NO. 31892-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ALFONSO CERDA SALAZAR,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The exclusion of evidence that related directly to Alfonso Cerda's defense denied his constitutional right to present a defense.[1]

2. The trial court abused its discretion by excluding photographs that Mr. Cerda's expert relied upon in determining that the injury did not derive from a bite.

3. The trial court abused its discretion by denying Mr. Cerda's motion for a mistrial when the prosecution witness testified in violation of a motion in limine.

4. The trial court abused its discretion in admitting evidence that contravened its motion in limine prohibiting the prosecution's witnesses from using the term "thousand-yard stare."

5. The trial court violated Mr. Cerda's constitutional right to a public trial when it conducted peremptory strikes on paper.

6. The trial court violated the public's right to open proceedings when it conducted peremptory strikes on paper.

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[1] While the case caption reflects two surnames, Alfonso Cerda Salazar, Mr. Cerda uses only the Cerda surname. 1 RP 3. The two consecutively-paginated volumes from trial are referred to as "1 RP" and "2 RP." The verbatim report of voir dire and opening statements is referred to as "Voir Dire RP" and the other two volumes are referred to by the first date transcribed, "5/1/13 RP" and "7/8/13 RP" (for the volume titled "various hearings").

7. The court's instruction misstated the definition of proof beyond a reasonable doubt and diluted the State's burden of proof.

8. Cumulative error denied Mr. Cerda a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee an accused the right to present a defense and to a fair trial. Moreover, under the rules of evidence, relevant evidence is presumptively admissible and an expert may present evidence from a learned treatise. Did the trial court prejudice Mr. Cerda's rights and abuse its discretion by excluding evidence from treatises upon which the defense expert relied to determine the alleged injury was not a bite mark?

2. In a pretrial ruling, the trial court barred testimony from a third-party witness attributing emotions to Mr. Cerda and from stating that Mr. Cerda delivered "a thousand-yard stare." Nonetheless, a State's witness testified to Mr. Cerda's emotional state and that he delivered a thousand-yard stare. Mr. Cerda objected and moved for a mistrial, but the court allowed the testimony and denied the motion. Did the trial court abuse its discretion in denying Mr. Cerda's motion for a mistrial and allowing the jury to consider the evidence?

3. The federal and state constitutions guarantee the public and an accused the right to open and public trials. Accordingly, criminal proceedings, including jury selection, may be closed to the public only when the trial court performs an on-the-record weighing test, as outlined in *State v. Bone-Club*[2] and finds closure favored. Violation of the right to a public trial is presumptively prejudicial. Where peremptory challenges were conducted in written form, removed from public scrutiny, without considering the *Bone-Club* factors, was Mr. Cerda's and the public's right to an open trial violated, requiring reversal?

4. The jury must decide whether the prosecution met its burden of proof; its duty is not to search for the truth. The court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." Did the court misstate and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

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

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

reversal standing alone. In light of the cumulative effect of the errors assigned above, was Mr. Cerda denied a fundamentally fair trial?

C. STATEMENT OF THE CASE

Alfonso Cerda worked on the day he was scheduled for court, so a warrant was issued. Voir Dire RP 471-73; 1 RP 78. While he and his wife were passengers in a vehicle driven by their son, Officer Westby pulled the vehicle over in Quincy, Washington. 1 RP 81-82; 2 RP 253-54, 277. Officer Westby approached the passenger side front door and told Mr. Cerda he was being arrested on the outstanding warrant. 1 RP 83. Mr. Cerda told Officer Westby he was on his way to the court in Ephrata and asked to be allowed to continue that way. 1 RP 110-12; 2 RP 255-57, 260, 276. Officer Westby did not let Mr. Cerda and his family proceed. 1 RP 116 (officer had discretion to let Cerda continue to Ephrata but did not).

