

NO. 46348-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

MANUEL URRIETA,

Appellant.

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

The Honorable Vicki L. Hogan, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. URRIETA HAD A RIGHT TO CORROBORATE SANTIAGO’S TESTIMONY UNDER THE OPEN DOOR DOCTRINE.....	1
2. THE PROSECUTOR’S COMMENTS AND CROSS EXAMINATION PRESENTED PERSONAL OPINION ON GUILT AND CREDIBILITY, VOUCHERED FOR THE STATE’S WITNESSES, AND ENCOURAGED THE JURY TO RENDER A VERDICT ON IMPROPER GROUNDS.....	4
3. THE SEARCH INCIDENT TO ARREST EXCEPTION DOES NOT APPLY TO WARRANTLESS DUI BREATH TESTS.....	6
4. REVERSAL IS REQUIRED BECAUSE PEREMPTORY CHALLENGES WERE CLOSED IN VIOLATION OF URRIETA’S RIGHT TO A PUBLIC TRIAL.	9
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Allen</u> 63 Wn. App. 623, 821 P.2d 533 (1991).....	8
<u>State v. Anderson</u> ___ Wn. App. ___, ___ P.3d ___, 2015 WL 2394961 (No. 45497-1-II, filed May 19, 2015)	9, 10
<u>State v. Berg</u> 147 Wn. App. 923, 198 P.3d 529 (2008).....	3
<u>State v. Brett</u> 126 Wn.2d 136, 892 P.2d 29 (1995).....	5
<u>State v. Byrd</u> 178 Wn.2d 611, 310 P.3d 793 (2013).....	7, 8
<u>State v. Darden</u> 145 Wn.2d 612, 41 P.3d 1189 (2002).....	2
<u>State v. Francisco</u> 148 Wn. App. 168, 199 P.3d 478 (2009).....	8
<u>State v. Gomez</u> _ Wn.2d _, _ P.3d _, 2015 WL 1590302, (No. 90329 -8, filed 4/9/2015)..	9
<u>State v. Hartzell</u> 153 Wn. App. 137, 221 P.3d 928 (2009) <u>review granted, remanded on other grounds</u> , 168 Wn.2d 1027, 230 P.3d 1054 (2010).....	3
<u>State v. Hornaday</u> 105 Wn.2d 120, 713 P.2d 71 (1986).....	8
<u>State v. Love</u> 176 Wn. App. 911, 309 P.3d 1209 (2013) <u>review granted in part</u> , 181 Wn.2d 1029 (2015).....	10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	4
<u>State v. Saintcalle</u> 78 Wn.2d 34, 309 P.3d 326 (2013).....	11

FEDERAL CASES

<u>Missouri v. McNeely</u> ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).....	8
<u>Riley v. California</u> ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).....	6, 8
<u>Rock v. Arkansas</u> 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).....	3
<u>Schmerber v. California</u> 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).....	6, 7, 8, 9
<u>Skinner v. Ry. Labor Executives' Ass'n</u> 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).....	7, 8
<u>United States v. Robinson</u> 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).....	7

RULES, STATUTES AND OTHER AUTHORITIES

Ronald E. Henson <u>Breath Alcohol Testing</u> Aspatore, 2013 WL 6140725 (Oct. 2013).	7, 8
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A. ARGUMENT IN REPLY

1. URRIETA HAD A RIGHT TO CORROBORATE SANTIAGO'S TESTIMONY UNDER THE OPEN DOOR DOCTRINE.

The State first argues Urrieta's right to present a defense was not violated because he had prior opportunities to elicit from Officer Drasher the name of Aaron Letho, the second back seat passenger. Brief of Respondent (BoR) at 11-12. This argument should be rejected because on the prior occasions the State mentions, there had, as yet, been no reason to prove the name of the backseat passengers. The State had not yet insinuated Santiago was making them up on the spot. Until the prosecutor's cross-examination of Santiago, counsel would have been justified in concluding that the names of the backseat passengers were of only minimal relevance. Since the State bears the burden of proof, there was no reason for defense counsel to attempt to establish every detail. But then, during the cross examination of Santiago, the prosecutor insinuated he was inventing his entire testimony, including the names of Jake Boyd and Aaron Letho, the backseat passengers. 1RP 108. As discussed in the opening brief, this created a false impression that Santiago was inventing these names and opened the door to evidence corroborating his testimony. Until that point, counsel could reasonably believe that evidence would have had only minimal relevance.

