Supreme Court No. 96283-9

(COA No. 75991-4-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Abdirahman S. Sakawe,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Abdirahman Sakawe was seventeen years old when he was charged with robbery, attempted robbery, and assault, based on the State's claim that he was part of group of about ten boys who assaulted and tried to rob two other young men of their cell phones.

Mr. Sakawe was convicted of all three offenses in 2008, but the Court of Appeals reversed for ineffective assistance of counsel. He was retried and convicted again in 2013, but the Court of Appeals again reversed, because the prosecutor improperly testified to the contents of the lost surveillance video. In 2016, the State tried Mr. Sakawe a third time, nearly ten years after the charged offense, after he had finished serving the sentence from the first convictions. The State was still missing the surveillance video, and two of its three eye-witnesses were unavailable.

The Court of Appeals affirmed the trial court's admission of an absent eye-witness's testimony about her *memory* of recognizing Mr. Sakawe after the first trial, rejecting his claims under the federal and state constitutions that his right to due process was violated where the witness was not subject to cross-examination at the third trial and she was never able describe the assailant at any time pre-trial or during trial. The Court of Appeals also failed to consider the use of police force in procuring a juvenile's statement.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Pursuant to RAP 13.3 and RAP 13.4(b)(3),(4) Abdirahman Sakawe, petitioner here and appellant below, asks this Court to accept review of the August 6, 2018 Court of Appeals decision terminating review, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Under the federal constitution, due process prohibits an identification derived from an impermissibly suggestive procedure that gives rise to a substantial likelihood of irreparable misidentification. The inherent suggestiveness of in-court identifications is thought to be neutralized by the safeguards of the adversarial system, including cross-examination of the witness. Did it violate federal due process for the court to admit a now-absent witness's *memory* of recognizing Mr. Sakawe in court at a previous trial, nearly five years after the incident, when the witness had previously been unable to describe or identify the assailant, and Mr. Sakawe was unable to confront and cross-examine her about this highly suggestive, unreliable in-court identification during the third trial?

2. Should Washington courts require exclusion of suggestive, unreliable in-court identifications under art. I, sec. 3 in light of the overwhelming scientific research over the last decades establishing that perception and memory and far more fallible and malleable than previously

understood, and in line with other federal and state courts that have acknowledged the danger of misidentification that may derive from unreliable in-court identifications?

3. The Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be compelled in any criminal case to be a witness against himself." A juvenile may feel more pressure to submit to police questioning than an adult. Here, a police officer used violent force against Mr. Sakawe, slapping him and allowing his dog to bite the youth, causing injury that required medical treatment. The officer then questioned Mr. Sakawe at the hospital while he received treatment for the dog bite. Must a court consider the effect of police use of force on a juvenile when determining whether the youth is subject to custodial interrogation?

D. STATEMENT OF THE CASE

1. Two young men are assaulted and robbed of their cell phones; at no time can they identify their assailant.

Chuan-Wen Chuang and Ka Chen were waiting at a bus stop, looking at their phones when a group of about 5-10 boys[1] approached them. RP 373; 375; Ex. 50, p.7. They were not paying attention to the boys when Mr. Chuang's cell phone was somehow snatched from him. RP 375.

[1] Mr. Chen was 19-years old at the time, and he described the people as younger than he was. RP 373.

Mr. Chuang was not present for the second or third trial, but during the first trial, he testified that an unidentified member of this group grabbed his throat. Ex. 50, p. 10. He also stated that a black man wearing a "red hat" attacked Mr. Chen and grabbed his throat. Ex. 50, pp.8-9.[2] Mr. Chuang said his cell phone was taken by a "black guy," but he could not otherwise describe this person, other that he had a lighter complexion than the man with the red hat. Ex. 50, pp. 12, 10.

Mr. Chuang and Mr. Chen were followed by two people from the group when they ran back to their hotel. Ex. 50, pp. 13, 15. Mr. Chuang said that the person with the red hat punched him once, and attempted to jump over the counter to grab the cell phone that Mr. Chen had handed over to the front desk person, Ms. Wood. Ex. 50, p. 17. At trial, Mr. Chen did even recall that either he or Mr. Chuang were assaulted in the hotel lobby. RP 381.

Ms. Wood, the front desk person at the hotel when the incident occurred, yelled at the two youth who followed Mr. Chen and Mr. Chuang into the lobby, and they left within seconds. CP 75, 142, 110.

[2] Appellant will refer to Mr. Chuang's prior trial testimony as "Ex. 50" followed by the page number of the transcript.

2. Police slapped Mr. Sakawe, a juvenile, and allowed their K-9 to attack and bite him when he was not even yet a suspect.

Officers Ochart, Shields and Gallagher responded to the hotel's 911 call soon thereafter. RP 310. Officers Gallagher and Ochart viewed the hotel's surveillance video of the altercation that contained about 10-15 seconds of low-definition footage. RP 310, 323, 400. They then went to investigate a separate call they received involving a group of young people they suspected could be involved in this robbery. RP 326. At that scene, Officer Ochart was able to recognize Mahad Warsami from the surveillance video. RP 410. Another youth in the group, Shirwa Muse, was patted down and frisked. RP 334-335. Mr. Muse was placed into custody when police found Mr. Chuang's cell phone in his pocket, but he broke free and ran away. RP 229, 231, 335.

Police called in a K-9 unit to track down Mr. Muse. RP 233. Police followed the dog and heard a male screaming. RP 344. Instead of Mr. Muse, they located Mr. Sakawe, who was screaming and trying to hold off the police dog not far from the roadway. RP 233, 344. Officer O'Neil commanded Mr. Sakawe to let go of the dog; when he did not, the officer slapped Mr. Sakawe to get him to release the dog. RP 104. The officer did not stop his dog from biting Mr. Sakawe in the leg until Mr. Sakawe

complied with his commands. RP 104. Officer Gallagher did not recognize Mr. Sakawe from the surveillance video he had just viewed. RP 344.

