SUPREME COURT NO. 102267-1

NO. 56596-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDREW WINDROW,

Petitioner.

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

The Honorable Donald Richter, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Andrew Kayne Windrow, appellant below, asks this Court to review the decision of the Court of Appeals referenced below.

B. COURT OF APPEALS DECISION

Windrow seeks review of the court of appeals decision in State v. Windrow, No. 56596-0-II (Slip Op. filed June 27, 2023). A copy of the slip opinion is attached as Appendix A. A copy of the order denying Windrow's motion to reconsider, filed July 17, 2023, is attached as Appendix B.

C. REASON WHY REVIEW SHOULD BE GRANTED

Review is warranted under RAP 13.4(b)(1) because the court of appeals decision conflicts with a prior decision of this Court.

D. ISSUE PRESENTED

In State v. Derri, 199 Wn.2d 658, 511 P.3d 1267 (2022), this Court held the due process clause of the Fourteenth Amendment requires exclusion of eyewitness identification

evidence obtained by an unnecessarily suggestive procedure and is unreliable under the totality of circumstances. Does the court of appeals decision in Windrow conflict with this Court's decision in Derri by wrongly concluding the in-court identification procedure employed at Windrow's trial was not impermissibly suggestive and unreliable?

E. STATEMENT OF THE CASE

1. *The Incident and Investigation*

In August 2021, Mary Rae Bettger rented a cabin in Ocean Park, Washington. RP 64. Sometime prior to 4 a.m. one morning Bettger decided to drive onto the beach to look at the stars. RP 64, 70. As Bettger approached the beach in her car, she saw headlights coming towards her. She stopped to see where the car would go before proceeding. As the car got closer it appeared to speed up and then "veered over and hit the front end" of Bettger's car, despite her headlights being on. RP 64-65. Bettger recalled that after the car initially hit her it then backed

up, the driver thrust his torso out of the driver's window and began yelling and striking her car with a machete. RP 66, 71.

Bettger said she backed up in an attempt to escape and "floored it away from the area," but the other car followed. Despite Bettger's attempts to evade, the other car caught up and rammed her from behind causing her to go off the road into heavy brush before driving away. RP 68. Bettger got out of her car and made her way to a nearby home, whose residents called 911 on her behalf. RP 70.

Pacific County Sheriff Deputy Nicholas Zimmerman responded to the 911 call and Bettger explained what happened. RP 72, 81. Zimmerman saw damage to the front, back, driver, and passenger sides of Bettger's car. RP 84, 88. He also noticed debris near her car that appeared to be off something other than Bettger's car. RP 84.

Zimmerman went to the approach to the beach where the incident began. RP 85. There he found more debris, including shattered headlights or taillights, and a license plate. RP 86. The

license plate was traced to Windrow's car, a 1999 silver Subaru Legacy. RP 112-13.

Zimmerman located Windrow's car later that day. Windrow was in the driver's seat. RP 91. When Zimmerman asked, "what the issue was at the time," Windrow replied that his car "was broken" and asked Zimmerman for "a jump" because his battery was dead. RP 92. Zimmerman agreed to provide "a jump," which gave him the opportunity to observe Windrow's car. He noticed it had "substantial front-end damage and a missing alternator belt, which explained why the battery was dead. RP 92. He also saw a hatchet on the floor near Windrow's feet. RP 102. Although Zimmerman considered Windrow a suspect, he chose not to arrest him at the time and instead did so after speaking with Bettger. RP 93, 105.

Zimmerman admitted he never showed Bettger a photo of Windrow. RP 105. He also admitted Bettger never confirmed with Bettger that Windrow was the person who drove the car that struck her car or used the machete against her car. RP 105-06.

2. *The Charges, Trial, & Sentencing*

The Pacific Count Prosecutor charged Windrow with second degree assault and second degree malicious mischief. CP 6-7; RCW 9A.36.021(1)(c); RCW 9A.48.080(1)(a). A jury trial was held in November 2021, before the Honorable Judge Donald Richter. RP 13-172.

At trial, Bettger provided the following testimony about the identity of her assailant:

> Q [PROSECUTOR]. So, when the individual that hit you on the beach approach was leaning out of his car, torso out, were you able to get a look at him?
> A. I did get a look, yeah.
> Q. Can you point to the person that you recognize as the person who assaulted you on that evening?
> A. (No audible response.)
> Q. Can you identify this person?
> A. I -- I don't know that I absolutely can, unless the hair cut and that -- the positioning –
> Q. Is there anything –
> A. -- were exactly the same.
> Q. Describe the person that you saw that night?
> A. Someone with brown-ish hair, a little shaggy, a little longer. Kind of a -- I don't know, a look of maybe rage on the face. That –
> Q. Do you recognize anyone here in the courtroom that you believe to be the person that assaulted you that night?

A. I don't –

MR. ARCURI: Objection; leading and asked and answered.

THE COURT: I'll sustain as to leading.

Q. (By Ms. Munger:) Do you see the man who hit you in the courtroom here today?

MR. ARCURI: Objection; asked and answered.

