

70563-6

70563-6

NO. 70563-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN SAKAWE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY ROBERTS

BRIEF OF RESPONDENT

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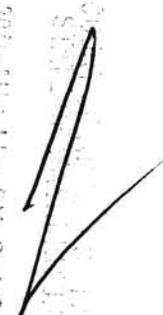


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A. ISSUES PRESENTED

1. Whether Sakawe’s right to a fair trial was protected when the deputy prosecutor who handled Sakawe’s previous trial was allowed to testify regarding relevant factual matters?

2. Whether Sakawe’s right to a fair trial was protected when the trial court determined that a prior in-court identification procedure was not impermissibly suggestive?

3. Whether Sakawe’s convictions for attempted second-degree robbery and second-degree assault violate double jeopardy when as charged and proved in this case, the crimes constituted the “same offense”?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

On November 22, 2007, shortly after 11:00 p.m., Ka “Charles” Chen and Chaun-Wen “Andre” Chuang were at a bus stop along Pacific Highway, in Des Moines, Washington. 5RP 170-71; 7RP 10-11.¹ Chen and Chuang were both from Taiwan and attended local community colleges. 5RP 165-66; 7RP 10. Chuang lived at a hotel near the bus stop, the Garden Suites, which hosted an international student dorm. 5RP 136.

¹ The State adopts Appellant’s designation of the Verbatim Report of Proceedings.

While Chen and Chuang waited for the bus, a large group of young males accosted them. 5RP 171-72; 7RP 13. An African-American male wearing what Chuang described as a red hat grabbed Chen by the throat and demanded his cell phone. 7RP 15-16. Chuang grabbed the man's arm to help Chen, but Chuang was grabbed and punched by another young male. 7RP 16-17. While Chuang was trying to assist Chen, someone snatched Chuang's cell phone. 5RP 174; 7RP 18. The young males demanded money or wallets from Chuang and Chen. 5RP 176; 7RP 17-18. Although they were surrounded at the bus shelter, Chuang and Chen were able to run away, and they fled to the nearby Garden Suites Hotel. 5RP 173-74; 7RP 18-21.

Catherine Wood was working in the hotel lobby that evening. 5RP 126, 128, 134. Wood knew Chuang because he lived there. 5RP 136-37. She saw Chuang and Chen run into the lobby shortly after 11:00 p.m. 5RP 134-35. Seconds after they arrived, Wood saw an African-American male wearing a black and red hoodie enter the hotel lobby and confront Chuang in a threatening manner. 5RP 139-40. Chuang recognized the individual who confronted him in the hotel lobby as the young black male wearing the red hat, who had grabbed Chen's throat at the bus stop. 7RP 23. The young male hit Chuang in the face, knocking his glasses off. 5RP 143; 7RP 24. Chen gave his cell phone to

Wood and asked her to hold onto it for him. 5RP 141-42; 7RP 22. Wood yelled at the male wearing the black and red hoodie to get out of the hotel. 5RP 143-44. As she did so, she saw another young black male at the door telling the individual in the black and red hoodie that they should leave, and together, they did. 5RP 144-45; 7RP 24.

The police were called, and Officers Shields, Gallagher, and Ochart all arrived at the hotel within ten minutes. 4RP 89; 5RP 23, 76; 6RP 42. While Officer Shields spoke with Chen and Chuang, Officers Gallagher and Ochart reviewed surveillance video from the hotel lobby. 4RP 93-95; 5RP 25-28; 6RP 42-46. Officer Gallagher saw that the surveillance video depicted a dark-skinned male with a medium to slight build, about 5'8 tall, wearing a black and red jacket and a red and black baseball hat. 5RP 30, 85-86. On the video, Officer Gallagher observed the male enter the hotel lobby and immediately accost a person inside, hitting him and struggling with him over something. 5RP 30-31. Gallagher also saw that two dark-skinned individuals were holding the lobby doors open. 5RP 31-32. One of the males holding the door was wearing a white hoodie, drawn close around his face, while the other wore dark, nondescript clothing. 5RP 32, 87-88. Officer Gallagher could not make out any facial features of the individuals in the video. 5RP 37, 82.

Within ten minutes of their arrival at the Garden Suites Hotel, the officers received a dispatch to a location just several blocks away. 4RP 106-07; 5RP 38. Officers Ochart and Gallagher left the hotel to respond to the second call. 4RP 109; 5RP 38-39. Officer Gallagher arrived at the second scene less than a minute after leaving the hotel. 5RP 39-40. Upon approaching, he observed a dark-skinned male wearing a white hoodie drawn close around his face standing with another young male who wore dark clothing. 5RP 40-41. Officer Gallagher immediately believed that the individual wearing the white hoodie was the male he had seen on the hotel surveillance video. 5RP 41. Also, to Officer Gallagher, the second male's appearance was consistent with the second male who he had seen standing by the hotel doors wearing dark clothing. 5RP 41-42.

Officers Ochart and Gallagher detained the two males, who they later identified as Warsame (wearing the white hoodie) and Muse (wearing the dark clothing). 4RP 111-14; 5RP 42-43. Officer Shields brought victims Chen and Chuang over to see whether they recognized either Warsame or Muse. 4RP 116; 5RP 44. Chen and Chuang could not identify Warsame or Muse. 5RP 183; 6RP 47-49; 7RP 27. However, Chuang's cell phone, which displayed Asian characters and was attached to a distinctive keychain, was discovered in Muse's pocket. 4RP 114; 5RP 43; 6RP 50; 7RP 31-32.

While being transferred to a different patrol car, Muse fled the officers on foot. 4RP 118-20; 5RP 46; 6RP 51-52. A short time later, Auburn K9 Officer Dan O'Neil and his partner Ronin arrived to help locate Muse. 5RP 47, 101; 6RP 73, 97. When placed at the location Muse had been detained, Ronin was commanded to "seek." 6RP 100-01. Ronin got up, indicated that he was tracking a scent, and immediately ran toward a large tree and bushes. 6RP 101-03. The bushes and tree were in the front yard of someone's home, about 30 or 40 yards from where Warsame and Muse had been detained. 5RP 53; 6RP 74.

Appellant Sakawe was under the tree. 5RP 50; 6RP 103. Ronin did as he was trained to do—bite and hold the source of the scent he was tracking until Officer O'Neil commanded him with "out." 6RP 104-07, 142. Ronin was not trained to bite and hold individuals that are not the source of the scent he tracked. 6RP 142. Not immediately connecting Sakawe to the robbery, Officers Gallagher, O'Neil, and Ronin restarted the track in an attempt to find Muse. 5RP 52-54; 6RP 107-08. Officer Shields waited with Sakawe for paramedics to arrive and treat Sakawe's dog bite. 6RP 56-57. According to Officer Shields, Sakawe was wearing a red hoodie or sweatshirt with a black jacket. 6RP 57. Sakawe told Shields that he was just sleeping under the tree because he was homeless.

6RP 57-58. Sakawe was ultimately taken to the hospital for treatment for the dog bite. 6RP 58.

After Officer O'Neil completed his search for Muse, he went to Highline Hospital to talk to Sakawe about the dog bite. 6RP 108-09, 137. Contrary to the statement he had earlier made to Officer Shields about being homeless, Sakawe told Officer O'Neil that he lived in Burien. 6RP 109-10, 139-40. Officer O'Neil noticed a fresh abrasion by Sakawe's right eye.² 6RP 111. Officer O'Neil noticed that Sakawe was wearing a red hoodie and a black shirt or sweatshirt.³ 6RP 107, 135-36.

