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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JEAN PAUL WHITFORD, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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**INDEX**

**I. RESPONDENT’S ISSUES PRESENTED ..... 1**

**II. STATEMENT OF THE CASE ..... 2**

Procedural history. .... 2

Substantive facts. .... 2

**III. ARGUMENT ..... 4**

**A. THE TRIAL COURT DID NOT ERROR WHEN IT FAILED TO SUPPRESS BLOOD TAKEN PURSUANT TO A SEARCH WARRANT. .... 4**

1. Failure to immediately read and present a copy of the warrant and receipt of property seized to the defendant at the time of the search for the defendant’s blood. .... 5

2. Failure to immediately provide a copy of the warrant to the defendant after his blood was drawn pursuant to a search warrant. .... 6

**B. THE PROSECUTOR’S HYPOTHETICAL QUESTION POSED TO THE EXPERT WITNESS ON DIRECT EXAMINATION DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT AS IT WAS IN DIRECT RESPONSE TO QUESTIONS POSED BY THE DEFENSE DURING CROSS-EXAMINATION. EVEN IF THERE WAS ERROR, IT WAS NOT PREJUDICIAL BECAUSE THE TRIAL COURT, IN AN ABUNDANCE OF CAUTION, INSTRUCTED THE JURY TO DISREGARD THE QUESTION AND ANSWER GIVEN. .... 12**

Standard of review. .... 12

1. First prong: The prosecutor’s inquiry was not improper. .... 12

2. Second prong: The prosecutor’s question was not prejudicial. .... 15

C.	THE TRIAL COURT’S ACT OF ADMINISTERING A CUSTOMARY OATH TO A REPLACEMENT BAILIFF DURING JURY DELIBERATIONS DID NOT VIOLATE THE DEFENDANT’S RIGHT TO A PUBLIC TRIAL.....	16
	Standard of review. ....	16
	1. Experience.....	19
	2. Logic. ....	21
	3. Closure. ....	23
<b>IV.</b>	<b>CONCLUSION .....</b>	<b>24</b>

## **TABLE OF AUTHORITIES**

### **WASHINGTON CASES**

<i>State v. Avendano–Lopez</i> , 79 Wn. App. 706, 904 P.2d 324 (1995), <i>review denied</i> , 129 Wn.2d 1007 (1996) .....	14, 15
<i>State v. Betancourth</i> , –Wn.2d–, 413 P.3d 566 (2018) .....	11
<i>State v. Blizzard</i> , 195 Wn. App. 717, 381 P.3d 1241 (2016), <i>review denied</i> , 187 Wn.2d 1012 (2017).....	7
<i>State v. Bowman</i> , 8 Wn. App. 148, 504 P.2d 1148 (1972) .....	8
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	17
<i>State v. Busig</i> , 119 Wn. App. 381, 81 P.3d 143 (2003), <i>review denied</i> , 151 Wn.2d 1037 (2004).....	7
<i>State v. Dodson</i> , 110 Wn. App. 112, 39 P.3d 324 (2002).....	7
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006) .....	18
<i>State v. Ettenhofer</i> , 119 Wn. App. 300, 79 P.3d 478 (2003) .....	9, 10, 11
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	4
<i>State v. Jones</i> , 185 Wn.2d 412, 372 P.3d 755 (2016).....	19, 21
<i>State v. Kern</i> , 81 Wn. App. 308, 914 P.2d 114 (1996), <i>review denied</i> , 130 Wn.2d 1003 (1996).....	6
<i>State v. Lane</i> , 37 Wn.2d 145, 222 P.2d 394 (1950) .....	22
<i>State v. Linder</i> , 190 Wn. App. 638, 360 P.3d 906 (2015).....	9, 10
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014) .....	12, 15
<i>State v. Lormor</i> , 172 Wn.2d 85, 257 P.3d 624 (2011).....	23
<i>State v. Love</i> , 183 Wn.2d 598, 354 P.3d 841 (2015) .....	23

