

70563-6

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NO. 70563-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN SAKAWE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

In 2007, a group of teenagers demanded property from two young Taiwanese men. It was nighttime, the incident was short, and the two complainants never identified anyone involved. A poor quality video showed some of the incident and the police seized Abdirahman Sakawe's clothes based on their similarity to the video. However, the court suppressed Mr. Sakawe's clothes because they were unlawfully seized, and the State was unable to play the videotape at trial.

The State's case hinged on a motel desk clerk who told the police she could not describe the perpetrator. In 2013, this clerk told the prosecution that when she saw Mr. Sakawe in court in 2008, knowing he had been charged with this crime, she recognized him. The State also called a prosecutor as a witness even though she had been removed from the case after viewing privileged attorney-client communications and she testified about suppressed evidence.

Mr. Sakawe's convictions should be reversed due to the improper use of a prosecutor with a conflict of interest and an unreliable in-court identification. Alternatively, his convictions for attempted second degree robbery and second degree assault based on the same facts and law violate double jeopardy.

B. ASSIGNMENTS OF ERROR.

1. Because the State's case rested on inadmissible evidence, Mr. Sakawe's convictions violate due process of law.

2. The State's reliance on evidence that could not be meaningfully cross-examined rendered the trial fundamentally unfair and violates the Sixth and Fourteenth Amendments, as well as article I, sections 3, 21, and 22.

3. The State's access to and knowledge of privileged attorney-client communications violates Mr. Sakawe's right to counsel under the Sixth Amendment and article I, section 22 and his right to due process of law.

4. The prosecution's use of evidence derived from illegally seized property violates the exclusionary rule of article I, section 7 and the Sixth Amendment.

5. The court erroneously admitted an unreliable and unduly suggestive identification contrary to the Fourteenth Amendment and the more protective guarantees of article I, section 3.

6. Mr. Sakawe's convictions for attempted second degree robbery and second degree assault violate the double jeopardy clauses of the state and federal constitutions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. It is disfavored, and rarely permissible, for the State to call a prosecutor who was an advocate in the case as a witness against the accused. The prosecutor at Mr. Sakawe's second trial used the original prosecutor as a witness against Mr. Sakawe even though this prosecutor had promised to seal herself off from the case after receiving privileged attorney-client information, her memory was shaped by evidence that had been suppressed, and other witnesses were available to testify about the same information. Did the State's reliance on testimony from a prosecutor who should have been barred from further involvement in the case deny Mr. Sakawe a fair trial?

2. An unreliable identification occurs when the witness had little opportunity to form an independent memory of the person and subsequently views that person in circumstances that plainly show the State's belief that this person is the suspect. The only witness who offered any eyewitness identification of Mr. Sakawe saw the perpetrator only briefly, did not identify Mr. Sakawe at the time of the incident or when she saw him in court six months later, but after five years passed, she claimed she recognized him when he sat at counsel table in 2008. Did this witness's lack independent memory of the perpetrator make it

likely that her identification stems from the unreliable and highly suggestive circumstance of seeing him in court, knowing he was the person charged with the crime?

3. It violates double jeopardy to punish a person twice for the same offense. Mr. Sakawe was convicted of attempted second degree robbery and second degree assault, charged as a simple assault with the intent to commit a felony theft or robbery. The use of force was based on the same incident, with the same intent, at the same time. Did it violate double jeopardy to punish Mr. Sakawe for both offenses?

D. STATEMENT OF THE CASE.

1. *Incident*

Charles Chen and Andre Chuang¹ were waiting at a bus stop on the evening of November 22, 2007, when a group of teenagers approached them. 5RP 170-71.² Someone snatched Mr. Chuang's cellphone but he did not remember who. 5RP 174; 6RP 18-19. A different person punched him. 6RP 41. Mr. Chen heard someone say "give me your wallet" but no one took his wallet. 5RP 176. Both men

¹ Mr. Chen said he preferred the name Charles to his given name Ka; Mr. Chuang preferred Andre to his given name Chaun-Wen. 5RP164; 6RP 9.

were visiting the United States from Taiwan and Chinese is their primary language. 1RP 106; 5RP 166; 6RP 10.

Mr. Chen remembered pushing his way out of the bus shelter and running back to the motel where Mr. Chuang was staying. 5RP 176; 6RP 20. He did not remember anyone hitting him but Mr. Chuang thought he saw someone grab Mr. Chen by the throat while at the bus stop. 5RP 176; 6RP 15.

A person followed them into the motel lobby. 5RP 180. Mr. Chen did not think this person touched Mr. Chuang or himself, could not recall this person's skin color, and did not remember what he was wearing. 5RP 179, 181. Nothing was taken from Mr. Chen. 5RP 187.

According to Mr. Chuang, the guy who had grabbed Mr. Chen's throat at the bus stop wore a red hat and came into the motel lobby. 6RP 22. Inside the lobby, this person punched Mr. Chuang one time. 6RP 23. Another person entered the lobby and told the person in the red hat to leave, which he did. 6RP 24.

The motel's desk clerk Catherine Wood called her manager, who called the police. 5RP 147. Her manager showed two police

² The eight volumes of pretrial and trial transcripts are referred to by the volume number on the cover page. Any other transcripts are referred to by the

officers the surveillance video of the lobby, which the officers watched several times. 4RP 93; 5RP 27, 150. They noted that the person who followed the Asian men into the lobby wore a black jacket with red on it, or a red jacket with some black on it. 4RP 100; 5RP 30. Officer Randy Gallagher also described this person as wearing a red and black baseball hat in the video. 5RP 30.

Within one-half hour, officers responding to an unrelated call stopped several teenage boys, but not Abdirahman Sakawe. 4RP 107-08. The boys wore clothing consistent with the video from the motel lobby. 4RP 111; 5RP 41. One boy, Shirwa Muse, carried a cell phone with Chinese characters. 4RP 115. Mr. Chuang and Mr. Chen recognized the telephone as the one taken from Mr. Chuang but did not recognize the people stopped by the police. 5RP 45; 6RP 26, 49-50.