The State also argues, rather disingenuously, that there was no dispute that Aaron Letho was the name of one of the backseat passengers. BoR at 14. The entire tone of the cross-examination (and subsequent closing argument) was that Santiago had invented his testimony and was lying about virtually every aspect of his story, including Letho's name. By the use of phrases such as, "Let me guess," the prosecutor insinuated, without outright declaring, his disbelief of Santiago's assertions. 1RP 108. To argue that the State did not challenge Letho's identity is to blindly adhere to a literal interpretation of the words while ignoring the obvious tone and implications of the cross-examination.

The State has still failed to identify a compelling interest that could outweigh the defense's right to present relevant evidence. This right applies even to evidence of minimal relevance, State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002), which is what Letho's name appeared to be – up until the prosecutor strongly suggested Santiago was making it up. The defense must be allowed to present relevant evidence unless it would impact the fairness of the trial. Id. Here, the trial would have been rendered more, not less, fair if counsel had been able to present the evidence corroborating Letho's name and refuting the false impression left by the prosecutor's cross-examination.

The State has also failed to rebut the application of the open door doctrine, which permits admission even of otherwise inadmissible evidence in order to correct a false impression created by the other party. State v. Berg, 147 Wn. App. 923, 938-40, 198 P.3d 529 (2008). The open door doctrine can operate to trump even a constitutional ban on evidence such as the Confrontation Clause. State v. Hartzell, 153 Wn. App. 137, 154, 221 P.3d 928 (2009) review granted, remanded on other grounds, 168 Wn.2d 1027, 230 P.3d 1054 (2010). It can also override evidentiary rules such as the ban on hearsay. See Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (explaining that if the court believes defense evidence is barred by evidentiary rules, “the court must evaluate whether the interests served by the rule justify the limitation.”). “[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence.” State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). This is so even if the evidence would otherwise be irrelevant or inadmissible. See id. at 939-40 (admitting police officer’s testimony about mother of victim’s failure to report to police in unrelated case).

2. THE PROSECUTOR'S COMMENTS AND CROSS EXAMINATION PRESENTED PERSONAL OPINION ON GUILT AND CREDIBILITY, VOUCHER FOR THE STATE'S WITNESSES, AND ENCOURAGED THE JURY TO RENDER A VERDICT ON IMPROPER GROUNDS.

The State argues that the prosecutor's comments about the late disclosure of Santiago's testimony were only meant to suggest this was a reason to doubt his credibility rather than an improper attempt to penalize Urrieta for the late disclosure. BoR at 22-23. This argument ignores that the prosecutor argued about Santiago's testimony, "You don't get to do this." 1RP 147. It ignores the argumentative cross-examination including, "And you expect to come in here after all that's been said and done and just tell the jurors whatever you want?" 1RP 105. These comments strongly suggest Santiago should not "get to" testify or "tell the jurors" his version of events.

The State has not even attempted to justify the prosecutor's comments during opening statements that it would be presenting "credible evidence of guilt." 2RP 80. The State may not vouch for the credibility of its witnesses during opening statements. State v. Monday, 171 Wn.2d 667, 671, 677-78, 257 P.3d 551 (2011). This comment was misconduct.

The State argues that the prosecutor's comments to the jury that "they underestimate you" were merely a reasonable inference from the evidence. BoR at 30-31. This argument should be rejected. There was no evidence presented about the defense witnesses' assessments of jurors or that

those estimations were incorrect. This argument was an attempt to insinuate that defense witnesses committed an affront to the dignity of the jury by giving testimony. That goes far beyond a mere inference that their accounts were not credible and amounts to penalizing Urrieta's right to compel witnesses and present a defense.

In arguing that the prosecutor did not offer a personal opinion that Santiago was lying, the State again opts to ignore the connotations and tone of the cross-examination and argument. The prosecutor made comments such as:

- "Is that what you want us to believe?"
- "you expect to come in here after all that's been said and done and just tell the jurors whatever you want?"
- "And this guy, Aaron, right, let me guess, both of these guys were in the backseat?"

IRP 102-05, 108. These comments made clear the prosecutor believed Santiago was lying.