<i>State v. Ollivier</i> , 178 Wn. 2d 813, 312 P.3d 1 (2013), cert. denied, 135 S.Ct. 72 (2014).....	5
<i>State v. Parker</i> , 28 Wn. App. 425, 626 P.2d 508 (1981) .....	8
<i>State v. Parks</i> , 190 Wn. App. 859, 363 P.3d 599 (2015), review denied, 185 Wn.2d 1032 (2016).....	18, 20, 21, 23
<i>State v. Paumier</i> , 176 Wn.2d 29, 288 P.3d 1126 (2012) .....	16
<i>State v. Schierman</i> , –Wn.2d–, 415 P.3d 106 (2018).....	24
<i>State v. Smith</i> , 181 Wn.2d 508, 334 P.3d 1049 (2014).....	18
<i>State v. Sublett</i> , 176 Wn.2d 71, 292 P.3d 715 (2012).....	18, 19, 21, 22
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990) .....	16
<i>State v. Temple</i> , 170 Wn. App. 156, 285 P.3d 149 (2012) .....	7
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	12
<i>State v. Whitlock</i> , 188 Wn.2d 511, 396 P.3d 310 (2017).....	19
<i>State v. Wraspir</i> , 20 Wn. App. 626, 581 P.2d 182 (1978).....	5, 8
<i>State v. Young</i> , 89 Wn.2d 613, 574 P.2d 1171, cert. denied, 439 U.S. 870 (1978).....	20
<i>Tacoma v. Mundell</i> , 6 Wn. App. 673, 495 P.2d 682 (1972).....	9

### FEDERAL CASES

<i>Press-Enterprise Co. v. Superior Court</i> , 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).....	18
---	----

### RULES

CrR 2.3.....	6
--------------	---

**OTHER**

Washington Courts, *Benchbook on Criminal Procedure – Superior Court*, Jury Trial Script Appendix, available at <https://inside.courts.wa.gov/index.cfm?fa=cntlManuals.showManualsPage&manualid=crimsup&file=Script04> (Revised February 2006) ..... 20

## **I. RESPONDENT'S ISSUES PRESENTED**

1. If the defendant has not alleged a constitutional violation, but rather alleges a ministerial error regarding procedural noncompliance with CrR 2.3(d), has he alleged or established any prejudice requiring suppression of the blood evidence taken from him during a DUI investigation?

2. Did the deputy prosecutor commit misconduct when she asked an expert witness, during redirect examination, about the tolerance levels of experienced and alcoholic drinkers, in response to questioning during cross-examination?

3. In an abundance of caution, if the trial court instructed the jury to disregard the deputy prosecutor's question about experienced or alcoholic drinkers, has the defendant established the deputy prosecutor's question had a substantial likelihood of affecting the jury's verdict despite the trial court's curative instruction?

4. Does an open court violation occur where the trial court administers an optional, conventional oath to a replacement bailiff, due to an illness of the regular bailiff, to take charge of the jury during deliberations?

## II. STATEMENT OF THE CASE

### Procedural history.

Jean-Paul Whitford was charged by amended information in the Spokane County Superior Court with felony driving while under the influence<sup>1</sup> and first degree driving while license suspended or revoked. CP 106-07.<sup>2</sup> Prior to trial, the defendant pleaded guilty to the first degree driving while license suspended. CP 100-05. The defendant was convicted of felony driving while under the influence after a jury trial and this appeal timely followed. CP 108.<sup>2</sup>

### Substantive facts.

Deputy Sheriff Dustin Palmer was on patrol and parked at a gas station in the Spokane Valley on May 2, 2015, at 12:40 a.m. RP 6-8.<sup>3</sup> The deputy heard a Honda Civic's gears grinding and accelerating. RP 8. The deputy gave chase and attempted to catch up to the vehicle. RP 8. The Honda then travelled at a high rate of speed through a residential area,

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<sup>1</sup> The defendant had prior DUI convictions which elevated this crime to a felony. CP 88. The defendant's prior criminal history is not in dispute in this appeal.

<sup>2</sup> The State has filed a supplemental designation of clerk's papers to include the Amended Information (estimated to be CP 106-07) and the jury Verdict (estimated to be CP 108).

<sup>3</sup> The verbatim report of proceedings taken from trial on June 21-22, 2017, before the Honorable Raymond Clary, is referenced herein as "RP." The verbatim report of proceedings taken from a hearing on February 11, 2016, is referenced herein as "2/11/16 RP."

ultimately stopping at a residence. RP 8-9. The deputy contacted the defendant, who was the driver of the vehicle, and smelled an odor of alcohol on his breath. RP 10.

Deputy Todd Miller arrived at the location and proceeded with the investigation for driving while under the influence. RP 25-26. Deputy Miller contacted the defendant and observed he had glassy eyes and an odor of alcohol coming from his breath when he spoke. RP 37. In response to the deputy's questions, the defendant remarked he had been at a tavern, consumed five pints, and was heading home.<sup>4</sup> RP 38. The defendant exhibited signs of impairment and was arrested for driving while under the influence of alcohol based upon the administered gaze nystagmus test, his inconsistent answers, his speech, and his admission of consuming five pints. RP 54. The defendant was transported to the jail for a blood draw. RP 56. A search warrant was authorized and the defendant's blood was drawn by a paramedic at 2:43 a.m. RP 56-62, 64-67.