2. PROCEDURAL FACTS.

a. The Original Convictions And Subsequent Personal Restraint Petition.

In 2008, Sakawe was convicted, following a jury trial, of second-degree robbery, attempted second-degree robbery, and second-degree

² Sakawe told Officer O'Neil that he had received the abrasion while he was "running." 3RP 17. Sakawe also told Officer O'Neil that he had been in Des Moines visiting his friend, Muse. 3RP 14, 18. The statements from Sakawe about how he received the abrasion and that he was visiting Muse were suppressed by the trial court, who concluded that Sakawe was in "custody" at the hospital, and that after Sakawe told Officer O'Neil that he lived in Burien, Officer O'Neil's questioning turned into an "interrogation." 3RP 139-40.

³ At the direction of Des Moines Officer Gallagher, Auburn Officer O'Neil collected Sakawe's clothing. 3RP 20-24. The trial court suppressed the clothing because it was seized without a warrant. Although the court concluded that Sakawe was in "custody" at the hospital, it also determined that because Sakawe was not formally arrested and instead was allowed to leave the hospital, the clothing was not properly seized incident to arrest. 3RP 140.

assault.⁴ CP 8. Deputy Prosecutor Julie Kline handled the case for the State. 05/15/08RP. In 2012, Sakawe filed a personal restraint petition in which he successfully argued that his attorney had given him incorrect advice as to the immigration consequences of the plea offers that had been made to him prior to his trial. He asserted that he would have pled guilty to one of the offers had he been correctly advised. CP 24-29.

During a reference hearing regarding Sakawe's ineffective assistance of counsel claim, the trial court reviewed notes from Sakawe's prior trial counsel *in camera*, and provided a redacted copy of some of the notes to Deputy Prosecutor Kline, who handled the reference hearing. CP 126-29; 1RP 33-34; 2/16/12RP 2-3. The State indicated its belief that, should the case ultimately need to be retried, the King County Prosecutor's Office would not be required to withdraw, so long as the prosecutors handling the reference hearing and personal restraint petition were shielded from future prosecution of the case. 1RP 18. The court sealed all of the notes it reviewed *in camera*, and signed an order indicating that the only prosecutors to have access to the redacted notes were those handling the reference hearing and personal restraint petition. CP 129; 1RP 40; 2/16/12RP 2-3. Sakawe's convictions were reversed in the personal restraint petition. CP 24-29.

⁴ The second-degree robbery conviction was vacated because it merged with the second-degree assault conviction. CP 6-8.

b. The Current Trial.

Following the reversal of Sakawe's convictions, Deputy Prosecutor Patrick Hinds assumed responsibility for the case. 1RP 42. During the original trial in 2008, the State had encountered significant difficulty playing a copy of the video surveillance on its own equipment. 2RP 30. Kline ultimately had to retrieve the computer from the Garden Suites Hotel and have it physically brought to the courtroom in order to play the video surveillance footage for the jury. Id. After the trial in 2008, the computer was returned to the hotel, and later sold or recycled. 2RP 30-31. At the retrial in 2013, Hinds was unable to play the video surveillance footage on any equipment belonging to either the prosecutor's office or the police department. 2RP 31; 4RP 31.

Hinds proposed to call Kline as a witness at the retrial. 2RP 32-33. He informed the trial court that Kline had not been involved in the prosecution of the case since Sakawe's convictions were reversed. 2RP 47. He argued that because he was unable to play the video surveillance footage for the jury, and because Kline had viewed the video "probably more than anyone else," she should be allowed to testify about her memory of what the video depicted. 2RP 33. Additionally, Hinds asked that Kline be allowed to testify about the difficulty she had encountered playing the video at the prior trial. Id. Specifically, he

argued that the State's efforts to present the video footage to the jury were relevant to its determination of the case, and that Kline's testimony that she had been required to physically bring the computer from the hotel would provide context for the detective's testimony that the hotel computer had since been sold or destroyed. 2RP 43-44.

Sakawe argued that Kline's testimony should not be allowed, given that she had previously prosecuted the case. 2RP 35-40, 49-51. After consideration, the court ultimately disagreed that there was a conflict of interest, and concluded that Kline could testify about what she recalled seeing on the video and about the technical difficulties she had playing the video in 2008. 2RP 44, 88.

Later, after the trial court suppressed the clothing that Sakawe was wearing when he was discovered under the tree, Sakawe moved to preclude Kline (and also Detective Savage) from testifying regarding her memory of the clothing worn by the suspect in the video. 7RP 45, 53. Sakawe argued that Kline could not "parse out" her memory of the suspect's clothing in the video from her observations of Sakawe's suppressed clothing. 7RP 44-45.

The court stated that it would allow Detective Savage to testify about what she observed in the video as part of her investigation, but indicated that it was concerned that Kline's description of the clothing in

the video might be tainted by her examination of the suppressed clothing done in preparation for trial. 7RP 47-49, 51. Prior to ruling on Sakawe's motion, the court heard testimony from Kline. 7RP 71-81. Outside the presence of the jury, Kline testified that she had watched the surveillance video between 10 and 15 times. 7RP 74. She testified that she viewed the video several times before she ever saw the clothing that was in evidence. 7RP 75. She only saw the clothing two times, once during an "evidence view" with defense counsel, and then once again during trial. Id. Kline did not believe any photographs of the clothing were ever taken. Id. After hearing from Kline, the trial court stated, "I am satisfied that it is appropriate to have Ms. Kline testify with regard to her memory of what she saw in the video." 7RP 81.

Following the retrial, Sakawe was convicted again of second-degree robbery, attempted second-degree robbery, and second-degree assault. CP 72-74. On July 1, 2013, Sakawe received a standard range sentence totaling 13 months of incarceration, and 18 to 36 months of community custody. CP 109-10; 8RP 100. He now appeals. CP 114.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF DEPUTY PROSECUTOR KLINE.

Sakawe contends that the testimony of deputy prosecutor Kline violated constitutional due process requirements. Specifically he argues that a combination of several factors relating to her testimony operated in conjunction to deny him a fair trial. This claim fails. Kline did not participate in the prosecution of Sakawe after his convictions were reversed in the 2012 personal restraint petition. At the retrial in 2013, she provided relevant evidence that did not relate to information she may have learned during the 2012 reference hearing. Her testimony was based solely on admissible evidence, and she neither expressed an opinion on Sakawe's guilt nor vouched for the State's case. Sakawe has failed to establish that her testimony deprived him of a fair trial.

a. Kline's Previous Prosecution Of Sakawe Did Not Preclude Her Testimony In The 2013 Trial.

Sakawe's argument that Kline's testimony deprived him of a fair trial begins with the broad premise that testimony from a prosecutor is generally "disfavored." He erroneously asserts that, to be allowed, the testimony of a prosecutor must be "unattainable elsewhere." Opening Brf. of App. at 13-14. However, consideration of other available evidence is only necessary to a motion to *disqualify* a prosecutor from litigating a

case, not to the determination of whether a prosecutor who is *not* litigating a case should be permitted to testify. Sakawe cites no authority for his claim that testimony from all prosecutors is generally “disfavored,” or that before Kline could testify, the State was required to demonstrate that she was the only one who could provide the testimony that she did.