Suggesting a reason why the witness might not be believable is permitted. See, e.g., State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29, 49-50 (1995) (approving of prosecutor arguing, "I would suggest that one reason you might want to believe Pat Milosevich on that issue is that she at the time those events were occurring was watching her husband of 33 years being

blown away by a .410 shotgun.”). But, taken as a whole, the prosecutor’s comments in this case went far beyond drawing inferences from the evidence. The prosecutor’s tone and comments suggested Urrieta had no right to present Santiago’s testimony, clearly conveyed the prosecutor’s personal belief Santiago was lying, vouched for the credibility of the State’s witnesses, and encouraged jurors to punish Urrieta for underestimating them. This pervasive misconduct denied Urrieta a fair trial.

3. THE SEARCH INCIDENT TO ARREST EXCEPTION DOES NOT APPLY TO WARRANTLESS DUI BREATH TESTS.

The State argues it could properly comment on Urrieta’s refusal of a breath alcohol test because warrantless breath tests are permissible under the exception for searches incident to a lawful arrest. BoR at 32-38. This argument should be rejected because the search incident to arrest is limited to a search of the person’s body for physical objects. See Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014) (explaining categorical application of search incident to arrest only makes sense for physical objects). It does not permit searches of non-physical items such as digital information on a cell phone. Id. And it does not permit “intrusions beyond the body’s surface.” Schmerber v. California, 384 U.S. 757, 769, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

A breath test for alcohol reveals information, not physical objects. And it requires production of the breath found in the deepest part of the lungs which is not produced during normal respiration. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1423, 103 L. Ed. 2d 639 (1989); Schmerber, 384 U.S. at 769-70; Ronald E. Henson, Breath Alcohol Testing, Aspatore, 2013 WL 6140725, at *16, *20 (Oct. 2013). Thus, under both Riley and Schmerber, the breath test is not part of a valid search incident to arrest.

The State cites State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013) and United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), for the proposition that a warrantless search of the arrestee's person is justified by the arrest itself. But neither Byrd nor Robinson involved an intrusion into the body. Robinson, 414 U.S. at 222-23 (search of cigarette package in coat pocket); Byrd, 178 Wn.2d at 614 (“This case concerns the search of an arrestee's purse incident to her arrest.”). In Byrd, this Court held police may search a person and any items found on or closely associated with the person at the time of arrest, without any justification beyond the fact of the arrest. 178 Wn.2d at 614.

But requiring production of deep lung breath for alcohol testing is not a search of the person or items found on or closely associated with the person. It entails a much greater intrusion into the body – deep into the lungs

– and reveals far more information about the inner workings of the body than a mere object found in the person’s possession. Skinner, 489 U.S. at 616-17; Schmerber, 384 U.S. at 769-70; Ronald E. Henson, Breath Alcohol Testing, Aspatore, 2013 WL 6140725, at *16, *20 (Oct. 2013). Breath testing goes beyond what would be permitted under Byrd merely based on the fact of a lawful arrest. Schmerber, 384 U.S. at 769-70.

Any search beyond the physical objects found on the person of the arrestee must be closely tethered to the original justifications for the search incident to arrest: officer safety and preservation of evidence. Riley, ___ U.S. at ___, 134 S. Ct. at 2485. A breath test does not necessarily implicate either of these concerns. The natural and predictable dissipation of alcohol in the bloodstream does not create a per se exigency requiring immediate search to preserve the evidence. Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 1561, 185 L. Ed. 2d 696 (2013). And alcohol in the bloodstream cannot be used to threaten officer safety because it is not under the voluntary control of the arrestee. State v. Francisco, 148 Wn. App. 168, 175, 199 P.3d 478 (2009) (“[T]he presence of liquor in a person’s body does not constitute possession because the person’s power to control, possess, or dispose of it ends upon assimilation.”) (citing State v. Hornaday, 105 Wn.2d 120, 126, 713 P.2d 71 (1986); State v. Allen, 63 Wn. App. 623, 625, 821 P.2d 533 (1991). Breath alcohol testing is a search that penetrates inside the body and

does not address concerns for preservation of evidence or officer safety. It is therefore not permissible merely as an incident to a lawful arrest. Schmerber, 384 U.S. at 770-71.