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<sup>4</sup> The trial court had conducted a CrR 3.5 hearing, found the defendant's statements to law enforcement admissible, and entered written findings of fact and conclusions of law. CP 81-84.

### III. ARGUMENT

#### A. THE TRIAL COURT DID NOT ERROR WHEN IT FAILED TO SUPPRESS BLOOD TAKEN PURSUANT TO A SEARCH WARRANT.

The defendant first contends that blood taken from him pursuant to a search warrant should have been suppressed because officers did not read the search warrant to him prior to taking his blood and officers did not present him with a copy of the search warrant before it was executed, as he claims is required by CrR 2.3(d).

At the time of the execution of the search warrant for the defendant's blood, and prior to the blood draw, Deputy Miller showed the defendant a copy of the search warrant. CP 58-59 (finding of fact 9).<sup>5</sup> Following the defendant's blood draw, Deputy Miller left a copy of the warrant and receipt of property taken (defendant's blood) with the Spokane County Jail staff to be given to the defendant upon his release from jail. CP 59 (finding of fact 10). The defendant moved to suppress the blood taken from him pursuant to the search warrant, alleging the officer did not give him a copy of the search warrant. 2/11/16 RP 2-7. The trial court denied the motion

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<sup>5</sup> After the suppression motion, the trial court entered written findings of fact and conclusions of law. CP 57-60. The defendant has not assigned error to any of the court's findings of fact. Unchallenged findings of fact following a CrR 3.6 suppression hearing are accepted as verities upon appeal, and will not be reviewed by the appellate court. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994).

finding that the defendant's complaint regarding the execution of the search warrant was ministerial and it did not constitute a departure from CrR 2.3(d). CP 59; 2/11/16 RP 16-18.

1. Failure to immediately read and present a copy of the warrant and receipt of property seized to the defendant at the time of the search for the defendant's blood.

Regarding the defendant's argument that the officer was required to give him a copy of the search warrant prior to its execution,<sup>6</sup> the same type of claim was addressed and dismissed by our high court in *State v. Ollivier*, 178 Wn. 2d 813, 851-52, 312 P.3d 1 (2013), *cert. denied*, 135 S.Ct. 72 (2014). In that case, the defendant argued that evidence found on his computer should have been suppressed because the officer failed to present him a copy of the search warrant before it was executed. *Id.* The Supreme Court disagreed and held that CrR 2.3(d) does not require that a copy of the warrant be provided to a suspect before the search is commenced. *Id.* The court found that posting a copy of the warrant before leaving the premises was sufficient. *Id.*; *see also State v. Wraspir*, 20 Wn. App. 626, 628, 581 P.2d 182 (1978) (the Fourth Amendment does not require immediate service of the warrant before the search can commence).

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<sup>6</sup> See Appellant's Br. at 12.

Here, it is uncontested the officer showed the defendant a copy of the search warrant. *Ollivier* is controlling and the defendant's claim has no merit.

2. Failure to immediately provide a copy of the warrant to the defendant after his blood was drawn pursuant to a search warrant.

The defendant further argues that the officer failed to follow the proper procedure under CrR 2.3(d), by not immediately providing him a copy of the search warrant and receipt of the property seized at the time of the blood draw. CrR 2.3(d) states:

Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request provide a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

Unless there is an alleged constitutional violation, the rules for execution and return of a warrant are ministerial acts, *State v. Kern*, 81 Wn. App. 308, 311, 914 P.2d 114 (1996), *review denied*, 130 Wn.2d 1003 (1996), which do not “flow so directly from the Fourth Amendment’s proscription upon unreasonable searches that failure to abide

by them compels exclusion of evidence obtained in execution of a search warrant.” *State v. Temple*, 170 Wn. App. 156, 162, 285 P.3d 149 (2012). Accordingly, this Court has held that it will not invalidate a search warrant for ministerial or clerical error unless prejudice is shown. *State v. Busig*, 119 Wn. App. 381, 388, 81 P.3d 143 (2003), *review denied*, 151 Wn.2d 1037 (2004); *State v. Blizzard*, 195 Wn. App. 717, 730-31, 381 P.3d 1241 (2016), *review denied*, 187 Wn.2d 1012 (2017) (generally, unless a defendant can show prejudice, procedural or technical noncompliance with CrR 2.3(d) does not invalidate a warrant or otherwise require suppression of evidence).