As the police were arresting Mr. Muse for possession of the stolen cellphone, Mr. Muse fled. 5RP 45-46. The police called for a K-9 search. 5RP 47. The dog started tracking Mr. Muse's scent, but then veered off in another direction. 5RP 49; 6RP 54. The dog turned into a leafy area with large tree branches and found Mr. Sakawe under a tree. 5RP 49. Mr. Sakawe explained that he was homeless. 5RP 51. Mr.

date of the proceeding.

Sakawe did not have a red hat and wore a jacket described as mostly red with black writing. 5RP 56-57; 6RP 135. The police later seized his other clothes, compared them to the motel's surveillance video, and arrested him. 3RP 20, 90, 93.

2. First trial and post-conviction proceedings

In 2008, Mr. Sakawe was prosecuted by Julie Kline and convicted of the charged offenses of second degree robbery (for Mr. Chuang's phone); attempted second degree robbery (for trying to take something from Mr. Chen); and second degree assault against Mr. Chen. CP 6-8.

After he was convicted, he learned that he had received inaccurate immigration advice from his trial attorneys. 2/16/12RP 51-54, 59; 83, 87. He was born in Somalia, moved to the United States as a refugee when he was six years old, and was a legal permanent resident. 2/16/12RP 74, 76. His attorneys did not accurately explain the consequences of going to trial rather than accepting an offered plea bargain. 2/16/12RP 9, 22, 36; CP 26-27. He filed a personal restraint petition and the Court of Appeals ordered a reference hearing to determine whether Mr. Sakawe received ineffective assistance of counsel based on this immigration advice. CP 25-26.

Ms. Kline requested notes from Mr. Sakawe's lawyers about their conversations with him. 1RP 22-23, 33-34; 2/16/12RP 2. The prosecution offered to create a "Chinese wall" between those involved in the reference hearing and any other prosecutors involved in the case if a retrial occurred. 1RP 18. The prosecutors told that court that there would not be a conflict "if we create that – that wall." *Id.* The court agreed that no discussion should occur between the prosecutors involved in the reference hearing and other members of the prosecutor's office. 1RP 23-24. At the reference hearing, Ms. Kline cross-examined Mr. Sakawe and both of his attorneys about their discussions of plea offers as well as their discussions about the incident based on the notes she had received. 2/16/12RP 29, 34, 37-38, 90-91, 97-99, 120-21.

The Court of Appeals reversed Mr. Sakawe's convictions based on the inaccurate immigration advice and ordered a new trial. CP 29.

3. *Second trial*

Before the second trial, newly appointed attorney Scott Schmidt moved to suppress the clothes police seized from Mr. Sakawe without a warrant before his arrest. CP 30-39. The court granted this motion and ordered the clothes excluded from trial because they were illegally seized. 3RP 140.

The prosecution was unable to show the surveillance video from the motel lobby at the second trial due to software issues. 2RP 30-31; 4RP 31. Instead of playing the video, it called three police officers who had watched the video repeatedly and each recounted what they remembered the video showing. 4RP 96-105; 5RP 28-37; 7RP 127-30. One of these officers, Detective Cathy Savage, had viewed and photographed the illegally seized clothes but the court told her to testify about the clothes from her memory of the video. 7RP 44-45.

The prosecution also called Julie Kline, the prosecutor from the first trial, over defense objection. 2RP 35-38, 42; 7RP 44-45, 65-66. Ms. Kline described the video. 7RP 89-94. Although her memory had been shaped by closely scrutinizing the clothes that the police illegally seized from Mr. Sakawe, the court directed Ms. Kline to testify about the video based on her memory of the video and not her memory of the clothes. 7RP 44-45, 48, 51-53.

Mr. Chen did not identify Mr. Sakawe as a person involved in the incident. 5RP 183. The prosecution did not know where Mr. Chuang was and read his testimony from the first trial. 2RP 87. He had never identified Mr. Sakawe as being involved in the incident. 7RP 26.

Desk clerk Catherine Wood also testified at both trials. At the first trial, she did not identify Mr. Sakawe. 2RP 90. At the second trial, she did not recognize Mr. Sakawe. 5RP 147. But at the second trial, she claimed that she remembered that when she was testifying in 2008, she saw Mr. Sakawe in the courtroom and recognized his face as the person in the motel lobby. 5RP 148. She had never mentioned this recognition to the prosecution until the second trial, five years later. 2RP 90.

In his closing argument, the prosecutor emphasized Ms. Wood's identification of Mr. Sakawe as "the guy from the lobby." 8RP 39. He also stressed Ms. Kline's corroboration of Ms. Wood's testimony. *Id.* He argued that what the jury was left with was "the testimony of the people who actually saw Mr. Sakawe live," rather than through a "poor resolution video." 8RP 79. Those people were the two complainants, "Ms. Wood, and Ms. Kline, and what they told you is that based on what they saw of his face and his body, he was the guy in the red hat at the bus shelter. He was the guy who chased him into the hotel. He was the guy in the lobby." 8RP 79. The prosecutor made this argument even though the two complainants and Ms. Kline had not testified that Mr. Sakawe was the person in the lobby, and Ms. Kline was not present for any part of the incident.

Mr. Sakawe was convicted of the three charged offenses. CP 72-74. He had already served them sentence permitted under the standard range. 8RP 96. The prosecution agreed that counts two and three, attempted robbery in the second degree and second degree assault were the same criminal conduct but the court did not enter that finding on the judgment and sentence, without explanation. CP 106-07; CP 124. The court imposed separate punishment for all three offenses. CP 106-09.