Q. (By Ms. Munger:) That you can identify?

THE COURT: It's been objected to. I don't think the witness has had an opportunity to answer that question. I'll overruled the objection.

THE WITNESS: The man at the bench?

Q. (By Ms. Munger:) Can you point?

A. (Witness complies.)

Q. Can you describe a piece of clothing that he's wearing?

A. Oh, that he's wearing currently? Like a black jacket and a navy blue t-shirt.

MS. MUNGER: And let the record reflect that the witness has identified the Defendant, Andrew Windrow.

RP 73-74.

On cross, defense counsel elicits from Bettger:

Q. So, on August 8th, you spoke with police that night; right?

A. Yes.

Q. And did you describe to them who you thought had possibly assaulted you that night?

A. I don't recall if I tried to make a description.

Q. At any point did the officer show you a photo lineup so that you could identify who your attacker was?
A. No.
Q. At any point –

THE COURT: I'm sorry, what was the answer?

THE WITNESS: Oh, no.

THE COURT: Okay. Please speak up.

Q. (By Mr. Arcuri:) At any point did the officers bring you by a suspect so that you could confirm that was the person that hit you?
A. No.
Q. At any point did you identify definitively to the officers who had struck you that night?

MS. MUNGER: Objection, Your Honor; that has been asked and answered.

THE COURT: I'm going to overrule. You may answer the question.

THE WITNESS: I'm sorry, could you repeat that sir?

Q. (By Mr. Arcuri:) Did you ever positively identify any individual as the person who had struck you that night?
A. No.
Q. And this incident occurred three months ago; right?
A. Obviously, yeah.
Q. And you're sure, today, that the Defendant is the one who hit you, even though it's been three months since you'd possibly seen your attacker?
A. Well, I think it's pretty well burned into my mind. If he were to lean that way, if the hair, yeah, I would say positive –

Q. Even though you didn't identify anyone to the police throughout this entire process?
A. I had no idea who hit me. I had no idea -- I mean, I had –
Q. So, on the -- on the incident day when you're speaking to the police, you have no idea who hit you?
A. Well, I don't -- no.
. . .
Q. (By Mr. Arcuri:) So, after all this time, you've never said to anyone, including the police, that Mr. Windrow was the one driving the vehicle that hit you; correct?
MS. MUNGER: Asked and answered.
THE COURT: No, overruled.
THE WITNESS: Correct.
Q. (By Mr. Arcuri:) So, today when you are in court today is the first time you are identifying the Defendant as the person who attacked you?
A. Okay, I guess that would be accurate.

RP 75-78.

On redirect, the prosecutor elicited from Bettger:

Q. Did anyone -- after you spoke to the police the first time, or, well, after the time you spoke to the police, did anyone ever re-contact you and ask you to identify anyone?
A. I was contacted again by Officer Zimmerman, excuse me.
Q. Did he, during that second contact, ask you to identify someone, either by photos or anything like that?
A. Not that I recall.

> Q. So, the reason then that you're identifying the Defendant for the first time today is because no one has ever asked you to before?
> A. That's correct.

RP 78-79.

After the prosecution rested its case, the court granted the defense motion to dismiss the malicious mischief charge for lack of evidence. RP 121-22. The defense rested. RP 125.

In closing argument defense counsel conceded Windrow's car was used to assault Bettger, but argued the prosecution failed to prove it was Windrow driving at the time of the assault. RP 154-61.

The jury found Windrow guilty of assault as charged. CP40: RP 167-69. Windrow was sentenced to 50 months of incarceration and 18 months of community custody. CP 45-57.

3. *The Appeal*

On appeal, Windrow raised four claims. First, he argued the trial court erred by overruling trial counsel's "asked and answered" objection to the prosecutor repeatedly asking Bettger

if she could identify her assailant in court. Brief of Appellant (BOA) at 12-17. Next, Windrow argued the prosecutor committed flagrant and ill-intention misconduct by eliciting an impermissibly suggestive identification from Bettger that Windrow was her assailant when she had already stated she could not positively identify who was driving. BOA at 18-28. Next Windrow argued that to the extent his attorney failed to preserve the previous two claims, then he was deprived of his right to effective assistance of counsel. BOA at 28-32. Finally, Windrow argued cumulative error warranted reversal. BOA at 32-33.

The majority opinion issued by the Court of Appeals rejected Windrow's first claim on the basis that it was not preserved for appeal and did not constitute manifest error affecting a constitutional right. Appendix A at 4-8. As to the prosecutorial misconduct claim, the majority opinion concluded there was no flagrant and ill-intentioned misconduct, and that Windrow could not show prejudice. Appendix A at 8-10.

Finally, the majority opinion rejected Windrow's ineffective assistance of counsel claim for lack of prejudice, and the cumulative error claim based on the lack of error. Appendix A at 10-11.[1]

In a concurring opinion, Judge Veljacic opined that under the current state of the law, Windrow's conviction should be affirmed, but wrote separately to voice his concerns about "the in-court identification procedure utilized [at Windrow's trial] where it was the first identification procedure undertaken by the State." Appendix A at 13. Judge Veljacic noted:

> While we have historically been content to allow a first time identification procedure in open court because it was tested by cross-examination in the presence of the jury and was, therefore, as good as we could do, I disagree that continuation of this historical practice is the best course in light of what we now know about memory and identification.

