Supreme Court No. ____
COA No. 85943-9-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES R. SPITZER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

James Spitzer, the petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review.

B. COURT OF APPEALS DECISION

Mr. Spitzer seeks review of the Court of Appeals' decision dated January 27, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Assuming the appellate court did not limit its resentencing mandate, the trial court must conduct resentencing de novo. At the new sentencing hearing, the trial court must exercise independent discretion without deference to the initial sentencing court's decision. At Mr. Spitzer's resentencing hearing, the trial court imposed the maximum sentence purely because it imposed the maximum sentence at the original hearing. Under this Court's precedent, the resentencing court erred by not conducting a de novo resentencing. The Court of Appeals misread that

precedent and affirmed Mr. Spitzer's sentence. This Court should grant review. RAP 13.4(b)(1).

2. Due process entitles a defendant to an impartial and disinterested tribunal. A judge must disqualify herself if her impartiality is reasonably questioned. During Mr. Spitzer's trial, the court found the prosecutor committed misconduct during closing argument. Despite that finding, the court reiterated the same improper argument when it originally sentenced Mr. Spitzer to the high end of the standard range. At the beginning of the resentencing hearing, the court refused to recuse itself. The Court of Appeals affirmed, but it refused to address whether the court was apparently biased by repeating the prosecutor's misconduct at the sentencing hearing. The court's ruling conflicts with U.S. Supreme Court precedent and trivializes the due process implications of an apparently biased criminal tribunal. This Court should grant review. RAP 13.4(b)(1), (b)(3).

D. STATEMENT OF THE CASE

The State charged Mr. Spitzer with one count of first degree rape and one count of first degree kidnapping. CP 63. The State contended Mr. Spitzer sexually assaulted A.U. in Everett. CP 60.

At trial, the prosecutor began his closing argument by describing Mr. Spitzer as:

> [T]he personification of everyone's worst nightmare: That you will pass somebody on the street and they will decide to hurt you, not because of who you are, not because of what you believe or what you've said or what you've done, but simply because you're there.

CP 63. The prosecutor finished his closing argument by telling the jury, "The very personification of the nightmare that . . . [A.U.] worried about . . . came true. That nightmare's name is James Spitzer." CP 63.

The jury convicted Mr. Spitzer as charged. CP 79. Before sentencing, Mr. Spitzer moved for a new trial, arguing that prosecutorial misconduct "deprived him of a

fair trial because the prosecutor made improper statements during closing argument when he told the jury that [Mr.] Spitzer was 'everyone's worst nightmare.'" CP 63.

The trial court agreed the prosecutor committed misconduct: "I do find that the comments were improper. I do think that they invited the jury to stand in the shoes of the victim and to think about their worst nightmare or anyone's worst nightmare of being abducted off the street." 12/13/21 RP 915. It nevertheless denied the motion because it found the statements were harmless. 12/13/21 RP 915–16.

The court proceeded to sentencing. CP 93. During that hearing, the trial court calculated Mr. Spitzer's offender score as seven. CP 64, 81. The court used a Nevada burglary conviction from 2011 in reaching this calculation. CP 100, 106. The court then sentenced Mr. Spitzer to 236 months to life in prison. CP 83. This represented the maximum of the standard range. CP 81.

In imposing the sentence, the trial court repeated the prosecutor's improper argument: "This -- at this point in time, I think the Court can say this is everyone's worst nightmare, to be abducted by a stranger on the street." 12/13/21 RP 923.

Mr. Spitzer appealed and the Court of Appeals reversed his sentence. CP 78. It found the trial court improperly calculated Mr. Spitzer's offender score, which was one point higher than it should have been. CP 52, 78. The court "remand[ed] for resentencing with a corrected offender score." CP 78. It did not restrict what the trial court could do at the resentencing hearing. See CP 60, 78.

The resentencing hearing occurred almost two years after the initial sentencing. CP 21. At the beginning of the hearing, Mr. Spitzer moved for recusal. 10/6/23 RP 6. The trial court denied the request. 10/6/23 RP 7. It proceeded to resentence Mr. Spitzer and recalculated his offender score as

six. CP 27. This resulted in a reduced standard range of 162 to 216 months, to life. CP 10.