A decision to admit or exclude evidence is reviewed for abuse of discretion. State v. Griswold, 98 Wn. App. 817, 823, 991 P.2d 657 (2000). “A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, or its discretion is exercised for untenable reasons.” State v. Cohen, 125 Wn. App. 220, 223, 104 P.3d 70 (2005) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). A court acts unreasonably “if its decision is outside the range of acceptable choices given the facts and the legal standard.” Id.

ER 602 allows witnesses to testify about matters of which they have personal knowledge. The rule applies to all witnesses, and does not exclude prosecutors merely by virtue of the fact of their employment. Indeed, ER 601 states that, “Every person is competent to be a witness except as otherwise provided by statute or by court rule.” There is no statute or court rule outlining an absolute prohibition on the testimony of prosecutors.

A trial court may, in its discretion, disqualify a prosecutor from litigating a case in which she is likely to be a material witness. State v. Sanchez, 171 Wn. App. 518, 545, 288 P.3d 351 (2012) (citing Pub. Util. Dist. No. 1 of Klickitat Cnty. v. Int'l Ins. Co., 124 Wn.2d 789, 811-12, 881 P.2d 1020 (1994) (“PUD”). Disqualification is based on RPC 3.7, which states: “A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.” To demonstrate compelling circumstances required to remove a lawyer from a case, “a party must show that the attorney will provide material evidence unobtainable elsewhere.” State v. Schmitt, 124 Wn. App. 662, 666-67, 102 P.3d 856 (2004) (citing PUD, 124 Wn.2d at 812).

By its very terms, this rule assumes that a lawyer can properly be called as a witness. While disqualification under RPC 3.7 may be unwarranted if the attorney’s testimony is not necessary or is attainable elsewhere, it does not follow that a prosecutor who is *not* involved in the litigation of a case is prohibited from testifying therein *unless* her testimony is unattainable elsewhere. Sakawe does not argue on appeal that the King County Prosecutor’s Office should have been disqualified from prosecuting his case, and he cites no authority for his claim that the trial court was required to find that Kline’s testimony about the video was “necessary” or “unattainable elsewhere” before allowing her testimony.

RPC 3.7—an *ethical* rule limiting an attorney’s ability to act as an advocate in a case in which she may be a witness—does not govern the admissibility of evidence, nor does it bar a witness from presenting otherwise admissible evidence. A criminal defendant’s concern about bias and objectivity on the part of the prosecutor-witness is appropriately addressed through cross examination. State v. Bland, 90 Wn. App. 677, 681, 953 P.2d 126 (1998).

While Sakawe makes the unsupported assertion that calling a prosecutor to testify in a criminal matter is a “disfavored” practice, the only cases he cites in support of that proposition all involved factual situations where the prosecutor continued to litigate the case in which he was a “witness.” See United States v. Alu, 246 F.3d 29 (2nd Cir. 1957) (prosecutor who testified at perjury trial regarding the defendant’s false grand jury testimony also participated in the presentation of the perjury case); United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998) (prosecutor’s continued representation of the government in case where he personally discovered key evidence during the course of trial constituted a form of improper vouching where the circumstances surrounding his discovery of the evidence was a material and contested fact); State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999) (defendant’s confrontation rights violated when prosecutor inserted herself as a witness

by cross-examining defense witness regarding statements allegedly made to her); State v. Lee, 203 S.C. 536, 28 S.Ed.2d 402 (1943) (although generally improper for prosecutor to testify for the State in a case in which he acts as advocate, the defendant had a right to call such prosecutor as a witness for the defense).

Here, Kline had no participation in the prosecution of Sakawe after the 2012 reference hearing.⁵ 2RP 47. Sakawe cites to no authority that she was prohibited from testifying at the 2013 trial simply because she had previously prosecuted the case against him. Moreover, in the absence of any persuasive authority, this Court should reject Sakawe's claim that the State was required to prove that her testimony was unattainable elsewhere. The trial court properly exercised its discretion to allow Kline to testify.

⁵ Sakawe asserts, "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." Opening Brf. of App. at 15. This statement is misleading. The prosecutor's full comment was:

In this particular case, that is a little bit unusual because Ms. Kline was obviously the prosecutor who handled the case before, so she has not been completely screened off, but I think the analysis is different here because it is through that process that she becomes a witness to the facts that are at issue. Since this case has come back and been assigned to me, Ms. Kline has had nothing to do with the prosecuting of this case, so I think she has been screened off to the extent necessary as required.

2RP 47.

b. Kline's Access To Redacted Notes Of Sakawe's Prior Attorney Did Not Preclude Her Testimony.

Next, Sakawe argues that Kline should have been prohibited from testifying because, during the reference hearing on Sakawe's ineffective assistance of counsel claim in 2012, she had been granted access to several pages of redacted notes from Sakawe's prior defense counsel. However, Sakawe did not object to Kline's testimony at trial on the basis that she had access to privileged information, so the court had no occasion to rule on such an argument. CP 65-66; 2RP 35-40, 49-52, 88; 7RP 44-45. Because he cannot establish manifest constitutional error, Sakawe is prohibited from arguing that as a basis for error on appeal. In any event, Kline testified only with respect to facts that she had learned prior to receiving the notes at the 2012 reference hearing, and there is no evidence that the substance of those notes was related to her testimony. Sakawe has failed to demonstrate Kline's testimony was improper due to her access to the prior attorney's redacted notes.

Generally speaking, a defendant cannot raise an issue for the first time in the appellate courts. RAP 2.5(a). Accordingly, in order to challenge a trial court's admission of evidence, a party must raise a timely and specific objection at trial. See ER 103(a)(1) (error may not be predicated upon a ruling admitting evidence unless a timely objection is

made, stating the specific ground of objection, if the specific ground was not apparent from the context); State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). An appellate court “will not reverse the trial court’s decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial.” State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). This rule affords the trial court the opportunity to correct errors and avoid unnecessary appeals and retrials. Id. (citing State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)); Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Sakawe’s objection to Kline’s testimony based on her prior prosecution of the case is insufficient to preserve appellate review of Kline’s testimony based on her access to what had previously been privileged information.

An exception to the general rule as stated in RAP 2.5 is made when the appellant demonstrates that the error complained of constitutes manifest constitutional error. RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 926-27. This exception, however, does not afford a defendant a means for obtaining a new trial whenever he can identify a constitutional error not preserved in the trial court. State v. Grimes, 165 Wn. App. 172, 180, 267 P.3d 454 (2011). To demonstrate manifest constitutional error, Sakawe

must show how the asserted error *actually affected* his rights at trial. Kirkman, 159 Wn.2d at 926-27. “It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” Id. (citing State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1992)). The defendant must make a plausible showing that the claimed constitutional violation had “practical and identifiable consequences.” State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Sakawe has not demonstrated that permitting Kline’s testimony after she received several pages of notes from his previous counsel was constitutionally impermissible. Her testimony was limited to her observations and her actions in 2008. There is nothing in the record to support the conclusion that Kline’s receipt of the notes in 2012 had any improper effect on her testimony or deprived Sakawe of a fair trial.

