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Supreme Court No. 99528-1
(COA No. 80076-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO CARDENAS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Alejandro Cardenas, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Alberto Alonso was hit in the face for 15-20 seconds. Immediately after, he had no idea who his two attackers were. Afterwards, Mr. Alonso's friends provided him Alejandro Cardenas's name, a person he was familiar with. Mr. Alonso provided police with Mr. Cardenas's name. The police showed Mr. Alonso a highly suggestive photomontage through which Mr. Alonso immediately identified Mr. Cardenas as his attacker. This out-of-court identification was admitted at trial even though Mr. Alonso's inability to identify his attacker immediately after the assault made it far more likely that he simply identified a person he knew of based on outside information, rather than based on his own memory.

The Court of Appeals found that the photo montage police used was unduly suggestive but did not require the trial court to

engage in full consideration of *Biggers*¹ factors, or find that additional protections to guard against eyewitness identification are required under our state constitution.

C. ISSUES PRESENTED FOR REVIEW

1. The trial court admitted the police-orchestrated, suggestive identification without applying the *Biggers* factors to assess its reliability. Instead, the trial court simply concluded that because there was some evidence that Mr. Alonso knew of Mr. Cardenas, this removed the risk of misidentification from the suggestive photomontage. This Court should grant review and hold that a trial court must explicitly apply the *Biggers* factors when assessing the reliability of an out-of-court identification. When applied here, these factors establish that the suggestive photo montage created an irreparable risk of misidentification that required suppression of the out-of-court and in-court identification. RAP 13.4b (3), (4).

2. The Washington State Constitution provides due process protections under art. I, sec. 3. Other courts and social

¹ *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

science recognize the constructive, dynamic, and selective process of memory contributes to the risk of irreparable misidentification regardless of police involvement.

Misidentification evidence is the leading cause of wrongful convictions. This Court should grant review and hold that Mr. Cardenas is entitled to additional assurances of reliability under our state constitution for both out-of-court and in-court identifications when, without additional safeguards, there was a real risk that the witness identified Mr. Cardenas based on outside influences, not his own memory. RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

Alberto Alonso was attacked by two men in a 7-11 parking lot. CP 91 (FF 1). The attack lasted between 15 and 20 seconds. CP 91 (FF 1). Surveillance video caught the attack, but the assailants' identity could not be discerned from the video. RP 84.

1. Immediately after being briefly assaulted by two men, Mr. Alonso has no idea who hit him.

When Mr. Alonso first arrived at the hospital, he told medical staff that he did not know who the assailants were. RP 67; CP 91 (FF 2). Later that day he told a detective that he had

no idea who the suspects were. RP 58. He also stated that he believed the two men were gang members who lived in a nearby apartment complex. RP 58-59; CP 91 (FF 4-5). The detective later wrote in his report that Mr. Alonso stated he believed the men were now staying at a different apartment building, about a mile away. RP 59. Mr. Alonso provided no additional description of the men. RP 62. The detective did not seek to obtain more information and did not confirm how long or how familiar Mr. Alonso was with them, or what outside information he had learned by that time. RP 62.

2. Based on information from an unnamed friend, Mr. Alonso tells police about Mr. Cardenas, who he then identifies in a highly flawed photo montage.

Weeks later, the detective showed Mr. Alonso a six-person photo montage which included the registered owner of the vehicle driven by the assailants. RP 71. Mr. Alonso told the detective that the men in that montage were too old. RP 72. Before being showed this montage, Mr. Alonso gave the detective two names he had been given by his friends

“Alejandro” and “Carlos.”² RP 62. He still provided no physical description of the men who attacked him. RP 62-63.

After Mr. Alonso told the detective Mr. Cardenas’s name, the detective then requested a montage be prepared with Mr. Cardenas in it. RP 72-73. The detective showed Mr. Alonso a six-person photo montage that mistakenly included four pictures of the same person. RP 60. Of the two different people in the montage, Mr. Cardenas was the only person wearing visible jail attire. CP 93 (FF 13). Mr. Alonso immediately picked out Mr. Cardenas from this montage. RP 75. The detective did not notice until later that there were four images of the same person instead of six different people. RP 60.