The resentencing hearing itself was brief. In arguing for the maximum, the prosecution stated:

> So, on October -- as you're aware, of course, on October 28th of 2021, Mr. Spitzer was found guilty by jury verdict of first degree rape and first degree kidnapping. Your Honor previously ruled that counts one and two merge for sentencing, and count two would be dismissed, leaving the first degree rape charge.
>
> The standard range on that level 12 offense is now, as a score of 6, 162 months to 216 months. That is an indeterminate sentence. I'm asking the Court to impose the high end of 216 months, based on the previous reasons I filed and spoke of following the trial.

10/6/23 RP 7–8. The defense then requested the low end of 162 months. 10/6/23 RP 9.

The court started by noting "Mr. Spitzer's offender score [went] from a 7 to a 6." 10/6/23 RP 11. As the court reasoned, "This is simply now essentially a matter of math,

given the fact there's just a new sentencing range." 10/6/23 RP 11. It then imposed the sentence:

> [B]ased upon the reasons that I previously gave, I believe the high end of this sentence is appropriate, given the nature of the offense and the facts that I heard at the trial. So, I am imposing the high end again, consistent with the earlier ruling, of 216 months.

10/6/23 RP 11. The court also "impose[d] the same earlier conditions of community custody that were previously imposed." 10/6/23 RP 12.

The Court of Appeals affirmed, holding the trial court properly resentenced Mr. Spitzer. Slip Op. at 6–9. It also held the trial court did not need to recuse itself before resentencing Mr. Spitzer. Slip Op. at 3–6.

E. LAW AND ARGUMENT

1. In contravention of this Court's precedent, the Court of Appeals incorrectly affirmed Mr. Spitzer's sentence even though the trial court failed to conduct a de novo resentencing.

The Court of Appeals initially reversed Mr. Spitzer's sentence and remanded for a de novo resentencing. CP 78.

But the resentencing court did not independently consider Mr. Spitzer and the case when it imposed the new sentence. Instead, it imposed the maximum sentence simply because it imposed the maximum at the original sentencing. This does not constitute a de novo resentencing, and the Court of Appeals erred and misread precedent in ruling otherwise.

a. Assuming an appellate court's remand mandate does not indicate otherwise, trial courts must conduct resentencings de novo and exercise independent discretion.

"Generally, the law wishes to prevent relitigation of an issue after the party enjoyed a full and fair opportunity to litigate the question." *State v. Dunbar*, 27 Wn. App. 2d 238, 244, 532 P.3d 652 (2023). But this principle does not strictly apply to criminal cases. Instead, in the criminal context, "a court on a sentence remand should be able to take new matters into account on behalf of either the government or the defendant." *Id.* at 244–45.

When a reviewing court vacates a sentence, "'there is no sentence'" until the trial court resentences the defendant. *State v. Vasquez*, __ Wn.3d __, 560 P.3d 853, 856–57 (2024) (quoting *State v. McWhorter*, 2 Wn.3d 324, 328, 535 P.3d 880 (2023)). Unless the reviewing court limits the mandate, "a resentencing judge has wide discretion to consider what sentence is appropriate, the same as exists in any sentencing." *Id.* at 857. In other words, if the appellate court does not limit the mandate as such, the trial court must conduct resentencing de novo. *Dunbar*, 27 Wn. App. 2d at 244.

"By ordering resentencing without any specific instructions or any prohibitions, the reviewing court returns the case to the trial court to consider every aspect of the offender's sentences de novo." *Id.* at 246. "Without a limitation, the resentencing court should consider sentencing de novo and entertain any relevant evidence that it could have heard at the first sentencing." *Id.*

b. The Court of Appeals incorrectly found the trial court conducted a de novo resentencing, despite this Court's holding in Vasquez.