Even assuming for the sake of argument that any alleged error is constitutional in nature, Sakawe has not made the showing of actual prejudice necessary for this Court to reach his claim of error. Prior to disclosing the nine pages, the court reviewed all of the notes *in camera*, stating that it would provide only those that it determined to be relevant to the issue at the reference hearing—ineffective assistance of counsel in plea bargaining as it related to immigration consequences. 1RP 33. Out of

over 100 pages of notes, the court disclosed only nine pages to Kline, in redacted form. 1RP 33; 2/16/12RP 3. The only information in the record about the substance of those nine pages is that they related to the ineffective assistance of counsel issue at the reference hearing—plea offers and communications between previous trial counsel and Sakawe, and general preparations regarding the decision to have a trial. CP 128. The court specifically stated that it was not turning over any material that was “not necessary to defend against ineffective assistance of counsel and the limited issue at the reference hearing.” Id.

At the retrial, Kline testified only about her observations of the surveillance video made in 2008, her efforts to play the surveillance video in 2008, and Sakawe’s presence at a 2008 proceeding at which witness Wood testified. 7RP 84-104. Sakawe cannot establish that Kline’s access to the redacted notes in 2012 affected her testimony regarding events that occurred earlier, in 2008. He has failed to establish that her testimony following receipt of the notes in 2012 had any practical or identifiable consequences to his case.

Sakawe cites to cases where the State violated the attorney-client privilege to argue that a presumption of prejudice exists. Here, however, the State did not *violate* the attorney-client privilege when the court provided it with access to nine pages of redacted notes. Rather, Sakawe

waived the privilege to the extent necessary to evaluate his claim of ineffective assistance of counsel. State v. Cloud, 95 Wn. App. 606, 613, 976 P.2d 649 (1999). He has not shown that the notes contained any information that exceeded the scope of the reference hearing or were relevant to Kline's testimony regarding 2008 events, and his waiver of the privilege does not provide a basis to assume prejudice. Sakawe did not object to Kline's testimony on the basis that she had access to privileged information. In the absence of manifest constitutional error, he is precluded from raising this claim on appeal.

- c. The Trial Court Properly Determined That Kline's Testimony Regarding Her Memory Of The Suspect's Appearance In The Video Footage Was Not Based On Suppressed Evidence.

Sakawe additionally argues that Kline should not have been allowed to testify because her memory of the video was "inevitably shaped" by her observations of Sakawe's clothing, which had been suppressed in the second trial. Opening Brf. of App. at 19-21. However, the trial court properly concluded that Kline could testify based solely on her memory of what she had seen in the video.

Kline testified outside the presence of the jury that she had viewed the video several times before she ever looked at Sakawe's clothing, which was in evidence. 7RP 75. Kline told the court that she "knew the

video fairly well” before she ever saw the clothing. 7RP 76. Although she viewed the video between 10 and 15 times, she only saw Sakawe’s clothing two times, once before trial, and once during trial. 7RP 75. Kline never saw any photographs of the clothing. Id. She remembered the suspect in the video wearing a black hoodie jacket, with a red “top” underneath. 7RP 76. She testified that in the video, the black jacket was zipped up to “about mid chest,” exposing what looked like “some sort of white block lettering” on the top half of the red top. 7RP 76, 78. She testified that there was something white in the hood of the jacket, but she did not know whether it was part of the jacket itself or if something was stuck inside of the hood.⁶ 7RP 79.

When Kline later observed Sakawe’s seized clothing, she saw that his jacket hood was lined with white sheepskin. Id. Kline testified that in the video, the suspect wore a black and red hat. 7RP 77-78. Kline did not remember ever seeing a hat in evidence. 7RP 77-78. No hat was located on Sakawe when he was discovered in the bushes. 5RP 52, 110. Kline believed that her memory was clear about what she had seen in the video as opposed to what she remembered from seeing Sakawe’s clothing. Id. Her confidence in her ability to testify solely about her memory of the

⁶ Later, Kline told the jury that, from the video, the suspect’s jacket appeared to be a nondescript black-hooded jacket, or sweatshirt. 7RP 101. She testified that the red “top” appeared to her to have white lettering, although she could not be sure. 7RP 101-02.

video was based upon the fact that she watched the video many times before ever seeing Sakawe's clothes. Id.

After hearing Kline's testimony, the trial court concluded that Kline had the ability to testify about the suspect's appearance in the video solely from her memory of the video itself, and not from her memory of Sakawe's clothing. 7RP 81. Based on the evidence before the trial court, this Court cannot conclude that its decision to allow Kline's testimony was an abuse of discretion, or that no other reasonable judge would have made the same determination. See State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (abuse of discretion occurs only when no reasonable judge would have reached the same decision).

Sakawe also argues that Detective Savage's testimony regarding her observations of the suspect's clothing in the video should have been prohibited on the same grounds. However, Sakawe has similarly failed to demonstrate that the trial court abused its discretion in allowing the testimony from Detective Savage.

The State informed the court that it had discussed the issue with Detective Savage, and that she was clear that she could testify only about her memory of the video, and not anything that she learned from seeing the physical evidence. 7RP 46. The State argued that testimony about what Detective Savage saw in the video was relevant not only to her

investigation and interviews of the witnesses, and also for the purpose of demonstrating what the video showed, since it could no longer be viewed. 7RP 47-48. The State pointed out that Detective Savage’s memory of the suspect’s description in the video was “very general” and no more detailed than the other witnesses. 7RP 48. The trial court allowed the testimony with the caveat that Detective Savage could not testify to anything regarding the suppressed evidence. 7RP 49. At trial, Detective Savage’s description of the suspect’s clothing on the video was a black and red baseball cap, and what she thought was a red shirt and a black “puffy” jacket. 7RP 129.

Sakawe has not established that Detective Savage’s memory was “inevitably” shaped by the suppressed clothing. First, it is not clear from the record what Sakawe’s suppressed clothing actually was. Officer O’Neil, who seized the clothing, testified pretrial that he believed that he seized a red “hoodie” sweatshirt. 1RP 174; 3RP 22, 24, 36. Kline testified—outside the presence of the jury—that Sakawe’s clothing “matched” what she had seen in the video, and she testified that the jacket in the video was a black “hoodie.” 7RP 76-77. Detective Savage described the suspect’s jacket in the video as a black “puffy” jacket, not a “hoodie.” 7RP 129. Considering the witnesses’ slightly differing descriptions of the suspect’s clothing in the video, and the lack of

evidence about what Sakawe's clothing actually was, Sakawe has not demonstrated that Detective Savage's testimony was based on suppressed evidence. Although Sakawe argues that it was impossible for Savage to compartmentalize her memory of what she learned when, trial courts are routinely called to do just that when making evidentiary rulings and when presiding over bench trials, and we presume that they can. State v. Read, 147 Wn. 2d 238, 245, 53 P.3d 26 (2002).

Sheer speculation and citation to cases involving the potential pitfalls of eyewitness identification is insufficient to establish error. This Court cannot say that the trial court's decision to allow Detective Savage to testify about the suspect's clothing was an abuse of discretion, or that given her general and limited description deprived him of a fair trial.

d. Kline's Testimony Regarding Sakawe's Presence In Court In 2008 Was Properly Admitted.

Sakawe also argues that Kline should not have been allowed to testify that Sakawe "was the person Ms. Wood saw at the first trial" and "believes to be the perpetrator." Opening Brf. of Appellant at 22-23. He asserts that Kline's testimony improperly bolstered Wood's identification of him. His argument is not supported by the record or any authority.

Prior to the retrial, Wood mentioned that when she testified in 2008, she had recognized "the person she understood to be the defendant"

as being the male who had confronted Chuang inside the hotel lobby. 2RP 90-91; 5RP 148. She stated that she was surprised that no one ever asked her at the previous trial whether she recognized anyone in court. 2RP 91.