E. ARGUMENT.

1. **By using a prosecutor as a testifying witness after she received privileged attorney-client information and her memory was shaped by suppressed evidence, the State violated Mr. Sakawe's rights to a fair trial and effective assistance of counsel**

a. *Due process requires fair procedures as the predicate for a fair trial.*

The “constitutional floor” established by the Due Process Clause “clearly requires a fair trial in a fair tribunal” before an unbiased court. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22. One mechanism for ensuring a fair trial is the opportunity for meaningful cross-examination of adverse witnesses. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); U.S. Const.

amend. 6; Wash. Const. art. I, § 22. Likewise, the confidential attorney-client relationship is a “fundamental principle” in our justice system that 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). Similarly, a prosecutor’s misuse of evidence or improper arguments may deny a defendant his right to a constitutionally fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Using a prosecutor as a testifying witness for the State’s case is a disfavored practice that risks denying the accused person a fair trial. *See United States v. Alu*, 246 F.2d 29, 33-34 (2d Cir. 1957). This prohibition “is designed to ensure objectivity in the presentation of evidence.” *Id.*

“[T]he danger in having a prosecutor testify as a witness is that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise.” *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998). Jurors are likely to accord far greater weight to a prosecutor’s testimony due to the prosecutor’s prestige and official status. *See e.g., Monday*, 171 Wn.2d at 677. Jurors presume the prosecutor is privy to extra-record

information and may place outsized weight on her testimony for that reason. *See State v. Ish*, 170 Wn.2d 189, 199, 241 P.3d 389 (2010).

By using a prosecutor who had spearheaded the case against the accused as a fact witness, the State shields its case from the cross-examination that would otherwise occur for a different witness and inhibits the defendant's ability to effectively confront an adverse witness. *See State v. Sullivan*, 60 Wn.2d 214, 221, 373 P.2d 474 (1962) (noting attorney's limited ability to cross-examine himself after prosecutor called him as fact witness). A defendant is unlikely to benefit from exploring the testifying prosecutor's bias, such as her belief that the accused person committed the charged crime, or her access to extra-record information, making it hard for the defense to explain to the jury why they should not trust the prosecutor's testimony.

Even if it is not *per se* prohibited to call a prosecutor as a witness in the State's case, "it is certainly disfavored." *State v. Sierra*, 337 S.C. 368, 376, 523 S.E.2d 187, 191 (S.C. Ct. App. 1999) (quoting *State v. Lee*, 203 S.C. 536, 28 S.E.2d 402, 404 (1943) ("The courts clearly look with disfavor upon a prosecuting attorney's participation in a case as a witness for the State except under unavoidable circumstances.")).

RPC 3.7 prohibits a lawyer from acting as advocate and witness in the same case. One reason for this rule is that the fact-finder may be confused over whether the person is culling information from others as an advocate or reporting on first-hand information as a fact witness. RPC 3.7, Comment 2. If the attorney is testifying about a contested factual matter, his testimony must be “necessary” and involve information “unobtainable elsewhere.” *State v. Schmitt*, 124 Wn.App. 662, 667, 102 P.3d 856 (2004).

The State’s use of a prosecutor as a fact witness against Mr. Sakawe undermined the fairness of the proceedings in multiple ways that taken together, denied Mr. Sakawe a fair trial.

- b. *The court should not have let the prosecutor testify after she accessed privileged information and closely viewed suppressed evidence, especially when she was not a necessary witness*

The State engaged in the disfavored practice of using the prosecutor from the first trial as a testifying witness in the second trial, despite Mr. Sakawe’s objection. 2RP 88, 92, 104. The prosecutor’s substantive testimony against Mr. Sakawe unfairly impaired his ability to test the evidence against him and bolstered the State’s case for impermissible reasons.

- i. *The prosecutor who testified as a witness against Mr. Sakawe had reviewed privileged attorney-client communications.*

Before Mr. Sakawe received a second trial, prosecutor Julie Kline proposed creating a “Chinese wall” prohibiting her from having any contact with future prosecuting attorneys. 1RP 18. The original prosecutor offered to seal herself off from any later prosecution in order to receive defense counsels’ notes of their privileged communications with Mr. Sakawe. *Id.* The court granted Ms. Kline’s request to review the attorneys’ notes about their conversations with Mr. Sakawe, admonishing the prosecution not to share the information. 1RP 23. Despite defense counsel’s objection that Mr. Sakawe’s conversations with his lawyers about the incident were beyond the scope of the hearing, the court permitted Ms. Kline to use these attorney notes to question Mr. Sakawe and his prior lawyers about their private discussions of the incident, trial preparation, and plea bargaining. *See* 1RP 19; 2/16/12RP 29, 34, 90-91, 98.

When Ms. Kline was called as a witness against Mr. Sakawe at his second trial, the second trial’s prosecutor conceded that Ms. Kline had not been “completely screened off this case,” even though she was not acting as the prosecuting attorney of record. 2RP 47; 7RP 84-104.

A prosecutor's exposure to privileged attorney-client materials is presumptively prejudicial. *See State v. Pena Fuentes*, 179 Wn.2d 808, 318 P.3d 257, 262 (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). In *Perrow*, police executing a search warrant took documents that included notes the defendant had written in preparation for meeting with his attorney about uncharged allegations. *Id.* at 326, 329. The Court of Appeals ruled that "the writings seized from Mr. Perrow's residence were protected by the attorney-client privilege and the State's seizure of these materials violated that privilege." *Id.* at 330. Because "it is impossible to isolate the prejudice presumed from the attorney-client privilege violation," the court dismissed the charge, finding the State's potential exposure to privileged materials was structural error. *Id.* at 332.

In *State v. Cory*, 62 Wn.2d 371, 372, 382 P.2d 1019 (1963), a police officer eavesdropped on a private attorney-client conversation. There was no evidence that the officer "transmitted" what he learned to the prosecutor, but the court held that it "must assume" the prosecution learned about it. *Id.* at 377 n.3. There was also no evidence that the prosecution used the information to its advantage but based on the

importance of safeguarding a defendant's right to private consultation with counsel, once the incursion occurs its taint cannot be removed. *Id.*

Perrow and *Cory* demonstrate the lengths to which the State must go to remove a criminal prosecution from the possibility of exposure to privileged materials.

In order to avoid the disqualification of her office, Ms. Kline offered to seal herself off from a future prosecution. 1RP 18. Although the court gave her permission to receive privileged information, it was premised on her promise to seal herself off from further proceedings. 1RP 22-23. She did not have permission to continue to participate in the case in any way. Yet she served as a witness against Mr. Sakawe at his later trial and was never "completely screened off." 2RP 47. By aiding the State's case after reviewing Mr. Sakawe's confidential communications with his attorney about his actions at the time of the incident, presumed prejudice results and taints the trial. *See Perrow*, 156 Wn.App. at 332.

ii. *The prosecutor was not a necessary fact witness to explain the content of a missing video.*

Ms. Kline's testimony included her detailed description of a video showing a portion of the incident on which she had relied at the

first trial. 7RP 86-94. Defense counsel Scott Schmidt had not seen this video because the State could not locate software to play it during the second trial and he was not involved in the case during the first trial.