During Mr. Spitzer's original sentencing, the trial court imposed a 236-month sentence, which was at the top of the standard range. CP 81, 83. After the Court of Appeals reversed the sentence for an improper offender score, the trial court imposed a sentence of 216 months, at the top of the newly calculated standard range. CP 10, 12. The court—viewing the resentencing as "simply . . . a matter of math"—imposed the maximum sentence based purely "upon the reasons [it] previously gave[.]" 10/6/23 RP 11.

In doing so, the court did exactly what this Court said it could not in *Vasquez*. There, the trial court conducted a limited resentencing where it imposed virtually the same sentence for virtually the same reasons as the original sentence. *Vasquez*, 560 P.3d at 855. This Court reversed and ordered a new resentencing. *Id.* at 859. Since there was "significant ambiguity" about whether the trial court

understood its obligation to resentence without deference to the prior trial court's sentencing determination, the Court held the defendant did not receive a de novo resentencing. *Id.* at 858.

The trial court also ran afoul of the Court of Appeals' decision in *Dunbar*. In that case, the Court of Appeals indicated a resentencing court "may impose the identical sentence or a greater or lesser sentence within its discretion." *Dunbar*, 27 Wn. App. 2d at 249. Yet, "The resentencing judge may not rely on a previous court's sentence determination and fail to conduct its own independent review." *Id.*

The trial court here expressly relied on its previous sentence determination. Indeed, the only rationale the court provided for the sentence was the "reasons [it] previously gave [at the initial sentencing hearing]." 10/6/23 RP 11. In other words, the court failed to exercise independent discretion in resentencing Mr. Spitzer.

Because the court based the resentence on the original sentencing determination, the resentencing was not de novo. A court's failure to conduct a de novo resentencing is reversible error. *Vasquez*, 560 P.3d at 859; *Dunbar*, 27 Wn. App. 2d at 248–50. By affirming Mr. Spitzer's sentence, the Court of Appeals contravened both *Vasquez* and *Dunbar* and deprived Mr. Spitzer of a legally appropriate de novo resentencing. This Court should grant review. RAP 13.4(b)(1), (b)(2).

2. In violation of due process, the Court of Appeals sustained a sentence imposed by an apparently biased court.

When imposing Mr. Spitzer's initial high-end sentence, the trial court reiterated the prosecutor's improper argument. This created the suspicion of partiality that required the court's recusal before resentencing Mr. Spitzer. Failing to appreciate the constitutional violation at hand, the Court of Appeals affirmed. The court's ruling conflicts with precedent and trivializes the due process issue in this case.

A "fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). "Due process requires a competent and impartial tribunal[.]" *Peters v. Kiff*, 407 U.S. 493, 501, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972). But a judge must be more than impartial, they must also appear impartial. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). "Where a judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating." *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 524, 145 P.3d 1208 (2006).

Thus, in determining whether recusal is warranted, actual prejudice is not the standard. *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). Instead, "even if there is no showing of actual bias in the tribunal . . . due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters*, 407 U.S. at 502. As a result, "a

mere suspicion of partiality may be enough to warrant recusal." *Tacoma S. Hosp., LLC v. Nat'l Gen. Ins. Co.*, 19 Wn. App. 2d 210, 218, 494 P.3d 450 (2021).

"A judge is required to 'disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.'" *Id.* at 217–18 (quoting CJC 2.11(A)). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Sherman*, 128 Wn.2d at 206 (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

Mr. Spitzer satisfies that test here. At the end of trial, the prosecutor committed clear misconduct by telling the jury that Mr. Spitzer was everyone's personification of their worst nightmare. CP 69–70. Before the initial sentencing hearing, the trial court agreed this comment constituted misconduct. 12/13/21 RP 915.

The trial court nevertheless repeated the same improper argument when it imposed Mr. Spitzer's initial sentence. As it reasoned, a sentence at the top of the standard range was appropriate because "at this point in time, I think the Court can say *this is everyone's worst nightmare*, to be abducted by a stranger on the street." 12/13/21 RP 923 (emphasis added).