The court recognized this photo montage was “quite poor.” CP 93 (FF 13). However, the court did not consider that Mr. Alonso would have been influenced by the suggestive montage, finding that “[e]ither Mr. Alonso knew both defendants before the assault or his identification was influenced by his unnamed ‘friends.’” CP 93 (FF 14). The court concluded this was

² This person’s case was resolved separately and is not part of this appeal.

not a “stranger identification,” and under the “totality of the circumstance [sic],” there was “not a very substantial likelihood of irreparable misidentification.” CP 93; RP 96. Mr. Alonso’s pre-trial identification was admitted at trial. CP 93, RP 98.

At trial, Mr. Alonso testified to having far more familiarity with Mr. Cardenas than he had ever claimed before, stating he had seen Mr. Cardenas before the attack at his friend Henry’s house. RP 131-33. He also claimed Mr. Cardenas had lived two buildings away, across the street from him. RP 132. Though before he was unable to identify the two men who came to his car window before he was attacked, at trial he stated he saw Mr. Cardenas’s face at his window prior to being attacked. RP 134. By the time of trial, Mr. Alonso was “certain” Mr. Cardenas was one of the men who attacked him. RP 140.

Mr. Cardenas maintained he was not the person who assaulted Mr. Alonso. 5/23/19 RP 9³. His sister and girlfriend testified he was at a birthday party with them on the day of the

³ The VRP hearings that are not consecutively paginated are preceded by the date of the hearing.

assault. RP 211, 240. The jury convicted Mr. Cardenas as charged. CP 39.

At sentencing, the prosecutor struggled to reconcile the fact that Mr. Cardenas was a friendly, funny, respectful person who, the detective learned through researching his social media account, was a “legitimate, loving father” with an extensive family. 5/23/19 RP 4-5.

3. The Court of Appeals finds the identification procedure was suggestive, but does not require the trial court to explicitly apply the *Biggers* factors to guard against misidentification.

The Court of Appeals affirmed despite agreeing the montage was “unnecessarily suggestive.” Slip op. at 1. While recognizing that “the court could have been more explicit in its findings,” it found the various trial court findings “touch[ed] on the five factors” and established a “plausible inference” that Mr. Alonso knew his attackers. Slip op. at 6. It found this reduced the risk of misidentification under the totality of the circumstances, even though Mr. Alonso did not identify Mr. Cardenas independent of the suggestive montage and the

information he received from outside sources. Slip op. at 6; RP 67; CP 91 (FF 2).

The Court of Appeals also rejected Mr. Cardenas's claim that the in-court identification should have been suppressed and that our state constitution should be interpreted to provide additional safeguards to protect against mistaken eyewitness identifications, a leading cause of wrongful convictions. Slip op. at 7-10.

E. ARGUMENT

The witness's identification of Mr. Cardenas should have been suppressed because it derived from a highly suggestive police identification procedure that risked irreparable misidentification.

The trial court admitted Mr. Alonso's identification of Mr. Cardenas that police obtained through an unnecessarily suggestive identification procedure without applying the *Biggers* factors to assess its reliability. It also allowed Mr. Alonso's subsequent in-court identification that flowed from this impermissibly suggestive identification procedure without determining if it was independently reliable. Mr. Cardenas was entitled to additional due process protections ensuring the

reliability of the out-of-court and in-court identification procedures under the Washington State Constitution.

- a. Due process requires thorough consideration of the *Biggers* factors when police use an unnecessary, suggestive identification procedure.