Mr. Cerda did not willingly leave his son's vehicle or his wife's company. 1 RP 83-84; 2 RP 287-88. The window was raised and the door locked, but Officer Westby eventually opened the door, forcefully removed Mr. Cerda by pulling Mr. Cerda out through the passenger door Officer Westby had opened. Then Officer Westby firmly kneed Mr. Cerda in the stomach and twice punched Mr. Cerda in the head. 1

RP 83-85, 88-92, 116-17. When Officer Westby pulled Mr. Cerda out of the vehicle, the two tussled over into a ditch on the side of the road. 1 RP 93-94, 119; 2 RP 281. Officer Westby held Mr. Cerda to the ground and handcuffed him with the assistance of Sergeant Snyder, who arrived on the scene after Mr. Cerda was removed from his car. 1 RP 94-95; 2 RP 205-07, 281.[3]

Officer Westby claimed he was bitten on the arm by Mr. Cerda while Officer Westby was forcibly removing him from his car—after Officer Westby kneed Mr. Cerda but before punching him twice in the head. 1 RP 91; 2 RP 234. Officer Westby sought medical care and then returned to the precinct where Sergeant Snyder photographed the apparent injury. 1 RP 106-08, 110; 2 RP 211-12; Exhibits 13-16. The photographs show what looks to be a single puncture wound on Officer Westby's right upper arm. *See* Exhibits 13-16.

The State charged Mr. Cerda with resisting arrest and assault in the third degree. CP 1-2 (charging under RCW 9A.36.031(1)(g) and RCW 9A.76.040). Mr. Cerda asserted that the injury Officer Westby received was not from a bite, but perhaps from contact with brush,

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

debris or the ground when Officer Westby wrestled Mr. Cerda into the ditch. *E.g.*, 5/1/13 RP 8, 11-12; 1 RP 119-20. Mr. Cerda presented an expert forensic pathologist with experience studying human bite marks on human skin, Dr. Carl Wigren. 2 RP 137, 145-48. Dr. Wigren testified that the photographs of Officer Westby's injury are inconsistent with a human bite. 2 RP 141-42, 148-49, 166-69. As discussed further below, Dr. Wigren was prevented from showing the jury photographs of typical bite marks. *E.g.*, 1 RP 19-27; 2 RP 171-82; Exhibits 1-4. Instead, the court allowed him to render a simplistic drawing of a bite mark. Exhibit 18.

Meanwhile, during the State's case-in-chief, Officer Westby violated a pretrial motion in limine ruling but a mistrial was denied. *E.g.*, CP 9-10; 1 RP 49-52. Mr. Cerda was convicted, and now appeals. CP 29-47.

D. ARGUMENT

1. The trial court denied Mr. Cerda's right to present a defense and abused its discretion by excluding evidence relied on by the defense expert.

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

"Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and

admissible." *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (emphasis added). The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). Article 1, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness).

These provisions require that an accused receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (emphasis added); *accord Washington*, 388 U.S. at 19.

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

b. Contrary to the trial court's ruling, the photographs of typical bite marks were admissible and critical to Mr. Cerda's defense that the injury did not derive from a bite.

Mr. Cerda sought to introduce through Dr. Wigren photographs of typical human bite marks on human skin. *See* Exhibits 1-4; 1 RP 19-27; 2 RP 171-82. The photographs derived from learned treatises, which Dr. Wigren testified is a typical resource for disseminating, researching and acquiring information in forensic pathology. Exhibits 1-4; 1 RP 19; 2 RP 171, 174. As Dr. Wigren testified, he consulted the four excerpted photographs in forming his opinion in this case. 2 RP 172; *see* 2 RP 174 (common in field to consult such resources). The evidence was not only relevant but central to Mr. Cerda's defense that the wound on Officer Westby's arm was not a bite mark but a puncture wound or other injury obtained while tussling with Mr. Cerda in the ditch or on the roadside .

Mr. Cerda even asked for the exhibits to be used simply as illustrative evidence, even just one or two of the four proposed photographs. 1 RP 19, 22; 2 RP 177, 179-80. As the court initially acknowledged, such photographs from learned treatises are typically admitted to illustrate an expert's testimony. 1 RP 19-20. However, the court ultimately excluded the evidence, even as illustrative. The State objected to the evidence as hearsay and lacking authentication. 2 RP 177. The court found "I can't see how these pictures would be more helpful than just [Dr. Wigren] drawing patterns or basic structures of what would be a bite mark." 1 RP 24-25; *accord* 2 RP 181. He further ruled the exhibits were barred for substantive purposes as hearsay and on lack of foundation. 2 RP 177-82.