Generally, when one party controls relevant evidence that is not produced at trial, the trier of fact may infer that this evidence is favorable to the other party unless its absence is satisfactorily explained. *See Pier 67 Inc. v. King Co.*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977). At Mr. Sakawe's trial, the State avoided this negative inference due to its unsuccessful efforts to show the video at trial.

Rather than showing the video, it called multiple witnesses to describe what they recalled seeing when watching it. Three police officers had seen the video numerous times and they described their recollections for the jury. 4RP 98-105; 5RP 27-32; 7RP 126-30. After overruling defense counsel's objection that the prosecutor's testimony about the video was cumulative, the prosecutor also described it in great detail for the jury. 7RP 89-93.

The prosecutor's testimony about the video was not necessary or unobtainable elsewhere. *Schmitt*, 124 Wn.App. at 667. The court should not have let the State bolster its case by having the trial prosecutor testify about the video in addition to other witnesses.

iii. *The prosecutor's recollection of the video was tainted by suppressed evidence.*

Another reason that the prosecutor should not have been permitted to testify was that her memory was shaped by evidence that was inadmissible at the second trial. The same flaw taints the testimony of case detective Cathy Savage. 7RP 44-45.

Mr. Sakawe's clothes were suppressed at the second trial because they were unlawfully seized. 3RP 140. At the first trial, this seizure was not challenged; the clothes were admitted into evidence and relied upon by the State to claim Mr. Sakawe was the person in the video and therefore the perpetrator of the robbery and assault. *See* 5/15/08RP 34-35, 118-20. During Ms. Kline's closing argument at the first trial, she played the video, told the jury to closely compare the clothes seized from Mr. Sakawe with the video, and argued "you can positively identify him by the clothes that he was found with. They are not similar, they are the same. It is not the same color combination, they are the same clothes." 5/15/08RP 120.

But at the second trial, the court ruled the clothes were unlawfully seized and precluded the State from offering the clothes or evidence derived from the unlawful seizure. *State v. Winterstein*, 167

Wn.2d 620, 636, 220 P.3d 1226 (2009) (exclusionary rule bars use of illegally seized evidence at trial). Ms. Kline admitted that she had closely viewed these clothes, compared them to the otherwise fuzzy video, and used them to argue Mr. Sakawe was the person who robbed the two complainants. 7RP 75-77. Mr. Sakawe complained that the prosecutor and detective's memories of the video were tainted by having scrutinized the now-suppressed clothes. 7RP 44-45, 50. The court ruled that the prosecutor could testify from the portion of her memory that came from seeing the video, but not from her memory of seeing the illegally seized clothes. 7RP 82. The court also permitted the detective to testify about the video despite her familiarity with suppressed evidence. 7RP 49.

The court allowed this testimony based on an impossible notion of having the mental control to unremember viewing important evidence; "once contaminated, a witness's original memory is very difficult to retrieve." *State v. Lawson*, 352 Or. 724, 748, 291 P.3d 673, 689 (2012); *State v. Henderson*, 208 N.J. 208, 27 A.3d 872, 894 (2011) ("retained memory can be unknowingly contaminated by post-event information [and] the witness's retrieval of stored 'memory' can be impaired and distorted by a variety of factors").

The court unreasonably ruled that the prosecutor and detective could parse the strands of memory and testify only about what each knew from watching the video. When evidence is illegally obtained, the “constitutionally mandated exclusionary rule” bars the prosecution from using the evidence or evidence derived from it. *Winterstein*, 167 Wn.2d at 632. Courts are not authorized to balance interests or speculate about whether information could have been lawfully obtained when deciding whether to exclude illegally obtained evidence under article I, section 7. *Id.* at 634.

The fact that illegally seized evidence inevitably shaped the prosecutor’s memory of the lost video provides another reason why her testimony should have been excluded. Officers Gallagher and Ochart had watched the video but never examined Mr. Sakawe’s clothes closely after they were seized by the police. 4RP 96-97, 122; 5RP 37, 55. Their memory of the video was not based on examining the clothes after they were unlawfully seized. The availability of untainted witnesses also shows this testimony was not necessary. Because the prosecutor and detective’s testimony was inevitably shaped by suppressed evidence, their testimony about the video should have been excluded.

iv. *The prosecutor bolstered the witness's unreliable identification.*

Ms. Kline's testimony also bolstered the motel desk clerk's belated identification of Mr. Sakawe. Ms. Wood had never identified any perpetrator, neither at the time of the incident in November 2007 nor when she was testifying in May 2008. 2RP 90; 5RP 162. At the time of the incident, a detective asked Ms. Wood to describe the person in the lobby and she responded, "I really couldn't tell you." 5RP 159. The only detail she could give was that he wore a black and red type sweatshirt hoodie. *Id.* She also said she had not seen the person's face, only a profile, and could not describe any facial features. 5RP 161.

However, at the 2013 re-trial, she claimed that when she testified in 2008, the person who she saw seated at counsel table was the perpetrator from the motel lobby. 2RP 90, 94, 102; 5RP 148. Ms. Kline connected this testimony to Mr. Sakawe by telling the jury that he was the person Ms. Wood saw at the first trial. 7RP 95, 103-04. Ms. Kline did not remember whether Mr. Sakawe was the only black man in the courtroom when Ms. Wood testified. 7RP 104.