The court objectively appeared biased by first finding an argument was improper but then repeating that same argument as a reason to impose a high-end sentence. "Our system of jurisprudence . . . demands that in addition to impartiality, disinterestedness, and fairness on the part of the judge, there must be no question or suspicion as to the integrity and fairness of the system, I.e., 'justice must satisfy the appearance of justice.'" *Chicago, M., St. P. & P. R. Co. v. Washington State Human Rights Comm'n*, 87 Wn.2d 802, 808, 557 P.2d 307 (1976) (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)). Using a comment

that constitutes misconduct in sentencing a defendant implicates all these concerns. A reasonable observer would think a court ceases to be fair and disinterested when it first finds a prosecutor's comment is improper misconduct but then uses the same comment to justify a high-end sentence.

The Court of Appeals failed to appreciate the gravity of this issue. In a footnote, it ruled it would not consider the constitutional nature of the trial court's apparent bias. Slip Op. at 3 n.2. And at no point in its analysis did the Court of Appeals reference that an apparently biased tribunal may violate due process.

In its brief in the Court of Appeals, the State contended the appearance of partiality doctrine is purely non-constitutional. Resp. Br. at 21–22. In support, the State cited *State v. Mandefero*, 14 Wn. App. 2d 825, 834 n.1, 473 P.3d 1239 (2020). But *Mandefero* is irreconcilable with controlling U.S. Supreme Court precedent, *Rippo v. Baker*, 580 U.S. 285, 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017).

In *Rippo*, the U.S. Supreme Court held a judge's failure to recuse despite their apparent bias may violate the Due Process Clause of the Constitution. *Id.* at 287. "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.'" *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986)). "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)).

The Court of Appeals did not address *Rippo*, nor has this Court had the occasion to address that decision. This Court should grant review and hold, in line with *Rippo*, that an apparently biased tribunal may violate due process. RAP 13.4(b)(1), (b)(3), (b)(4).

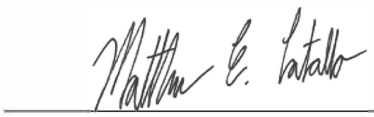
F. CONCLUSION

Mr. Spitzer respectfully asks this Court to accept discretionary review. RAP 13.4(b).

This petition is 2,749 words long and complies with RAP 18.7.

DATED this 18th day of February 2025.

Respectfully Submitted



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FILED
1/27/2025
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. SPITZER, JAMES ROBERT, Appellant.	No. 85943-9-I UNPUBLISHED OPINION

BOWMAN, J. — In 2021, a jury convicted James Robert Spitzer of first degree rape and first degree kidnapping. The trial court sentenced him to a high-end standard-range indeterminate sentence. Spitzer appealed, and we affirmed the conviction but remanded for resentencing with a corrected offender score. Spitzer now appeals his new sentence, arguing that the judge abused her discretion by refusing to recuse herself and that the court failed to conduct a de novo resentencing. Because the court did not abuse its discretion by denying Spitzer's motion for recusal or by again imposing a high-end indeterminate sentence, we affirm.

FACTS

We recounted the facts underlying Spitzer's conviction and sentence in an unpublished opinion on his first appeal. *See State v. Spitzer*, No. 83546-7-I (Wash. Ct. App. July 10, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/835467.pdf. We repeat only the facts relevant to this appeal.

In June 2021, Spitzer attacked A.U. in the middle of the street just after 6:00 a.m. as she walked to work. He threatened to kill her, then led her to a wooden area and violently raped her for about three hours. In December 2021, a jury convicted Spitzer of first degree rape and first degree kidnapping.

At sentencing, the trial court determined that the rape and kidnapping charges merged and dismissed the kidnapping charge. It then calculated Spitzer's offender score as 7.[1] In calculating the offender score, it included a prior Nevada burglary conviction. The court then sentenced Spitzer to a high-end standard-range indeterminate sentence of 236 months to life in confinement.

Spitzer appealed. We affirmed the conviction but determined that Spitzer's Nevada burglary conviction was not comparable to burglary in Washington. *Spitzer*, No. 83546-7-I, slip op. at 16-18. We remanded for resentencing with a corrected offender score. *Id.* at 19.