Evidence Rule 803(a)(18) makes plain that learned treatises relied upon by an expert witness on direct examination are not excluded by the general rule barring hearsay. Dr. Wigren recognized the treatises as authoritative in his field; he should have been entitled to show them to the jury. *See State v. Rangitsch*, 40 Wn. App. 771, 780, 700 P.2d 382 (1985);[4] *Cameron v. Benefit Ass'n. of Ry. Employees*, 6

[4] "A witness permitted by the court to testify as an expert may rely on statements contained in treatises, periodicals, and pamphlets. These statements are not excluded by the hearsay rule, and they may be read into evidence

Wn.2d 440, 443, 444, 107 P.2d 1096 (1940). Accordingly, the court erred in excluding the evidence on that basis.

The court also ruled that Mr. Cerda presented insufficient foundation. However, it is unclear what more should have been done to support the exhibits. Dr. Wigren testified 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.

Finally, the court's ruling that the exhibits could not be admitted even for illustrative purposes was also erroneous. The State admitted four photographs of Officer Westby's injury. Exhibits 13-16. Dr. Wigren's photographs provided a direct point of comparison (and in his expert opinion, contrast) to the State's evidence. *Compare* Exhibits 1-4 *with* Exhibits 13-16. The drawing of typical bite marks, which the court allowed Dr. Wigren to make in lieu of the photographs, was simplistic and incongruent to the State's evidence. *Compare* Exhibit 18 *with* Exhibits 1-4, 13-16. The photographs 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

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provided the expert has testified to their reliable authority." *Rangtisch*, 40 Wn. App. at 780.

(1991) (discussing probative value of photographs). "Even where a witness has described an injury, photographs have evidentiary value in making the description more intelligible." *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 284, 840 P.2d 860 (1992). "Much 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)); *cf. In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 708, 286 P.3d 673 (2012) (discussing power of images). Just as the photographs assisted the expert in making his findings, they would have assisted the jury in analyzing Dr. Wigren's testimony. *Id.*

This evidence was central to Mr. Cerda's defense that Officer's Westby injury was not from a bite. The trial judge impeded Mr. Cerda's constitutional right to present a defense by determining the manner in which Mr. Cerda could present that defense.

c. The error requires reversal.

Due process demands an accused be permitted to present evidence that is relevant and of consequence to his theory of the case. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924. Because the court's exclusion of relevant evidence denied Mr. Cerda's Sixth Amendment right to present a defense, the error requires reversal unless

the State can prove beyond a reasonable doubt that it "did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The State cannot meet its burden in this case. The photographs of Officer Westby's injury do not resemble the bite marks in the excluded exhibits. *Compare* Exhibits 13-16 *with* Exhibit 1-4. The excluded photographs support Dr. Wigren's expert conclusion that Officer Westby's injury is consistent with a blunt object force injury, where an object came perpendicular to the skin to create an abrasion, but not a bite mark. 2 RP 166-67. The drawing that the court found more appropriate did not have the same persuasive value. *See* Exhibit 18. In fact, it might have served to discredit Dr. Wigren's expertise in its simplicity. *See id.* The excluded evidence directly supported Mr. Cerda's defense and was not cumulative. The State cannot show the excluded evidence would not have had an effect on the jury.

In *Maupin*, our Supreme Court reversed a murder conviction where the trial court erroneously excluded evidence of a witness who saw the victim with someone other than the defendant on the day of the alleged crime. 128 Wn.2d at 928, 930. Though the excluded evidence

would not have necessarily resulted in an acquittal, it "casts substantial doubt on the State's version of the crime." *Id.* at 930. Thus it was "impossible to conclude a reasonable jury would have reached the same result beyond a reasonable doubt." *Id.*

To reverse the conviction, this Court need not find that Mr. Cerda's version of events is "airtight." *Jones*, 168 Wn.2d at 724. A reasonable jury reviewing the excluded evidence may have reached a different result. *See id.* Accordingly, the error was not harmless and requires reversal of Mr. Cerda's convictions with remand for a new trial. *Id.*; *Maupin*, 128 Wn.2d at 924.

2. The trial court abused its discretion by denying a mistrial and allowing the jury to consider evidence it had ruled inadmissible.