The trial court failed in its gate-keeping role by allowing the prosecutor to testify that Mr. Sakawe was the person Ms. Wood saw in

court and believes to be the perpetrator. The court expressed its concern over the proposed testimony of the prosecutor but permitted her testimony with few constraints. 7RP 53.

c. The State took advantage of the prosecutor's testimony to vouch for its case based on facts not in evidence

In its closing argument, the State misrepresented Ms. Kline's testimony and claimed she had identified Mr. Sakawe as the perpetrator. It told the jury to rely on the people who saw Mr. Sakawe "live," including the prosecutor Ms. Kline. 8RP 79. Then the State told the jury that what these people, including Ms. Kline, "tell you is he [Mr. Sakawe] was the guy in the red hat at the bus shelter who chased – into the hotel. . . . he's the guy in the lobby." *Id.* The State used the prosecutor's testimony to give credence to Ms. Wood's claim of identification. Ms. Kline had not told the jury that Mr. Sakawe was the guy in the red hat, and in fact she was not present during the incident, but the State implied to the jury that she knew more about the strength of Ms. Wood's identification than it did and used her to vouch for Ms. Wood.

Cross-examining the prosecutor about her bias was nearly impossible for Mr. Sakawe because Ms. Kline possessed information

about the case that colored her testimony but which had not been revealed to the jury. Mr. Sakawe could not meaningfully cross-examine the prosecutor's memory of the video when it was tainted by her viewing of suppressed evidence. He had little incentive to explore the bias that stemmed from her interest as a prosecutor in seeing Mr. Sakawe convicted. Her exposure to privileged attorney-client communications was also not properly before the jury.

The jury is likely to rely on the prosecutor as a credible source of information by virtue of her status as a government attorney. *See Ish*, 170 Wn.2d at 199; *Monday*, 171 Wn.2d at 677. The harmful and intangible effects from having a prosecutor testify as a State witness were exacerbated because the original prosecutor's recollection of the case was based on inadmissible or unavailable evidence. The State used Ms. Kline's testimony to bolster Ms. Wood's claim she previously recognized Mr. Sakawe. The cumulative harm flowing from the use of a prosecutor as a fact witness denied Mr. Sakawe a fair trial.

2. The clerk’s claim she recognized Mr. Sakawe when he was in court five years earlier stemmed from impermissibly suggestive circumstances and denied Mr. Sakawe his right to a fair trial

a. Unreliable and suggestive identification procedures violate due process.

“[E]yewitness misidentification is the leading cause of wrongful convictions, a factor in 75 percent of post-conviction DNA exoneration cases.” Jason Cantone, *Do You Hear What I Hear?: Empirical Research on Earwitness Testimony*, 17 Texas Wesleyan L. Rev. 123, 128 (Winter 2011).

When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it must be suppressed. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977); *Manson v. Brathwaite*, 432 U.S. 98, 144, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *see* U.S. Const. amend. 14; Const. art. I, § 3.

Prior identifications arranged by the State are inadmissible if the identification procedure was suggestive, and if so, the suggestiveness created a substantial likelihood of misidentification. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). A suggestive identification procedure unduly calls attention to one individual over others. *Id.* The likelihood of misidentification from a suggestive

procedure is evaluated based on: (1) the witness's opportunity to view the suspect at the time of the incident, (2) the witness's level of attention, (3) the accuracy of the witness's description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. *State v. Barker*, 103 Wn.App. 893, 905, 14 P.3d 863 (2000); *Neil v. Biggers*, 409 U.S. 188, 199-200, 193 S. Ct. 357, 34 L. Ed. 2d 401 (1972).

The only "identification" of Mr. Sakawe as the perpetrator came from Catherine Wood, the motel desk clerk, who claimed for the first time in 2013 that when she was in court testifying about the incident in 2008, she had recognized Mr. Sakawe as the perpetrator. 2RP 90. She had not told anyone that she thought she recognized Mr. Sakawe until one week before the trial in 2013. 2RP 90, 93-94.

Mr. Sakawe moved to suppress her in-court identification stemming from the inherently suggestive courtroom setting that had not been offered or even disclosed until five years had passed. 3RP 94-95. The court refused and the State relied on this testimony as the linchpin in convincing the jury of Mr. Sakawe's involvement. 8RP 39, 79-80.

b. *Ms. Wood's minimal opportunity to observe, her vague description, and the overt suggestiveness of the suspect's*

identity during trial make it likely her identification did not stem from the incident.

Ms. Wood's claim that she recognized Mr. Sakawe while he was on trial in 2008 is unreliable evidence that should not have been admitted. The experience of seeing Mr. Sakawe in court and on trial inherently conveyed that he had been arrested by the police and charged by the prosecution. During a jury trial, the presence of the person charged with the crime signifies the government's belief that it suspects this person is the perpetrator, far more than a suggestive show-up.

In *State v. McDonald*, 40 Wn.App. 743, 744, 700 P.2d 327 (1985), a robbery victim viewed a line-up and picked out number four, who was not the defendant. Afterward, the detective told him that the person in position number three was the one who had been arrested. *Id.* The witness also saw the defendant handcuffed outside the courtroom. *Id.* at 745. The victim then identified the defendant in-court as the perpetrator, despite defense objection. *Id.*

The Court of Appeals ruled that the in-court identification should not have been permitted. By telling the witness that the defendant was the person who had been arrested, the detective effectively told the victim that "this is the man" who did it. *Id.* at 746.

The witness did not have a strong enough independent memory to overcome the suggestiveness of the identification procedure. The incident lasted only five or six minutes and the perpetrators were behind the victim for half of that time. *Id.* at 747. The victim did not describe the person's facial features clearly or his clothes accurately. *Id.* The court held there was a substantial likelihood of misidentification. *Id.* The court also refused to remand the case for a hearing on whether the in-court identification came from an independent memory of the incident. It ruled that "any identification" by the witness "would be so unreliable that its admission would violate due process." *Id.* at 748 n.2.

Similarly to the robbery victim in *McDonald*, Ms. Wood did not positively identify Mr. Sakawe until after she knew that he was the person who the State had arrested and charged. His presence in the courtroom just as effectively conveyed the government's belief that "this is the man" who did it as telling the witness that the defendant was the person who had been arrested in *McDonald*, 40 Wn.App. at 746.

