NO. 104457-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEWIS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Robert Lewis seeks review of the Court of Appeals' unpublished opinion affirming his convictions for two counts of second-degree assault and one count of second-degree unlawful possession of a firearm. *State v. Lewis*, No. 86431-9-I, 2025 WL 2306193 (unpublished, August 11, 2025). Lewis claimed on appeal that the trial court should have suppressed two in-court identifications of Lewis by two witnesses. The Court of Appeals correctly recognized that "there was nothing to review" because neither witness identified Lewis in court. Lewis also claimed, for the first time in his reply brief, that evidence of police photomontage identifications should also have been suppressed. The Court of Appeals correctly concluded that Lewis could not raise a new argument in a reply brief, and that he had waived the claim in any event by affirmatively agreeing that the photomontage identifications were admissible at trial.

Lewis' petition for review is based on claiming that the lower court's opinion conflicts with this Court's opinion in

State v. Derri[1] concerning photomontage identifications. He is wrong, for the reasons the Court of Appeals correctly identified. This case meets none of the standards for this Court's review under RAP 13.4(b).

The State is briefly answering Lewis' petition to bring this Court's attention to the fact that Lewis continues to misstate and obfuscate the record in this case, most importantly by failing to acknowledge that the photomontage-identification evidence was admitted with Lewis' *affirmative agreement* at trial, and by disregarding the Court of Appeals' admonition that new arguments and claims cannot be made for the first time in a reply brief. As such, this Court's review is unnecessary and would in fact be inappropriate.

B. STANDARDS FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in

[1] 199 Wn.2d 658, 674-75, 511 P.3d 1267 (2022).

conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b). This case meets none of these criteria.

C. STATEMENT OF THE CASE

For a more comprehensive statement of the facts of this case, the State refers this Court to the Brief of Respondent below and the Court of Appeals' unpublished opinion, *State v. Lewis*, No. 86431-9-I.

In short, Lewis tried to buy cigarettes from a convenience store but was refused because he did not look like the person in the identification he presented. RP 688-89, 707-09. Lewis became enraged and verbally abused two clerks, Sharanpreet Singh and Lovish Kalia. RP 690, 708. Lewis left the store and

fired four shots into the building, nearly hitting Singh and Kalia, before driving away. RP 690-92, 708, 739.

A police officer recognized Lewis from surveillance video, in part because of Lewis' unusually prominent chin and jawline. RP 755-56. Police administered photomontages to Singh and Kalia separately. Kalia identified Lewis with 10-percent confidence. RP 744-45. Singh identified Lewis with 50-percent confidence. RP 770.

At trial, Lewis *expressly agreed* to the admission of the photomontage identifications, so long as the State did not characterize them as "positive identification." RP 235-36, 674-78. However, Lewis moved to suppress any in-court identification by Kalia and Singh on the basis that Lewis being seated at counsel table was suggestive. RP 232, 676, 681-83. The trial court overruled the objection. RP 234. Despite the trial court's ruling, the State never asked Singh to identify Lewis in court. RP 705-18. And, when the State asked Kalia to

identify "the shooter," Kalia pointed not to Lewis but to someone in the back of the courtroom. RP 702.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

Lewis claims that the Court of Appeals decision conflicts with *Derri* and complains that RAP 2.5 is an unfair "procedural hurdle." Petition at 15. But Lewis' entire argument depends on ignoring the plain fact that *Derri* applies only when a *party moves to suppress* police-administered identification evidence on grounds that the identification procedure was suggestive. *Derri*, 199 Wn.2d at 673-74 ("defendant has the burden to establish, by a preponderance of evidence, that a police-administered identification procedure was unnecessarily suggestive"). Lewis has again failed to acknowledge that he *agreed to the admission* of photomontage evidence at trial.

As was the case in both the opening brief and reply brief in the Court of Appeals, Lewis' petition continues to present the facts of this case in a way that is wholly inconsistent with the record.

