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Division II  
State of Washington  
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NO. 52752-9-II

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

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STATE OF WASHINGTON, Respondent

v.

COURTNEY BRYCE PROSSER, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-00784-4

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The State presented sufficient evidence that Courtney Prosser committed the crime of Robbery in the First Degree with a deadly weapon.**
- II. **Prosser waived his claim that the victim's out-of-court identification of him as the assailant was impermissibly suggestive because he did not raise the issue in the trial court nor has he explained, under RAP 2.5, how he can raise the issue for the first time on appeal.**
- III. **The record is insufficient to review Prosser's claim that the search warrant was constitutionally infirm.**
- IV. **The State agrees that the trial court erred when it imposed the discretionary \$100 crime lab fee.**

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Courtney Bryce Prosser was charged by information with Robbery in the First Degree, Possession of a Stolen Motor Vehicle, and Possession of a Controlled Substance - Methamphetamine for his actions occurring on or about March 18, 2018. CP 4-5. The robbery count also contained an allegation that Prosser committed the crime while armed with a deadly weapon, to wit: a knife. CP 4.

The case proceeded to a jury trial before the Honorable Gregory Gonzales, which commenced on October 8, 2018 and concluded on October 10, 2018. RP 34-463. The jury convicted Prosser as charged to

include the deadly weapon enhancement. CP 206-10; RP 468-476. The trial court sentenced Prosser to 158 months of total confinement. CP 237; RP 489-90. Prosser filed a timely notice of appeal. CP 253.

B. STATEMENT OF FACTS

On March 12, 2018, Nathan Bradford was driving his wife Camille Bradford's car, which was a silver, 2008, C300 Mercedes Benz. RP 157-59, 165, 167. The couple lives in Auburn, Washington, but on that day Mr. Bradford drove the car to a worksite in Everett. RP 158-59. While at the worksite, Mr. Bradford drove around to the back to make sure the back door was locked. RP 158. When he saw that it was propped open and not locked, he hopped out of his car—leaving the keys inside—and entered the building for less than five minutes to close and lock the door. He returned to find the car missing. RP 158-161.

That same silver Mercedes was next spotted on March 18, 2018 in Ridgefield, Washington at the Gee Creek Rest Area. RP 162, 168, 189, 221, 269-270. That's where Anthony Cavallo had stopped with his two young daughters, ages 7 and 9, on their way back home to Kirkland, Washington from Portland, where they had stayed the night before. RP 209-210, 212, 228. Cavallo parked his car and walked to the restroom while his daughters remained in the vehicle. RP 212-13, 229. When Cavallo walked back to his car he did so with his personal cellphone in his

hand, and just as he got to the car he was approached by Prosser who said “give me your fucking wallet.” RP 214-17.

Cavallo saw what he believed was a black knife in one hand and a black object in Prosser’s other hand that appeared to be a gun. RP 217-19. Prosser kept the knife to his side the entire time he was interacting with Cavallo. RP 217-18. Instead of handing over his wallet, Cavallo offered Prosser some cash money from his front pocket that totaled less than \$30. Prosser rejected the money stating something like “give me your wallet or I’m going to take your fucking car.” RP 218, 233. Cavallo had also placed his personal cellphone on the top of his car during the confrontation. RP 219, 232, 234-35.

Cavallo’s daughters heard Prosser’s threat to take the car and ran out of the passenger side of Cavallo’s car screaming for someone to help and call the police. RP 220. At that point, Prosser remarked that Cavallo was a “fucking idiot” for not giving up his wallet when he had kids in the car, grabbed Cavallo’s cellphone, and walked back to a silver or grey Mercedes (the Bradford’s 2008 C300). RP 220-21, 234.

Prosser drove the Mercedes out of the rest area, and Cavallo followed in his own while calling 911 from his business phone, which had been inside the car during the altercation. RP 219, 221-24, 232, 234-35. Cavallo followed Prosser for a short time going north on Interstate 5 when

he witnessed someone throw an unidentified black object out the passenger side window. RP 224-25, 235. Prosser then exited I-5, while Cavallo continued north on the freeway. RP 224.

