

70563-6

70563-6

NO. 70563-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN SAKAWE,

Appellant.

2014 OCT 20 11:03
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

The prosecution had slim evidence against Mr. Sakawe. The two complainants never identified him as the perpetrator and no physical evidence connected him to the crime. The thin reed on which the State hung its case was a purported in-court identification five years earlier by a witness who (1) at the time of the incident told the police she could not describe and did not see the perpetrator's face, (2) did not recognize Mr. Sakawe at trial in 2013, and (3) during the prior trial in 2008, had not told anyone she recognized Mr. Sakawe as he sat as the single defendant in the courtroom. The State's efforts to win a conviction against Mr. Sakawe by using improperly-elicited evidence and this dubious identification should not be condoned. He is entitled to a fair trial and his case should be remanded so he receives one.

1. ***The prosecutor was supposed to be walled off from the case, not be a witness for the State.***

a. *The testifying prosecutor was not supposed to be involved in the case at all.*

The first trial's prosecutor requested privileged information, including Mr. Sakawe's admissions to his lawyers, with the promise she would seal herself off from future prosecution. 1RP 18. Defense counsel objected to providing defense attorney notes to the prosecution

because Mr. Sakawe's conversations with his lawyers about the incident were beyond the scope of the reference hearing devoted to the accuracy of immigration advice he received. 1RP 19. Although the court reviewed the notes in camera and gave only some of the notes to Ms. Kline, she used these attorney notes to question Mr. Sakawe and his prior lawyers about their private discussions about strategy, including what Mr. Sakawe told his lawyers about the incident. 2/16/12RP 33, 90-91, 97-98.

This prosecutor told the court she would seal herself from future involvement in a later prosecutor as a condition of access to privileged attorney-client information. It is presumptively prejudicial for a prosecutor to be exposed to privileged attorney-client materials is presumptively prejudicial. *See State v. Pena Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014); *State v. Perrow*, 156 Wn.App. 322, 330, 332, 231 P.3d 853 (2010); *see also* RPC 4.4 (attorney may not intrude into attorney-client relationship of another party).

The confidential attorney-client relationship is not only a "fundamental principle" in our justice system, it is "pivotal in the orderly administration of the legal system, which is the cornerstone of a just society." *In re Schafer*, 149 Wn.2d 148, 160, 6 P.3d 1036 (2003).

By obtaining privileged materials, the State improperly violates the attorney-client privilege and the State must ensure no taint in the subsequent prosecution of the case. *State v. Lenarz*, 22 A.3d 536, 549 (Conn. 2011). This doctrine is construed strictly because receiving privileged information aids the State in innumerable ways, such as insight into the defendant's trial strategy, which helps the prosecution select jurors, guides the investigation, and cements its theory. *Id.* at 551 n.16. It also upsets the adversary system, which functions properly only when the attorney's advice to the client is insulated from the government. *Id.* at 548. Finally, its benefits to the State are hard to measure with precision. *Id.*; see *Briggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Cir. 1983) (because trial involves "host of discretionary decisions," impossible for defendant to show how one piece factored into state's decisions).

The State's access to privileged attorney notes about Mr. Sakawe's admissions was conditioned on barring Ms. Kline from any involvement in prosecuting Mr. Sakawe. 1RP 18-19. On appeal, the prosecution contends that Ms. Kline's involvement in the second trial was as a fact witness, but regardless of the content of her testimony, it is evident that the State did not adhere to its promise to seal her off of

the case. Her involvement in the prosecution is presumptively prejudicial due to her access to privileged information and the State has not established that Ms. Kline did not convey privileged information to other members of the prosecution team. *Pena Fuentes*, 179 Wn.2d at 819. It is the State's burden of proof, not Mr. Sakawe's obligation to disprove.

b. *The prosecutor's memory of the lost videotape was shaped by the suppressed clothes.*

Not only was Ms. Kline's testimony improper based on her obligation to seal herself from the case, she was an unnecessary witness who bolstered the prosecution based on testimony tainted by suppressed evidence.