In *Blizzard*, the defendant argued that the warrant failed to provide for a return date in the search warrant pursuant to RCW 10.96.020, which allows for the search of records in the possession of one who receives service outside of Washington, and requires a return of the records within 20 business days. 195 Wn. App. at 730. This Court held that Blizzard did not allege or show that the warrant’s failure to specify the time for its execution and return prejudiced him. *Id.* at 730. Ultimately, this Court found the failure to include the statutory language in the search warrant did not invalidate the warrant for the defendant’s cell phone records. *See also State v. Dodson*, 110 Wn. App. 112, 122, 39 P.3d 324 (2002) (this Court resolved the same issue in the same manner).

Similarly, in *State v. Parker*, 28 Wn. App. 425, 426-27, 626 P.2d 508 (1981), the defendant argued for suppression of the search warrant under CrR 2.3(d), as the copy of the warrant handed to him lacked the magistrate's signature and date signed. The original was signed and dated by the magistrate. *Id.* at 426. This Court determined that the execution and return of a search warrant is ministerial. *Id.* Procedural noncompliance does not, therefore, invalidate the warrant unless the defendant establishes prejudice. *Id.* at 427. This Court held that Parker had not established prejudice and the lower court properly denied the motion to suppress. *Id.*

In *Wrspir*, officers executed a warrant on a home where the defendants were absent. No one other than the officers were present for the search. 20 Wn. App. at 628. The defendants argued the trial court's suppression order should be affirmed because the officers did not serve a copy of the warrant or receipt upon the two men who were later arrested. This Court found CrR 2.3 was adequately followed and "sufficient checks and balances were demonstrated" in the case. *Id.* at 630. Having shown no prejudice, the rule was not violated. *Id.*

In *State v. Bowman*, 8 Wn. App. 148, 150, 504 P.2d 1148 (1972), the court held that suppression was not required for a technical violation under former statute governing execution of search warrants for "dangerous

drugs” where the warrant was read aloud and served on householder, but not served on defendant as required by statute.

Similarly, in *Tacoma v. Mundell*, 6 Wn. App. 673, 495 P.2d 682 (1972), a search warrant was granted to search the defendant’s premises. After the search, the defendant was arrested and transported to the police station. The defendant was not personally given a copy of the warrant, but rather it was left in his jail property box after he was booked into jail. *Id.* at 676. Division Two held under former RCW 69.33.430, although it is preferable that the defendant is served personally with a copy of the search warrant at the time of its execution, it was not reversible error where the defendant received a copy of the warrant the next day.

The defendant’s reliance on this Court’s decision in *State v. Linder*, 190 Wn. App. 638, 360 P.3d 906 (2015), and *State v. Ettenhofer*, 119 Wn. App. 300, 307, 79 P.3d 478 (2003) is unavailing. In *Linder*, the defendant was charged with a drug offense. He moved to suppress evidence found in a closed tin box during the search and inventory of its contents because it was performed by a single police officer and not in the defendant’s presence or the presence of another witness, in violation of CrR 2.3(d).

The trial court ruled that, absent suppression of the contraband, there was no adequate remedy for the defendant to attack the search warrant

because it pitted the defendant's word against the officer. 190 Wn. App. at 645. The *Linder* court observed that the benchmark of previous decisions concerning the execution and return of search warrants is "prejudice." *Id.* at 649. This Court held that the officer's violation of the rule, which requires more than one person to witness the search, was not ministerial; instead, it was prejudicial. The violation could not be cured after the fact, and there was no other remedy available, other than exclusion of the evidence, to enforce the rule's requirement that the property owner or more than one person witness the search. *Id.* at 651.

Similarly, in *Ettenhofer*, officers had obtained a telephonic warrant, but no written warrant with the judge's signature and no copy of the warrant was given to the defendant. Division Two ultimately held that CrR 2.3(c) requires that once probable cause is determined for a search, the officers must affix the authorizing magistrate's signature to the properly executed, written warrant. The court invalidated the search based on the lack of a written warrant. The *Ettenhofer* court also observed:

If our concern were only with these violations, we would next consider whether the violations prejudiced the defendant because, constitutional considerations aside, rules guiding the warrant procedure are ministerial and reversal, therefore, does not follow as a matter of course. But because we conclude that the written warrant failure violated *Ettenhofer's* constitutional rights against unreasonable

searches, which renders the search invalid as a matter of law, prejudice need not be shown.