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[1] The majority opinion also rejected the issues raised by Windrow in his pro se Statement of Additional Grounds for Review. Appendix A at 11.

Appendix A at 13 (omitted citations are to recent studies showing the unreliability of eyewitness identification).

Judge Veljacic concludes his opinion as follows:

> Whether steeped in history or not, we should not sacrifice a low pressure, neutrally administered, sequential lay down of photos comprised of similarly appearing individuals in favor of a high pressure request for a witness to, not simply confirm a prior identification, but rather, for the first time, select from a pool of one.

Appendix A at 16.

F. ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S DECISION IN DERRI.

In June 2022, this Court issued its most recent decision on what constitutes an impermissibly suggestive identification procedure, State v. Derri, supra. The specific issue was "whether trial courts must consider new scientific research, developed after the 1977 Brathwaite[2] decision, when applying that federal

[2] Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

due process clause test." 199 Wn.2d at 663. This Court held "that courts must consider new, relevant, widely accepted scientific research when determining the suggestiveness and reliability of eyewitness identifications." Id.

This Court also held that "the due process clause of the Fourteenth Amendment compels exclusion of eyewitness identification evidence" that was "obtained by an unnecessarily suggestive police procedure" and "lacks reliability under the totality of circumstances." 199 Wn.2d at 673.

As has been recognized for decades, misidentification by eyewitnesses is the "single greatest cause of wrongful convictions in this country." Perry v. New Hampshire, 565 U.S. 228, 263-64, 132 S. Ct. 716 (2012) (Sotomayor, J., dissenting) (internal citations omitted). In fact, a "staggering" 76% of the first 250 wrongful convictions overturned by DNA evidence were based on eyewitness misidentification. Id.; See also Brathwaite, 432 U.S. 98 at 119 (Marshall, J., dissenting).

> Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures.

Id. (footnotes omitted).

Empirical research demonstrates that eyewitness identifications are probably only accurate about 50% of the time.[3] In one classic study, bank tellers who were exposed to attempted fraud by a customer identified an innocent person as the attempted fraudster in a photo lineup 40% of the time a few hours later.[4]

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[3] Michael R. Leippe & Donna Eisenstadt. *Eyewitness Confidence and the Confidence- Accuracy Relationship for Memory in People*, in The Handbook of Eyewitness Psychology: Vol. II Memory for people 375, 385) (R. C. L. Lindsay et al. eds., 2007).

[4] See James M. Lampinen et al. *The Psychology of Eyewitness Identification* 5 (Routledge 2012).

The Due Process guarantee of fairness prohibits the admission of an unreliable eyewitness identification in a criminal trial. Derri, 199 Wn.2d at 673; Manson, 432 U.S. at 113-14; U.S. Const. Amend. XIV; Wash. Const. art. I, sec. 3.

Whether an eyewitness identification of a defendant is so unreliable as to violate the Due Process clause of the federal constitution requires a two-step inquiry. Perry, 565 U.S. at 238-39. The first question is whether the identification procedure was unnecessarily suggestive. Id.

Where the defendant demonstrates the identification procedure was unnecessarily suggestive, "the corrupting effect of the suggestive identification itself" must be weighed against other factors probative of the reliability of the witness' identification. Manson, 432 U.S. at 114. The impermissibly suggestive procedure violates due process when it "creates an irreparable probability of misidentification." Id. at 116.[5]

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[5] This constitutional issue is reviewed de novo. State v. Jorgenson, 179 Wn.2d 145, 150, 312 P.3d 960 (2013).

An identification meets due process only if it is not so impermissible as to create a substantial likelihood of misidentification. State v. Brown, 128 Wn. App. 307, 312, 116 P.3d 400 (2005). Generally, courts have held identification procedures "to be impermissibly suggestive solely when the defendant is the only possible choice given the witness's earlier description." State v. Ramires, 109 Wn. App. 749, 761, 37 P.3d 343 (2002).

A defendant making a claim of an impermissible identification procedure must first show the procedure was impermissibly suggestive. If the defendant fails to meet this initial burden, the inquiry ends. Brown, 128 Wn. App. at 312–13. If the defendant meets this burden, then the court determines whether the identification procedure contains sufficient indicia of reliability despite the suggestiveness. Brown, 128 Wn. App. at 312–13.

The product of an impermissibly suggestive identification process may still be admissible at trial if it is otherwise sufficiently reliable. Brown 128 Wn. App at 313.

> In considering the reliability of the identification, the court may consider: (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 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.

Ramires, 109 Wn. App. at 762 (citing State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)).