Due process concerns arise when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Perry v. New Hampshire*, 565 U.S. 228, 238–39, 132 S. Ct. 716, 724, 181 L. Ed. 2d 694 (2012) (citing *Manson v. Brathwaite*, 432 U.S. 98, 107, 109, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977)); U.S. Const. amend XIV, § I; Const. art. I, sec. 3.

A photographic identification procedure violates the accused’s due process rights when it is “so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.” *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

To evaluate whether the Due Process Clause bars admission of identification evidence, courts use a two pronged test. First, the accused must show that “the identification procedure was suggestive.” *State v. Kinard*, 109 Wn. App. 428,

433, 36 P.3d 573 (2001) (citing *State v. Barker*, 103 Wn. App. 893, 905, 14 P.3d 863 (2000)). “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.” *Biggers*, 409 U.S. at 198. Second, the court must weigh the “corrupting effect of the suggestive identification” against factors indicating reliability. *Brathwaite*, 432 U.S. at 114. “[R]eliability is the linchpin” in determining the admissibility of identification testimony. *Id.*

Because “misidentification of a person’s visage” is “likely to become irreparable,” and due to the unique importance eyewitness identifications carry with juries, the *Biggers* safeguards are necessary. *State v. King*, 31 Wn. App. 56, 61, 639 P.2d 809 (1982). The Due Process Clause thus 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 (citing *Biggers*, 409 U.S. at 201).

- b. The trial court's failure to apply the *Biggers* factors deprived Mr. Cardenas of critical safeguards that protect against irreparable misidentification.

The Court of Appeals agreed with the trial court's assessment that the identification procedure used here was "quite poor," noting Mr. Cardenas was singled out by the "distinctive striped clothing of a Snohomish County Jail inmate." CP 93 (FF 13); slip op. at 5. Because this was a suggestive identification procedure, the trial court was required to weigh the "corrupting effect of the suggestive identification" against factors indicating reliability. *Brathwaite*, 432 U.S. at 114; *Kinard*, 109 Wn. App. at 434; slip op. at 5.

These factors are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of his prior description, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Brathwaite*, 432 U.S. at 114-16 (citing *Biggers*, 409 U.S. at 199-200).

Each of these factors requires a factual finding. *Kinard*, 109 Wn. App. at 434. Generally, where findings are required, they must be sufficiently specific to permit meaningful review.

Matter of Det. of G.D., 11 Wn. App. 2d 67, 69, 450 P.3d 668 (2019). This is because a court’s decision to admit evidence of eyewitness identification evidence is reviewed for abuse of discretion, which requires this Court review whether the trial court’s findings are supported by substantial evidence. *Kinard*, 109 Wn. App. at 434; *see also Munoz-Pacheco v. Holder*, 673 F.3d 741, 745 (7th Cir. 2012) (balancing favorable and unfavorable factors is an exercise of discretion; failure to exercise discretion is a legal mistake).

The trial court’s legal conclusions ignored the significance that Mr. Alonso’s out-of-court identification was obtained through a suggestive police identification procedure, and led the court to admit the identification without analyzing the *Biggers* factors. The Court of Appeals excused this requirement by interpreting the court’s findings in a way that could be construed as touching on these factors, making its own assessments of reliability in lieu of the trial court. Slip op. at 6.

Though some of the court’s factual findings pertain to some of the *Biggers* factors, the trial court did not weigh their reliability—an assessment that should not be made for the first

time on appeal. *See, e.g., Kinard*, 109 Wn. App. at 434. For example, the court's first finding of fact states the time Mr. Alonso had to view his attackers was between 15-20 seconds. CP 91 (FF 1). This factual finding pertains to the first *Biggers* factor, the opportunity to view the suspect. *Biggers*, 409 U.S. at 199. However, the court did not determine whether this weighed in favor of or against reliability. *Kinard*, 109 Wn. App. at 434.