Ms. Wood lacked a significant basis for an independent memory. The incident was short. Officer Gallagher watched the video of the incident several times and he said the entire confrontation in the lobby lasted 15 to 20 seconds. 5RP 91. Detective Savage described the

entire incident in the lobby as less than one minute and characterized it as “pretty quick.” 7RP 170. Ms. Wood had not seen the video and she thought the incident was one or two minutes in total length. 5RP 146. These estimates are all shorter than the incident in *McDonald*.

Ms. Wood’s attention during this short time was also focused on Mr. Chen, who stood by her desk, tossed her his cell phone, and told her to take it. 5RP 135, 141. The person in the lobby was a stranger to Ms. Wood. 5RP 159. Most significantly, the only description she could give shortly after the incident was a generic clothing description, and she admitted she “couldn’t” describe any other details about the person. 5RP 159. In 2008, she said she only saw the person’s side profile, not his face. 5RP 161.

Cross-examination was a particularly ineffective tool to caution the jury against relying on her unreliable identification due to the circumstances of the case. Having waited five years before she told anyone she thought she recognized Mr. Sakawe in court, she did not recall the suggestiveness of the circumstances. She did not remember whether Mr. Sakawe was the only young black male in the courtroom, nor did prosecutor Kline. 5RP 161; 7RP 104. Additionally, the jury did not know that this purported recognition occurred when Mr. Sakawe

was being tried for the same incident. 2RP 73; 7RP 7; CP 67. To keep the jury from learning that Mr. Sakawe was previously tried and convicted, the court had prohibited the parties from referring to the first trial as a jury trial, and instead they called in a court proceeding. 2RP 73. The second jury did not know that when Ms. Wood saw Mr. Sakawe in court in 2008, it would have been obvious that he had been arrested and charged with the crime.

The jury could not evaluate the suggestiveness of the circumstances in which Ms. Wood thought she recognized Mr. Sakawe without knowing that she saw Mr. Sakawe when he was on trial, yet there were strong reasons for keeping the jury from knowing about the prior trial. These circumstances made it difficult to show the unreliability of Ms. Wood's viewing of Mr. Sakawe in court.

Eyewitness identification testimony causes wrongful convictions because it is compelling for a jury even if inaccurate. Social science data "increasingly cast[s] doubt on the reliability of cross-racial identification, and our courts must carefully guard against misidentification." *State v. Allen*, 176 Wn.2d 611, 632-33, 294 P.3d 679 (2013) (Madsen, J., concurring).

In the case at bar, there is a significant possibility that Ms. Wood's identification stemmed not from the incident, after which she was completely unable to describe the facial features of the perpetrator, but rather from seeing Mr. Sakawe in court as he was being prosecuted for the charged offense. Because her claim that Mr. Sakawe was the perpetrator was the only direct evidence linking Mr. Sakawe to the offense other than the generic descriptions this unreliable identification testimony should not have been permitted.

c. Unreliable identification procedures are prohibited by article I, section 3.

The due process analysis used to evaluate the inadmissibility of an identification procedure under the Fourteenth Amendment is focused on the suggestiveness of the police procedures. *See Perry v New Hampshire, _ U.S. _, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012).* Reliability is the primary concern under article I, section 3, rather than deterring police misconduct. An independent evaluation of article I, section 3 demonstrates that the reliability should be the touchstone.

i. *The Gunwall factors show an independent state constitutional analysis is appropriate.*

To find that a state constitutional provision supplies different or broader protections than its federal counterpart, courts analyze six nonexclusive criteria. These are: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

As to the first two factors, the language of the federal and state due process clauses are identical. Both prohibit the deprivation of “life, liberty, or property without due process of law.” U.S. Const. amend. 14; Const. art. I, § 3. This does not end the inquiry. *State v. Davis*, 38 Wn.App. 600, 605 n.4, 686 P.2d 1143 (1984) (citing Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977)). “Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.” *Gunwall*, 106 Wn.2d at 61.

While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary. The people of this state shaped our constitution, and it is our solemn responsibility to interpret it.

State v. Dubose, 699 N.W.2d 582, 597 (Wis. 2005).

With respect to the third *Gunwall* factor, the legislative history from the constitutional convention does not shed light on whether the state due process clause should be interpreted differently from the federal one. See *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (citing *Journal of the Washington State Constitutional Convention, 1889*, at 495-96 (B. Rosenow ed. 1962)).

Regarding the fourth factor, pre-existing state law, the Washington Supreme Court has held that the standard for reliability of evidence embodied in the state constitution's due process clause provides broader protection than the federal due process clause, and it has never retreated from this holding. *Marriage of King*, 162 Wn.2d 378, 414, 174 P.3d 659 (2007) (Madsen, J., dissenting) (citing *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) ("*Bartholomew II*"). In *Bartholomew I*, the Court held that certain provisions of Washington's death penalty statute violated the federal

due process clause because they permitted consideration of any relevant evidence at the penalty phase regardless of its reliability. *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982) (“*Bartholomew I*”). The U.S. Supreme Court vacated the judgment and remanded for reconsideration in light of its decision in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). On remand, the state supreme court emphasized the importance of the state constitution’s different due process considerations.

[I]n interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court’s interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution’s due process clause.

Bartholomew II, 101 Wn.2d at 639. The Court held that the statute violated article I, section 3, declaring, “We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability.” *Id.* at 640. It stressed that “the independent state constitutional grounds we have articulated are adequate, in and of themselves, to compel the result we have reached.” *Id.* at 644.

This independent interpretation of article I, section 3 was not anomalous. In *Davis*, the trial judge inferred guilt from the defendant’s post-arrest silence. This did not violate the federal due process clause

because the defendant had not been read *Miranda* warnings. *Davis*, 38 Wn.App. at 604 (citing *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982)). But this Court held that article I, section 3 required a different result. *See id.*

Pre-existing state law addressing both the fairness of procedures in state courts, and the specific question of whether article I, section 3 provides greater protection against the admissibility of unreliable evidence in a criminal trial, unequivocally favors an independent constitutional analysis with respect to identification testimony.