The unreasonableness of the State's claim that Ms. Kline's memory must have been from the lost videotape and not her reliance on suppressed clothes at the prior trial is demonstrated by her closing argument in 2008. Resp. Brief at 19, 21-22. Her 2008 closing argument demonstrates the inextricable nature of having closely observing the illegally seized clothes and not merely relying on the fuzzy videotape. She told the jury that Mr. Sakawe must be the perpetrator because:

The defendant was not simply wearing the same color combination as the person in the video. The clothes, as you can

see for yourself, match exactly down to the white lettering on the red sweatshirt, under the black zip-up hoody, with the fleece in the hood of the black sweat shirt

5/15/08RP 136. Apparently using the clothes demonstratively, she told the jury to compare the clothes to the video: “[Y]ou can positively identify him by the clothes he was wearing in the video and the clothes he was found with. They are not similar, they are the same.” 5/15/08RP 120. Whatever the prosecutor remembered in 2013 from the videotape she saw in 2008 was undoubtedly shaped by the close scrutiny she paid to the clothes during the trial. Because her testimony not only followed a broken promise to seal herself from the prosecution, but also was premised on a memory shaped by illegally seized and suppressed evidence, her testimony should not have been permitted.

c. Substantial prejudice results from using a prosecutor as a witness to testify about her memory of evidence depicting Mr. Sakawe’s guilt.

Mr. Sakawe should not have been required to take on the difficult task of arguing to the jury that a prosecutor’s memory should not be trusted, both because it was based on suppressed evidence and because it requires asking the jury to disregard the mantle of reliability and good-faith accorded to a prosecutor. Just as police officers carry a “special aura of reliability,” there is a fundamental “badge of

evenhandedness and fairness that normally marks our system of justice.” *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983); *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Demanding a defense attorney malign the motives of the prosecution in order to challenge the State’s case is an unfair burden of place on him, when the jurors will start from the presumption that the prosecutor represents the government even when testifying about what happened outside of court.

It is certainly misconduct for a single prosecutor to be “both a witness and an advocate in the same litigation.” *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). While Ms. Kline was not acting as the prosecuting attorney *per se*, she was not a merely a bystander who happened to observe a crime. Her role as the prosecutor against Mr. Sakawe was part of her testimony and it accords her testimony an imprimatur of truth and expectation of good faith, and for this reason it should not have been permitted unless strictly necessary to the case. Yet a number of other witnesses were available to describe the missing videotape or to note Mr. Sakawe’s presence in the courtroom in 2008, making Ms. Kline unnecessary. 8RP 79. And the State’s use of her testimony as if it stood for the proposition of Mr. Sakawe was the person in the motel, made the prejudicial effect far outweigh any

legitimate probative value. *Id.* Finally, given the paucity of the evidence showing Mr. Sakawe was the perpetrator, the advantage the State received by having a prosecutor testify that Mr. Sakawe likely wore clothes matching the perpetrator was crucial evidence that would affect the jury and be a linchpin for his conviction. This court should reverse his convictions and order that he receive a fair trial.

2. *The unreliable and highly suggestive in-court identification should have been suppressed*

- a. *An in-court identification of the accused is inherently suggestive and unduly unreliable when the jury does not see the identification occur*

“[I]t is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant.”

United States v. Rogers, 126 F.3d 655, 658 (5th Cir. 1997); *accord United States v. Archibald*, 734 F.2d 938, 941, 943 (2d Cir. 1984).

“Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor.” *Archibald*, 734 F.2d at 941.

The admission of an in-court identification violates due process when the circumstances in which it was obtained undercut its

reliability. “Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime. *Rogers*, 126 F.3d at 659. In *Rogers*, the court found an in-court identification violated due process by applying the five factors relevant to misidentification set forth in *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). *Id.* at 658.¹ Because the incident was short, the robber’s face was partially obscured, the witness did not give a prior accurate description of the perpetrator, and ten months passed between the incident and the identification, the *Rogers* Court ruled that the certainty of the witness when in the courtroom could not outweigh other factors counting against the reliability of the identification. *Id.* at 659.

Applying a similar analysis, the court found an in-court identification impermissibly suggestive in *United States v. Greene*, 704 F.3d 298, 308 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 419 (2013). In *Greene*, the prosecutor asked a witness to look at the defendant and say whether he resembled the robber. *Id.* at 308-10. The *Greene* Court

¹ The *Biggers* factors weigh: (1) the witness’s opportunity to view the suspect at the time of the incident, (2) her level of attention, (3) the accuracy of her description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. *Biggers*, 409 U.S. at 199-200.

applied the *Biggers* factors to decide whether this impermissibly suggestive procedure produced an unreliable identification. It ruled the in-court identification was suggestive and “the unreliability of the in-court identification was clear” under *Biggers*. *Id.* at 308, 310; *see also United States v. Davis*, 103 F.3d 660, 670 (8th Cir. 1996) (in-court identification procedure was “arguably suggestive,” but witness’s ample opportunity to observe and timely line-up identification sufficiently reduced likelihood of irreparable misidentification).