The trial court also abused its discretion when it denied Mr. Cerda's motion for a mistrial after a State's witness testified as to Mr. Cerda's emotional state and delivery of a "thousand-yard stare." Officer Westby explained during pretrial motions, "basically a thousand-yard stare is when someone is looking at you, but they're not looking directly at you, they're pretty much looking through you, you can tell, you can see the anger on their face, you can see the resistiveness. . . . In this case, I saw his eyes, and his eyes were – and

his eyes were angry and they were looking through me." 1 RP 46-47. Officer Westby compared the look to that his jujitsu instructor gave when "he kind of snapped into a zone when he'd get really heated in the match and you could see his eyes would intensify and they basically looked right through you." 1 RP 48-49. Mr. Cerda was particularly opposed to Officer Westby putting his own labels on something as subjective as Mr. Cerda's emotions. 1 RP 45-46 ("No question the officer can testify about what he saw and what he heard. He just can't put a label on it."), 47 ("[H]e can't label it and he can't tell the jury what he believes is going on in Mr. Cerda's mind.").

Upon Mr. Cerda's pretrial motion, the court ruled that Officer Westby could not claim to know Mr. Cerda's emotional state and could not use the term "thousand-yard stare." CP 9-10 (motion in limine); 1 RP 44-52. The court explained its ruling as follows,

> The witness can testify what he sees about the eyes looking at him and being scrunched up. The fact that I could tell he was angry because [. . .] shouldn't be something that he should testify to. That's for the jury to decide. He can describe what he saw from his own senses. His opinion about what the defendant is thinking is something that doesn't seem appropriate. There seems to be some interpretation going on too. He can describe what he saw. We'll allow him to do that. . . .
>
> He should not – this witness should not testify that the witness [Cerda] was angry. Rather that he

> appeared angry. And here's why. And he can describe the eyes and the stare. We don't need to hear about martial arts or his dojo or instructor or master and what he looked like and comparing it to that. You can describe what he saw and that he appeared angry for those reasons. He shouldn't testify [that Cerda] was angry. . . .
>
> And he does have to articulate why that – why he looked angry. But he can't testify that he was angry.
>
> And there's also the notion here that the appearance might be independently relevant for the jury to know what took place and why certain things happened. Even if the appearance was – the conclusion of the appearance was misperceived. The word thousand-yard stare, I think we shouldn't use that, just because it's not helpful to the jury. We're not sure what that meant. When I asked what it meant, first it was that he was looking past him, but later it was that he was angry. And, as I said, those are two different things. So he can just describe with more detail.

1 RP 49-52.

Despite the pretrial order, Officer Westby testified Mr. Cerda "became upset," "[h]e was again very upset," and "[h]e gave me what you'd call a thousand-yard stare." 1 RP 83, 85. Mr. Cerda objected, and the court allowed the officer to explain what he meant by "a thousand-yard stare," over a second defense objection, before overruling the objections. 1 RP 85-86. In subsequent argument outside the presence of the jury, Mr. Cerda argued the testimony was a direct violation of the pretrial ruling. 1 RP 87. The court disagreed that the

testimony violated the pretrial ruling and denied Mr. Cerda's motion for a mistrial. 1 RP 86-88.

Courts evaluate three factors to determine whether an error warrants a new trial: (1) the seriousness of the error, (2) whether the improper statement was cumulative of evidence properly admitted, and (3) whether the error could be cured by an instruction. *State v. Perez-Valdez*, 172 Wn.2d 808, 856, 265 P.3d 853 (2011). This Court reviews the denial of a motion for mistrial for an abuse of discretion. *Id.* at 858.

The irregularity here was serious. Though Officer Westby sat through the court's pretrial ruling, he testified directly in contradiction to it. As the court stated in its ruling, it is for the jury not Officer Westby to decide whether Mr. Cerda was upset, angry, or resistant. Officer Westby could testify only to his own perceptions. Further, Mr. Cerda raised the matter in advance of trial and the court expressed a final ruling upon which Mr. Cerda was entitled to rely. But this predictability was shattered when Officer Westby testified in violation of the ruling and the court allowed the testimony. *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

Additionally, the testimony was not cumulative—Officer Westby was the only officer on scene for most of the interaction with Mr. Cerda. Sergeant Snyder arrived on the scene after Mr. Cerda had been removed from the vehicle and testified only to his assistance in handcuffing Mr. Cerda and his observation and photography of Officer Westby's injuries. 2 RP 205-06, 211-12.