Five to ten minutes later an officer who had responded to the 911 dispatch observed a silver Mercedes driven by a black male, which matched the description of the car and person involved in a robbery. RP 187-190. That officer eventually activated his emergency lights and stopped the vehicle. RP 194-95. Prosser exited the Mercedes as additional responding officers and deputies arrived at the scene. RP 195-97, 247, 271, 296, 304.

Prosser was detained. RP 271-72, 296. Officers also noticed that two children were inside the Mercedes. RP 176-77, 181, 248, 271. These children were identified as Prosser's sons, ages 6 and 12. RP 176-77, 181, 272. The younger child was observed to have a glass pipe hanging out of his front left pocket. RP 178-79. The pipe was seized and residue from inside the pipe tested positive for methamphetamine. RP 179-180, 321-24. Officers discovered that older child had a black folding knife in one pocket and two cellphones in the other; one of those phones was Cavallo's. RP 249, 262-63, 272-74, 297-98, 308-09, 311. Next, Cavallo

was brought to the scene where he remarked, regarding Prosser, “that’s 100% him, no doubt.” RP 253-54, 259-264.<sup>1</sup>

Police later executed a search warrant on the Mercedes that Prosser had been driving, i.e., the Bradford’s stolen car, and on a cellphone found within the car. RP 331, 334, 341. Inside the car, the searching detective located lots of clothing, a child’s backpack with “Prosser” on it as well as an email address of prosser.courtney@yahoo.com, and the Bradford’s license plates, which were properly associated with the car, folded up and under some personal items. RP 343-48.

The search of one of the recovered cellphones included pictures of one of Prosser’s children and text messages sent from “Courtney” in which he made many incriminating remarks indicating that he had knowledge that the Mercedes he was driving was stolen. RP 350-52, 359-366. For example, one text message on March 14, 2018 from Prosser stated: “I stole the goddamn car, Jennifer. Do I got to spell it out for you? . . .” while another on the same date stated: “I stole the fucking car. It’s stolen. We riding dirty in a stolen car.” Ex. 38; RP 363-66.<sup>2</sup>

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<sup>1</sup> Cavallo did not identify Prosser as his assailant at trial. The significance of this, or the lack thereof, is discussed below in the argument section.

<sup>2</sup> Prior to trial, Prosser challenged the search warrant utilized to search the relevant cellphone as lacking in particularity, among other alleged deficits, and sought to suppress the text message evidence. CP 17-26. The trial court denied the motion. 75-78.

## ARGUMENT

### **I. The State presented sufficient evidence that Courtney Prosser committed the crime of Robbery in the First Degree with a deadly weapon.**

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a jury best resolves. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996).

Notably, our Supreme Court has “reasoned that evidence of pretrial identification has greater probative value than a courtroom identification because the witness’ memory is fresher and the identification occurs before the witness can be influenced to change his mind.” *State v. Grover*,

55 Wn.App. 923, 931-32, 780 P.2d 901 (1989) (citing *State v. Simmons*, 63 Wn.2d 17, 385 P.2d 389 (1963)). Thus, it should come as no surprise that “[a] pretrial identification of the accused is admissible as substantive evidence of identity despite the witness’s inability to make an in-court identification.” *Id.* at 931 (quoting *State v. Hendrix*, 50 Wn.App. 510, 514, 749 P.2d 210 (1988)); ER 801(d)(1)(iii). Therefore, the inconsistency of a witness’s pretrial identification versus his or her in-court identification goes only to the weight of the evidence. *Id.*; *State v. Vaughn*, 101 Wn.2d 604, 610, 682 P.2d 878 (1984).