Police called for aid and had Mr. Sakawe transported to the emergency room. RP 242, 345. While at the hospital, Officer O'Neil went to talk to Mr. Sakawe, ostensibly to document the dog bite and contact his parents. RP 107. But the officer instead inquired about what Mr. Sakawe was doing in the area. RP 107. Mr. Sakawe answered that he was hanging out in Des Moines earlier in the day with his friend "Shirwa." RP 107. The officer made no effort to contact Mr. Sakawe's parents. RP 290.

3. Mr. Sakawe is identified as the assailant by a now-absent witness's memory of recognizing him after seeing him seated by defense counsel at the first trial, five years after the incident.

At no time prior to trial was Ms. Wood able to describe the person she fleetingly saw in the hotel lobby that night, other than a generic clothing description of a hoody and that he was a "black young man." CP 63-65. She was never asked to identify the perpetrator prior to trial. CP 59, 63-67, 120.

At the first trial, held in 2008, about five months after the altercation in the lobby, Ms. Wood could only describe the assailant as a "black young man, and that's about all I could tell you." CP 76. The prosecutor did not ask her to identify Mr. Sakawe as the defendant at that time, presumably because the prosecutor did not think she could make the identification. RP 93.

During the second trial in 2013, Ms. Wood could not identify the assailant in the hotel lobby in the courtroom or provide any description other than that "he is black." CP 112, 116. The State then asked whether she recognized the defendant during the first trial in 2008. RP 112. Ms. Wood said she did. CP 112-113. She claimed that she did not say this during the first trial because she was not asked. CP 126. Defense counsel objected to the introduction of this testimony, but was overruled by the trial court. 3RP 94-95[3].

Ms. Wood was unavailable at the third trial in 2016. RP 4. Over defense objection, the court allowed the State to introduce Ms. Wood's testimony from the second trial in which she stated that she was able to identify Mr. Sakawe during the first trial. CP 52, 112. Mr. Sakawe was convicted by a bench trial of all counts. CP 211.

4. The Court of Appeals found no constitutional deficiency with the unreliable in-court identification and admission of a juvenile's statement to an officer who had just allowed his dog to attack the youth in order to gain his submission.

The Court of Appeals affirmed Mr. Sakawe's convictions, finding that the admission of Ms. Wood's unreliable in-court identification did not violate due process because "the safeguards of the adversary system protected against placing undue weight on Wood's in-court eyewitness

[3] Record of Proceeding from appellate case number 70563-6-I.

testimony." Slip Op. at 11. The Court of Appeals placed great weight on the fact that Ms. Wood was cross-examined five years prior, in a different proceeding and that Mr. Sakawe's attorney was able to argue in closing how utterly unreliable this evidence was. Slip Op. at 11-12. The Court of Appeals did not consider Mr. Sakawe's claim that an unreliable in-court identifications should be prohibited under the Washington State Constitution, finding admission of the unreliable identification was harmless error, despite the fact that Ms. Wood's identification was the only eyewitness identification of Mr. Sakawe as the assailant. Slip Op. at 13.

The Court of Appeals also determined that Mr. Sakawe was "not subject to custodial interrogation" when he was being treated for a police-inflicted dog bite by the same officer who had just slapped him and allowed his dog to bite him, failing to specifically account for the officer's use of force against the juvenile. Slip Op. at 16.

E. ARGUMENT

1. This Court should grant review to decide whether under the federal constitution, due process requires exclusion of a suggestive, unreliable first time in-court identification when there are not adequate adversarial safeguards in place to reduce the irreparable harm of misidentification.

a. Ms. Wood's memory of recognizing Mr. Sakawe was a highly suggestive, unreliable in-court identification.

An identification procedure violates the Fourteenth Amendment right to due process if it is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." *State v. Birch*, 151 Wn. App. 504, 514, 213 P.3d 63 (2009) (citing *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002)). "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972).

When an unnecessarily suggestive identification procedure is used, the court must consider whether the improper identification procedure "so tainted the resulting identification as to render it unreliable and therefore inadmissible." *Perry v. New Hampshire*, 565 U.S. 228, 235, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012) (citing *Biggers*, 409 U.S. at 201); *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

Here, because Ms. Wood's identification of Ms. Sakawe was elicited for the first time during his second trial, after she had seen him seated next to defense counsel at the first trial, charged with the crime, there is no question this was a suggestive, unreliable identification procedure. *Perry*, 565 U.S. at 244. ("Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do."); *Brathwaite*, 432 U.S. at 114 (citing *Biggers* factors, 409 U.S. at 199-200). At no time, either before or during trial was Ms. Wood able to describe or identify the assailant, her attention was diverted during the brief opportunity to view the suspect, and there was a five-year time gap between the altercation and her identification of him, rendering her identification of him entirely unreliable. *See Biggers*, 409 U.S. at 199-200.

b. Mr. Sakawe was not protected by the safeguards of the adversary system that are thought to reduce the harm of a suggestive, unreliable in-court identification.

Perry acknowledges that in-court identification procedures are suggestive. 565 U.S. at 244. But, as emphasized by the Court of Appeals in Mr. Sakawe's case, a suggestive procedure may be neutralized by the "other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." Slip Op. at 10 (citing *Perry,* 565 U.S at 245). These protections include the defendant's Sixth Amendment right to confront the eyewitness, right to

effective assistance of counsel, and eyewitness-specific jury instructions. Slip. Op. at 10 (citing *Perry*, 565 U.S at 245–47).