Not until repeatedly being asked to point to her alleged assailant in the courtroom did Bettger questionably identify Windrow by stating, "The man at the bench?" RP 74. Windrow was the only choice Bettger had as he was the only one of two people at the defense table and it was already apparent the other person was defense counsel.[6] Under Ramires, this was an

[6] In his motion to reconsider, Windrow argued the majority decision misconstrued the facts by claiming Bettger would not have known who the defendant was and who was defense

impermissibly suggestive identification technique. 109 Wn. App. at 761.

The only Ramires factor not weighing against admitting Bettger's identification of Windrow as her assailant is factor (5) because it was only about three months between the crime and her confrontation with Windrow at trial. But given Bettger's limited view of the driver coupled with the lack of a detailed description of her assailant or ever making a pretrial identification of Windrow as her assailant, this factor does not weigh in favor of admitting her in-court identification. As discussed below, the four remaining Ramires factors all weigh against a reliable identification.

Although Bettger testified she got "a look" at her assailant when he protruded out of the car and struck her car with a machete, she did not immediately point to Windrow as that

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counsel, when in fact it is clear from the record she would have known who defense counsel was before she was asked to identify her alleged assailant. Motion to Reconsider at 1-8.

person, instead admitting she could not be sure who it was. RP 73. And when she eventually did point to Windrow, her accompanying response was in the form of a question. "The man on the bench?" RP 74. These facts indicate a lack of reliability under factors (1) (opportunity to view the criminal at the time of the crime) and (2) (the witness' degree of attention).

And Bettger provided only a vague description of her assailant as "[s]omeone with brown-ish hair, a little shaggy, a little longer" with "maybe rage on the face." RP 73. She never identified his race, height, weight or what he was wearing. Nor could Bettger recall if she ever gave law enforcement a description of her assailant on the day of the incident. RP 75. Bettger was never asked to identify Windrow as the assailant prior to trial. RP 75, 76, 79, 105-06. Under Ramires factor (3), these fact ways against the reliability of Bettger's in-court identification of Windrow as the assailant.

Finally, as for factor (4) – "the level of certainty demonstrated at the confrontation" – Bettger initially said she

could not identify her assailant in the courtroom, and when she did identify Windrow, she did so as if seeking approval from the prosecutor that she was correct and even afterwards admitted she had "no idea" who her assailant was. RP 76.

Despite Bettger's repeated statements that she could not identify her assailant in the courtroom, the prosecutor persisted over defense objection, eventually getting her to questionably point to Windrow. Even if this was not flagrant and ill-intention prosecutorial misconduct, it did violate Windrow's due process right to a fundamentally fair trial because admission of unreliable eyewitness identification testimony in a criminal trial violates the due process clause. Derri, 199 Wn.2d at 673; Manson, 432 U.S. at 113-14; U.S. Const. Amend. XIV; Wash. Const. art. I, sec. 3.

The court of appeals majority decision concludes Windrow failed to establish Bettger's in-court identification was inherently unreliable in violation of the due process clause is not supported by the record. Had it correctly assessed the totality of the circumstances surrounding Bettger's in-court identification,

including considering "new, relevant, widely accepted scientific research when determining the suggestiveness and reliability of eyewitness identifications," as required by Derri, it would not have concluded Windrow failed to establish manifest error affecting a constitutional right. 199 Wn.2d at 663; see Appendix A at 7 (majority holding Windrow failed to establish manifest error affecting a constitutional right).

As Judge Veljacic noted in his concurrence, recent scientific research has revealed the ability of an eyewitness to accurately identify a stranger often fades within hours,[7] 70 percent of wrongful convictions discovered through DNA are the

[7] Citing 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, 959 (2015) ("Studies indicate that faces are often forgotten only a few hours after an event, and that after one day, the recall of a 'strangers' age, hair color, and height [is] usually inaccurate.'" (alteration in original) (quoting Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RIGHTS. L. REV. 755, 771 (2005))).

product of eyewitness misidentification,[8] and cross examination of an eyewitness who has misidentify a person is likely less effective because they are stating what they believe is the truth, even though they are wrong.[9] Appendix A at 13-14.

G. CONCLUSION

The court of appeals affirmed Windrow's conviction on the basis that he failed to show Bettger's in-court identification was constitutionally unreliable. Appendix A. But under Derri, Bettger's tepid in-court identification of Windrow as her

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[8] Citing Samantha L. Oden, Note, *Limiting First-Time In-Court Eyewitness Identifications: An Analysis of State v. Dickson*, 36 QUINNIPIAC L. REV. 327, 330 (2018) (stating that more than 70 percent of wrongful convictions overturned by DNA testing in the nation are attributed to eyewitness misidentification).

[9] Citing ; Jennifer L. Overbeck, Note, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1905 (2005) ("Many eyewitnesses are telling the truth as they recall it; they are simply mistaken. Because they believe they are telling the truth, they are somewhat less vulnerable to cross-examination.") and Jack B. Weinstein, *Eyewitness Testimony*, 81 COLUM. L. REV. 441, 443-45 (1981) (book review) (discussing that post-event information and interactions can impact memory).

assailant was the product of an impermissibly suggestive procedure and not otherwise reliable and should not have been admitted. Whether in the context of a manifest error affecting a constitutional right, prosecutorial misconduct, or ineffective assistance of counsel, as argued in Windrow's opening and reply briefs, his conviction should have been reversed and remanded for a new, fair trial. This Court should therefore grant review under RAP 13.4(b)(1).