Finally, a limiting instruction would have served no purpose here, where the trial court admitted the testimony as substantive evidence despite its pretrial ruling and over Mr. Cerda's objections.

The trial court abused its discretion in denying Mr. Cerda's motion for a mistrial. This court should reverse and remand.

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

This Court reviews violations of the public trial right de novo. *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013). "A defendant does not waive his public trial right by failing to object to a closure during trial." *Id.*

a. Jury selection in a criminal trial must be presumptively open to comply with the constitutional right to a public trial.

The Washington Constitution mandates that criminal proceedings be open to the public without exception. Article I, section

10 requires that "Justice in all cases shall be administered openly." Article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

The public trial guarantee ensures "that the public may see [the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public

confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*). Open public access provides a check on the judicial process that is necessary for a healthy democracy and promotes public understanding of the legal system. *State v. Sublett*, 176 Wn.2d 58, 142 n.3, 292 P.3d 715 (2012) (Stephens, J. concurring); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). Openness deters perjury and other misconduct; it tempers biases and undue partiality. *Wise*, 176 Wn.2d at 5. In particular, "a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004)); *accord* Const. art. I, § 35 (victims of crimes have right to attend trial and other court proceedings).

To protect this constitutional right to a public trial, Washington courts have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five

requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enterprise I*, 464 U.S. at 510).

b. The public was improperly excluded from the peremptory challenge process because it was held on paper without considering the *Bone-Club* factors.

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *Sublett*, 176 Wn.2d at 71-72; *Wise*, 176 Wn.2d at 11-12; *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *Orange*, 152 Wn.2d at 804.[5] "The process of juror selection is

[5] Accordingly, the Court need not apply the experience and logic test to determine whether the proceeding is subject to the open trial right. *Sublett*, 176 Wn.2d at 73 (lead opinion); *id.* at 136 (Stephens, J. concurring); *see State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (distinguishing voir dire, to which open trial right conclusively applies, to pre-voir dire release of prospective jurors by clerk for illness, a stage to which experience and logic test must be applied).

itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505.

Peremptory and for-cause challenges are an integral part of voir dire. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures); *Wilson*, 174 Wn. App. at 342 (noting peremptory and for cause challenges are part of voir dire); *New York v. Torres*, 97 A.D.3d 1125, 1126-27, 948 N.Y.S.2d 488 (2012) (closure of courtroom to defendant's wife while initial jury selection held, including exercise of 16 peremptory challenges, is erroneous). Indeed, "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury." *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923 (2001).

There are important limits on both parties' exercise of peremptory challenges that must be enforced in open court, subject to public scrutiny. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury selection, including in exercise of peremptory challenge, and critical role of public scrutiny). Like the questioning of prospective jurors, such challenges to the venire must be held in open

proceedings absent an on-the-record consideration of the public trial right, competing interests, alternatives to closing the proceeding and the other *Bone-Club* considerations. *See Jones*, 175 Wn. App. at 98-99 (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30 (6) as requiring peremptory challenges to be held in open court); *cf. State v. Saintcalle*, 178 Wn.2d 34, 41-42, 309 P.3d 326 (2013) (discussing important public interest in proper exercise of juror challenges: "Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin."); *id.* at 44 ("peremptory challenges have become a cloak for race discrimination").

In *Wilson*, Division Two recently distinguished between hardship strikes made by the clerk prior to the commencement of voir dire, which is not subject to the open trial right, and peremptory challenges, which are part and parcel of voir dire. 174 Wn. App. at 343-34. This Court observed that unlike hardship strikes made by the clerk, "voir dire" under Criminal Rule 6.4 involves the trial court and counsel questioning prospective jurors to determine their ability to

serve fairly and impartially, and to enable counsel to exercise informed challenges for cause and peremptory challenges. *Id.* at 343. While a clerk may excuse jurors on limited, administrative bases, such excusals cannot interfere with the court and parties' rights to excuse jurors based on cause and peremptory challenges. *Id.* at 343-44.

This approach is consistent with other jurisdictions. California has long held that peremptory challenges must be exercised in open court. *People v. Harris*, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (1992). In *Harris*, the right to a public trial was violated where peremptory challenges were exercised in chambers based on the trial court's unilateral determination. *Id.* at 677. The violation required reversal even though the court tracked the challenges on paper, announced in open court the names of the stricken prospective jurors, and the proceedings were reported. *Id.* at 684-85, 688-89.