1. LEWIS' OPENING BRIEF.

First, Lewis' opening brief asserted that Lewis had moved to suppress any in-court identifications as unreliable because "these eyewitness identifications were the product of a suggestive photomontage procedure and identifying Mr. Lewis at counsel table itself was unnecessarily suggestive." AOB at 10 (citing RP 231-32). That is not accurate. While Lewis had indeed objected to *in-court* identifications, he never asserted at trial that the photomontage procedures were suggestive. To the contrary, the record plainly shows that Lewis *wanted* the photomontage identifications admitted and had affirmatively *agreed* to their admission. Indeed, at the point in the record cited by Lewis (RP 231-32), his trial counsel characterized the photomontage procedure as "a controlled situation" and argued that "the State [should be] limited to the identification that they have [the photomontage evidence]."[2] *See also* RP at 677-78

[2] This is an objectively reasonable strategic decision, because it allowed the defense to criticize highly uncertain photomontage

("I don't have a problem with the montages. In fact, I want to…question the witnesses about those montages.").

Second, Lewis asserted in his opening brief that "[a]t trial, Mr. Singh indicated that he recognized Mr. Lewis as the man he refused to sell cigarettes to at the minimart. Mr. Singh pointed to Mr. Lewis as he sat at defense table." AOB at 11 (citing RP 771). That is also not accurate. Singh *never* identified Lewis in court or testified that he recognized him. Instead, Singh testified about only the photomontage procedure. RP 709-12. Furthermore, Singh was not even testifying on page 771 of the verbatim report of proceedings as Lewis suggests. Instead, that page contains the testimony of Officer Shaun Feero about administering the photomontage to Singh.

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identifications while suppressing any possible in-court identifications. Indeed, Lewis adopted this strategy at trial. RP 623, 703, 711, 717, 777, 842, 926-27.

Unlike Singh, Kalia *was* asked to identify the assailant in court; however, he pointed to someone in the gallery. RP 702-04.

Despite the fact that neither Singh nor Kalia identified Lewis in court, Lewis argued repeatedly in his opening brief that the court should have suppressed these "courtroom identifications" (plural). *See* AOB at 13 ("The trial court erred in not suppressing the courtroom identifications of Mr. Lewis by two clerks. They were unreliable and gained from suggestive procedures"); *see also* AOB at 16 ("[t]hese courtroom identifications should have been suppressed," and the trial court "erroneously allowed them"). Lewis even went so far as to say that "Mr. Kalia's courtroom identification should have been suppressed" (AOB at 28) and that "Mr. Singh's courtroom identification of Mr. Lewis should have been suppressed" (AOB at 30).

2. LEWIS' REPLY BRIEF.

Lewis' reply brief continued to misstate what occurred at trial and introduced additional inaccuracies about the issues preserved for appeal. For example, Lewis stated that "contrary to the State's argument, Mr. Lewis' objection to the in-court identifications preserved the issue [regarding the photomontages] for appeal." ARB at 3. This is incorrect. In his opening brief, Lewis argued (for the first time) that the photomontage procedure was suggestive and that this suggestive procedure tainted the in-court identification(s) of Lewis (even though neither witness made an in-court identification). AOB at 13. The State's response brief argued that (1) insofar as Lewis' argument for suppression of in-court identification relied on alleged deficiencies with the photomontage, he had waived that argument because the photomontage evidence was admitted by agreement,[3] and (2)

[3] Because Lewis affirmatively agreed to the admission of the photomontage evidence, thus encouraging the trial court to

Lewis' claims that in-court identifications should have been suppressed were inapt because neither witness identified Lewis in court. Br. of Resp't at 16-20.

Lewis' reply contained further omissions of the fact that Lewis agreed the photomontages were admissible. For example, Lewis argued that "to the extent that Mr. Lewis in the lower court did not emphasize the suggestiveness of the out-of-court photomontage, the issue is properly presented for the first time on appeal as [a constitutional issue]." ARB at 5. To be clear, Lewis did not merely "not emphasize" the suggestiveness of the photomontage—he *agreed* the photomontages should be admitted, and made a strategic choice to emphasize the witnesses' equivocal identifications to discredit the State's case.