Likewise, the trial court's second finding of fact states Mr. Alonso first told medical staff he did not know who his attackers were. CP 91 (FF 2). This fact is relevant to the third *Biggers* factor, accuracy of the prior description, but the trial did not weigh this factor. *Id.* This is especially critical here because it undermines Mr. Alonso's subsequent varying, contradictory statements about prior familiarity with his attackers. CP 91 (FF 4-5).

The trial court's findings failed to address or weigh the remaining relevant *Biggers* factors, including the time between the confrontation and the crime, the witness's degree of attention, and the accuracy of his prior description. *Biggers*, 409 U.S. at 199-200.

Analysis of the police identification procedure under *Biggers's* reliability factors was especially critical here, where the pre-trial identification procedure arranged by police was based on information Mr. Alonso received from unknown, outside sources. CP 92-93 (FF 10, 14). This created an especially high risk that Mr. Alonso's identification did not derive from his initial memory from the incident, a problem the *Biggers* factors are intended to assess. Research shows that memory is not like a video recording but is a "constructive, dynamic, and selective process." *State v. Henderson*, 208 N.J. 208, 245, 27 A.3d 872 (2011). Memory can be unknowingly distorted, contaminated, and even falsely imagined at each stage of the process. *Id.* at 246. "Like physical trace evidence, memory traces can be tampered with, destroyed, lost, distorted, or contaminated by the procedures that are used to collect it." Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, Wis. L. Rev. 615, 622-23 (2006).

The Court of Appeals did not require the trial court to fully consider these factors, which are designed to guard against admission of unreliable evidence derived through police

identification procedures such as this. Slip op. at 6. This Court should accept review and ensure trial courts properly apply the *Biggers* factors to assess the reliability of a suggestive out-of-court identification, which applied here, reveal the unreliability of Mr. Alonso's identification. RAP 13.4(b)(3),(4).

- c. The suggestive out-of-court identification procedure tainted the witness's in-court identification.

The impermissibly suggestive pretrial procedure invalidated Mr. Alonso's subsequent in-court identification because the State failed to establish the latter was independently reliable, a violation of due process that this Court should review under RAP 13.4(b)(3).

When an out-of-court identification was obtained by an impermissibly suggestive procedure, a witness may make an in-court identification if it had an "independent source" from the suggestive police identification procedure. *State v. Johnson*, 132 Wn. App. 454, 459, 132 P.3d 767 (2006). The State must establish by clear and convincing evidence the in-court identification was based upon observations of the suspect other than tainted pre-trial identification. *State v. Smith*, 36 Wn. App.

133, 138, 672 P.2d 759 (1983) (citing *United States v. Wade*, 388 U.S. 218, 240, 87 S. Ct. 1926, 18 L. Ed.2d 1149 (1967)).

To determine if the witness's in-court testimony had an independent origin, the court must consider the witness's prior opportunity to observe the suspect, any discrepancy between a pre-confrontation description and the defendant's actual description, any prior identification of another person, any prior identification of the defendant by photograph, any failure to identify the defendant on a prior occasion, the lapse of time between the alleged act and the identification, and whether the witness previously knew the defendant. *Smith*, 36 Wn. App. at 138 (citing *Wade*, 388 U.S. at 241).

Here the State failed to prove to what degree, if any, Mr. Alonso was previously acquainted with Mr. Cardenas. CP 93 (FF 14). At trial, Mr. Alonso testified to having a greater ability to recognize his assailants during the incident than he had ever claimed before. RP 131-32. Mr. Alonso's later statements of increased memory about the incident are likely the result of contamination from his "unnamed 'friends,'" as non-state actors

can affect the reliability of an eyewitness identification just as police can. CP 93 (FF 14); *Henderson*, 208 N.J. at 268.

The State failed to prove Mr. Alonso could identify his attacker independently from his identification of Mr. Cardenas from the suggestive photo montage. His in-court identification should have been suppressed. RAP 13.4(b)(3), (4).

- d. This Court should accept review and hold that article I, section 3 requires additional assurances of reliability for eyewitness identification evidence.