I certify that this document was prepared using word processing software and contains 3882 words excluding those portions exempt under RAP 18.17.

DATED this 15th day of August, 2023.

Respectfully submitted,

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_____

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Appendix A

Filed
Washington State
Court of Appeals
Division Two

June 27, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW KAYNE WINDROW, Appellant.	No. 56596-0-II UNPUBLISHED OPINION

CRUSER, A.C.J. — Mary Rae Bettger was attacked early one morning. Bettger identified Andrew Kayne Windrow as her assailant for the first time at Windrow's trial for second degree assault. A jury convicted Windrow.

Windrow appeals. He argues that the trial court abused its discretion by overruling his objection to the in-court identification procedure. He also contends that the prosecutor committed misconduct through the identification procedure and that his attorney provided ineffective assistance. Windrow asserts that cumulative errors require a new trial. He also filed a statement of additional grounds for review (SAG) arguing that a towing company unlawfully sold his vehicle.

We affirm Windrow's conviction. We decline to address Windrow's SAG because it is not a matter related to the decision under review.

FACTS

I. BACKGROUND

Around 4:00 a.m. one morning, Bettger drove to the beach to look at the stars. When she neared the beach, Bettger saw a vehicle approaching from the other direction and stopped to let it pass. As it approached, the vehicle veered over and struck the front driver's side of Bettger's vehicle. The vehicle then backed up and a man leaned out of the driver's window. The man yelled at Bettger and struck at her vehicle several times with what Bettger believed was a machete.

Bettger turned her car around and fled. The vehicle pursued Bettger for several blocks before ramming her and sending her off the road. By the time Bettger got out of her car, the other vehicle was gone. Bettger sought help from residents in the area who called 911. While Bettger sat in the emergency aid vehicle, she heard yelling outside that sounded similar to the man that struck her vehicle.

Deputy Nicholas Zimmerman investigated the incident. He observed damage to Bettger's vehicle that included several six-inch dents near the driver's window. He also noticed debris nearby that was different from the color and damaged parts of Bettger's vehicle. At the beach approach, Zimmerman found a damaged front bumper and a license plate. The bumper had "Subaru" printed on it and was marred with blue paint the same color as Bettger's vehicle. The foam lining for the bumper matched the debris found near Bettger's vehicle. Zimmerman traced the license plate to a 1999 silver Subaru Legacy registered to Windrow.

Later that day, Zimmerman found Windrow in the driver's seat of a silver 1999 Subaru Legacy. The car's rear license plate matched one found at the beach approach. The car had substantial front-end damage. Windrow asked Zimmerman for a jump start because his car's

battery was dead. The damage to Windrow's car included missing the entire front bumper and the alternator belt, which charges the car battery.

After jumping Windrow's car, Zimmerman obtained a statement from Bettger. Zimmerman never showed Bettger a photo of Windrow or a photo lineup of her suspected assailant. And he never confirmed with Bettger that she saw Windrow driving the Subaru. Zimmerman then arrested Windrow. During the arrest, Zimmerman found an 18 to 20-inch-long hatchet in Windrow's car. The blade of the hatchet was consistent with the marks on Bettger's car.

The State charged Windrow with one count of second degree assault and one count of second degree malicious mischief.

II. TRIAL

At trial, Bettger identified Windrow as her assailant for the first time:

> [PROSECUTOR:] Can you point to the person that you recognize as the person who assaulted you on that evening?
> [BETTGER:] (No audible response.)
> [PROSECUTOR:] Can you identify this person?
> [BETTGER:] I—I don't know that I absolutely can, unless the hair cut and that—the positioning—
> [PROSECUTOR:] Is there anything—
> [BETTGER:] —were exactly the same.
> [PROSECUTOR:] Describe the person that you saw that night?
> [BETTGER:] Someone with brown-ish hair, a little shaggy, a little longer. Kind of a—I don't know, a look of maybe rage on the face. That—
> [PROSECUTOR:] Do you recognize anyone here in the courtroom that you believe to be the person that assaulted you that night?
> [BETTGER:] I don't—
> [DEFENSE COUNSEL]: Objection; leading and asked and answered.
> THE COURT: I'll sustain as to leading.
> [PROSECUTOR:] Do you see the man who hit you in the courtroom here today?
> [DEFENSE COUNSEL]: Objection; asked and answered.
> [PROSECUTOR:] That you can identify?
> THE COURT: It's been objected to. I don't think the witness has had an opportunity to answer that question. I'll overruled the objection.

> [BETTGER:] The man at the bench?
> [PROSECUTOR:] Can you point?
> [BETTGER:] (Witness complies.)
> . . .
> [PROSECUTOR]: And let the record reflect that the witness has identified the Defendant, Andrew Windrow.