The trial court resentenced Spitzer in October 2023. Before the resentencing, Spitzer's attorney moved for the judge to recuse herself:

> Mr. Spitzer has asked me to ask Your Honor if Your Honor thinks it's in the interest of justice for Your Honor to recuse yourself, given Your Honor gave Mr. Spitzer what he believes is an illegal sentence.

The judge refused. She told Spitzer that since it

> was not brought to my attention at the time of the sentencing, I, frankly, was not aware of the illegality of the sentencing until the Court of Appeals spoke of that. So, I don't believe that there is any basis for me to recuse on that ground.

The court then recalculated Spitzer's offender score as 6 with a new

[1] Based on an offender score of 7, the standard range was 178 to 236 months.

standard range of 162 to 216 months. The State recommended the court impose a high-end indeterminate sentence of 216 months "based on the previous reasons [it] filed and spoke of following the trial." Spitzer asked the court to impose a low-end indeterminate sentence of 162 months. He told the court, "I had filed a sentencing memorandum previously articulating my reason for why I think the Court should give the bottom of the range sentence. I will renew that argument today."

The court then resentenced Spitzer to a high-end indeterminate sentence of 216 months to life. The court explained that

> based upon the reasons that I previously gave, I believe the high end of this sentence is appropriate, given the nature of the offense and the facts that I heard at the trial. So, I am imposing the high end again, consistent with the earlier ruling, of 216 months.

Spitzer appeals.

ANALYSIS

Spitzer argues that the judge abused her discretion by failing to recuse herself at the resentencing hearing. He also argues that the trial court erred by failing to conduct a de novo resentencing.

1. Recusal

Spitzer argues that the resentencing judge should have recused herself under the appearance of fairness doctrine.[2] We disagree.

[2] Spitzer also argues that the trial court's ruling amounts to manifest constitutional error under RAP 2.5(a)(3). The State asserts that the appearance of fairness doctrine is a nonconstitutional claim arising from Washington's Code of Judicial Conduct. In any event, Spitzer's scant mention of manifest constitutional error in his reply brief does not warrant review under that rule. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We need not consider arguments unsupported by meaningful analysis or authority. *Id*.

"Recusal lies within the discretion of the trial judge, and his or her decision will not be disturbed without a clear showing of an abuse of discretion." *State v. Perala*, 132 Wn. App. 98, 111, 130 P.3d 852 (2006). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

The appearance of fairness doctrine requires judges to recuse themselves when they have bias against a party or when their impartiality can be questioned. *State v. Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006). A proceeding satisfies the appearance of fairness doctrine "only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). This is an objective test to determine " 'whether the judge's impartiality might reasonably be questioned.' " *Id.* (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)). Because we presume the trial court performs its functions without bias, a party asserting a violation of the appearance of fairness doctrine must show sufficient evidence of a judge's bias; mere speculation is not enough. *Id.*

Here, Spitzer asked the trial judge to recuse herself because she issued an "illegal sentence" at the first sentencing. Spitzer did not say how issuing an incorrect sentence would cause a reasonably prudent and disinterested person to conclude that the judge would not be fair, impartial, and neutral at a subsequent sentencing. Even so, the judge explained that she had no opportunity to address the out-of-state conviction that rendered Spitzer's offender

score unlawful at the first sentencing because the parties did not bring it to her attention. So, there was no reason to believe that she could not be fair and impartial at the resentencing. This conclusion does not amount to an abuse of discretion.

For the first time on appeal, Spitzer also argues the trial judge should have recused herself based on statements she made at the first sentencing hearing. At that hearing, the judge described Spitzer's crime as "everyone's worst nightmare, to be abducted by a stranger on the street."[3] But Spitzer did not ask the judge to recuse herself on that basis. And we necessarily "assess the reasonableness of an exercise of discretion based on the totality of then-existing facts." *State v. Smith*, 3 Wn.3d 718, 722 n.1, 555 P.3d 850 (2024).