119 Wn. App. at 307 (internal citations omitted).

Here, the defendant does not claim resulting prejudice, that the search was unreasonable, or any constitutional provision was violated.<sup>7</sup> Furthermore, he does not contend that he *never* received a copy of the warrant or inventory. Rather, he argues law enforcement violated CrR 2.3(d), by not immediately providing a copy of the search warrant and its inventory to him at the time of the blood draw. Indeed, this case is much like *Mundell, supra*, in that respect. In doing so, the defendant fails to allege or demonstrate how this alleged error prejudiced him. At most, the defendant asserts a ministerial violation, and absent a showing of prejudice, the alleged procedural noncompliance does not invalidate the warrant or suppression of its fruits. The trial court did not err when it denied his motion to suppress the blood evidence.

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<sup>7</sup> “At its core, the exclusionary rule provides a remedy for individuals whose constitutional rights have been violated. As [the Court has] previously stated, the rule should be applied to achieve three objectives: first, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence.” *State v. Betancourth*, –Wn.2d–, 413 P.3d 566, 570 (2018).

**B. THE PROSECUTOR’S HYPOTHETICAL QUESTION POSED TO THE EXPERT WITNESS ON DIRECT EXAMINATION DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT AS IT WAS IN DIRECT RESPONSE TO QUESTIONS POSED BY THE DEFENSE DURING CROSS-EXAMINATION. EVEN IF THERE WAS ERROR, IT WAS NOT PREJUDICIAL BECAUSE THE TRIAL COURT, IN AN ABUNDANCE OF CAUTION, INSTRUCTED THE JURY TO DISREGARD THE QUESTION AND ANSWER GIVEN.**

The defendant next argues the deputy prosecutor committed misconduct when she asked a hypothetical question to an expert witness, during redirect examination, regarding the tolerance level to alcohol of an experienced or alcoholic drinker.

Standard of review.

A prosecutorial misconduct inquiry consists of two prongs: (1) whether the prosecutor’s comments were improper and (2) if so, whether the improper comments caused prejudice. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). An appellate court reviews allegations of prosecutorial misconduct under an abuse of discretion. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). A defendant bears the burden of showing that the prosecutor’s comments are both improper and prejudicial. *Id.* at 430.

1. First prong: The prosecutor’s inquiry was not improper.

During trial, a Washington State Patrol forensic toxicologist testified on direct examination that he tested the defendant’s blood and

determined that it consisted of 0.24 grams of ethanol per 100 milliliters of blood, with an error rate or uncertainty rate of plus or minus .020. RP 156. The deputy prosecutor questioned the toxicologist concerning burn off rates and retrograde extrapolation, and the toxicologist approximated the blood alcohol level to be .243 at the time of driving. RP 162. The toxicologist also discussed an individuals' tolerances to alcohol (a light drinker as opposed to a heavy drinker) and alcohol's effect on those individuals. RP 165-66.

During cross-examination, the defense questioned the toxicologist regarding the defendant's alcohol burn off rate and absorption rate, the variation in the burn off rates of different individuals, the differences in the observable, specific physical effects of individuals with a blood alcohol levels of .08, .15, and .24.<sup>8</sup> RP 173, 177-80.

During redirect examination, the deputy prosecutor asked the following question:

[DEPUTY PROSECUTOR]: Okay. Now, sir, let's go back to the idea about tolerance. Defense counsel asked you a lot about things that you would expect to see. Now when we are talking about a seasoned drinker on even someone who may be an alcoholic, how does that affect your analysis?

[WITNESS]: So the outward affects would -- that individual would appear --

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<sup>8</sup> Specifically, the toxicologist was questioned on the impact the different levels of alcohol would have on speech, motor control or balance, flushed skin, and other physical effects. RP 177-80.

The defense objected and requested a mistrial. 183-84. After argument, the court denied the motion.

THE COURT: All right. To borrow a phrase from you, Mr. Johnson, I think that the witness and you engaged in a number of hypotheticals about what the potential for certain outliers and what effect that has. And I didn't have a sense, I mean, an alarm didn't go off in me that those words, that there was an assertion that Mr. Whitford was a seasoned drinker or an alcoholic. So I'm not inclined to declare a mistrial. But I do want to be responsive to everybody's sense of a fair trial. If you think that some kind of curative instruction or order to strike a question is appropriate, I would entertain that. I'm just thinking, nothing -- I didn't see that any different than the things that you were asking or the things that the witness himself brought up spontaneous in response to other questions.

So what my concern is, and the reason I'm saying that, is if we go back to that and say something more, I don't know that it's going to help resolve your concern. So you let me know if you would like a curative instruction and I will give it. You let me know if you would like me to strike the question and answer, and I will.