These protections were inadequate in Mr. Sakawe's third trial. Ms. Wood was never cross-examined during the first trial in 2008 about her ability to identify Mr. Sakawe, because she did not claim to recognize him at that time. In 2013, defense counsel was unable to reference the first trial in order to keep the jury from learning that Mr. Sakawe had been previously tried and convicted, so defense counsel could not cross-examine Ms. Wood about the suggestiveness of Mr. Sakawe sitting beside defense counsel at the first trial when she claims to have recognized him back in 2008. 2 RP 73.[4]

And Mr. Sakawe had no opportunity for cross-examination at his third trial. Defense counsel was clear that Mr. Sakawe had new questions to elicit on cross-examination. RP 131-132. The finder of fact here was unable to observe Ms. Wood's demeanor and the suggestiveness of the identification. *See e. g. Foster*, 750 F.3d at 691 (the witness's testimony took place in front of the jury, "which observed and presumably weighed any arguably suggestive circumstances."). And unlike in *Perry*, there was

[4] Referring to the 2013 Record of Proceedings.

not "lengthy instruction on identification testimony and the factors for the trier of fact to consider when evaluating it." *Id.* at 248.

Despite the glaring fact that Mr. Sakawe was not permitted to cross-examine Ms. Wood about her memory of purportedly recognizing him at trial in 2008, which was elicited by the prosecution in 2013, but not subject to adequate cross-examination, the Court of Appeals found "the record shows the safeguards of the adversary system protected against placing undue weight on Wood's in-court eyewitness testimony." Slip Op. at 11.

c. Mr. Sakawe asks this Court to determine whether a highly suggestive, unreliable in-court identification that is not subject to cross-examination violates the accused's due process rights under the federal constitution.

The United States Supreme Court has not specifically addressed whether an unnecessarily suggestive, unreliable first time, in-court identification procedure orchestrated by the State violates due process. In *Perry,* the court focused on "improper law enforcement activity" in holding that "that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." 565 U.S. at 248. The *Perry* court addresses the central role of "state action," but the question before the Court was whether *private* conduct triggered due process protections.

Perry, 565 U.S. at 232–33; *State v. Dickson*, 322 Conn. 410, 426, 141 A.3d 810 (2016), *cert. denied*, No. 16-866, 2017 WL 108128 (U.S. June 19, 2017).

Mr. Sakawe asks this Court to grant review to determine whether an unreliable, first-time in-court eyewitness identification elicited by the State should be suppressed where there were insufficient adversarial safeguards to limit the risk of misidentification. RAP 13.4(b)(3).

2. This Court should grant review of a question that has not been decided under Washington State's Constitution: Does due process require exclusion of a suggestive, unreliable in-court identification?

Regardless of whether federal due process protects against the suggestive, unreliable in-court identification procedure used in Mr. Sakawe's case, Mr. Sakawe asks this Court to consider whether article I, section 3 of the Washington State constitution protects against inherently suggestive in-court identifications. RAP 13.4(b)(3) and (4).

Both the state and federal constitutions protect against the deprivation of "life, liberty, or property without due process of law." U.S. Const. amend. XIV; Const. art I § 3. *State v. Davis*, 38 Wn. App. 600, 604, 686 P.2d 1143 (1984). When the federal and state constitutional clauses are nearly identical, constitutional decisions by federal courts that are "logically persuasive and well-reasoned, paying due regard to precedent and policies

underlying specific guarantees," should be given "persuasive weight as guideposts when interpreting counterpart state guarantees." *Davis*, 38 Wn. App.at 605 *(*quoting Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489, 502 (1977)).

Since *Perry*, federal courts have continued to protect against the inherent suggestiveness of in-court identifications. *See e.g. Lee v. Foster*, 750 F.3d 687, 691-92 (7th Cir. 2014); *United States v. Green*, 704 F.3d 298, 305-10 (4th Cir. 2013). These decisions recognize that in-court identifications are "the most dangerous evidence known to the law" because of "the very appreciable danger of convicting the innocent." *Greene*, 704 F.3d at 310 (citing *Smith v. Paderick*, 519 F.2d 70, 75 (4th Cir. 1975)).

Some state Supreme Courts have addressed this serious problem under state law. *Dickson*, 322 Conn. at 426); *see also Commonwealth v. Crayton*, 470 Mass. 228, 241-242, 21 N.E..3d 157 (2014) (pursuant to common law principles of fairness, first time in-court identifications are inadmissible except for "good reason," as when identity is not at issue or eyewitness knew defendant before crime.)

These well-reasoned decisions are amply supported by social science research that recognizes the great risk of mistaken eyewitness identification for in-court identification procedures: "the factors that lead psychologists and scholars (and now a few courts) to question the ability of

jurors to assess the reliability pretrial identifications are present in their purest forms in a first time, in-court identification." Aliza B. Kaplan & Janis C. Puracal, *Who Could It Be Now? Challenging the Reliability of First Time in-Court Identifications After State v. Henderson and State v. Lawson,* 105 J. Crim. L. & Criminology 947, 955 (2015). Research shows that there is no "principled basis for limiting the application of the science to pretrial identifications and carving out exceptions for in-court identifications." *Id.* at 956.

Mr. Sakawe asks this Court to grant review to decide whether under Washington's Constitution, due process requires judicial pre-screening of first-time, highly suggestive, unreliable in-court identifications.

3. This court should grant review to decide a matter of public interest and of constitutional import that specifically impacts youth of color, who are disproportionately subject to police use of force: must a court factor the use of police force against a juvenile when determining whether a youth is subject to custodial interrogation and thus entitled to *Miranda* warnings?

a. Courts recognize that a juvenile will feel pressured to submit to custodial interrogation where an adult in the same circumstances may not.

Miranda[5] warnings are designed to protect a person's constitutional right not to make incriminating confessions or admissions to police while in

[5] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

the coercive environment of police custody. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004); U.S. Const. amend. V. *Miranda* warnings must be given when a suspect is subject to (1) custodial (2) interrogation (3) by an agent of the State. *Id.* (citing *State v. Sargent,* 111 Wn.2d 641, 647, 762 P.2d 1127 (1988)).

The age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*. *J.D.B. v. North Carolina,* 564 U.S. 261, 264, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). Any police interview of an individual suspected of a crime has "coercive aspects to it." *Id.* at 268 (citing *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977)). A juvenile subjected to police questioning will "sometimes feel pressured to submit when a reasonable adult would feel free to go." *J.D.B.* at 271–72. Thus, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *Id.* at 277.