Here, sufficient evidence supports Prosser’s conviction for Robbery in the First Degree while armed with a deadly weapon. Cavallo testified that a black male approached him as he returned to his car at the Gee Creek Rest Stop. RP 214-16. That person said to Cavallo: “give me your fucking wallet,” while holding in one hand what appeared to be a black knife and holding in the other hand “a black object that looked like a gun.” RP 216-18, 230-31, 241-42.<sup>3</sup> When Cavallo did not turn over his wallet the assailant grabbed Cavallo’s personal phone off the roof of Cavallo’s car and drove away with it in a silver or grey Mercedes. RP 220-

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<sup>3</sup> Cavallo’s level of confidence in the identity of the objects in Prosser’s hands at the time of the robbery diminished to “50/50” during cross-examination. RP 230-31. That abrupt change in certainty was impeached as defense investigator Steve Teply testified that Cavallo told him that he was “98% sure on the knife” and “75% sure” that his assailant had a gun at the time of the robbery. RP 288-90.

21, 234. Cavallo decided to follow the Mercedes as it continued to I-5 north and he discontinued pursuit (while on the phone with 911) when the Mercedes exited the freeway shortly thereafter. RP 223-24, 235. Before the Mercedes exited the freeway, Cavallo saw a black object thrown from the vehicle. RP 224-25, 235.

Meanwhile, a police officer who was located north of the Gee Creek Rest Stop was dispatched to the call and informed to be on the lookout for a grey Mercedes with a black male driver. RP 187-88. Once the officer was informed that the suspect had exited I-5, he parked and waited about 5 to 10 minutes before he saw a silver or grey Mercedes driven by a black male pass by. RP 176, 189-91. The officer eventually stopped the car. RP 193.

The driver was identified as Courtney Prosser. RP 247-48. Cavallo's phone was found on the person of one of Prosser's young children who was also in the Mercedes. RP 249, 262-63, 272-73, 297-98. That same child also had a black folding knife in one of his pockets. RP 273-74, 308-09, 311. When Cavallo was brought to the scene he remarked, regarding Prosser, "that's 100% him, no doubt." RP 253-54, 259-264.

When viewing the evidence in a light most favorable to the State and deferring "to the trier of fact on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence,”  
overwhelming evidence exists to support the conclusion that Prosser was  
the person that robbed Cavallo. There is no other reasonable explanation  
for how Cavallo’s cellphone came to be in the silver/grey Mercedes that  
Prosser was driving about 10 minutes after the robbery. Furthermore,  
Cavallo’s “that’s 100% him, no doubt” pretrial identification, has “greater  
probative value than” his failed courtroom identification, and is by itself  
sufficient evidence to prove identity, “because the [Cavallo’s] memory  
[wa]s fresher and the identification occur[ed] before” he could be  
“influenced to change his mind” and was corroborated by other evidence.  
*Grover*, 55 Wn.App. at 931-32. The evidence is similarly sufficient that  
Prosser displayed a deadly weapon at the time he committed the  
robbery—the reasonable inference from the evidence is that the black  
folding knife found in Prosser’s son’s pocket was the same black knife in  
Prosser’s hand at the time of the robbery. *Camarillo*, 115 Wn.2d at 71.  
Sufficient evidence supported Prosser’s conviction for Robbery in the  
First Degree with a deadly weapon.

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**II. Prosser waived his claim that the victim’s out-of-court identification of him as the assailant was impermissibly suggestive because he did not raise the issue in the trial court nor has he explained, under RAP 2.5, how he can raise the issue for the first time on appeal.**

The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citation omitted). This “rule reflects a policy of encouraging the efficient use of judicial resources.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted). Our courts “will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Scott*, 110 Wn.2d at 685 (citation omitted). The theory of issue preservation by timely objection also “facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.” *State v. Lazcano*, 188 Wn.App. 338, 356, 354 P.3d 233 (2015) (citing *State v. Strine*, 176 Wn.2d 742, 749-50, 293 P.3d 1177 (2013)). And while a party need not intone magic words in order to preserve an argument for appeal, a party does need to at least make the essential argument and the “argument

should be more than fleeting.” *Id.* at 355; *State v. Wilson*, 108 Wn.App. 774, 778, 31 P.3d 43 (2001).