This Court should accept review and find under article I, section 3, due process requires application of the *Biggers* factors to government and non-government actors, as well as consideration of additional factors that scientific studies and court decisions since *Biggers* have determined are necessary to ensure reliability and accuracy in eyewitness identifications. RAP 13.4(b)(3), (4).

To a jury “there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed.2d 549 (1981). Jurors particularly inflate the value of identification testimony where

other evidence in the case is weak. *Henderson*, 208 N.J. at 236-37. Research has also revealed the suggestive effect that private actors can have on eyewitnesses' recollection of events. *State v. Chen*, 208 N.J. 307, 310, 320-21, 27 A.3d 930 (2011). Mistaken eyewitness identification are the leading cause of wrongful conviction, causing "more wrongful convictions than all other causes combined." *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006); see also *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (Studies show the vast majority of exonerees (79%) were convicted based on eyewitness testimony; "we now know that all of these eyewitnesses were incorrect").

Mr. Cardenas argued that application of the *Gunwall*⁴ factors support independent and more stringent protections against eyewitness identification procedures under our state constitution on appeal. Br. of App. at 26-30. The Court of Appeals noted it had "previously examined these factors in the context of eyewitness identification" in an unpublished decision. Slip op. at 8 (citing *State v. Haff*, No. 70296-3-I, slip op. at 14-24 (Wash. Ct. App. Feb. 23, 2015) (unpublished)). However the

⁴ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

court's decision in *Haff* and Mr. Cardenas's case fail to ensure the reliability of eyewitness identification procedures as required by due process under our state constitution.

This Court should grant review and find our constitution affords the accused additional protections to guard against mistaken eyewitness identification. This would require, in addition to consideration of the *Biggers* factors, consideration of government and non-government actors and scientific findings related to memory and the flaws of both in-court and of-court identification procedures. These additional protections are necessary to guard mistaken eyewitness identification, the leading cause of wrongful conviction. RAP 13.4(b)(3) &(4).

F. CONCLUSION

Based on the foregoing, Mr. Cardenas respectfully requests that review be granted under to RAP 13.4(b)(3) and (4).

DATED this 24th day of February, 2021.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO CARDENAS, JR.,

Appellant.

No. 80076-1-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, J. — Alejandro Cardenas Jr. appeals his conviction for second degree assault, alleging that the admission of the victim’s out-of-court photo identification and subsequent in-court identification violated his due process rights under the federal and state constitutions. We conclude that the photomontage used by law enforcement was unnecessarily suggestive. However, because the court reasonably concluded that there was no substantial likelihood of irreparable misidentification, we affirm the trial court’s admission of the identification. Furthermore, we conclude that a different outcome is not required under our state constitution. Finally, we grant the parties’ request to amend Cardenas’s community custody term to comply with RCW 9.94A.702.

FACTS

On February 27, 2016, Alberto Alonso was attacked by two men in a 7-11 parking lot in Monroe, Washington. The men punched him repeatedly in his face and head for 15 to 20 seconds. Alonso, who did not understand English very well, told hospital staff that day that he did not know who his attackers were. He

also told a police officer, through the use of an interpreter, that he did not know the names of his attackers, but that they were two Hispanic men with suspected gang involvement who used to live in his neighborhood.

After reviewing the 7-11 surveillance video, the police officer prepared a photographic lineup containing an image of the registered owner of the vehicle that the attackers had driven. On March 10, 2016, when the officer arrived to show Alonso the photomontage, Alonso disclosed that he had learned from friends that the attackers' names were Alejandro and Carlos. When he viewed the photomontage, Alonso indicated that neither of the men was included in the lineup, and that the men who had attacked him were younger than those pictured.

Based on this information, the police department prepared new photomontages containing images of Alejandro Cardenas and Carlos Villegas. The photo montage used for Cardenas depicted six Hispanic men with similar facial hair. However, four of the photographs were of the same person, such that Cardenas was one of only three unique people in the lineup. Furthermore, Cardenas was the only person in the lineup wearing a jail uniform.