Report of Proceedings (RP) at 73-74.

On cross-examination, Bettger acknowledged that she never identified Windrow as her assailant in the three months since the incident, at one point stating, "I had no idea who hit me." RP at 76. On redirect examination, she explained that she identified Windrow for the first time that day because no one had ever asked her to identify her assailant before.

After the State rested, Windrow moved to dismiss the malicious mischief charge. The court granted the motion and dismissed the charge.

In closing argument, defense counsel conceded that Windrow's vehicle was used to assault Bettger. But counsel argued that Bettger's weak identification of Windrow as her assailant meant the State failed to prove beyond a reasonable doubt that Windrow was the driver. Through jury instruction 11, which addressed factors affecting the weight the jury should give eyewitness identification testimony, counsel argued that Bettger's identification was not credible in part because Bettger struggled to identify her assailant in the courtroom.

The jury convicted Windrow of second degree assault and the trial court sentenced him to 50 months of confinement. Windrow appeals his conviction.

ANALYSIS

I. EVIDENTIARY RULING

Windrow argues that the trial court abused its discretion and denied him his right to a fair trial by overruling his "asked and answered" objection to Bettger's in-court identification. Br. of

Appellant at 3, 12-17. He reasons that the in-court identification procedure was impermissibly suggestive and it was the only direct evidence that he was the driver. Because Windrow challenges the identification on the ground that it was impermissibly suggestive for the first time on appeal and has not demonstrated a manifest error affecting a constitutional right, we decline to review this issue.

A. Preservation for Review

RAP 2.5(a) authorizes this court to "refuse to review" any alleged error not raised in the trial court, unless the claimed error relates to a lack of trial court jurisdiction, the failure to establish facts upon which relief could be granted, or a manifest error affecting a constitutional right.

Windrow did not preserve the error below. He objected to the identification procedure on the grounds that Bettger already answered that she could not identify her assailant in the courtroom. At no point in our record of proceedings below did Windrow ever assert that the identification procedure was impermissibly suggestive. Thus, we may decline to review this issue unless he meets one of the RAP 2.5(a) exceptions. Windrow's contention does not target the RAP 2.5(a) exceptions of trial court jurisdiction or the failure to establish facts meriting relief, so he must demonstrate a manifest error affecting a constitutional right.

B. Manifest Error

A party demonstrates manifest constitutional error by showing that the issue affects their constitutional rights and that they "suffered actual prejudice." *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020), *review denied*, 195 Wn.2d 1025 (2020). To demonstrate actual prejudice, the defendant must make a plausible showing that the claimed error had practical and identifiable consequences in the trial. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 to the Washington Constitution guarantee criminal defendants the right to a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). In particular, "the due process clause of the Fourteenth Amendment compels exclusion of eyewitness identification evidence" that was "obtained by an unnecessarily suggestive police procedure" and "lacks reliability under the totality of circumstances." *State v. Derri*, 199 Wn.2d 658, 673, 511 P.3d 1267 (2022); *see Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Under *Brathwaite*, Windrow must establish by a preponderance of the evidence that the identification procedure was "unnecessarily suggestive." *Derri*, 199 Wn.2d at 674. "Generally, courts have found [out-of-court] lineups or montages to be impermissibly suggestive solely when the defendant is the only possible choice given the witness's earlier description." *State v. Ramires*, 109 Wn. App. 749, 761, 37 P.3d 343 (2002). If Windrow fails to show that the identification procedure was impermissibly suggestive, the inquiry ends. *Id.*

Here, Windrow has not shown that the identification procedure was impermissibly suggestive. Bettger never identified Windrow before his trial, so there was no prior description to rely on where Windrow was "the only possible choice." *Id*. Although Windrow is correct that at trial he was "one of two people at the defense table," Br. of Appellant at 24, both people were men, and our record does not include a physical description of defense counsel or a description of either person's attire. It is standard practice to exclude witnesses from courtrooms before they testify, *see* ER 615, so Bettger would not have known which person was the attorney until counsel began making objections. As discussed above, there is no evidence in our record that Windrow objected to the suggestiveness of the procedure either beforehand or at the time of the identification.

Counsel could have requested a hearing outside the presence of the jury and raised the same contention Windrow now asserts for the first time on appeal. He did not. Thus, Windrow failed to develop the record below showing that the procedure was suggestive. *Derri*, 199 Wn.2d at 674.

Windrow also cannot demonstrate prejudice. Circumstantial and direct evidence are equally reliable. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017). Because the identification occurred in-court, Windrow cross-examined Bettger about the reliability of her testimony and encouraged the jury to find reasonable doubt about her credibility in closing argument. Bettger's identification of Windrow was shaky at best. Even without Bettger's identification, the circumstantial evidence presented at trial supported a strong inference that Windrow was the man who attacked Bettger. Defense counsel conceded that Windrow's car was used to assault Bettger. The day of the assault, police found Windrow in that car, which sustained damage during the assault that would have made it inoperable shortly thereafter due to the lack of an alternator belt to charge the battery. And police found a hatchet inside the car that was consistent with the marks on Bettger's vehicle. Windrow cannot show that he would have been acquitted without Bettger's identification, so he has not demonstrated practical and identifiable consequences in his trial to establish a manifest error. *O'Hara*, 167 Wn.2d at 99.