The Supreme Court has also noted that unique concerns arise in the context of interrogating juveniles. *See, e.g., In re Gault,* 387 U.S. 1, 187 S.Ct. 1428, 18 L.Ed.2d 527, 87 S.Ct. 1428 (1967). "No matter how sophisticated," a juvenile subject of police interrogation "cannot be compared" to an adult subject. *Gallegos v. Colorado,* 370 U.S. 49, 54, 82

S.Ct. 1209, 8 L.Ed.2d 325 (1962). Special consideration should also be accorded to a youth who is subjected to police violence prior to police questioning.

b. No reasonable juvenile would feel free to leave when he was questioned by the same officer who slapped him and let his dog bite him in order to gain his submission.

Here, no reasonable juvenile would feel free to leave after being slapped by an officer who then allowed his dog to bite him for failing to comply with his commands, and was then questioned by the same officer while receiving treatment at the hospital for this police-inflicted injury. *See J.D.B.* at 271-272.

When Mr. Sakawe did not comply with the officer's command to let go of his dog, the officer hit Mr. Sakawe with an "open hand—palm strike." RP 104. When Mr. Sakawe released the dog, the dog bit him in the leg. RP 104. Officer O'Neil did not tell the dog to stop because the dog "needs to defend himself." RP 273. Only after Mr. Sakawe complied with Officer O'Neil's commands did the dog release its bite. RP 274.

Des Moines police officers then "escorted" Mr. Sakawe out of the area and summoned medical aid to take him to the hospital, where Officer O'Neil later questioned Mr. Sakawe while he was lying in a hospital bed waiting to be treated by medical staff. RP 106. The officer asked Mr. Sakawe "what he was doing in Des Moines, how he ended up down in that

area." RP 107. Mr. Sakawe told him that he lived in Burien, and that he came down to Des Moines to hang out with some friends. RP 107. Mr. Sakawe said his friend's name was "Shirwa." RP 107. Officer O'Neil recalled that "Shirwa" was the suspect he was tracking in the robbery. RP 107.

Officer O'Neil claimed that the tenor of the conversation was "nice," and that he was concerned his dog accidentally bit a juvenile. RP 109. However, Officer O'Neil did not follow up with Mr. Sakawe's parents. RP 290. The Court of Appeals determined that Mr. Sakawe was not subject to custodial interrogation under these circumstances. Slip Op. at 16.

c. Mr. Sakawe urges this Court to require consideration of police force against a juvenile in determining whether a youth is subject to custodial interrogation in order to reduce the unjust effects of racial disproportionality in police-initiated contact and use of force against youth of color.

The Court of Appeals found that "because Officer O'Neil was aware Sakawe was a juvenile, Sakawe was not a suspect, he was not under arrest or handcuffed, and the police did not prevent him from leaving the hospital, we conclude he was not subject to custodial interrogation." Slip Op. at 16. The Court of Appeals failed to account for the police officer's use of force necessitating Mr. Sakawe's hospitalization, and failed to consider that Mr.

Sakawe would have been required to forego needed medical treatment for a police-induced injury in order to avoid police questioning.

According to the Bureau of Justice Statistics, between 1998 and 2008 youth ages 16-18 were involved in 3.5% of all interactions with police, but youth ages 16-18 were involved in 30.1% of police uses of force which was initiated by police 81% of the time.[6] Black and Hispanic youth are disproportionately subject to police use of force.[7] It is a matter of substantial public interest that a juvenile who is not even a suspect in a crime is subjected to police violence, creating the need for his medical treatment, which police then use as an opportunity to obtain incriminating statements to use against the youth at trial. RAP 13.4(b)(3) and (4). Such procedures contribute to the well-documented over-criminalization of youth of color and should be reviewed by this Court.

Mr. Sakawe thus urges this Court to accept review and decide whether the fact of police use of force against a juvenile must be considered in determining whether a youth is subject to custodial interrogation.

[6] Strategies for Youth: Connecting Cops and Kids https://strategiesforyouth.org/resources/facts/#foot (last accessed 9/3/18).

[7] Id.

F. CONCLUSION

Mr. Sakawe respectfully urges this Court to accept review to decide whether a highly suggestive, unreliable, first time in-court identification should be excluded under the federal and state constitutions when the adversarial safeguards thought to protect against the risk of misidentification are absent. Mr. Sakawe also asks this Court to consider whether the fact of police violence against a juvenile must be considered when determining whether the youth is subject to custodial interrogation.

DATED this 5th day of September, 2018.

Respectfully submitted,

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APPENDIX

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

THE STATE OF WASHINGTON, Respondent,	)	No. 75991-4-I
v.	)	UNPUBLISHED OPINION
ABDIRAHMAN S. SAKAWE, Appellant.	)	FILED: August 6, 2018

SCHINDLER, J. — The trial court convicted Abdirahman S. Sakawe of robbery and attempted robbery in the second degree and assault in the second degree. Sakawe seeks reversal, arguing (1) the court violated his right to due process by admitting unreliable in-court identification testimony, (2) the court erred in denying his motion to suppress statements he made to the police at the hospital, and (3) sufficient evidence does not support the convictions. We affirm.

FACTS

First Trial

The State filed charges against Abdirahman S. Sakawe in 2008 for robbery in the second degree of Chuan-Wen "Andre" Chuang and attempted robbery in the second degree and assault in the second degree of Ka "Charles" Chen. A jury convicted

Sakawe. We affirmed the convictions. State v. Sakawe, 150 Wn. App. 1045, 2009 WL 1664930, at *3.

Personal Restraint Petition

Sakawe filed a personal restraint petition alleging ineffective assistance of counsel. We remanded for a reference hearing. In re Pers. Restraint of Sakawe, 168 Wn. App. 1028, 2012 WL 1980895, at *1. The trial court found Sakawe "would have pled guilty if he had been properly advised regarding immigration matters." Sakawe, 2012 WL 1980895, at *2. Because the failure to advise a defendant of " 'available options and possible consequences constitutes ineffective assistance of counsel,' " we granted the petition and remanded for a new trial. Sakawe, 2012 WL 1980895, at *2-*3 (quoting In re Pers. Restraint of McCready, 100 Wn. App. 259, 263, 996 P.2d 658 (2000)).