RP 187.

The defense attorney then moved to strike the question and answer.

RP 188. Upon the jury's return to the courtroom, the trial court, in an abundance of caution, instructed the jury to disregard the question, the answer that was given, and to consider it stricken from the trial. RP 190.

“[T]he introduction of evidence that would be inadmissible if offered by the opposing party ‘opens the door’ to explanation or contradiction of that evidence.” *State v. Avendano-Lopez*, 79 Wn. App. 706,

714, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996). The doctrine promotes fairness by preventing one party from raising a subject and then barring the other party from further inquiry. *Id.* at 714.

In the present case, if anything, the deputy prosecutor's question was in response to the defense attorney's cross-examination regarding the impairment levels of drinkers with .08 blood alcohol, .15 blood alcohol and .24 blood alcohol, and their respective physical effects and tolerance levels. It cannot be reasonably concluded that the deputy prosecutor's question was directed at the defendant, but rather different individuals' tolerance levels to different amounts of alcohol. It is evident from defense counsel's questioning that he was attempting to establish that the defendant did not exhibit the typical signs of impairment of an individual with a blood alcohol content of .24. In fact, during closing argument, defense counsel argued that the defendant did not exhibit the physical, intoxication indicators of an individual with a blood alcohol level of .24. RP 242-48. The defendant has not established any prosecutorial misconduct, where he opened the door to the deputy prosecutor's question.

2. Second prong: The prosecutor's question was not prejudicial.

Even if the defendant could establish error, there was no prejudice. To show prejudice, a defendant must show a substantial likelihood that the prosecutor's statement affected the jury's verdict. *Lindsay*, 180 Wn.2d at

440. Other than proclaiming prejudice, the defendant, on appeal, does not argue or establish how he was prejudiced. Indeed, the trial court instructed the jury to disregard the question and answer and struck it from the record in an abundance of fairness to the defendant. An appellate court presumes the jury follows the trial court's instructions when the trial court instructs the jury to disregard an improper question or argument. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990). Here, there is no evidence that the jury ignored the trial court's admonition. Moreover, the defendant has not established any error or prejudice, which is necessary to entitle him to any relief. This allegation has no merit.

**C. THE TRIAL COURT'S ACT OF ADMINISTERING A CUSTOMARY OATH TO A REPLACEMENT BAILIFF DURING JURY DELIBERATIONS DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL.**

The defendant argues an open courts violation occurred when the trial court appointed a replacement bailiff during jury deliberations.

Standard of review.

Whether a defendant's constitutional right to a public trial has been violated is a question of law, which an appellate court reviews review de novo on direct appeal. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012).

At the end of closing argument, the trial judge swore in his bailiff. RP 257. After the jury reached its verdict, the court informed the parties that

his customary bailiff had to leave due to an illness, and a replacement bailiff was sworn in. RP 259. Although not objected to, defense counsel advised the court that the defendant would file an appeal, contending, in part, that the subsequent oath of the replacement bailiff “was not done in public.” RP 264. Thereafter, the defendant filed a motion for a new trial and argued, in part, that the replacement bailiff did not take her oath in open court. RP 272-74. The trial court denied the motion.

THE COURT: I read both of your briefs and gave considered thought to this. When Ms. Myers was no longer available to the court, as is commonly done here in Spokane County Superior Court, another bailiff substitutes. I don't know that every judge does this, but because at the point that a bailiff becomes a substitute, the jury has already heard what the JA's role is or the bailiff's role is. But as a precaution, I swore her in with the exact same oath that I gave Ms. Myers. And the door to Ms. Myers' office, which is essentially in the courtroom or next to the courtroom, was wide open. There wasn't anybody here. Nonetheless, I did it as a precaution.

And this is a skilled bailiff. She works for Judge Moreno. At that point, all the evidence was in, every ruling had been made. The jury was back conducting its deliberations. I don't see any prejudice to Mr. Whitford's trial or rights in the trial. The jury made its decision based on the evidence, not this oath. So I'm denying the motion for a new trial.

RP 278-79.

A criminal defendant has a constitutional right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public also has a constitutional right to attend court proceedings.

*Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986); *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

A reviewing court must first determine whether the proceeding at issue even implicates the public trial right constituting a closure. *State v. Sublett*, 176 Wn.2d 71, 292 P.3d 715 (2012); *State v. Parks*, 190 Wn. App. 859, 864, 363 P.3d 599 (2015), *review denied*, 185 Wn.2d 1032 (2016). “[N]ot 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.