4. REVERSAL IS REQUIRED BECAUSE PEREMPTORY CHALLENGES WERE CLOSED IN VIOLATION OF URRIETA'S RIGHT TO A PUBLIC TRIAL.

The courtroom is closed for purposes of the right to a public trial when “the public is excluded from particular proceedings within a courtroom.” State v. Anderson, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 2394961 (No. 45497-1-II, filed May 19, 2015) (citing State v. Gomez, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 1590302, at * 2 (No. 90329 -8, filed Apr. 9, 2015)). In Anderson, the for-cause challenges were exercised at a sidebar conference. Slip op. at 2. Although the public was not excluded from the courtroom and the sidebar was not in a physically inaccessible location, the court nonetheless found a closure. Id. at 5-6. The court explained that the entire purpose of the sidebar is to prevent the public from hearing what is being said. Id. at 4-5. “Taking juror challenges at sidebar in this way thwarts public scrutiny just as if they were done in chambers or outside the courtroom.” Id. at 5-6. The court held the sidebar conference “constituted a closure of the juror selection proceedings because the public could not hear what was occurring.” Id. at 6.

There is no reason to differentiate the for-cause challenges at sidebar in Anderson from the peremptory challenges held on paper in this case. In both cases, an essential part of jury selection occurred in such a way as to “thwart[] public scrutiny.” Anderson, slip op. at 5. The public could not hear or see which potential jurors were challenged by which party.

The State also argues, based on State v. Love, 176 Wn. App. 911, 915, 309 P.3d 1209 (2013), review granted in part, 181 Wn.2d 1029 (2015) and Sublett’s experience and logic test, that peremptory challenges do not implicate the public trial right. But Anderson expressly rejects the reasoning from Love that the State relies on in this case. Slip op. at 9-12. The State argues that the experience prong is met only if traditionally the proceeding was required to be held in public. BoR at 53 (citing Love, 309 P.3d at 1213). But, as Anderson points out, the correct inquiry is whether the proceeding was traditionally open to the public, not whether it was historically required to be. Slip op. at 10. Like for-cause challenges, peremptory challenges have traditionally been exercised in open court, subject to public scrutiny. Wilson, 174 Wn. App. at 344.

The “logic” portion of the Sublett test also indicates peremptory challenges must be open. As the Anderson court explains, a proceeding should logically be open to the public when public scrutiny can act as a check against abuses. That is particularly the case for peremptory

challenges. Anderson, slip op. at 12. The court noted that the for-cause challenges at issue in Anderson were “less prone to arbitrary or improper exercise than peremptory challenges.” Slip op. at 12. Nevertheless, the court held the public has “a vital interest” in overseeing even the for-cause challenges. Slip op. at 12. Moreover, it serves the appearance of fairness to ensure that for-cause challenges are subject to public scrutiny. Slip op. at 12-13. The same is true for peremptory challenges, which are even more susceptible to abuse. Slip op. at 12.

The State argues there is no reason for the public to scrutinize the exercise of peremptory challenges, including the ability to observe the race of challenged jurors – essentially, that jury selection should be color blind. BoR at 54 n.3. Indeed, it should be. But when the public cannot see the jurors who are excused, it cannot serve its proper function of acting as a check on racially motivated peremptory challenges. Ignoring race leaves us unable to recognize or remedy the racism, both conscious and unconscious, that, sadly, still rears its ugly head in our judicial system. See generally, State v. Saintcalle 178 Wn.2d 34, 35-36, 44-49, 52, 309 P.3d 326 (2013) (encouraging courts to rise to the challenge presented by unconscious racial bias in jury selection).

Both logic and experience dictate that peremptory challenges implicate the right to a public trial and may not be shielded from view

without careful application, on the record, of the Bone-Club factors. With no suggestion that the court considered the competing interests at stake before holding peremptory challenges on paper, this Court should hold that Urrieta's right to a public trial was violated and reverse his conviction.

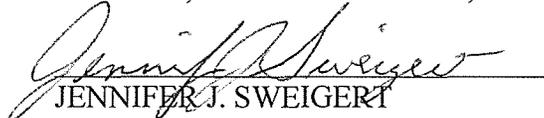
D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Urrieta requests this Court reverse his conviction.

DATED this 27th day of May, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", is written over a horizontal line.

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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)	
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v.)	COA NO. 46348-2-II
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MANUEL URRIETA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF MAY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MANUEL URRIETA
 DOC NO. 348302
 CLALLAM BAY CORRECTIONS CENTER
 1830 EAGLE CREST WAY
 CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MAY 2015.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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