Second Trial

On remand, the State was unable to present the hotel lobby surveillance video footage to the jury. The trial court overruled the defense objection to calling the prosecutor from the first trial to testify about the video. The defense did not object to the police officer testimony. The prosecutor and police officers testified about what they saw on the hotel surveillance video. The jury convicted Sakawe. On appeal, we held the trial court abused its discretion by allowing the prosecuting attorney from the first trial to testify about the hotel lobby video. We reversed and remanded for a new trial. State v. Sakawe, No. 70563-6-I, slip op. at 15 (Wash. Ct. App. Nov. 30, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/705636.pdf.

Third Trial

On remand, Sakawe waived his right to a jury trial. Charles and a number of police officers testified. Because Andre and Garden Suites Hotel employee Catherine Wood were unavailable to testify, the State moved to admit their testimony from the previous trials. The defense objected to admitting the in-court identification testimony of Wood. The court overruled the objection and admitted the testimony.

The evidence showed that on the evening of November 22, 2007, two Taiwanese exchange students, Chuan-Wen "Andre" Chuang and Ka "Charles" Chen, were waiting at a bus stop when a group of approximately 10 young black males surrounded them and asked for a cigarette and the time. Andre and Charles had no cigarettes but Andre removed his cell phone from his pocket to check the time. One of the men "snatched" the phone away from him. Meanwhile, a black male wearing a red hat grabbed Charles by the throat. When Andre tried to intervene and stop the man, another black male grabbed Andre by the throat, punched him twice in the face, and then demanded money.

Andre and Charles managed to escape and ran to the Garden Suites Hotel where Andre lived. Garden Suites Hotel employee Catherine Wood was working at the front desk. When Andre and Charles ran into the hotel lobby, Charles threw his phone to Wood for safekeeping. Two men followed Charles and Andre inside the hotel. One of the men was the black male wearing a red hat who grabbed Charles by the throat at the bus stop. The other black male was wearing a white hooded sweatshirt. The man in the red hat followed Charles and Andre into the lobby while the man in the white hooded sweatshirt remained at the hotel entry. The man in the red hat punched Andre

in the face, knocking off his glasses. The man unsuccessfully tried to jump over the front counter to grab the phone from Wood. The man then confronted Charles and put him in a headlock. After Wood yelled at the man in the red hat to leave, both men fled.

Des Moines Police Officer Eddie Ochart, Officer Randy Gallagher, and Officer David Shields responded to the 911 call. The officers viewed the hotel lobby surveillance video. The officers who viewed the hotel lobby surveillance footage testified about what the video showed. The defense did not object to the police officer testimony. The surveillance video showed a man entering the hotel lobby after Charles and Andre ran inside. The man wore a black and red hooded sweatshirt, a red and black hat, and dark pants. Another man wearing a white hooded sweatshirt entered the lobby but remained by the entrance.

While at the hotel, the police learned that a group of about 10 young men had gathered within walking distance of the hotel. Officer Gallagher left. Officer Gallagher immediately recognized the young man in the white hooded sweatshirt from the surveillance video. The man in the white hooded sweatshirt was standing with another black male in dark clothing. Officer Gallagher identified the man in the white sweatshirt as Mahad Warsame and the other black male as Shirwa Muse. Officer Ochart found a cell phone with "Asian characters" on it in Muse's pocket. Andre confirmed the cell phone was the phone that was stolen from him at the bus stop. The officers arrested Muse. Muse slipped out of his handcuffs and ran away. The officers called in a K-9 unit to track Muse.

Auburn Police Department Officer Daniel O'Neil and police canine Ronin arrived at about 12:05 a.m. The dog ran into a wooded area and located and bit a young black

male who was later identified as Abdirahman S. Sakawe. Sakawe was "wearing a red and black sweatshirt and black jeans." Sakawe told Officer Shields that he was homeless and spent nights in the woods. But the officers did not find any bedding or sleeping gear and it was between 30 and 40 degrees outside that evening. The officers called medics. The medics drove Sakawe to Highline Medical Center to treat the dog bite injury.

Ronin and Officer O'Neil tracked Muse to an apartment building. Officer O'Neil then went to Highline hospital to document the dog bite injury. Sakawe told Officer O'Neil he was 17 years old and lived in Burien. Sakawe said he was in Des Moines that day "hanging out with his friend 'Shirwa.' "

The court found Sakawe guilty as charged of robbery in the second degree, attempted robbery in the second degree, and assault in the second degree. The court entered extensive written findings of fact and conclusions of law.

ANALYSIS

Sakawe seeks reversal, arguing (1) the court violated his right to due process by admitting Wood's in-court identification testimony, (2) the court erred in admitting statements he made to the police at the hospital, and (3) insufficient evidence supports the conviction.

1) In-Court Identification

Sakawe contends the admission of Wood's in-court identification testimony violated the federal due process clause. U.S. CONST. amend. XIV. Sakawe asserts the in-court identification was unnecessarily suggestive and unreliable.

Before trial, Sakawe filed a motion to suppress admission of the testimony of Wood from the previous trials as "improper, suggestive in-court identification." Sakawe cited Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The court denied the motion to suppress the testimony. The court ruled Biggers and Brathwaite did not apply because the in-court identification was not procured or arranged by law enforcement.

> Those cases that gave rise to the law that defense would have applied here would not necessarily apply to this fact pattern.
>
> I think that the idea is that law enforcement, police and others have to be held in check, and when they do something that improperly suggests that a person is the defendant, then there is the potential of a due process violation.

The court noted the extensive defense cross-examination of Wood in the previous two trials and ruled that "where the police are not involved," the court would determine credibility and the weight to give to the evidence.