Therefore, to determine whether a defendant’s public trial right has been violated, an appellate court engages in a three-part inquiry: (1) whether the proceeding at issue implicates the public trial right; (2) if so, was the proceeding closed; and (3) if so, was the closure justified. *State v. Smith*, 181 Wn.2d 508, 521, 334 P.3d 1049 (2014). If an appellate court concludes that the right to a public trial does not apply to the proceeding at issue, the court does not reach the second and third steps in the analysis. *Id.* at 519.

To resolve whether the public trial right attaches, the court applies the “experience and logic” test. *Sublett*, 176 Wn.2d at 72-73. Under the experience prong, the court considers whether the proceeding at issue has historically been open to the public. *Id.* at 73. Under the logic prong, the

court asks “whether public access plays a significant positive role in the functioning of the particular process in question. *Id.* at 73. A defendant must satisfy both prongs. *Id.* at 73. Consideration is given to whether openness will “enhance[] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. *State v. Whitlock*, 188 Wn.2d 511, 521, 396 P.3d 310 (2017) (alteration in the original).

1. Experience.

It is the defendant’s burden to show, as a matter of experience, that swearing in a replacement bailiff has “historically been open to the press and general public.” *See State v. Jones*, 185 Wn.2d 412, 422, 372 P.3d 755 (2016). Here, the defendant has not provided any historical or legal information showing the public has traditionally been able to observe the ministerial task of swearing in a replacement bailiff.

More specifically, the defendant has not identified any case that holds that a trial court’s swearing in of a replacement bailiff, due to the illness of the original bailiff, in an office within or near the courtroom, constitutes a closure or violates the defendant’s constitutional rights. Indeed, a trial court is not constitutionally, statutorily, or rule bound to administer an optional oath to the bailiff to take charge of the jury after presentation of the of evidence, closing arguments have concluded, and

during deliberations.<sup>9</sup> Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978).

In addition, a trial court swearing in a replacement bailiff would be considered a ceremonious or administrative act by the trial court. For instance, in *Parks*, the defendant argued that his right to a public trial was violated when the trial court swore in a large venire in the jury assembly room. 190 Wn. App. at 862. In analyzing the experience prong of the open court test, this Court found that swearing in the venire prior to selection was analogous to an administrative component of jury selection to which the

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<sup>9</sup> At best, the only reference to administering an oath to a bailiff to take charge of a jury before deliberations is found in the Superior Court Criminal Procedure Benchbook, which states:

G. Send Jury out to Deliberate

(c) Oath of Bailiff Where Appropriate:

Do you solemnly swear or affirm that you will take the jury in charge, that you will suffer no one to communicate with them, that you will give them no food or drink except by order of the court, and that when they have agreed upon a verdict, you will bring them into court?

Washington Courts, *Benchbook on Criminal Procedure – Superior Court*, Jury Trial Script Appendix, available at <https://inside.courts.wa.gov/index.cfm?fa=cntlManuals.showManualsPage&manualid=crimsup&file=Script04> (Revised February 2006)

The benchbook's requirement or authority that this oath be administered to a judicial assistant or bailiff is unknown.

public trial did not attach. *Id.* at 866. Likewise, the Supreme Court in *Jones* found that a judicial assistant’s act of drawing jurors’ names during a recess to designate alternate jurors did not implicate the defendant’s public trial right.<sup>10</sup> *Id.* at 422-26. Here, the defendant fails to meet his burden to establish the first prong of the experience and logic test.

2. Logic.

To establish the logic prong, the defendant must establish “public access plays a significant positive role in the functioning of the particular process in question.” *Sublett*, 176 Wn.2d at 73. In analyzing this prong, an appellate court looks to whether openness will advance the purposes of the public trial right: “to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions,

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<sup>10</sup> In *Jones*, 185 Wn.2d at 422-23, the Supreme Court reviewed several prior decisions which addressed whether certain tasks performed outside of the courtroom violated a public trial right: “*State v. Russell*, 183 Wn.2d 720, 729, 357 P.3d 38 (2015) (work sessions to review juror questionnaires for hardship excusals); [*State v.*] *Slert*, 181 Wn.2d [598,] 605-06, 334 P.3d 1088 [(2014) (plurality opinion)], (González, J., lead opinion) (reviewing jury questionnaires prior to voir dire), 614 (Stephens, J., dissenting) (administrative excusal of individuals from the jury pool due to illness); *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 28–29, 296 P.3d 872 (2013) (lining up and seating the venire in numerical order before unlocking the courtroom); *State v. Beskurt*, 176 Wn.2d 441, 447, 293 P.3d 1159 (2013) (C. Johnson, J., lead opinion) (juror questionnaires used by the attorneys as a “screening tool” for voir dire conducted in open court could be sealed without implicating defendant’s public trial right).”

to encourage witnesses to come forward, and to discourage perjury.” *Id.* at 72.