At the trial in 2013, Wood testified that she did not know whether the young male from the hotel lobby was present in court. 5RP 148.

However, she testified that when she had been in court five years earlier, she had recognized the person who she understood to be the defendant at that proceeding to be the same individual who had entered the lobby and confronted Chuang. 5RP 148-49. Kline later testified that Sakawe had been present in court at the 2008 proceeding where Wood had testified. 7RP 95-96. Kline could not recall whether any other African-American males were in the courtroom when Wood testified. 7RP 104.

Sakawe does not explain what he means when he argues that Kline “improperly bolstered” Wood’s testimony. “Bolster” means “to give additional strength to.” Webster’s New International Dictionary 249 (3rd. ed. 1993). Regardless, Kline’s testimony was proper. Contrary to Sakawe’s assertions, Kline did *not* testify that Sakawe was the person who Wood saw at the first trial. She testified only that Sakawe was present in court when Wood testified. 7RP 95. The inference from such testimony was, of course, that Wood had recognized Sakawe. However, Kline properly testified only to the fact that Sakawe had been present in court in

2008, leaving it up to the jury to draw, or not draw, the inference that Wood had recognized him. See State v. Vaughn, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984) (witness may testify only about facts of which she has personal knowledge (citing ER 602)). Kline’s factual testimony properly provided an evidentiary link in the State’s case, and did not “improperly bolster” Wood’s identification.

Sakawe also claims that the State was able to use Kline’s testimony to improperly vouch for the credibility of its witnesses during closing argument.⁷ He asserts that Deputy Prosecutor Hinds misrepresented Kline’s testimony by claiming that she had identified Sakawe as the suspect in the video. Opening Brf. at 23. A close reading of the State’s argument demonstrates that is not the case. In rebuttal, Hinds told the jury:

The last point I will speak on is they didn’t find a hat on Mr. Sakawe, and in point of fact the State agrees with Mr. Schmidt’s point that most of the descriptions given by all of the people who watched the video were fairly generic ones of clothing and of body type.

I would suggest to you that based on those descriptions and the description of what the video looks like, if we played the video for you, if we had been able to, you likely would not have been able to draw a determination as to whether it was Mr. Sakawe or not based on what you saw in the video.

⁷ Sakawe did not assign error to the State’s closing argument, and he does not raise a claim of prosecutorial misconduct.

That is why the point of all of those witnesses was was there anything that was inconsistent? – because there is not enough in the video to draw a direct link.

What does that leave us with? That leaves us with the testimony of the people who actually saw Mr. Sakawe live who weren't looking at a poor resolution video, but were looking at the person in person. And that in this case that would be Mr. Chen, Chuang, Ms. Wood and Ms. Kline, and what they tell 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 78-79. Hinds continued:

Could they give a description of his face? Ms. Wood said she couldn't in her prior testimony or in their interview. No. But how hard is it to describe a face? . . . How will you look at someone and describe their face?

The State would suggest to you that what she testified to is exactly the way it happens, using your common sense in the real world. You may or may not be able to describe someone in the sort of situation Ms. Wood was put in, but if you see that person you can say, "Yeah, I recognize them, or, "No, I don't." That is exactly what happened with Ms. Wood.

8RP 80. Hinds then addressed Sakawe's argument that Wood had only claimed to recognize the person in court in 2008 because he was the charged defendant and was the person who sat in the defendant's chair. Id. He pointed out that Wood was unwilling to identify Sakawe in the current trial under similar circumstances, and how that spoke to the credibility of her identification in 2008. 8RP 80-81.

From this, it is clear that the State did not claim that Kline *herself* identified Sakawe as the suspect, but rather the prosecutor referred to Kline because her testimony linked Wood's identification of the suspect to Sakawe. In point of fact, Kline *had* seen Sakawe "live"—in court in 2008. The prosecutor's argument that Kline was one of the persons who saw Sakawe "live" was due to the fact that it was Kline's testimony which actually linked Wood's 2008 identification to Sakawe. Indeed, Sakawe's counsel did not object to the State's argument, providing strong evidence that he did not find it objectionable. The State did not improperly use Kline's testimony to vouch for the credibility of the State's witnesses.

e. Sakawe Has Failed To Demonstrate That Kline's Testimony Violated His Right To Due Process.

Sakawe seems to argue that a confluence of the above factors violated his right to due process of law. His claim should be rejected. Sakawe has not demonstrated that allowing Kline's testimony was arbitrary or unfair, that it was so egregious that it shocks the conscience of this Court, or that it interfered with any rights implicit in the concept of ordered liberty.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. Due process protects

the individual from the arbitrary exercise of government power. Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). It requires the government to follow appropriate, fair procedures before it deprives any person of a protected interest; this is commonly referred to as “procedural due process.” Id.; United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 687 (1987). The Due Process Clause also “prevents the government from engaging in conduct that ‘shocks the conscience’ or interferes with rights ‘implicit in the concept of ordered liberty’”; this is referred to as “substantive due process.” Salerno, 481 U.S. at 746 (internal citation omitted).

Sakawe does not cite to any cases that compel the conclusion that a violation of due process occurred here. As demonstrated above, he has failed to establish that Kline’s testimony was influenced by her knowledge of the suppressed clothing. Nor has he demonstrated that the substance of Kline’s testimony was affected in any manner by her access to the redacted notes of his prior counsel, or that cross-examining her about the notes would have exposed bias on her part or undermined her credibility in any way. And while Sakawe asserts that he had “little incentive to explore the bias that stemmed from her interest as a prosecutor in seeing [him] convicted,” he makes no attempt to explain why he could not have questioned her about that fact. Sakawe’s argument would seemingly

apply any time an investigating police officer testifies. This Court should reject Sakawe's claim that Kline's testimony denied him the due process of law.

2. WOOD'S TESTIMONY REGARDING HER EARLIER IN-COURT IDENTIFICATION DID NOT DEPRIVE SAKAWE OF A FAIR TRIAL.

Sakawe argues that Wood's testimony—that she recognized the individual who was in court in 2008 as the male in the hotel lobby—violated principles of due process. However, due process is not implicated when there is no impermissibly suggestive identification procedure involving state action. The trial court properly exercised its discretion to allow the testimony, finding that Wood's act of seeing the suspect in court in 2008 was not a suggestive identification procedure. The trial court's conclusion that concerns about the reliability of the identification went to its weight and not its admissibility was correct. Moreover, because no state action occurred by Wood simply observing Sakawe in court, the right to due process is not implicated, and the trial court's ruling should be affirmed on that basis as well.

Sakawe urges this Court to abandon the long line of authority that establishes the framework for the admissibility of eyewitness identification in Washington. He contends that this change is compelled by the due process clause of the Washington Constitution. However, this

Court should not consider Sakawe's state constitutional claim for the first time on appeal. He did not raise the issue below, and he has failed to establish manifest constitutional error.

Finally, even if this Court considers Sakawe's state constitutional claim, he has failed to establish that article I, section 3 provides broader protection in this circumstance than its federal counterpart.

a. Legal Standard For The Admissibility Of Eyewitness Identification Evidence.

The court's decision to admit eyewitness identification evidence is reviewed for abuse of discretion. State v. Sanchez, 171 Wn. App. 518, 579, 288 P.3d 351 (2012) (citing State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001)). The standard is a deferential one, and this Court must affirm the trial court's decision when there are tenable grounds or reasons underlying it. Id.