Before viewing this montage, Alonso informed the police officer that he had learned his attackers' full names, and he identified them as Alejandro Cardenas and Carlos Villegas. When he viewed the new photomontages, he picked out Cardenas and Villegas and wrote their names next to their pictures.

Cardenas moved to suppress Alonso's out-of-court identification as well as his anticipated in-court identification. He alleged that the flaws in the

photomontage created a substantial likelihood of irreparable misidentification that would make the admission of Alonso's identification a violation of Cardenas's due process rights. The court admitted the identification, concluding that although the montage was "quite poor," there was not a substantial likelihood of irreparable misidentification because Alonso already knew Cardenas's face. A jury subsequently found Cardenas guilty of second degree assault. The court sentenced Cardenas to 9 months in jail, with an 18-month term of community custody. Cardenas appeals.

ANALYSIS

On appeal, Cardenas alleges that Alonso's identification should have been suppressed because it violated his federal due process rights. Furthermore, he contends that article I, section 3 of the state constitution requires additional assurances of reliability for eyewitness identification evidence. Finally, the parties request permission to amend Cardenas's judgment and sentence to shorten his community custody term. Because there were sufficient indicia of reliability supporting Alonso's identification, we disagree with Cardenas and affirm the trial court. However, we agree that Cardenas's community custody term exceeded the amount of time allowed by statute and grant the parties' request to amend the sentence.

Standard of Review

The admission of identification evidence is "subject to the sound discretion of the trial court." State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). Accordingly, on review we ask "whether there are tenable grounds or reasons for

the trial court's decision." Id. Unchallenged findings of fact are verities on appeal. Rush v. Blackburn, 190 Wn. App. 945, 956, 361 P.3d 217 (2015).

Federal Due Process Grounds for Suppression

When law enforcement uses "an identification procedure that is both suggestive and unnecessary," a defendant's federal due process rights are implicated. Perry v. New Hampshire, 565 U.S. 228, 238-39, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012). If this procedure creates a "very substantial likelihood of irreparable misidentification," the trial court must suppress the evidence. Id. at 232. Where unreliability is not caused by the state or does not cause a very substantial risk of misidentification, due process does not require suppression. Id.; State v. Allen, 176 Wn.2d 611, 622, 294 P.3d 679 (2013). Instead, due process in these cases "protects a defendant against a conviction . . . by affording the defendant means to persuade the jury that the evidence should be discounted." Perry, 565 U.S. at 237.

Accordingly, to succeed on a motion to suppress, the defendant must first establish that the identification procedure was impermissibly suggestive. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). A procedure is suggestive if it directs undue attention to the defendant. State v. Eacret, 94 Wn. App. 282, 283, 971 P.2d 109 (1999). If he establishes this, the court then considers whether the procedure created a substantial likelihood of irreparable misidentification based on the totality of the circumstances. Vickers, 148 Wn.2d at 118. The reliability of the identification is accordingly the "central question" in a motion to suppress identification evidence. Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L.

Ed. 2d 401 (1972). In answering this question, the court should consider the totality of the circumstances, including 5 factors described in Biggers: “(1) the opportunity of the witness to view the criminal at the time; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.” State v. Barker, 103 Wn. App. 893, 905, 14 P.3d 863 (2000).

In this case, the court answered the first question by acknowledging that the photomontage presented to Alonso was “quite poor,” but in answering the second question, it ultimately concluded that there was “not a very substantial likelihood of irreparable misidentification.” We agree with Cardenas and the trial court that Cardenas has met his burden as to the first question. Cardenas is the only person in the montage wearing the “distinctive striped clothing of a Snohomish County Jail inmate.” See State v. Ramirez, 109 Wn. App. 749, 756, 762, 37 P.3d 343 (2002) (affirming trial court’s conclusion that photomontage was unduly suggestive where only the suspect was wearing a dark shirt described by the witness). Furthermore, including multiple unique faces in a photomontage provides protection against possible random identifications. The fact that Cardenas was only one of three, instead of one of six, unique people in the lineup greatly decreased this protection. Thus, the trial court properly moved to the second step of this analysis.