An exception to this rule exists, however, for manifest errors affecting a defendant’s constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. “In order to benefit from this exception, ‘the [defendant] must identify a constitutional error and show how the alleged error actually affected the [defendant]’s rights at trial.’” *State v. Grimes*, 165 Wn.App. 172, 180, 267 P.3d 454 (2011) (alterations in original) (quoting *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)) (quoting *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). More than that, however, is required; in order to take advantage of one of the RAP 2.5(a) exceptions on appeal, a defendant must actually present a RAP 2.5 argument to this Court. *State v. Lindsey*, 177 Wn.App. 233, 247, 311 P.3d 61 (2013).

The “manifest error” standard is exacting; “[t]he record must contain ‘nearly explicit’ facts demonstrating a constitutional violation.” *Ramirez*, 5 Wn.App.2d at 132-33 (citation omitted). In other words, a defendant cannot meet his burden if he “simply assert[s] that an error occurred at trial and label[s] the error ‘constitutional.’ . . .” *Grimes*, 165 Wn.App. at 186.

More particularly, a failure to challenge an out-of-court identification as impermissibly suggestive in the trial court—and, generally, as part of a CrR 3.6 suppression hearing—waives such a challenge on appeal unless an appellant can show that the error was manifest. *State v. Ramirez*, 5 Wn.App.2d 118, 129-133, 425 P.3d 534 (2018); *see also State v. Hall*, 40 Wn.App. 162, 165, 697 P.2d 597 (1985); *State v. Shea*, 85 Wn.App. 56, 58, 930 P.2d 1232 (1997) *overruled on other grounds by State v. Vickers*, 107 Wn.App. 960, 967 n. 10, 29 P.3d 752 (2001)); *State v. Oeung*, 196 Wn.App. 1011, 2016 WL 7217270, 31-32 (2016)<sup>4</sup>. Accordingly, an allegedly impermissibly suggestive identification is not one of those constitutional errors that our courts have concluded can always be raised for the first time on appeal. As noted by *Ramirez*, this is because “the trial record” may be “insufficient to determine the merits of the constitutional claim . . .” if the “State’s witnesses were never asked about what policies governed their pretrial identification procedures[,] [n]or was a record made regarding what steps may have been taken to protect against suggestiveness or misidentification[,]” or “whether the procedures used by law enforcement were more suggestive than necessary under the circumstances.” *Ramirez*, 5 Wn.App.2d at 132 (citation omitted).

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<sup>4</sup> This Court’s opinion in *Oeung* is unpublished. Pursuant to GR 14.1 “unpublished opinions . . . may be accorded such persuasive value as the court deems appropriate.”

Here, Prosser did not challenge the show-up identification in the trial court as impermissibly suggestive. *See* RP 116-17, 253-264. As a result, key evidence, such as the “Field Show-Up Advisement Form,” which was discussed with and signed by Cavallo, was not admitted or substantively discussed. RP 255-57. Nor was (1) the “State’s witness[] . . . asked about what policies governed the[] pretrial identification procedure[;] . . . a record made regarding [(2)] what steps may have been taken to protect against suggestiveness or misidentification[;]” or (3) “whether the procedures used by law enforcement were more suggestive than necessary under the circumstances.” *Ramirez*, 5 Wn.App.2d at 132; RP 253-264. Furthermore, Prosser has failed to argue that RAP 2.5 applies or explain how the supposed error is manifest.

Because Prosser did not make his current argument in the trial court the record is “insufficient to determine the merits of the constitutional claim” in his favor. *Id.* Thus, and because Prosser has not argued RAP 2.5 applies, this Court should hold that Prosser waived the argument that the show-up identification was impermissibly suggestive.

Nonetheless, Prosser’s argument that the show-up identification was impermissibly suggestive fails, even assuming he properly raised the issue and the record is sufficient to permit review, because the show-up was not *impermissibly* suggestive. An out-of-court identification only

“violates due process if 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) (citation omitted); *Perry v. New Hampshire*, 565 U.S. 228, 238-39, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012) (holding that “due process concerns arise only when law enforcement officers use an identification procedure that is *both* suggestive and *unnecessary*”) (emphasis added). Determining whether an identification is impermissibly suggestive requires a two-step inquiry in which the defendant bears the burden of proof. *Id.* (citation omitted).