To exclude eyewitness identification evidence as a violation of the due process clause, "the unnecessarily suggestive circumstances of the identification must have been arranged by law enforcement." State v. Sanchez, 171 Wn. App. 518, 573, 288 P.3d 351 (2012) (emphasis added). "Due process concerns arise only when *law enforcement officers* use an identification procedure that is both suggestive and unnecessary." Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716, 723, 181 L. Ed. 2d 694

(2012) (emphasis added). Where the eyewitness identification procedure involves no state action, due process is not implicated, and no preliminary judicial inquiry into reliability is required. Perry, 132 S. Ct. at 730. Instead, the reliability of the identification is properly tested in traditional ways—through the presence of counsel, cross examination, rules of evidence, and jury instructions on the pitfalls of eyewitness identification and the burden of proof. Id. at 721.

Where law enforcement has arranged or is involved in an identification procedure, Washington courts have long employed a two-part framework for the admissibility of identification evidence. First, a defendant seeking to exclude such evidence must establish that the identification was impermissibly suggestive. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). A suggestive identification procedure is one that draws undue attention to a particular individual. Kinard, 109 Wn. App. at 432. If the defendant fails to meet this initial burden to show suggestiveness, the inquiry ends, and the evidence is admissible. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing Vaughn, 101 Wn.2d 604).

If the defendant demonstrates that the identification procedure was impermissibly suggestive, the court moves to the second step of the

analysis: determining whether, under the totality of the circumstances, the procedures created a substantial likelihood of irreparable misidentification. Linares, 98 Wn. App. at 401. When considering the second prong of the test, courts consider five factors: the opportunity of the witness to view the suspect, the witness's degree of attention at the initial live encounter, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the time between the initial live viewing and the identification procedure. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

b. The Trial Court Properly Exercised Its Discretion To Allow Wood's Testimony.

No United States Supreme Court or any published Washington case appears to have decided the specific issue of whether an inquiry into the Biggers reliability factors is necessary when an in-court identification was not preceded by an impermissibly suggestive pretrial identification procedure. However, other courts that have considered the question have concluded that, "absent an unduly suggestive *pretrial* identification procedure, questions as to the reliability of a proposed in-court identification affect only the in-court identification's weight and not its admissibility." Byrd v. State, 25 A.3d 761, 767 (Del. 2011) (emphasis added); see e.g., United States v. Domina, 784 F.2d 1361 (9th Cir. 1986)

(declining to apply the Biggers factors to an initial in-court identification); Galloway v. State, 122 So.3d 614, 664 (Miss. 2013), cert. denied, 134 S. Ct. 2661, 189 L. Ed. 2d 209 (2014) (same); State v. King, 156 N.H. 371, 376, 934 A.2d 556 (2007) (same); State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005) (same); State v. Smith, 200 Conn. 465, 470, 512 A.2d 189 (1986) (“The manner in which in-court identifications are conducted is not of constitutional magnitude but rests within the sound discretion of the trial court.” (citations omitted)).

The inherent suggestiveness in the normal trial setting does not rise to the level of constitutional concern. Byrd, 25 A.3d at 767. Rather, the admissibility of a first-time in-court identification is generally left to the discretion of the trial court. State v. Hickman, 355 Or. 715, ___ P.3d ___ (2014) (citing People v. Rodriguez, 134 Ill. App. 3d 582, 480 N.E.2d 1147 (1985)). “Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.” Domina, 784 P.2d at 1369 (quoting Manson v. Brathwaite, 432 U.S. 98, 107, 113-14 n.14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)).

The identification procedure Sakawe complains of was Wood’s seeing him in court during his 2008 trial. 2RP 100; 5RP 148-49. Wood

was never involved in any form of pretrial identification procedure. 2RP 90. She was never asked to participate in an in-person identification procedure, nor was she asked to look at any photographs. 2RP 90; 5RP 156. She was never informed whether Chen or Chuang were asked to identify anyone or not. Id. At the first trial in 2008, she was not asked whether she recognized anyone in the courtroom. 2RP 90; 5RP 161-62.

Sakawe fails to point to any specific facts to support his claim that his presence when Wood testified in 2008 was an impermissibly suggestive identification procedure. Nor does he point to any persuasive authority to support his contention that Wood's identification was, by itself, impermissibly suggestive. Sakawe does discuss State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985). However, in that case, prior to the in-court identification of one of the co-defendants, the victim had failed to identify that co-defendant in a pretrial line-up. 40 Wn App. at 744. After the victim failed to identify that defendant, the investigating detective told the victim that that defendant had been arrested for the crime. Id. Additionally, prior to the in-court identification, the victim observed the defendant wearing handcuffs. Id. at 745. No similar pretrial suggestive procedures occurred here.

This Court should decline to find that Wood's observation of Sakawe in court in 2008 was impermissibly suggestive simply because she

knew that he was the defendant at that proceeding. Such a holding would contradict the above-cited cases holding otherwise, would render all in-court identifications impermissibly suggestive, and would contradict the rule that a determination of suggestiveness be decided on its individual facts. Simmons, 390 U.S. at 384. The trial court properly exercised its discretion to admit the evidence without engaging in an analysis of the Biggers reliability factors.⁸

Furthermore, regardless of whether the procedure was suggestive, absent government involvement, there is no due process violation under either the federal or state constitutions. Perry, 132 S. Ct. at 730; see also State v. McCullough, 56 Wn. App. 655, 658-59, 784 P.2d 566 (1990) (violation of the state due process clause requires government action); Sanchez, 171 Wn. App. at 58 n.23 (finding no need to address defendant's due process challenge under the Washington Constitution after affirming the trial court's conclusion that no impermissibly suggestive identification procedure by police occurred). A conclusion that due process is implicated in the absence of governmental action "would open the door to

⁸ The trial court concluded, "Given the facts that are before the Court, I will allow the in-court identification . . . I haven't heard anything that leads me to conclude that there was an improperly suggestive ID procedure. To the extent that there is the potential that something like that could come up during an in-court identification, I don't have the facts in this case to support such a determination so I am going to deny the motion." 2RP 104.

judicial preview, under the banner of due process, of most, if not all, eyewitness identifications.” Perry, 132 S. Ct. at 727.

Moreover, although Sakawe argues that the state due process clause affords greater protection than the federal constitution in the context of the admissibility of eyewitness identification evidence *generally*, he fails to mention or discuss the initial requirement that there be some form of state involvement *in order to trigger due process protections*. Because the evidence here did not involve an impermissibly suggestive identification procedure involving state action, due process concerns are not implicated, and the trial court properly exercised its discretion to admit Wood’s testimony. See State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (appellate court may affirm a lower court’s ruling on any grounds adequately supported by the record).

- c. This Court Should Not Review Sakawe’s State Constitutional Claim For The First Time On Appeal.

In the absence of manifest constitutional error, this Court generally does not consider arguments on appeal that were not raised in the trial court. RAP 2.5. Although RAP 2.5(a)(3) may permit a party to raise an issue of manifest constitutional error for the first time on appeal, “[I]t does not mandate appellate review of a newly-raised argument where the facts necessary for its adjudication are not in the record and therefore where the

error is not ‘manifest.’” State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); see also Kirkman, 159 Wn.2d at 935 (if trial record is insufficient to determine the merits of the constitutional claim, review is not warranted). Additionally, if it is unnecessary to reach a constitutional question to decide a case, this Court should decline to do so. City of Seattle v. Williams, 128 Wn.2d 341, 347, 908 P.2d 359 (1995).