The trial court's use of a secret ballot was no more open than the proceedings in *Harris*. Here, for-cause challenges were conducted in open court but the trial court unilaterally directed that peremptory strikes would be exercised silently on paper. *Compare* Voir Dire RP 463-65 (peremptories) *with, e.g.*, Voir Dire RP 404-06, 447 (cause challenges). Thus, at the conclusion of the parties' rounds of

interviewing the venire, the courtroom was silent while the attorneys shuffled paper between them. *See* Voir Dire RP 463-65. Although not explicitly excluded from the courtroom where the silent proceedings occurred, the public did not see or hear which party struck which jurors or in what order. *Cf. State v. Leyerle*, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). The public had no basis upon which to discern which jurors had been struck and which were simply excused because the panel had been selected. There was no public check on the non-discriminatory use of peremptories. This Court cannot ascertain whether the same jurors would have been stricken if the parties had been required to face the public scrutiny of open proceedings. Like in *Harris*, the subsequently-filed record does not absolve the constitutional violation. *See* CP 49-51 (jury panel information sheet); *Harris*, 10 Cal. App. 4th at 684-85, 688-89.

c. Violation of the public trial right constitutes structural error, requiring reversal and remand for a new trial.

When the record "lacks any hint that the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted" and reversal is

required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181 ("The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis."). "If the trial court failed to [conduct a *Bone-Club* inquiry] then a 'per se prejudicial' public trial violation has occurred "even where the defendant failed to object at trial." *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18). Allowing the error to "go unchecked 'would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.'" *Id.* (quoting *Wise*, 176 Wn.2d at 18). Because here the trial court conducted peremptory challenges in private without considering the *Bone-Club* factors, Mr. Cerda's conviction should be reversed and the matter remanded for a new, public trial.

4. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge diluted the State's burden of proof in violation of Mr. Cerda's due process right to a fair trial.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012); *State*

v. McCreven, 170 Wn. App. 444, 472-73, 284 P.3d 793, 807-08 (2012). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 16 (instruction # 3). By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in

Emery, 174 Wn.2d at 741. It is of no moment that Mr. Cerda did not object at trial to the use of the instruction. *See id.* at 757.[6]

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets.

The pattern instruction reads:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [*If, from such*

[6] The State, not Mr. Cerda, proposed the improper instruction. CP 57.

consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury's role. *Id.* at 764. However, the error was harmless because the "belief in the truth" theme was not part of the court's instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the "belief in the truth" language almost 20 years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle,* the issue before the Court was whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the Court did not determine whether the "belief in the truth" phrase minimizes the State's burden

and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

The erroneous instruction diluted the burden of proof. *Emery*, 174 Wn.2d at 741 (error where jury told its job is to search for the truth). Because the State was not held to the standard of proof beyond a reasonable doubt, Mr. Cerda was denied his constitutional right to a fair trial. His convictions should be reversed and the matter remanded.

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

Each of the above trial errors requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Cerda a fundamentally fair trial.

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

Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Not only was key evidence supporting Mr. Cerda's defense erroneously excluded but the State was allowed to present evidence that contradicted a pretrial ruling intended to protect Mr. Cerda from undue prejudice. Compounding the injustice, the court equated the jury's role with a search for the truth, diluting the State's constitutional burden, and the public was excluded from a portion of jury selection. Mr. Cerda's convictions should be reversed because in the cumulative the trial errors denied him a constitutionally fair trial.

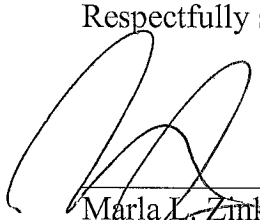
E. CONCLUSION

It cannot be said that Mr. Cerda had a fair trial. The court excluded persuasive evidence supporting his defense and expert testimony. 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. The public was excluded from portions of voir dire, and the court's instruction misstated the State's burden of proof. Standing alone or in combination, these errors deprived Mr. Cerda of

his constitutionally-required fair trial and require reversal of the resulting convictions.

DATED this 24th day of March, 2014.

Respectfully submitted,



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Washington Appellate Project
Attorney for Appellant

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF MARCH, 2014.

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