The litany of cases cited by the State purportedly opposing any challenge to in-court identification are inapposite. Resp. Brief at 33-34. Each decision is premised on the contemporaneousness of the in-court identification, so the jury would witness the in-court identification as it occurs, seeing any uncertainty or hesitation by the witness, including “facial expressions, voice inflection, body language” *United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir.1986).²

² The cases cited by the prosecution rely on the inapposite rationale that the jury actually witnessed the in-court identification as it occurred: *Byrd v. State*, 25 A.3d 761, 765-66 (Del. 2011) (relying on *Domina*); *State v. Lewis*, 363 S.C. 37, 42, 609 S.E.2d 515 (2005) (relying on the jury’s ability to observe the in-court identification as in *Domina*); *Ralston v. State*, 251 Ga. 682, 309 S.E.2d 135 (1983) (relying on fact that in-court identification occurs with “immediate supervision of the court” to avoid need for further scrutiny of in-court identification); *Galloway v. State*, 122 So.3d 614 (Miss. 2013), *cert. denied*, 134 S.Ct. 2661 (2014) (relying on *Ralston* and rationale that “the jury is present and

None of these necessary safeguards apply in the case at bar. Ms. Wood's claimed in-court recognition of Mr. Sakawe happened five years earlier, so no jurors saw her make the in-court identification. RP 148-49. No one saw whether she hesitated, whether someone told her Mr. Sakawe was the person she should select, or her degree of certainty. *Id.* Ms. Wood did not recognize Mr. Sakawe at the 2013 trial. 5RP 147. Under these circumstances: the inherent suggestiveness of the in-court proceeding, the witness's inability to provide a concrete description of the accused at the time of the incident, and the jurors lack of opportunity to see the in-court identification as it occurred, this in-court identification was too unreliable to admit even under the cases cited by the prosecution. 5RP 139, 159-60.

b. *The State's blanket claim that in-court identification are beyond challenge does not apply when the in-court identification occurred five years earlier.*

The prosecution never addresses the reliability of Ms. Wood's identification. It may implicitly concede that the *Biggers* factors would never condone a reliable identification from this witness, who could not

able to see first-hand the circumstances which may influence a witness" when witness identifies suspect in court); *State v. Smith*, 200 Conn. 465, 469-71, 512 A.2d 189 (1986) (citing *Domina* and relying on jury's ability "to evaluate for itself" the identification that occurs in its presence).

describe the perpetrator at all beyond his race and the color of his jacket, the incident was quick, substantial time passed before the in-court proceeding, and her level of certainty is dubious when she never told anyone she recognized Mr. Sakawe in court for five years.

Instead of claiming the identification was reliable, the prosecution skirts the issue by saying unreliable or suggestive identification evidence cannot be challenged because there has been no “state action” as described in *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 727, 181 L.Ed.2d 694 (2012). In *Perry*, a witness *sua sponte* looked out a window shortly after an incident, saw a suspect standing near an officer, and said identified him as the perpetrator. *Id.* at 721-22. The defendant conceded the identification resulted from “happenstance” but argued the circumstances were still suggestive. *Id.* at 725. The Supreme Court disagreed, finding that due process violations must arise from some conduct on part of the state. *Id.* at 726. In the course of its decision, it alternately discussed “police-designed lineups,” identifications “compelled by the State,” and “the manner in which the prosecution presents the suspect to witnesses.” *Id.* While the language in *Perry* may be imprecise to the extent it focuses on the police rather than the state officials who gather evidence to use against

an accused person, it was not addressing identifications obtained during a trial when the defendant is mandated to appear and the witness is called to the stand by the State.

“State action” under the Fourteenth Amendment does not mean it must be orchestrated by the police, as the prosecution contends. Enforcing private racially restrictive covenants violates Fourteenth Amendment and constitutes state action because of the involvement of the courts. *Shelley v. Kraemer*, 334 U.S. 1, 13-14, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). “As a general rule, the state action requirement of the Fourteenth Amendment is satisfied where the State is significantly intertwined with the acts of the private parties.” *Stephanus v. Anderson*, 26 Wn.App. 326, 335, 613 P.2d 533 (1980). There is “state action” in a criminal prosecution at which a witness, called to the stand by the State, sees the defendant at counsel table, who is compelled to appear by the State, and this state-arranged confrontation is the only vehicle used to obtain an identification against the accused.

c. The motel clerk's utter inability to describe the perpetrator at the time of the incident shows the in-court identification was too unreliable to be fairly admitted.