First, the defendant must establish that the identification procedure was impermissibly suggestive, and, if successful, the trial court then “considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification.” *Id.* (citation omitted); *State v. Sanchez*, 171 Wn.App. 518, 573, 288 P.3d 531 (2012). In short, the trial court weighs the “corrupting effect of the suggestive identification procedure” against the reliability of the identification. *Vaughn*, 101 Wn.2d at 607-08.

Thus, even “identification evidence obtained through an *unnecessarily* suggestive procedure” is not “per se inadmissible” if a trial court determines that the “corrupting effect of the . . . identification procedure” is “outweighed” by factors indicating that the identification is

reliable. *Id.* at 607-08 (emphasis added). Factors indicating reliability include “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” *Id.* (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

And while “show-ups,” where witnesses or victims are brought to the crime scene or near the location of the suspect for the purpose of identifying him or her, are universally recognized as being suggestive, they are also routinely held to be permissible, lawful, and necessary.<sup>5</sup> *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *State v. Fortun-Cebada*, 158 Wn.App. 158, 170-71, 241 P.3d 800 (2010); *State v. Guzman-Cuellar*, 47 Wn.App. 326, 332-36, 734 P.2d 966 (1987); *State v. Booth*, 36 Wn.App. 66, 71, 671 P.2d 1218 (1983); *Perry*, 565 U.S. at 237; *Biggers*, 409 U.S. at 195-201. Instead, in addressing eyewitness testimony challenged as unreliable, the United States Supreme Court has remarked that the Constitution “protects a defendant against a

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<sup>5</sup> In fact, the United States Supreme Court “has held that pretrial identification procedures violated the Due Process Clause only once, in *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).” *Sexton v. Beaudreaux*, --- U.S. ----, 138 S.Ct. 2555, 201 L.Ed.2d 986 (2018).

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 . . .” such as through “confrontation plus cross-examination of witnesses.” *Perry*, 565 U.S. at 237, 245-46; *see also State v. Rogers*, 44 Wn.App. 510, 516-17, 722 P.2d 1349 (1986).

Here, the factors indicating reliability greatly outweigh the suggestive effect of the show-up procedure. Cavallo’s opportunity to view Prosser at the time of the crime was face-to-face and unimpeded by a mask or other obstruction, Cavallo’s degree of attention to Prosser was extremely high given that this was a one-on-one confrontation, Cavallo’s prior description of Prosser was accurate albeit lacking much detail, Cavallo demonstrated complete certainty that Prosser was his assailant at the confrontation remarking “that’s 100% him, no doubt”, and the time between the crime and the confrontation seems to have been as short as 30 minutes to an hour. RP 216, 224, 230, 232, 238, 240-41, 260-62, 264. In total, the show-up identification was reliable.

Moreover, based on the record that does exist, the show-up identification procedure was not *unnecessarily* suggestive. *Beaudreaux*, 138 S.Ct. at 2559. First, the show-up procedure is generally “the least intrusive means reasonably available to verify or dispel the officers’

suspicion in a short period of time.” *Guzman-Cuellar*, 47 Wn.App. at 333 (citations omitted). Second, the crime occurred during Cavallo’s travel home, with his two young children, from Portland to Kirkland. Thus, that he attempt to identify the suspect shortly after the crime but before departing was imperative. Consequently, the show-up was not unnecessarily suggestive given the circumstances and the relevant factors support the conclusion that the identification was reliable. Prosser’s claim fails.

**III. The record is insufficient to review Prosser’s claim that the search warrant was constitutionally infirm.**

Prosser challenges the search warrant issued in this case arguing that it “lacked particularity as to the evidence to be seized” and is “overly broad.” Brief of Appellant at 17-24. There is one very big problem with these claims: the search warrant is not part of the record.<sup>6</sup> Thus, the record is insufficient to review these claims.