Sakawe challenged the admissibility of Wood’s identification based on the two-part framework outlined above. CP 50-52, 62-64. He argued that the identification procedure was impermissibly suggestive and that, under the Biggers factors, Wood’s identification was unreliable. 2RP 92-98. Sakawe did not argue or raise a claim that his right to due process under the state constitution was violated. He did not ask the court to adopt a different test than the one it utilized. Indeed, the trial court denied Sakawe’s suppression motion on the threshold basis that the identification was not made through an impermissibly suggestive procedure. 2RP 104. Thus, it did not consider or make factual findings regarding the reliability of Wood’s identification.

Now, Sakawe claims for the first time that his due process rights under article I, section 3 were violated by the admission of the evidence. He argues that the state constitution requires a totality of the circumstances inquiry into the reliability of eyewitness identification

evidence regardless of the suggestiveness of the procedures used. This Court should refuse to consider Sakawe's claim of error because it is not constitutional in nature, and even if constitutional in nature, the alleged error is not "manifest" where the record is insufficient for review.

As noted, under the *federal* constitution, due process is not implicated in the absence of government involvement in an eyewitness identification procedure. Perry, 132 S. Ct. at 728. Second, even if law enforcement plays a role, so long as the procedure used was not impermissibly suggestive, due process concerns are similarly not triggered. In the absence of impermissibly suggestive identification procedures "the due process clause does not condition the admissibility of identification testimony upon proof of its reliability." Vaughn, 101 Wn.2d at 605. See also Perry, 132 S. Ct. at 724 (due process concerns arise only when law enforcement officers use a suggestive and unnecessary identification procedure (citing Brathwaite, 432 U.S. at 107)). Indeed, the United States Supreme Court has recently characterized the second-step of the above analysis, which involves consideration of the Biggers factors, as a "due process reliability check" on the admissibility of eyewitness identification evidence. Perry, 132 S. Ct. at 727.

Moreover, as outlined above, under the *state* constitution, a due process violation does not occur in the absence of state action.

McCullough, 56 Wn. App. at 658-59; see also Sanchez, 171 Wn. App. at 58 n.23 (no need to consider state due process rights in the absence of an impermissibly suggestive identification procedure by law enforcement). Thus, this Court should conclude that because the identification evidence from Wood did not stem from an impermissibly suggestive procedure involving state action, Sakawe has failed to raise a constitutional claim of error under either the federal or state constitutions, and his state constitutional claim, not raised below, is precluded by RAP 2.5.

Finally, because the trial court ended its inquiry after finding that the identification procedure was not suggestive, it did not consider or make the factual findings necessary to adjudicate Sakawe's claim that Wood's identification was "unreliable." The record is thus insufficient to address his argument on appeal. Any error, even if constitutional in nature, was not "manifest," and this Court should decline to consider Sakawe's argument. Riley, 121 Wn.2d at 31.

d. Article I, Section 3 Does Not Provide Broader Protection Than Its Federal Counterpart.

In the event this Court reaches the merits of Sakawe's state constitutional claim, it should conclude that in this context, article I, section 3 does not provide broader protection than the federal constitutional right to due process. Sakawe asserts that due process

under the federal constitution is focused on the suggestiveness of police procedures and deterrence of police misconduct, while our state constitution is concerned with reliability. He argues that “suggestiveness” should be just one factor in a totality of circumstances test for the admissibility of eyewitness identification evidence. He essentially advocates for a state constitutional right to judicial pre-screening of “reliability” in every case involving eyewitness identification, no matter the circumstances. However, under the federal constitution, “[i]t is the likelihood of misidentification which violates a defendant’s right to due process.” Biggers, 409 U.S. at 198. Sakawe has not demonstrated that the state constitution requires a different analysis.

The state due process clause has been repeatedly found to provide rights coextensive with the federal constitution. See State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009) (analyzing the scope of due process that applies to probation violation hearings); State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994) (state due process right to the preservation of evidence the same as federal right); State v. Turner, 145 Wn. App. 899, 901, 187 P.3d 835 (2008) (due process clause of the state constitution does not require police to electronically record custodial interrogations); In re Pers. Restraint of Matteson, 142 Wn.2d 298, 12 P.3d 585 (2000) (state due process rights of inmates transferred to

out-of-state facilities the same as those under the federal constitution). In accordance with this authority, this Court should conclude that the due process protections of the state constitution are coextensive with those under the federal constitution in the context of the admissibility of eyewitness identification evidence.

In State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), the Washington Supreme Court carefully considered when it should resort to independent state constitutional grounds to decide a case, rather than relying on cases construing comparable federal constitutional provisions. The court recognized an unprincipled reliance on the state constitution when repudiating federal precedent threatens to undermine the credibility of the court. Id. at 60. The court also wanted lawyers to be able to predict the direction of the law. Id. It wanted to guide briefing on independent state constitutional grounds. Id. at 62. And, it sought to insure that its decisions were made “for well-founded legal reasons and not by merely substituting [its] notion of justice for that of duly elected legislative bodies or the United States Supreme Court.” Id. at 62-63.

In light of these goals, the court established six factors to guide the determination of whether the state constitution affords broader protections than its federal counterpart. These factors are: 1) the textual language of the state constitution; 2) significant differences in the texts of the parallel

provisions of the two constitutions; 3) state constitutional and common law history; 4) preexisting state law; 5) differences in structure between the federal and state constitutions; and 6) whether the subject matter of the particular provision presents a matter of particular state interest or concern. Gunwall, 106 Wn.2d at 61-62.

An analysis of these factors demonstrates that state constitutional protections in this context are not broader than those under the federal constitution. First, article I, section 3 reads, “No person shall be deprived of life, liberty, or property without due process of law,” and contains no further elaboration within its text. State v. Ortiz, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992). Secondly, there are no material differences between the “nearly identical” federal and state provisions. Wittenbarger, 124 Wn.2d at 480; U.S. Const. amend. XIV § 1. As to the third Gunwall factor, “[N]o legislative history has been shown which would provide a justification for interpreting the identical [due process] provisions differently.” Ortiz, 119 Wn.2d at 303; Matteson, 142 Wn.2d at 310. Thus, the first three Gunwall factors do not support a broader interpretation of the state constitution.

The fourth Gunwall factor examines pre-existing state law, particularly the law that existed at the time of the adoption of the constitution. State v. Smith, 150 Wn.2d 135, 152-54, 75 P.3d 934 (2003) (noting that laws not enacted until after the constitution was adopted could

not have influenced the framers' intent). In support of his analysis of preexisting state law, Sakawe argues that, "the Washington State Supreme Court has held that the reliability of evidence standard embodied in the state constitution's due process clause provides broader protection than the federal due process clause." Opening Brf. of App. at 33. However, neither of the cases he cites in support, State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984), and State v. Davis, 38 Wn. App. 600, 686 P.2d 1143 (1984), considered the admissibility of eyewitness identification evidence,⁹ and both were decided prior to Gunwall and a century after the adoption of the Washington Constitution. Thus, these cases "shed no light on any preexisting law regarding state due process" and are not helpful. Wittenbarger, 124 Wn.2d at 481. Moreover, to the extent that Sakawe argues that preexisting state law addresses both the fairness of state court procedures and provides for protection against the admissibility of unreliable evidence in a criminal trial, the current federal due process standard does the same thing.