When Ms. Wood was asked if she could describe the assailant, she said, “I couldn’t describe him much at that time, other than him

being a black male.” 5RP 139. The only thing she recalled about him was a “black and red” jacket but when asked for details she said, “I don’t recall.” *Id.* As to the perpetrator’s size, she said he seemed “similar” in size to complainant Mr. Chaung, but when asked if she meant similar in height or weight, she said, “I really don’t know.” *Id.*

At the time of the incident, the police asked her to describe the perpetrator and she told them, “I really couldn’t tell you” beyond the “black and red” jacket. 5RP 159. That was the only detail she could give to the police. 5RP 160. At the earlier 2008 trial, Ms. Wood was also asked about her description of the assailant at the time of the incident. 5RP 161. She said she “really didn’t get a lot of - - a good look at the person’s face.” *Id.* She was never asked to identify a potential perpetrator at the time of the incident, during the police investigation, or at the 2008 trial. *Id.*

When Ms. Wood saw Mr. Sakawe in the courtroom during her testimony at the 2008 trial, this interaction was set up by the state. She came to court at the prosecution’s request and Mr. Sakawe did the same. He sat at counsel table during the trial. 5RP 161. Although no witnesses recalled whether he was the only black male in the room, this

inference is reasonable. He was certainly the person in the courtroom obviously on trial. *See Archibald*, 734 F.2d at 941.

None of the *Biggers* factors suggest the identification was reliable. *Biggers*, 409 U.S. at 199-200, The State does not claim otherwise in its response brief, instead it avoids the issue by claiming no in-court identification can ever be suggestive or violate the Fourteenth Amendment. But as *Rogers*, *Archibald*, and *Greene* demonstrate, this assertion is false. Even without examining the greater protections of Article I, section 3, the fallibility of eyewitness identification and its outsized persuasive effect on jurors require limitations on in-court identifications obtained under suggestive and unreliable circumstances.

“Mistaken eyewitness identification is a leading cause of wrongful conviction, as recognized by Washington courts. *State v. Sanchez*, 171 Wn.App. 518, 572, 288 P.3d 351 (2012). “The vast majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect.” Brandon L. Garrett, *Judging Innocence*, 108 Colum. L.Rev. 55, 60 (2008) (cited in *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (alteration in original)). The jury’s likelihood to give undue

weight to an unreliable in-court identification requires courts to prohibit the introduction of such evidence.

Finally, this Court should disregard the State's effort to avoid examining article I, section 3 based on the lack of independent citation to the state constitution in the trial court. Appellate courts "have often independently evaluated our state constitution and have concluded that it should be applied to confer greater civil liberties than its federal counterpart when the reasoning and evidence indicate such was intended and is necessary," particularly when "the changing conditions of modern life" merit an evolution of our doctrines. *Alderwood Associates v. Washington Env'tl. Council*, 96 Wn.2d 230, 238-39, 635 P.2d 108 (1981). The evolution in our understanding of identification, memory, and jurors' mistaken reliance on unreliable identifications merit close scrutiny of admitting such evidence.

3. *The State correctly concedes the double jeopardy violation, which requires a resentencing hearing.*

The prosecution properly admits that the charged offenses of second degree assault and attempted second degree robbery may not be separately punished under double jeopardy prohibitions of the state and

federal constitutions. However, the prosecution's remedy argument is incorrect.

When two convictions violate double jeopardy, the remedy is to strike the less serious conviction. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). Second degree assault and attempted second degree robbery have been accorded the same seriousness level by the Legislature and trigger almost the same standard range sentence, although the second degree assault conviction is marginally longer, by .25 to 5 months. RCW 9.94A.515 (seriousness level IV); Response Brief at 49. However, Mr. Sakawe is not a United States citizen, as shown in his prior appeal where his conviction was overturned due to inaccurate immigration advice. The two offenses may carry significantly different immigration consequences. Given the similarity in the seriousness level and attendant sentence for these two offenses, the trial court should consider which of these offenses should be stricken due to the double jeopardy violation upon full information of the seriousness level of the offenses to Mr. Sakawe. Remand for resentencing is the proper remedy for this double jeopardy violation.

B. CONCLUSION.

For the foregoing reasons and those addressed in Appellant's Opening Brief, this Court should reverse Mr. Sakawe's convictions and sentence.

DATED this 17 day of October 2014.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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Respondent,)	
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v.)	
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ABDIRAHMAN SAKAWE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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