The defendant has not established how public access to a discretionary oath to the bailiff plays a significant positive role during deliberations. The trial court is not obligated to swear in a bailiff, prior to giving the bailiff charge of the jury. In *State v. Lane*, 37 Wn.2d 145, 222 P.2d 394 (1950), the defendant argued that, prior to assuming charge of the jury, the bailiff was not sworn to perform the duties of his office. Our high court found the record was silent as to any oath being given to the bailiff who was placed in charge of the jury, and no statute had been called to the attention of the Court requiring the bailiff to be sworn in. *Id.* at 150. The court found no error: “In the absence of statute requiring it, it is not necessary that the sheriff, marshal, or deputy placed in charge of a jury be specially sworn as bailiff of the jury, or at least, the omission to administer such special oath is not fatal where no objection was made and no prejudice to the accused appears.” *Id.* The Court ultimately held that a bailiff who performs his or her duties is a sworn officer, and until their authority to act is questioned, their authority is *presumed*. *Id.*

Here, the defendant cannot satisfy the logic prong. None of the values served by the public trial right is undermined by the lower court’s administration of a voluntary oath to a replacement bailiff. The defendant

has not supplied any authority establishing the need for the public's presence. No testimony or witnesses were involved and there was no need for public presence to remind the trial court of its responsibility to the accused. In addition, the deputy prosecutor and defense counsel is not required to be involved in administering the ceremonial oath, which does not need not be given in the first instance. Finally, the defendant has not shown that public access plays a significant role in the swearing in of a replacement bailiff during deliberations or that swearing the bailiff in open court would enhance the fairness of his trial and the appearance of fairness. *See, Parks*, 190 Wn. App. at 867. The openness of an oath, which is not required to be administered to a bailiff, would not enhance the fairness of the trial as the truth-seeking function of a trial which had concluded. There was no error in this appeal.

3. Closure.

Two kinds of closures impact a defendant's right to a public trial. The first, an express closure, occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). The second kind of closure occurs when the proceeding is "held someplace 'inaccessible' to spectators, usually in chambers." *State v. Love*, 183 Wn.2d 598, 606, 354 P.3d 841 (2015).

Here, the defendant has not produced *any* evidence the public was excluded from the oath given to the replacement bailiff. Even if the defendant could establish a closure occurred, his public trial claim fails as it was, if anything, a de minimis violation. *See State v. Schierman*, –Wn.2d–, 415 P.3d 106, 126-27 (2018) (although the Supreme Court found a public trial violation regarding a brief, in-chambers conference dealing with several for cause challenges during a four-month long aggravated first degree murder case, the doctrine of de minimis error applied because it involved no factual determinations and did not implicate the purposes of a public trial).

The defendant has not met his burden to establish a violation of a public trial right because it does not attach to the oath of the bailiff. If there was a violation, it was negligible when compared to the public trial violation in *Schierman* and does not require reversal of the conviction.

#### **IV. CONCLUSION**

The defendant’s allegation that he was not immediately given a copy of the search warrant and return of inventory, if anything, was a ministerial act, from which he has not alleged or established any prejudice requiring suppression of the blood evidence taken at the time of the search.

The trial court did not abuse its discretion when it denied the defendant’s motion for a mistrial as the deputy prosecutor’s hypothetical

question to the expert witness was in response to defendant's cross-examination regarding various blood alcohol levels and various individuals' tolerance levels to those alcohol levels. Nonetheless, the trial court instructed the jury to disregard the question and answer and the defendant fails to establish the jury disregarded the court's admonition. Thus, he fails to demonstrate any resulting prejudice.

Finally, the defendant has not provided any case authority or other information that a public trial right attaches to a discretionary oath given to the replacement bailiff during deliberations. Even more, if there was a violation of the public trial right, it was de minimus and not prejudicial.

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Dated this 4 day of May, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JEAN WHITFORD,

Appellant.

NO. 35576-4-III

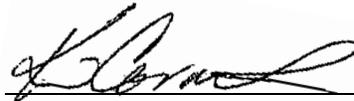
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I certify under penalty of perjury under the laws of the State of Washington, that on May 4, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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jason@providentlawfirm.com

5/4/18  
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(Place)

  
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**SPOKANE COUNTY PROSECUTOR**

**May 04, 2018 - 9:13 AM**

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