Next, while an analysis of the fifth Gunwall factor—structural differences between the state and federal constitutions—may support the

⁹ Bartholomew held that the rules of evidence applied in a death penalty sentencing proceeding, under both the federal *and* state constitutions. 101 Wn.2d at 638-39. Davis concluded that, unlike the federal constitution, our state constitution does not allow testimony regarding post-arrest silence, even where the defendant was not provided with Miranda warnings. 38 Wn. App. at 606.

notion that the state constitution is more protective in a general sense, with respect to article I, section 3, Sakawe does not explain how it sheds any light on the issue of admissibility of eyewitness identification evidence in particular.

Finally, with respect to the sixth Gunwall factor, particular state interest or local concern, Washington's concern with protecting fundamental fairness in a criminal proceeding is not substantially different than the national concern in protecting that same interest. Although criminal law generally involves local rather than national concerns, there is nothing uniquely local about the right to reliable eyewitness identification evidence.

On balance, the Gunwall factors do not provide a principled basis for interpreting the Washington Constitution as more protective than its federal counterpart in the context of eyewitness identification evidence. Accordingly, should this Court reach the issue, it should again hold that the rights protected are the same.

3. THE STATE CONCEDES THAT SAKAWE'S CONVICTIONS FOR ATTEMPTED SECOND-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT ARE THE SAME OFFENSE FOR DOUBLE JEOPARDY PURPOSES.

Sakawe contends that his convictions for second-degree assault and attempted second-degree robbery violate double jeopardy because

these convictions impermissibly punish him twice for the same offense. The State concedes that, as charged and proved in this particular case, Sakawe is correct. This Court should remand this case to the trial court solely to vacate the attempted robbery conviction.¹⁰

When a single act violates multiple criminal statutes, double jeopardy prevents multiple punishments if the legislature did not intend the crimes to be treated as separate offenses. Albernaz v. United States, 450 U.S. 333, 343-44, 101 S. Ct. 2221, 67 L. Ed. 2d 275 (1977). The Washington Supreme Court has set forth a three-part test for determining whether multiple punishments were intended by the legislature. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005).

First, the court examines the language of the relevant statutes to determine whether the legislature has expressly permitted or disallowed multiple punishments. Freeman, 153 Wn.2d at 771-72. If this first step does not provide an answer, the court then turns to the two-part “same evidence,” or “Blockburger”¹¹ test. In order to be the “same offense” for

¹⁰ Because Sakawe’s offender scores were calculated (and sentence was imposed) based on a finding that his convictions for attempted second-degree robbery and second-degree assault were the same criminal conduct under RCW 9.94A.589(1)(a), vacating the attempted second-degree robbery conviction on remand will have no effect on the sentence imposed. CP 107, 109, 172-75. Although the judgment and sentence should be amended to vacate the attempted second-degree robbery conviction, Sakawe does not need to be resentenced.

¹¹ Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

purpose of double jeopardy, the offenses must be the same in both law and in fact. If there is an element in each offense which is not included in the other, and proof of one would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

Finally, if applicable, the court considers the merger doctrine. Freeman, 153 Wn.2d at 772-73. Merger applies to specific statutory situations where one crime elevates another crime to a higher degree. When the degree of one offense is raised by conduct that in itself is described as a crime in a separate statute, the court presumes that the legislature intended to punish both offenses through a greater sentence for the greater crime. Freeman, 153 Wn.2d at 772-73.

The State concedes that, as charged and proved in this case, Sakawe's second-degree assault and attempted second-degree robbery are the "same offense" for double jeopardy purposes. As charged here, the second-degree assault required proof that Sakawe assaulted victim Chen with the intent to commit a first-degree theft or a second-degree robbery. CP 7, 103. The attempted second-degree robbery charge required proof that Sakawe, with the intent to commit the crime of robbery, took a substantial step toward the commission of second-degree robbery of

victim Chen. CP 97-98. Although in general, these two crimes appear to have different elements, when dealing with anticipatory offenses, the abstract term “substantial step” must be given a factual definition, otherwise it would be impossible to assess whether the attempted robbery required proof of a “fact” that the assault did not. In re Pers. Restraint of Orange, 152 Wn.2d 795, 818, 100 P.3d 291 (2004).

The State argued that Sakawe committed attempted second-degree robbery by taking the substantial step of assaulting Chen with the intent to rob him. 8RP 33-36, 45-46. The jury was instructed that in order to find Sakawe guilty of the second-degree assault, it must find that he assaulted Chen with the intent to commit either a first-degree theft or a second-degree robbery. CP 103.

Because, as charged and argued to the jury, the assault was the same act used to prove the substantial step element of the robbery charge, the crimes are the same in law and fact. See State v. Martin, 149 Wn. App. 689, 205 P.3d 931 (2009) (assault with intent to rape victim, when assault was the substantial step towards the rape, was “same offense” as attempted rape because evidence used to support both crimes was the same, and assault had no independent purpose from the attempted rape).

Accordingly, under the facts of this particular case, the State concedes that Sakawe's convictions for both attempted second-degree robbery and second-degree assault violates double jeopardy. The case should be remanded to vacate the lesser offense—attempted second-degree robbery. See State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006) (concluding that the offense to be vacated is the offense that carries the lesser sentence). Here, second-degree assault carries a standard range of 13 to 17 months. CP 107, 174. The standard range for attempted second-degree robbery is 9.75 to 12.75 months. CP 107, 173; RCW 9.94A.533(2) (standard sentencing range for anticipatory offenses is seventy-five percent of the range for the completed offense). Therefore, because the attempted robbery charge carries a lesser sentence, it is the lesser offense and should be vacated on remand. This Court should reject Sakawe's argument that potential immigration consequences play any role in the determination of which conviction to vacate.

Sakawe also argues that the court erred by “ignoring” the parties' stipulation that the assault and attempted robbery offenses constituted the same criminal conduct. Sakawe is wrong—the court adopted offender scores that necessarily included a finding that the two crimes were the same criminal conduct. CP 107, 172-74. Even though the court did not specify its finding on the judgment and sentence, it is of no consequence.

Because the court will be required to vacate the attempted robbery charge on remand, and because the two offenses were not originally scored separately, the finding (or lack of a finding) has no practical effect.

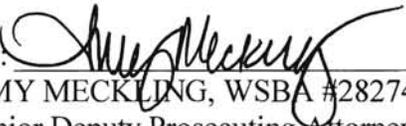
D. CONCLUSION

For the above-stated reasons, the State respectfully requests this Court to determine that Sakawe received a fair trial, and to remand solely for the purpose of vacating the attempted second-degree robbery conviction, entered in violation of double jeopardy.

DATED this 14th day of August, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

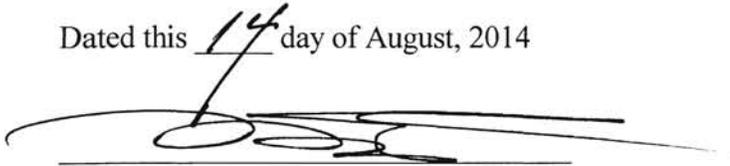
By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ABDIRAHMAN SAKAWE, Cause No. 70563-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of August, 2014

A handwritten signature in black ink, appearing to be "Nancy Collins", written over a horizontal line.

Name
Done in Seattle, Washington