The trial court’s conclusion that there was not a substantial likelihood of irreparable misidentification is supported by the record. In an unchallenged

finding, the court noted that Alonso told law enforcement on the day of the attack that the men who attacked him used to live in his neighborhood. A plausible inference is that Alonso already recognized their faces, even if he did not know their names. As the defense expert testified at the suppression hearing, there is a low risk of erroneous identification if the person being identified has an already familiar face to the witness. Given the presence of some evidence that Alonso recognized the men, the court was justified in allowing the jury to weigh the credibility of the identification.

Cardenas disagrees and asserts that the court erred by not making explicit findings for each of the Biggers factors. While the court could have been more explicit in its findings, we do not find this to be a reversible error. First, the court's findings and oral ruling do touch on the five factors: for instance, its finding that Alonso was attacked for 15 to 20 seconds speaks to Alonso's opportunity to view the suspect as well as his degree of attention. The court noted that Alonso wrote Cardenas's name next to his photograph, illustrating Alonso's degree of certainty. It noted that the assault took place on February 27, 2016, and that Alonso identified Cardenas in the photomontage on April 11, which speaks to the time between the crime and the confrontation. Moreover, Biggers makes clear that the question of reliability of an identification depends on the totality of the circumstances. Biggers, 409 U.S. at 199. The factors—particularly the opportunity of the witness to view the criminal at the crime, the witness's degree of attention, and the time between the crime and the confrontation—are most relevant to situations where the witness is identifying a

stranger, not a familiar face. See id. Accordingly, the court appropriately found that the totality of the circumstances illustrates that there was not a substantial likelihood of irreparable misidentification.

Finally, Cardenas contends that Alonso's subsequent in-court identification of Cardenas should have been suppressed. Because the out-of-court identification is admissible, and because there is evidence Alonso already recognized Cardenas's face, the photomontage's suggestiveness cannot justify the suppression of the in-court identification. State v. Hilliard, 89 Wn.2d 430, 439-40, 573 P.2d 22 (1977) ("The final contention is that because the photographic identification was impermissibly suggestive, the in-court identification should have been suppressed. First, the photographic identification was not improper. Second, even if the photographic identification procedure were questionable, the in-court identification is proper if it has an independent origin.").

State Due Process Grounds for Suppression

Cardenas also contends that article I, section 3 of the Washington constitution requires broader protection against suggestive photo identification than its federal counterpart. We disagree.

As an initial matter, Cardenas did not raise the state constitutional ground for suppression before the trial court. Under RAP 2.5(a), we need not review a claim of error that was not raised below, except that a party may contend for the first time on appeal that there was a manifest error affecting a constitutional ground. Review under this standard is "appropriate for 'obvious' errors that could

have been 'foreseen' by the trial court." State v. Ramirez, 5 Wn. App. 2d 118, 133, 425 P.3d 534 (2018) (quoting State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009)), review denied, 192 Wn.2d 1026, cert. denied, 140 S. Ct. 329 (2019). In Ramirez, we declined to address this issue, noting that the trial court did not commit any obvious or foreseeable error given that "[t]he Washington Supreme Court has repeatedly refused to recognize constitutional safeguards regarding eyewitness testimony beyond those set by the federal constitution." Id. at 134.

Even if we were to analyze this issue, the outcome would not change. To determine whether a state constitutional provision grants greater protections than its federal counterpart, we analyze the factors enumerated in State v. Gunwall. 106 Wn.2d 54, 720 P.2d 808 (1986). These factors are: (1) the state provision's textual language; (2) significant differences between the federal and state texts; (3) state constitutional and common law history; (4) existing state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state interest or local concern. Id. at 61-62.