In the first trial, Wood testified that she was working as a desk clerk at the Garden Suites Hotel at around 11:00 p.m. on November 22, 2007 when two "young Asian boys" ran into the lobby followed by two young black males. One of the Asian men "threw" her his cell phone. One of the young black men "swung at the one Asian kid, Andre, and knocked his glasses off of his face." After Wood yelled, " 'Get out of here,' " the other black male said, " 'Let's get out of here' " and "pulled" the first black male out of the building.

Wood described the clothing of the two men. Wood said the young black male who swung at Andre and knocked off his glasses was "wearing red" and the other black

male was "wearing white":

> He was, um, young and not sure if he was wearing, like — when I called the 911, or when I talked to them, I think I said that one of them was wearing white and one of them was wearing red, but I don't really recall. I think that the kid that was inside the building first was wearing red. . . . And, um, he was a black young man, and that's about all I could tell you."

Wood described the man "wearing white" as "a black young man, as well."

At the second trial in June 2013, Wood testified that the black male who assaulted Andre was wearing a black and red "hoodie."

Q. Can you describe that person, that third person who came in?
A. No, I couldn't describe him much at that time, other than him being a black male.
Q. Do you remember what he was wearing?
A. He was wearing a black and red hoodie.
Q. Can you describe any more for the jury what you mean by a black and red hoodie in terms of why was it black and red or?
A. I don't — I don't recall.
Q. Do you remember anything about that black male who came through the door, the third man, in terms of his size in comparison to Andre?
A. They seemed similar in size.
Q. Both height and weight or was one —
A. I really — I really don't know.

Wood testified that the other man who entered the lobby was "a black male and he was maybe slightly taller," and he was "wearing a black and white type hoodie."

Wood said that when she testified in the first trial, she "recognized" Sakawe.

Q. Did you testify at a prior proceeding related to this incident?
A. Yes, I did.
Q. Was that back in 2008?
A. Yes.
Q. Was that here at the [Maleng Regional Justice Center]?
A. Yes.
Q. When you were in court for that proceeding, did you recognize someone in the courtroom?
A. Yes, I did.
Q. Was it your understanding that person was the defendant?
A. Yes.

Q. Did you recognize that person, the defendant in the courtroom when you testified before?
A. Yes, I did.
Q. And who did you recognize that person as being?
A. It was the first black male that came into the building.
Q. So I just want to make sure I'm clear, so when you testified before, you recognized the defendant as being the person from the lobby; is that — do I understand that correctly?
A. Correct.
Q. All right.
How did you recognize him or what did you recognize?
A. I just recognized his face.

Sakawe contends the court violated his right to due process by not considering the factors under Biggers and overruling his objection to Wood's previous in-court identification testimony from the second trial. Sakawe asserts the testimony was unreliable and the result of an unnecessarily suggestive procedure.

In Biggers, the Court identified the factors the court should consider in determining whether the due process clause requires the suppression of eyewitness identification procured by law enforcement using unnecessarily suggestive circumstances. Biggers, 409 U.S. at 199-200. The Court in Biggers identifies the following factors to determine the reliability of the identification:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199-200.

In Perry v. New Hampshire, 565 U.S. 228, 240, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012), the Supreme Court rejected the contention that judges must determine the reliability of eyewitness evidence "any time an identification is made under suggestive circumstances." The Court emphasized that "due process concerns arise only when

law enforcement officers use an identification procedure that is both suggestive and unnecessary." Perry, 565 U.S. at 238-39.

Quoting Biggers, the Court states the due process clause "requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.' " Perry, 565 U.S. at 239 (quoting Biggers, 409 U.S. at 201). Quoting Brathwaite, the Court states:

> "[R]eliability [of the eyewitness identification] is the linchpin" of that evaluation . . . . Where the "indicators of [a witness'] ability to make an accurate identification" are "outweighed by the corrupting effect" of law enforcement suggestion, the identification should be suppressed.

Perry, 565 U.S. at 239[1] (quoting Brathwaite, 432 U.S. at 114, 116). Otherwise, the admissible evidence should be submitted to the jury. Perry, 565 U.S. at 239 (citing Brathwaite, 432 U.S. at 114; Biggers, 409 U.S. at 199-200).

The Court held that the rationale underlying Biggers and Brathwaite does not support "a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances." Perry, 565 U.S. at 240.

> Perry's argument depends, in large part, on the Court's statement in Brathwaite that "reliability is the linchpin in determining the admissibility of identification testimony." If reliability is the linchpin of admissibility under the Due Process Clause, Perry maintains, it should make no difference whether law enforcement was responsible for creating the suggestive circumstances that marred the identification.
>
> Perry has removed our statement in Brathwaite from its mooring, and thereby attributes to the statement a meaning a fair reading of our opinion does not bear. . . . [T]he Brathwaite Court's reference to reliability appears in a portion of the opinion concerning the appropriate remedy when the police use an unnecessarily suggestive identification procedure. The Court adopted a judicial screen for reliability as a course preferable to a per se rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, Brathwaite made plain, comes into play only after the

[1] Alterations in original.

> defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, notwithstanding improper police conduct.

Perry, 565 U.S. at 240-41.[2]

The Court acknowledged, "Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do." Perry, 565 U.S. at 244. The Court also acknowledged the concerns surrounding eyewitness testimony, stating that " 'the annals of criminal law are rife with instances of mistaken identification.' " Perry, 565 U.S. at 245 (quoting United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). But the Court concludes the "potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." Perry, 565 U.S. at 245.

The Court held the constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Perry, 565 U.S. at 237. "Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' have we imposed a constraint tied to the Due Process Clause." Perry, 565 U.S. at 237[3] (quoting Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)). The Court emphasized there are "other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." Perry 565 U.S. at 245. Such safeguards include the defendant's right to confront the eyewitness, the defendant's right to effective assistance of an attorney,

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[2] Emphasis in original; citation omitted.