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admit it, any purported error was also invited. *See In re Dependency of A.L.K.*, 196 Wn.2d 686, 694-95, 478 P.3d 63 (2020) ("Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal" and "[t]o determine whether the doctrine applies, the court considers 'whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.'") (internal citations omitted).

After the State pointed out in its brief that Kalia identified someone other than Lewis in court, Lewis' reply brief largely abandoned the argument raised in his opening brief that the in-court identifications should have been suppressed because they stemmed from allegedly suggestive photomontage procedure. ARB at 1. Instead, Lewis raised an entirely new argument—that the court erred in not suppressing *both* the in-court identifications *and* the photomontage identifications. ARB at 16. Lewis still failed to mention that he had agreed the photomontage identifications were admissible at trial and that he had stated on the record he wanted to question the witnesses about them. RP 674-78. The Court of Appeals correctly recognized that Lewis had waived any claim of error and that he had waited until his reply brief to claim that admitting the photomontage identifications was manifest constitutional error. *Lewis* at *10.

3. LEWIS' PETITION FOR REVIEW.

Lewis' petition continues to take liberties with the record and the law. He still does not acknowledge that he agreed to the admission of the photomontage evidence at trial. *See* Petition at 12-14. Moreover, Lewis continues to aver that he argued for suppression of any in-court identifications on grounds that "the eyewitnesses' identifications were the product of the suggestive montage…." Petition at 6. That is not accurate, as discussed above. Lewis also mischaracterizes the trial court's basis for allowing in-court identifications, stating that the trial court ruled "the past suggestive identification only went to the weight of the evidence." Petition at 7. To be clear, the record demonstrates that the trial court *never* found or even hinted at the possibility that the photomontage procedure was suggestive. RP 674-84. Indeed, neither party raised this issue for the trial court to consider because, again, Lewis agreed the photomontage evidence was admissible, likely strategically. RP 674-75, 677-78.

Lewis' petition does finally acknowledge that Singh was never asked to make an in-court identification. Petition at 8. But in doing so, Lewis engages in speculation: "[A]fter [Kalia's] failed identification, *it appears* the prosecution changed its mind about asking [Singh] to make an in-court identification." Petition at 8 (emphasis added). That is quite different from Lewis' opening brief below, in which he argued he deserved a new trial because the trial court allowed Singh to make an in-court identification.

Lewis' petition also mischaracterizes a motion to dismiss that Lewis brought after the jury's verdict. Lewis asserts that this motion "argued improper suggestive procedures violated due process." Petition at 8 (citing to RP 960-61). But that was not the basis for Lewis' motion. Lewis' post-trial motion raised *no* argument about due process nor *any* argument that any identifications (either in-court or out of court) were suggestive.

Rather, Lewis' argument for dismissal notwithstanding the verdict complained that the out-of-court identifications were equivocal (again, indicating Lewis' trial strategy in agreeing to their admission) and that the jury's verdict that he was the shooter rested on thin facts. RP 960-62. In other words, it was a *sufficiency-of-the-evidence* argument that raised no issues regarding suggestiveness and presented no constitutional questions about the identifications themselves.

In summary, Lewis' petition ultimately repeats the legal argument that he raised for the first time in his reply brief below—that the Court of Appeals was obligated to review the photomontage evidence *de novo* because Lewis' objection to the in-court identifications somehow preserved objections to the photomontage evidence to which he had agreed at trial. Certainly this Court should not accept review of an issue that was raised for the first time in a reply brief below that the State

never had the opportunity to address. *See Ives v. Ramsden*, 142 Wn. App. 369, 396, 174 P.3d 1231 (2008) (citing RAP 10.3(c)); *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("issues and argument raised for the first time in a reply brief are untimely and waived").

Ultimately, however, this Court should deny review because of Lewis' persistent inability to present the facts of this case accurately, including his repeated failure to acknowledge that he affirmatively agreed to the admission of the photomontage evidence he now wants this Court to declare unconstitutional. This case does not meet the standards of review under RAP 13.4(b).

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

This document contains 2,290 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 22nd day of August, 2025.

Respectfully submitted,

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