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Finally, state law enforcement measures are a matter of state or local concern, *id.*, as is the fundamental fairness of trials held in this state. *Bartholomew II*, 101 Wn.2d at 643-44. An application of the six *Gunwall* factors shows that article I, section 3's greater concern for the

reliability of evidence requires renunciation of the federal standard for admissibility of identification evidence.

ii. *This Court should hold that article I, section 3 prohibits the admission of unreliable identification evidence.*

This Court should hold that article I, section 3, prohibits the admission of unreliable identification evidence. Admissibility should not turn on the goal of deterring police misconduct because our constitution is more concerned with reliability and fairness than with deterrence. *See Bartholomew II*, 101 Wn.2d at 640 (“We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability”); *cf. State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (unlike Fourth Amendment, primary purpose of article I, section 7 of Washington Constitution is not to deter police misconduct, but to protect privacy). Instead, the suggestive circumstances surrounding the identification should be one factor in the totality-of-circumstances analysis. *See Recent Case, Evidence – Eyewitness Identifications – New Jersey Supreme Court Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications. – State v. Henderson*, 27 A.3d 872 (N.J. 2011), 125 Harv. L. Rev. 1514 (2012) (praising New Jersey Supreme

Court's update of standards but lamenting requirement of police misconduct; "The court should have treated equally all factors that might undermine the reliability of an identification").

Decades of scientific research show that the federal standard "does not offer an adequate measure for reliability" and "overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate." *Henderson*, 27 A.3d at 878. "[M]isidentifications stem from the fact that human memory is malleable." *Id.* at 888. Memory "can be unknowingly contaminated by post-event information" obtained from elsewhere. *Id.* at 894, 900.

There is also an "own-age bias" and "own-race bias," meaning people have a harder time accurately identifying people whose race and/or age group are different from their own. *Id.* at 906-907. The *Henderson* court updated its admissibility standard to incorporate all of this evidence. *See id.* at 920-22.

Despite the science demonstrating flaws in eyewitness identification, to a jury "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting) (quoting

Elizabeth Loftus, *Eyewitness Testimony* 19 (1979)). Cross-examination “is a useless tool” for educating jurors about biases that a witness has when the witness is unaware of the bias. *Allen*, 176 Wn.2d at 640 (Wiggins, J., dissenting). When a witness believes her identification is accurate, “traditional impeachment methods [are] inadequate for ferreting out the truth.” *Id.*

In light of evolving science explaining witness perception and memory, and article I, section 3’s paramount concern for fair trials using reliable evidence, this Court should hold that article I, section 3 prohibits the admission of unreliable identification evidence. *See Henderson*, 27 A.3d at 921.

d. *Admitting Ms. Wood’s unreliable claim of recognition five years earlier during a prior jury trial undermines the fairness of the trial.*

“[W]here there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.’” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). This Court cannot say that Ms. Wood’s claim she recognized Mr. Sakawe “had no effect on the jury,” and therefore it requires reversal for a new trial. *Id.*

Ms. Wood's claim that she recognized Mr. Sakawe when in court in 2008 is fraught with unreliability. At the time of the incident, she gave the vaguest of descriptions and admitted she did not see the perpetrator's face. When the police asked her to describe the perpetrator in the motel lobby, she said, "I really couldn't tell you." 5RP 159.

She did not mention to anyone that she recognized Mr. Sakawe in 2008. She did not identify Mr. Sakawe close in time to the incident. She did not remember enough about what Mr. Sakawe looked like to recognize him in 2013. It is likely that her memory of testifying in 2008 is shaped by post-event confirmation, such as seeing Mr. Sakawe in court and knowing he was the person the State arrested and charged.

Her identification was critical to the case. Without it, all the State had were general descriptions of a perpetrator wearing black with possibly some red, or red with black, gender and race. Mr. Sakawe did not have any stolen property in his possession. Due to the importance of Ms. Wood's claim that Mr. Sakawe was the perpetrator to the State's case and the likelihood that this claim stemmed from seeing Mr. Sakawe in court knowing he was the person charged, rather than an independent memory of the incident, renders the verdict unreliable and denies Mr. Sakawe due process of law.

3. The overlapping robbery and assault charges violate double jeopardy

- a. *A person may not be punished twice for two offenses that have the same legal and factual elements*

The double jeopardy clauses of the state and federal constitutions protect against multiple convictions and punishments for the same offense. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9. “Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently.” *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

The applicable rule is that, where *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact* which the other does not.

Orange, 152 Wn.2d at 817 (quoting *Blockburger*, 284 U.S. at 304; emphasis added in *Orange*).

This analysis is not based on a generic comparison of elements, but instead by looking at the case as charged. *Orange*, 152 Wn.2d at

816; *see also State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005) (“We consider the elements of the crime as charged and proved, not merely a[t] the level of an abstract articulation of the elements.”).

In *Orange*, the court concluded that double jeopardy principles barred convictions for attempted murder in the first degree and first degree assault. Even though the “substantial step” establishing attempted murder could in some cases be an act other than an assault, the same act was used as proof of the substantial step in Mr. Orange’s case was used to prove first-degree assault. 152 Wn.2d at 820.

Similarly, in *In re Personal Restraint of Francis*, 170 Wn.2d 517, 524, 242 P.3d 866 (2010), the defendant was charged with second degree assault by using a baseball bat and attempted first degree robbery by inflicting bodily injury in an effort to take property . Examining the “nature of the offenses as charged,” while acknowledging that the elements of the offenses differed, the court found that both offenses were predicated on the same assaultive conduct. *Id.* at 523-25. The bodily injury caused by the baseball bat was the basis for second degree assault and elevated attempted robbery to first degree attempted robbery, requiring a single punishment under double jeopardy law. *Id.* at 525.

These cases show that the abstract possibility of committing one crime without committing the other is not dispositive under *Blockburger*. The question instead is whether, in the context of a specific case, the proof required to convict for one crime is also sufficient to convict for the other. *Orange*, 152 Wn.2d at 820.

b. *Convictions for robbery and assault with the intent to commit theft or robbery violate double jeopardy.*

Robbery requires the use or threat of force against a person for the purpose of stealing personal property. *See State v. Tvedt*, 153 Wn.2d 705, 711-12, 107 P.3d 728 (2005). The Legislature has not signified its intent to separately punish the force used to facilitate the theft of property from a person unless the force rises to the level of first degree assault. *Freeman*, 153 Wn.2d at 776; *see State v. Kier*, 164 Wn.2d 798, 805, 194 P.3d 212 (2008). For assault to be separately punished from the forcible taking of property from a person, the assault conviction must rest on separate conduct and a distinct level of force. *See Freeman*, 153 Wn.2d at 776.