[3] Citation omitted.

eyewitness-specific jury instructions, the requirement that the State prove the defendant's guilt beyond a reasonable doubt, the rules of evidence, and expert testimony on the hazards of eyewitness identification evidence. Perry, 565 U.S. at 245-47.

The Court concluded, "[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." Perry, 565 U.S. at 248; see also Boyer v. Chappell, 793 F.3d 1092, 1100 (9th Cir. 2015) (Under Perry, a preliminary reliability analysis is not required unless the identification is procured by law enforcement.).

We conclude the court did not err or violate federal due process rights by admitting Wood's previous in-court identification testimony. The record shows the safeguards of the adversary system protected against placing undue weight on Wood's in-court eyewitness testimony. When asked on cross-examination at the first trial what the man wearing red "looked like," Wood admitted, "I really didn't get a lot of facial . . . . I just got, like, a side profile of the gentleman." Wood testified, "I didn't identify anybody. I saw — they brought nobody to me to identify." Defense counsel cross-examined Wood extensively in the second trial to highlight the unreliability of her testimony that she recognized Sakawe at the first trial. For example, defense counsel questions show how little Wood remembered:

> Q. . . . And the first person, the first black person who came into the lobby, describe them for me again?
> A. I can't really describe him to you. He is black.
> Q. Okay.
> All right. And what was he wearing?
> A. As far as I know it was a black and red hoodie.

Q. When you say black and red, was it — do you remember which parts were black and which parts were red?
A. No, I don't recall.
Q. Okay. All right.
Do you remember if the hood was up or down?
A. It was down.
Q. Down?
Was he wearing anything else that you remember?
A. I don't remember.
Q. Did you get a look at his hairstyle?
A. No.
Q. Okay.
Was there anything that prevented you from seeing his hairstyle or?
A. No.
Q. All right. You just don't remember?
A. Correct.

And defense counsel drew attention to Wood's failure to recognize Sakawe at the first trial:

Q. . . . And during that prior testimony you did not identify the person in the courtroom, correct?
A. Correct.
Q. And do you remember how long you were in the courtroom for your testimony?
A. I don't really recall.
Q. Was it a similar set up to what we have today, in terms of the layout of the room?
A. Yes, similar.
Q. Okay, and so the person that you saw in the courtroom that you indicated you recognized, was he the only black male in the room?
A. I don't know.
Q. Okay.
And you were more or less face-to-face with him [the] entire time that you were testifying?
A. Yes.

During closing argument in the third trial, Sakawe's attorney again emphasized the inconsistencies in Wood's testimony and the limited details Wood gave about the identification of the person who committed the crimes. Defense counsel argued Wood's

"ability to recall and remember is very suspicious," and the identification "is simply too tenuous" to prove Sakawe was guilty of the crimes beyond a reasonable doubt.

Sakawe also argues article I, section 3 of the Washington Constitution provides greater protection against suggestive in-court identification than the Fourteenth Amendment to the United States Constitution. We reject the State's argument that Sakawe did not preserve this argument under RAP 2.5(a). The motion to suppress the in-court identification cites both the Fourteenth Amendment and article I, section 3. Even if article I, section 3 of the Washington State Constitution provides greater protection than the federal constitution, any error in admitting the in-court identification testimony of Wood was harmless. Under a harmless error analysis, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012).

Although the court refers to Wood's testimony, the record establishes the trial court did not rely on Wood's in-court identification testimony in finding Sakawe guilty beyond a reasonable doubt. The defense did not object to police officer testimony describing the hotel lobby surveillance video. The police officer testimony established the surveillance video showed a black man wearing a red hat and black and red clothing enter the hotel lobby and confront Andre and Charles. The court found the testimony of Andre credible because he was able to identify the man in the red hat as the one who grabbed Charles' throat, he was able to distinguish the man in the red hat from other members of the group, and the surveillance video and testimony of the other witnesses corroborated his description of events. The court found the testimony of Charles

credible and that the testimony of the other witnesses and the surveillance video corroborated his testimony.[4] The court found the evidence established the clothes Sakawe was wearing matched the description of the assailant in the hotel lobby surveillance video. The court noted Sakawe was located in the area where Muse fled and found Sakawe's inconsistent explanations for why he was in the area not credible.

After the oral ruling that Sakawe was guilty beyond a reasonable doubt of the crimes charged, the prosecutor asked the court about "any findings with respect to . . . the identification by Ms. Wood in the courtroom prior." The court responded, "[A]lthough that testimony would support the court's findings, . . . I deliberately did not make any reference to any identification." Because the record shows the court explicitly did not rely on Wood's in-court identification and substantial evidence supports the findings of guilt beyond a reasonable doubt, we conclude any error in admitting the in-court identification testimony from the previous trials did not contribute to the verdict and was harmless.

2) Statements at the Hospital

Sakawe contends the court erred by admitting the statements he made to Officer O'Neil at the hospital. Sakawe asserts he was subject to custodial interrogation and Officer O'Neil did not advise him of his Miranda[5] rights. Under the Fifth Amendment to the United States Constitution, "[n]o person shall be . . . compelled in any criminal case

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[4] The written findings of fact and conclusions of law also state:
Wood's testimony was credible as her description of events was corroborated by both the other witnesses' descriptions of what was shown on the surveillance video and by the testimony of Andre and Charles. In addition, Wood's testimony was credible because the fact that only two people followed Andre and Charles into the hotel's lobby made identification easier.

[5] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

to be a witness against himself." A defendant must be warned of his right to remain silent and his right to the presence of an attorney before a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In In re Gault, 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), the United States Supreme Court held the constitutional privilege against self-incrimination under Miranda applies with equal force to juveniles.