In sum, Windrow failed to preserve this issue for our review and cannot demonstrate a manifest error affecting a constitutional right. We thus decline to reach this issue.

C. Overruling Windrow's Objection

To the extent that Windrow argues that the trial court abused its discretion in overruling his second "asked and answered" objection because Bettger previously answered the State's question, Br. of Appellant at 14, we also disagree. We review a trial court's decision to admit

evidence for abuse of discretion, which occurs when the decision is based upon untenable grounds or was made for untenable reasons. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). Bettger did not ever explicitly testify that she could not identify her assailant in the courtroom. She first responded "I don't know that I absolutely can," and her second response was interrupted by defense counsel's objection. RP at 73. Neither response was an unambiguous assertion that she could not identify her assailant. Thus, the trial court did not abuse its discretion in overruling Windrow's second "asked and answered" objection.

II. PROSECUTORIAL MISCONDUCT

Windrow argues that the prosecutor committed misconduct because her questioning of Bettger constituted an inadmissible, impermissibly suggestive identification procedure. We disagree.

A. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). We will conclude that a defendant who did not object to the prosecutor's conduct at trial "waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. We will "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762. The defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

We view a prosecutor's conduct in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Eliciting facts to admit as evidence, then presenting argument based on those facts, is the standard role of the prosecutor. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 166, 410 P.3d 1142 (2018) ("Facts are the responses to the 'who, what, where' questions prosecutors ask at trial.").

B. Application

As discussed above, Windrow objected to the identification at trial on the sole ground that Bettger had already been asked and failed to identify her assailant. Windrow did not argue below that it was improper for a prosecutor to elicit an identification that, it was later argued, was impermissibly suggestive. We hold that Windrow fails to show that the prosecutor's questioning was flagrant, ill intentioned, or prejudicial.

An in-court identification is admissible evidence if the State can establish by clear and convincing evidence that the in-court admission has "an origin independent of [any] improper identification procedure." *State v. Smith*, 36 Wn. App. 133, 138, 672 P.2d 759 (1983). Here, Bettger never even described the appearance of her assailant before Windrow's arrest and she did not participate in *any* pretrial identification procedure. Knowing this, the prosecutor asked Bettger if she could identify anyone in the courtroom as the man who attacked her. Bettger explained that she was not absolutely certain, stated that she remembered her assailant having "a little longer," "shaggy," "brown-ish hair" and "a look of maybe rage on the face," then pointed at Windrow. RP at 73. As discussed above, Windrow has not provided a sufficient record for us to conclude that the identification procedure was impermissibly suggestive. And it is proper for a prosecutor to

elicit a witness's version of events from the witness as long as the manner of questioning is not flagrant or ill intentioned. *Phelps*, 190 Wn.2d at 166. Windrow fails to show that the prosecutor's questioning here was flagrant or ill intentioned, much less prejudicial. We hold that Windrow has waived any alleged error.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Windrow argues that he received ineffective assistance because trial counsel failed to support his objection to Bettger's in-court identification of Windrow with proper authority. We disagree.

Criminal defendants are guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To show ineffective assistance, a defendant must establish that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Id.* at 32-33. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* at 33. We strongly presume that counsel's performance was reasonable, but defendant may overcome the presumption by showing that no conceivable legitimate tactic explains counsel's decision. *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). When and how an attorney objects is a "classic example of trial tactics." *Id.* at 248. To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* at 248. An ineffective assistance of counsel claim fails if a defendant fails to establish either prong. *Grier*, 171 Wn.2d at 33.

Even assuming without deciding that defense counsel provided deficient performance by failing to object that the identification procedure was impermissibly suggestive, Windrow cannot show prejudice. As discussed above, the circumstantial evidence admitted at trial supports a strong inference that Windrow was the driver who assaulted Bettger. There is not a reasonable probability that, but for Bettger's identification of Windrow, the outcome of the proceedings would have been different. Accordingly, we hold that Windrow's ineffective assistance of counsel claim fails.

IV. CUMULATIVE ERROR

Windrow argues that cumulative errors denied him a fair trial, warranting reversal of his conviction. "[A] defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *Emery*, 174 Wn.2d at 766. Windrow fails to show any error, so the cumulative error doctrine does not apply.

V. SAG

In his SAG, Windrow argues that a towing company unlawfully sold his vehicle. SAG at 1. RAP 10.10(a) provides that on direct appeal, "the defendant may file a pro se statement of additional grounds for review to identify *and discuss those matters related to the decision under review* that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." (emphasis added). Windrow's SAG does not discuss a matter related to the decision under review because it does not relate to the elements of second degree assault or call his conviction into doubt. Windrow's argument is better addressed in the civil realm. Accordingly, we decline to address his argument.

