAY OF MAY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** 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] D. ANGUS LEE, DPA RYAN VALAAS, DPA GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF MAY, 2014.

x \_\_\_\_\_ 

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