The party ““presenting an issue for review has the burden of providing an adequate record to establish such error.”” *State v. Slett*, 181 Wn.2d 598, 608, 334 P.3d 1088 (2014) (quoting *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012)). If that party is unable to meet its

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<sup>6</sup> The State also searched the trial court record in an effort to see if the search warrant and search warrant affidavit were in fact part of the record—and would have designated them as additional clerk’s papers had either been found—but the search was unsuccessful.

burden then appellate courts should decline to review the alleged error. *State v. Locati*, 111 Wn.App. 222, 226, 43 P.3d 1288 (2002); *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007) (noting that “[i]f the trial record is insufficient to determine the merits of the constitutional claim . . . review is not warranted”); *Lazcano*, 188 Wn.App. at 357 (holding that “the facts necessary to adjudicate the claimed error must be in the record on appeal”). Similarly, a court “will not for the purpose of finding reversible error, presume the existence of facts as to which the record is silent” *State v. Jasper*, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012); *Sisouvanh*, 175 Wn.2d at 607 (stating that a trial court’s decision “is presumed to be correct and should be sustained absent an affirmative showing of error.”) (internal quotation omitted).

Mechanisms exist by which to supplement the record. RAP 9.10; RAP 9.11. RAP 9.10 “allows a party to supplement the record transmitted to this court with materials that are already part of the record that was before the trial court.” *State v. Madsen*, 153 Wn.App. 471, 485, 228 P.3d 24 (2009) *overruled on other grounds by In re Flint*, 174 Wn.2d 539, 277 P.3d 657 (2012). RAP 9.11, on the other hand, allows a party to submit additional evidence that is not part of the trial record. *Id.* But “[a]dditional evidence is seldom taken on appeal and only if the strict criteria of RAP 9.11 are met.” *Id.* (citing *East Fork Hills Rural Ass’n v. Clark County*, 92

Wn.App. 838, 845-46, 965 P.2d 650 (1998)). If a defendant fails to supplement the record through RAP 9.10 or RAP 9.11 and still “wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. . . .” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citation omitted).

Here, the search warrant and search warrant affidavit are not part of the trial court record. *See CP*. Prosser, instead, cites to his trial attorney’s declaration in support of his CrR 3.6 motion for some of the language contained in the search warrant. Br. of App. at 21-22; CP 18-19. Presuming that this is the only language needed to assess the constitutionality of the search warrant and that the quotation is accurate is unwarranted. *Locati*, 111 Wn.App. at 226. For example, *State v. Higgins* instructs that in order to determine whether a warrant is overbroad courts must look to:

(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

136 Wn.App. 87, 91-92, 147 P.3d 649 (2006) (citation and internal quotation omitted). Such an assessment is impossible without examining the search warrant affidavit and other parts of the warrant itself. *Id.* at 92-94; *see State v. McKee*, 3 Wn.App.2d 11, 27-29, 413 P.3d 1049 (2018) *overruled on other grounds by State v. McKee*, 193 Wn.2d 271, 438 P.3d 528 (2019).

Moreover, Prosser failed to file a motion to supplement the record with the search warrant or search warrant affidavit pursuant to RAP 9.10 or RAP 9.11.<sup>7</sup> Consequently, the record remains insufficient to address Prosser's claims regarding the constitutionality of the search warrant and this Court should decline Prosser's invitation to hold otherwise.

#### **IV. The State agrees that the trial court erred when it imposed the discretionary \$100 crime lab fee**

As articulated by Prosser, and pursuant to *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) and the trial court's own findings in the judgment and sentence, Prosser's indigence requires that this Court remand with instructions for the trial court to strike the imposed \$100 crime lab fee. Br. of App. at 32; CP 236, 239.

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<sup>7</sup> The State does not concede that a motion made under RAP 9.10 or RAP 9.11 would have necessarily been granted.

**CONCLUSION**

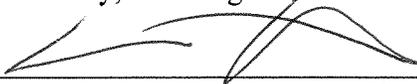
For the reasons argued above, Prosser's convictions should be affirmed and the case should be remanded for the striking of the \$100 crime lab fee.

DATED this 14<sup>th</sup> day of October, 2019.

Respectfully submitted:

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# CLARK COUNTY PROSECUTING ATTORNEY

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## Transmittal Information

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