CONCLUSION

We affirm Windrow's conviction.

Cruser, J.

We concur:

Glasgow, C.J.

VELJACIC, J. (concurring) — I agree with my colleagues in the majority that under current applicable law, in light of the arguments made by the parties, the conviction should be affirmed. I write separately because I cannot help but be troubled by the in-court identification procedure utilized here where it was the first identification procedure undertaken by the State.

The typical in-court identification occurs *after* an identification procedure during law enforcement's investigation. The purpose of the in-court identification is to answer the relevant question of whether the individual in court is the same individual previously identified. But when the in-court identification is the first presentment of the alleged perpetrator to the eyewitness, the procedure has a high likelihood of being impermissibly suggestive. In that context, with the defendant sitting at counsel table, there is little mystery as to who the witness will identify—the person in the defendant's seat.

It may be fairly argued that the witness will identify the person in the defendant's seat because they, in fact, committed the crime. But we would be better served in our credibility as a court system were we to utilize defensible practices that recognize that the person in the defendant's seat may *not* have committed the crime and instead will be identified as the assailant because the witness was provided only one choice of assailant—the person in the defendant's seat.

While we have historically been content to allow a first time identification procedure in open court because it was tested by cross-examination in the presence of the jury and was, therefore, as good as we could do, I disagree that continuation of this historical practice is the best course in light of what we now know about memory and identification. *See, e.g.,* 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, 959 (2015) ("Studies indicate that faces are often forgotten only a few hours after an event, and that after one day, the recall of a 'strangers' age, hair color, and height [is] usually inaccurate.'" (alteration in original) (quoting Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RIGHTS. L. REV. 755, 771 (2005))); Samantha L. Oden, Note, *Limiting First-Time In-Court Eyewitness Identifications: An Analysis of* State v. Dickson, 36 QUINNIPIAC L. REV. 327, 330 (2018) (stating that more than 70 percent of wrongful convictions overturned by DNA testing in the nation are attributed to eyewitness misidentification); Jennifer L. Overbeck, Note, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1905 (2005) ("Many eyewitnesses are telling the truth as they recall it; they are simply mistaken. Because they believe they are telling the truth, they are somewhat less vulnerable to cross-examination."); Jack B. Weinstein, *Eyewitness Testimony*, 81 COLUM. L. REV. 441, 443-45 (1981) (book review) (discussing that post-event information and interactions can impact memory).

To understand fully, one need only juxtapose an investigatory identification procedure with an in-court identification procedure. In one type of investigatory identification procedure, moderately sized photos of similarly appearing individuals are sequentially presented with uniform timing by a neutral administrator.[1] *See* Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1518-19 (2008) (discussing sequential photo arrays). The witness is given time to respond, can

[1] This procedure is the preferred method by the Washington Association of Sheriffs and Police Chiefs. *See* Washington Association of Sheriffs & Police Chiefs, *Model Policies: Eyewitness Identification—Minimum Standards* (May 21, 2015).

have the photos presented repeatedly, and is not pressured to make a selection. Washington Association of Sheriffs & Police Chiefs, *Model Policies: Eyewitness Identification—Minimum Standards* (May 21, 2015). Prior to the presentment, witnesses are advised, at minimum, that the person who committed the crime may or may not be included in the photo lineup, they are not required to make an identification, and the investigation would continue whether or not an identification is made. *Id.*

Here, the witness during the in-court identification was presented with a pool of one—the defendant. (A possible pool of two—if we are counting defense counsel—does not assuage my concern as two is still suggestive, but add that defense counsel is usually excluded from the range of choices because they have a speaking part, which thereby reveals their role as counsel.) The witness, in this case also the victim, is being questioned by the prosecutor—the one party in the room that could fairly be characterized as vindicating the victim's interests. The identification is occurring months after the fact. There is no advice that the witness need not identify anyone in the courtroom, leaving the opposite inference: that the perpetrator is in fact in the courtroom. All this says nothing of the ability of the witness to observe the perpetrator at the time of the crime. The witness was also making the selection in front of the entire court: gallery, jury, attorneys, and judge. An uncertain witness might feel pressured to select the only option; rather than stop the trial to assert that the State had the wrong perpetrator.

A continuation of this practice when it is the very first identification procedure is unwise. This is especially true when we consider the impact of a witness pointing an accusatory finger at the person in the defendant's chair in front of the jury. The gesture is powerful. *See* Oden, *supra*

at 333 ("Some studies indicate that witnesses making eyewitness identifications are believed 79.8% of the time.").

Whether steeped in history or not, we should not sacrifice a low pressure, neutrally administered, sequential lay down of photos comprised of similarly appearing individuals in favor of a high pressure request for a witness to, not simply confirm a prior identification, but rather, for the first time, select from a pool of one.

Veljacic, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

July 17, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW KAYNE WINDROW, Appellant.	No. 56596-0-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Andrew Kayne Windrow moves for reconsideration of the Court's unpublished opinion filed on June 27, 2023. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Glasgow, Cruser, Veljacic

FOR THE COURT:

CRUSER, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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