Spitzer argues he preserved the issue for appeal by moving for recusal before the judge began the resentencing hearing. And that even if he did not preserve the issue, "this Court often considers new arguments on appeal that stem from issues that were discussed in the trial court." But the cases Spitzer cites in support of his argument are inapt. For example, *State v. Kindell* involved the legal accuracy of a jury instruction—an issue that we review de novo. 181

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[3] This comment was similar to the prosecutor's comments in closing argument, which Spitzer argued amounted to prosecutorial misconduct in his first appeal. The prosecutor told the jury that what happened to A.U. was

> "the personification of every person's worst nightmare: That you will pass somebody on the street and they will decide to hurt you, not because of who you are, not because of what you believe or what you've said or what you've done, but simply because you're there."

Spitzer, No. 83546-7-I, slip op. at 4. The prosecutor added that " 'the very personification of [that] nightmare . . . came true. That nightmare's name is James Spitzer.' " *Id*. We determined on appeal that these comments amounted to improper argument. *Id*. at 11.

Wn. App. 844, 848-50, 326 P.3d 876 (2014). And *Lunsford v. Saberhagen Holdings, Inc*. involved an appeal from a summary judgment ruling. 139 Wn. App. 334, 337, 160 P.3d 1089 (2007), *aff'd*, 166 Wn.2d 264, 208 P.3d 1092 (2009). Again, an issue that we review de novo. *Id*. at 338.

As discussed above, we review a ruling on a motion to recuse for abuse of discretion. And, based on the totality of then-existing circumstances, the trial court did not abuse its discretion by denying Spitzer's motion to recuse.

2. De Novo Resentencing

Spitzer also argues the trial court erred by failing to conduct a de novo resentencing. Specifically, he asserts that the court did not exercise independent discretion and instead "imposed the maximum sentence simply because it imposed the maximum at the original sentencing." We disagree.

We will reverse a sentencing court's decision only if the court clearly abused its discretion or misapplied the law. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). When an appellate court remands a case for resentencing without any specific instructions or prohibitions, "the resentencing court should consider sentencing de novo and entertain any relevant evidence that it could have heard at the first sentencing. *State v. Dunbar*, 27 Wn. App. 2d 238, 246, 532 P.3d 652 (2023). The resentencing court is free to consider any matters relevant to sentencing, even those that were not raised at the first sentencing, including rehabilitation evidence. *Id*. at 248. The trial court may then impose "the identical sentence or a greater or lesser sentence within its discretion." *Id*. at 249.

The court exercises its discretion "by conducting a full, adversarial resentencing proceeding, giving both sides the opportunity to be heard." *State v. Toney*, 149 Wn. App. 787, 793, 205 P.3d 944 (2009). The "important components of the [resentencing] process are that parties be allowed to present their arguments and that the judge exercises their independent discretion in sentencing." *State v. Vasquez*, No. 102045-7, slip op. at 14 (Wash. Dec. 19, 2024), https://www.courts.wa.gov/opinions/pdf/1020457.pdf.

Here, the trial court conducted a full, adversarial resentencing, giving Spitzer and the State an opportunity to be heard. The State asked for a high-end sentence for the same reasons it presented at the first sentencing. Spitzer relied on his previous sentencing memorandum and, again, asked for a low-end sentence. The trial court considered the arguments and determined that based on the reasons it gave at the first sentencing, it still "believe[d] the high end of this sentence is appropriate, given the nature of the offense and the facts that [it] heard at the trial." The record shows that after considering the parties' arguments, the trial court properly exercised its independent discretion and imposed a sentence at the high-end of the standard range.

Still, citing *Dunbar*, Spitzer argues the court erred because it "never addressed whether there was any possible rehabilitation evidence" and, pointing to the court's own words, viewed Spitzer's resentencing as "simply . . . a matter of math." But *Dunbar* is inapt here.