This Court repeatedly found impermissibly compounded punishments in prosecutions for both assault, elevated in degree based on the intent to commit another felony, and the other felony that

underlies the assault. In *State v. Leming*, 133 Wn.App. 875, 888, 138 P.3d 1095 (2006), the defendant was charged with second degree assault based on a simple assault elevated to a felony because it occurred with the intent to commit felony harassment and he was also charged with felony harassment. Applying the same-evidence test, the *Leming* Court concluded that as charged, the State had to prove the same threatening conduct for both offenses. *Id.* at 888-89. Because the two charges were predicated on the same act of felony harassment, and both involved the threat of harm as a legal matter, the two convictions violated double jeopardy. *Id.*

Again in *State v. Martin*, 149 Wn.App. 689, 701, 205 P.3d 931 (2009), the Court applied the same-evidence test when a defendant was charged with both second degree assault based on the intent to commit rape and attempted rape in the third degree. Looking at the facts “as alleged” at trial, the Court found there was no purpose for the assault that was independent of the acts constituting the attempted rape and found the two convictions violated double jeopardy. *Id.*

Similarly, in *State v. Lindsay*, 171 Wn.App. 808, 817, 844, 288 P.3d 641 (2012), *as amended* (Feb. 8, 2013), *rev. granted on other grounds*, 177 Wn.2d 1023 (2013), the defendants were convicted of

second degree assault based on the intent to commit a felony as well as first degree robbery. The victim claimed that during the incident, the defendants “bound him with zip ties and a leash, beat and choked him, with a pipe, rendered him unconscious, taunted him, and took his property.” *Id.* at 816. The State argued the assault and robbery convictions did not violate double jeopardy because there was more assaultive conduct than needed to complete the robbery. *Id.* at 845. This Court explained that even though there were several assaults, “this argument misses the question entirely.” *Id.*

To resolve the double jeopardy issue in *Lindsay*, the court needed to find assault with the intent to commit a felony “had a purpose separate and distinct from his contemporaneous robbery.” *Id.* The jury did not expressly find the assault occurred with a separate and distinct purpose and any ambiguity in the jury’s verdict “must be resolved in the defendants’ favor.” *Id.* at 846. The Court held that the convictions merged even though the assaultive conduct extended beyond what might have been strictly necessary to steal property.

Mr. Sakawe was charged with second degree assault based on the allegation that a simple assault occurred “with the intent to commit the felony of theft in the first degree or robbery in the second degree.”

CP 103 (Instruction 23); CP 7 (amended information); RCW 9A.36.021(1)(e). He was separately charged with attempted robbery in the second degree. CP 6-7; CP 98 (Instruction 18); RCW 9A.56.210.

As charged, these two offenses involve the same factual and legal elements. To commit attempted second degree robbery, the State needed to prove Mr. Sakawe engaged in a substantial step to forcibly take property from Mr. Chen, with the intent to commit robbery. The only property the State alleged Mr. Sakawe tried to take was Mr. Chen's cell phone. 8RP 35. The only force purportedly used against Mr. Chen was that he was pushed or his throat pressed while standing by a bus shelter. 8RP 35-36. The State emphasized that the incident took place at the bus stop, and not inside the lobby, although the chase to the lobby constituted a continuing course of conduct. 8RP 45.

Similarly, to commit second degree assault as charged, the State needed to prove Mr. Sakawe threatened or caused bodily injury with the intent to take personal property from Mr. Chen by force. CP 89 (Instruction 10); CP 100 (Instruction 20); CP 102 (Instruction 22). The same evidence was used to prove the allegation of attempted second degree robbery. 8RP 35-36. The elevation of an offense's degree based on the intent to commit another crime is a classic scenario under which

a separate conviction for the predicate offense merges for purposes of punishment. *Francis*, 170 Wn.2d at 525.

c. *The court inexplicably ignored the stipulation to same criminal conduct*

The prosecution conceded that the two offenses of attempted second degree robbery and assault in the second degree constituted the same criminal conduct. CP 124. Yet the judgment and sentence did not include any same criminal conduct finding. CP 106-09.

When two or more current offenses constitute the “same criminal conduct,” they shall “count as one crime” for purposes of sentencing. *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 1218 (2002); RCW 9.94A.589 (1)(a). Two offenses constitute the “same criminal conduct” when they involve the same victim, occur at the same time and place, and are based on the same overarching intent. *State v. Saunders*, 120 Wn.App. 800, 824-25, 86 P.3d 232 (2005). The court erred by ignoring the prosecution’s valid stipulation when imposing sentence. CP 124. However, same criminal conduct does not require the vacation of a conviction, unlike double jeopardy. Accordingly, the remedy in this case is to vacate a conviction due to the violation of double jeopardy.

d. *The remedy for the double jeopardy violation is to vacate the less serious conviction.*

If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other. *Freeman*, 153 Wn.2d at 777. In *Womac*, the Supreme Court held that a trial court has an affirmative obligation to vacate *from the judgment* convictions which have been found to violate double jeopardy prohibitions. 160 Wn.2d at 659-61. “[C]onvictions may not stand for all offenses where double jeopardy protections are violated.” *Id.* at 658 (emphasis in original, citation omitted). Mr. Sakawe is entitled to vacation of the lesser conviction. Because one offense might have significantly different immigration consequences, the question as to which offense qualifies as the lesser that should be vacated should be resolved in the trial court on remand for resentencing.

F. CONCLUSION.

Mr. Sakawe's convictions should be reversed and a new trial ordered. Alternatively, a new sentencing hearing is required to remedy the double jeopardy violation.

DATED this 2nd day of May 2014.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 70563-6-I
)	
ABDIRAHMAN SAKAWE,)	
)	
Appellant.)	

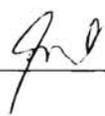
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