We review de novo a court's determination of whether the suspect was in custody. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). We examine the totality of the circumstances in analyzing whether a suspect was in custody. State v. Rosas-Miranda, 176 Wn. App. 773, 779, 309 P.3d 728 (2013). The "critical inquiry" is "not the psychological state of the defendant, but simply whether his freedom of movement was restricted." State v. Sargent, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988). We use an objective test to determine custody and "whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004); Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

A suspect is not necessarily in custody when confined to a hospital room. In State v. Kelter, 71 Wn.2d 52, 54, 426 P.2d 500 (1967), the court held:

> [T]here was no compelling atmosphere of in-custody interrogation in the questioning of the defendant in his hospital room; and no competent evidence was offered to show that the defendant was not in full possession of his faculties at this time; nor had the defendant been placed under arrest or otherwise restrained by the police in any manner.

In J. D. B. v. North Carolina, 564 U.S. 261, 271-77, 265, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011), the Court held a "reasonable child" standard applies in analyzing whether a 13-year-old child was in custody. The Court held that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." J. D. B., 564 U.S. at 277.

Sakawe contends a juvenile would reasonably believe he was in custody when the police questioned him at the hospital. The record shows that because the police dog attacked and injured Sakawe, police protocol required an officer to go to the hospital to document the dog bite injury. Officer O'Neil met with Sakawe to document the circumstances of the injury "with photographs and an incident report" while Sakawe was at the hospital waiting for treatment of the dog bite wound. The record shows Officer O'Neil knew Sakawe was 17 years old and planned to contact Sakawe's parent or guardian about the police dog bite. Because the undisputed record shows Officer O'Neil was aware Sakawe was a juvenile, Sakawe was not a suspect, he was not under arrest or handcuffed, and the police did not prevent him from leaving the hospital, we conclude he was not subject to custodial interrogation. The trial court did not err in admitting Sakawe's statements made at the hospital.

3) Sufficiency of the Evidence

Sakawe asserts sufficient evidence does not support the convictions for robbery in the second degree, attempted robbery in the second degree, and assault in the second degree because the State did not prove he was at the bus stop or in the hotel lobby.

The State has the burden of proving the elements of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Borrero, 147 Wn.2d 353, 364, 58 P.3d 245 (2002). Under the Fourteenth Amendment and the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington State Constitution, a criminal defendant is entitled to a " 'determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)[6] (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)); State v. Polo, 169 Wn. App. 750, 762-63, 282 P.3d 1116 (2012); State v. Johnson, 185 Wn. App. 655, 666, 342 P.3d 338 (2015).

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the evidence. Witherspoon, 180 Wn.2d at 883. Circumstantial evidence and direct evidence are equally reliable. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201. We defer to the trier of fact on "issues of witness credibility." Witherspoon, 180 Wn.2d at 883.

[6] Alteration in original.

RCW 9A.56.190 defines "robbery" as follows:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.[7]

"A person is guilty of robbery in the second degree if he or she commits robbery." RCW 9A.56.210(1). Robbery in the second degree is a class B felony. RCW 9A.56.210(2). A person is guilty of attempted robbery in the second degree when "with intent to commit" robbery," he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). A person commits assault in the second degree if he or she, "[w]ith intent to commit a felony, assaults another." RCW 9A.36.021(1)(e).

Andre testified that while standing at a bus stop with Charles, a group of "[a]lmost ten" young black males "surrounded" them. "And then all of a sudden, I saw a black guy grabbing Charles' throat." Andre testified that the man who grabbed Charles' throat was wearing a red hat. Andre heard the man tell Charles to hand over his cell phone. Andre testified that when he tried to intervene, another black male grabbed his throat and punched him in the face twice, and "another black guy" took his phone.

Andre said two of the black males chased after them, including "the one in the red hat" who was "grabbing Charles' throat" at the bus stop. The man in the red hat

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[7] We note the legislature amended chapter 9A.56 RCW in 2011 to add gender-neutral language throughout the chapter. LAWS OF 2011, ch. 336. Because no other changes were made to the relevant robbery statutes quoted in this opinion, we cite the current statutes.

followed Andre and Charles into the Garden Suites Hotel. After the man in the red hat "attempted to jump over the counter to grab the cell phone," the man punched Andre in the face.

Officer Shields testified that when he responded to the Garden Suites Hotel, the left side of Andre's face was red and "consistent with" a punch to the face. Officer Gallagher testified that the surveillance video showed the man who entered the hotel lobby after Charles and Andre was wearing a "black and red top," a "[r]ed and black hat," and "dark pants." Officer Gallagher said the man in the red hat and one of the victims had "a brief struggle over something." Officer Gallagher testified there was "kind of a headlock" as the man in the red hat was "grabbing at something." Officer Ochart testified that the surveillance footage showed the man who entered the hotel lobby was a "dark skinned male" who was wearing "red and black." Officer Ochart testified that this man was the one "causing the confrontation in the lobby." Officer Ochart said the video showed the man in red and black "either strike or swing at the Asian male" and at some point, the man put the other Asian male in a "headlock type move."

The hotel video also showed a black man wearing a white hooded sweatshirt enter the lobby for a "short amount of time." Officer Gallagher testified that the man in the white hooded sweatshirt was "holding the door open" for the man in the red hat.

Officer Gallagher testified that when he responded to the call about a group nearby, he immediately recognized the man wearing the white hooded sweatshirt from the hotel video. The man was standing with Shirwa Muse. Muse had a cell phone in his pocket that displayed "Korean characters." Andre confirmed the cell phone was his.

When Officer O'Neil found Sakawe in the wooded area, Sakawe was wearing "a black and red hoodie and black jeans." Sakawe had an "abrasion on his face" that looked "fresh." Sakawe first said that he was homeless and sleeping in the wooded area. But Officer O'Neil testified that it was a cold winter night and there was nothing to corroborate Sakawe was sleeping in the wooded area. When Officer O'Neil later spoke to Sakawe at the hospital, Sakawe said he "lived in Burien" and "was in Des Moines hanging out with his friends," specifically, his friend "Shirwa."

Substantial evidence supports the court's findings of fact and the findings support the conclusion that Sakawe committed robbery in the second degree, attempted robbery in the second degree, and assault in the second degree.

We affirm.

Schindler, J.

WE CONCUR:

Spearman, J.

Leach, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75991-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: September 5, 2018

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