In *Dunbar*, Division Three of our court remanded the defendant's convictions for resentencing. 27 Wn. App. 2d at 240-41. The resentencing judge

was not the same judge that originally sentenced the defendant. *Id.* at 241-42. At the resentencing hearing, the defendant submitted evidence of rehabilitation that occurred after his first sentence. *Id.* at 241. Specifically, he showed documentation of his participation in a treatment program, certificates of completed prison programs, and related awards. *Id.* The trial court noted that " 'what is before this Court is whether I should change the sentence' " imposed by the previous judge. *Id.* at 241-42. It then explained that while the defendant " 'has provided the Court with information about what he has done since being incarcerated, . . . the Court cannot take that into consideration and shouldn't take that into consideration.' " *Id.* at 242.

Division Three reversed and remanded for another resentencing. *Dunbar*, 27 Wn. App. 2d at 250. It explained that a de novo sentencing means the court can consider any matters relevant to sentencing, even those not raised at the first sentencing hearing. *Id.* at 248. And that a resentencing judge "may not rely on a previous court's sentence determination and fail to conduct its own independent review." *Id.* at 249.

This case is different than *Dunbar*. Here, Spitzer did not offer any new evidence or evidence of rehabilitation at his resentencing. Even so, he suggests the court should have "addressed whether such evidence existed." But a de novo resentencing presents the opportunity for "the parties" to present all relevant evidence. RCW 9.94A.530(2). Spitzer provides no support for his argument that the court must affirmatively search for such evidence. So, we presume he found none. *See Carter v. Dep't of Soc. & Health Servs.*, 26 Wn.

App. 2d 299, 317, 526 P.3d 874 (2023) (When "a party cites no authorities supporting its argument, we may assume that counsel searched diligently and found none.").

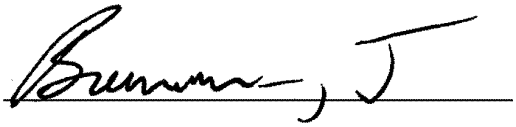
Nor does Spitzer show that the trial court failed to independently review the information provided at his resentencing. Spitzer argues that the court's comment that "[t]his is simply now essentially a matter of math, given the fact there's just a new sentencing range," shows that the court failed to exercise independent discretion. But he takes the comment out of context. The trial court made the remark while addressing Spitzer's *motion for recusal*. The court ruled:

> As I stated earlier, [the illegal sentence] issue was not brought before me at the time of sentencing previously. It has now been corrected. I don't see any basis for recusal. This is simply now essentially a matter of math, given the fact there's just a new sentencing range.

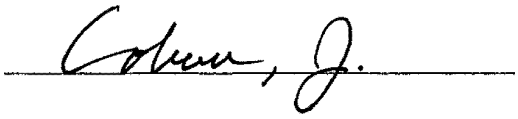
The court then gave both parties the opportunity to argue their sentencing recommendations. The trial court's "math" comment does not show that it avoided exercising its discretion at resentencing.[4]

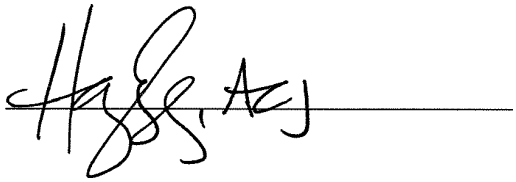
[4] In a statement of additional authorities, Spitzer argues that *Vasquez*, No. 102045-7, supports his argument. We disagree. In *Vasquez*, the resentencing judge chose not to consider some of the proffered evidence, did not allow the defendant to make certain arguments, and stated he wanted to " 'honor' " the first sentencing judge's decisions. *Id*., slip op. at 12-13. Our Supreme Court concluded that another resentencing was appropriate because "the court seemingly misunder[stood] its discretion." *Id*. at 13-14. But here, the record shows that the resentencing court understood and exercised its discretion.

Because we conclude that the court did not abuse its discretion by denying Spitzer's motion to recuse or by imposing a high-end standard-range sentence, we affirm.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 85943-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: February 18, 2025

WASHINGTON APPELLATE PROJECT

February 18, 2025 - 4:37 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	85943-9
Appellate Court Case Title:	State of Washington, Respondent v. James Robert Spitzer, Appellant
Superior Court Case Number:	21-1-00751-2

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