We previously examined these factors in the context of eyewitness identification in an unpublished decision. State v. Haff, No. 70296-3-I, slip op. at 14-24 (Wash. Ct. App. Feb. 23, 2015) (unpublished), <https://www.courts.wa.gov/opinions/pdf/702963.pdf>. In that case, we noted that the first two factors weigh against an independent interpretation because the text of the two provisions is "nearly identical." Id. at 15 (comparing Washington's article I, section 3, provision stating, "[n]o person shall be deprived of life, liberty,

or property, without due process of law” to the Fourteenth Amendment statement: “nor shall any state deprive any person of life, liberty, or property, without due process of law.”). As to the third factor, Cardenas cites no state constitutional or common law history that weighs in favor of independent interpretation, which is consistent with our observations elsewhere that “there is no contemporary record showing a broader meaning was intended by those adopting the Washington” due process clause. State v. Spurgeon, 63 Wn. App. 503, 506, 820 P.2d 960 (1991).

The fourth factor, preexisting state law, does not establish that greater limitations should be placed on eyewitness identifications under the state constitution. To the contrary, our Supreme Court has “traditionally . . . practiced great restraint in expanding state due process beyond federal perimeters.” Rozner v. City of Bellevue, 116 Wn.2d 342, 351, 804 P.2d 24 (1991). Cardenas cites no cases establishing broader protections against faulty eyewitness identifications in Washington, instead relying only on State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984). This reasoning fails because in that case, the court did not hold that the state due process clause provided broader protection than its federal counterpart. Instead, it merely stated that “[o]ur decision rests on an interpretation of both the state and federal constitutions. However, the independent state constitutional grounds we have articulated are adequate, in and of themselves, to compel the result we have reached.” Id. at 644. Furthermore, as we discussed in Haff, many Washington cases support the conclusion that the Washington and federal due process clauses provide

equivalent protection. Haff, No. 70296-3-I, slip. op. at 20-22.

As we noted in Spurgeon, the fifth and sixth factor generally lean toward broader protection for defendants under the Washington constitution, but lack specific links to the relief requested here. The fifth factor supports an independent construction because the federal constitution is a grant of enumerated powers, whereas the state constitution is a limit on sovereign powers. Spurgeon, 63 Wn. App. at 506. Similarly, with regard to the sixth factor, “the fact that criminal law enforcement is primarily a function of state government rather than the national government is true for every criminal case.” Id. at 507.

Because the Gunwall factors overall do not support a broader interpretation of the Washington due process clause, we reject Cardenas’s contention.

Request To Amend Sentence

The parties request permission to amend Cardenas’s sentence. We agree that this is appropriate.

When “an offender is sentenced to a term of confinement for one year or less” for second degree assault, “the court may impose up to one year of community custody.” RCW 9.94A.702(1)(b)-(c) (applying one-year limit to violent offenses and crimes against persons); see also RCW 9.94A.030(55) (defining violent offenses to include second degree assault); former RCW 9.94A.411 (2006) (defining crimes against persons to include second degree assault). However, while Cardenas was sentenced to only 9 months of confinement, the court imposed 18 months of community custody, in excess of the limit provided

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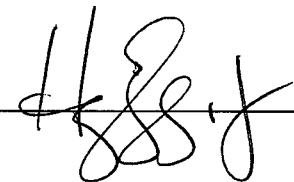
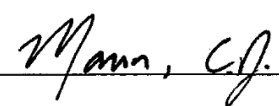
by RCW 9.94A.702.

RAP 7.2(e) provides that after we have accepted review of a decision, our permission must be acquired before the trial court may modify it. Because Cardenas's community custody term is too long, we grant permission to modify his sentence to comply with the terms of RCW 9.94A.702.

Accordingly, we affirm Cardenas's conviction and grant the parties' request to amend the sentence.

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WE CONCUR:

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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. 80076-1-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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