70296-3

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No. 70296-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HAFF,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The State presented insufficient evidence to prove that the crime was committed "within" a bank, as required by RCW 9A.56.200(1)(b).

As explained in the opening brief, the State failed to prove first-degree robbery as charged, because the robbery was not committed "within" a financial institution. The plain language of the statute requires proof of this element to elevate the crime from second-degree robbery to first-degree robbery. The State proved that there was a robbery *against* a financial institution and *at* a financial institution, but not that there was a robbery *within* a financial institution. Accordingly, the conviction should be reversed and the charged dismissed with prejudice. *See* Br. of Appellant at 5-11 (providing pictures and discussing RCW 9A.56.200(1)(b); *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009)).

The State points out that "Court Rules and case law recognize that crimes can occur in more than one location." Br. of Respondent at 7. This broad observation is uncontroversial, but the rule and case law cited are not relevant to the narrow issue here, which is the interpretation of the word "within" in the first-degree robbery statute.

The court rule the State references is CrR 5.1(b), which deals with venue. The subsection the State cites provides, "When there is reasonable doubt whether an offense has been committed in one of two or more

counties, the action may be commenced in any such county." CrR 5.1(b). Thus, this rule explicitly authorizes prosecution of a crime in a particular county, even if the crime did not occur within that county. The first-degree robbery statute, in contrast, requires the State prove that the robbery was committed "within and against a financial institution." RCW 9A.56.200(1)(b). It does not say that when there is reasonable doubt about whether the crime was committed within a financial institution or only against a financial institution, the crime may nevertheless be elevated to robbery in the first degree. *See id.* Thus, CrR 5.1(b) supports Mr. Haff's argument, not the State's.

The cases cited by the State are similarly inapposite, as they all address the venue court rule or statute. In *Rockl*, neither party disputed that the crimes occurred in both King and Pierce Counties. *See State v. Rockl*, 130 Wn. App. 293, 296, 122 P.3d 759 (2005) (cited in Br. of Respondent at 7). The defendant merely argued that because the crimes occurred in both counties, his motion to change venue from one to the other should have been granted. *Id.* This Court disagreed, holding that the plain language of CrR 5.1 did not provide a right to a change of venue in such circumstances. *Id.*

The other two cases the State cites addressed the statutory predecessor to CrR 5.1, which provided, "When a public offense has been

committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." *State v. Wilson*, 38 Wn.2d 593, 599, 231 P.2d 288 (1951) (citing Rem. Rev. Stat., § 2013 [P.P.C. § 141-1]). The statute applied where a woman was kidnapped in one county and her dead body was found in another, and where the defendant wrote a letter in one county and the victim received it in another. *See Wilson*, 38 Wn.2d at 599; *State v. Bogart*, 21 Wn.2d 765, 769, 153 P.2d 507 (1944); Br. of Respondent at 7-8.

The venue rule is not at issue here. At issue is the word "within" in the first-degree robbery statute, and the degree of enclosure or clarity of boundaries required to prove that a robbery occurred "within" a financial institution. *See* http://www.merriam-webster.com/dictionary/within (viewed 6/12/14) ("Within" means "inside something." It is "used as a function word to indicate enclosure or containment."). As the State points out, a person can be both "within" King County and "within" Washington State, because he is completely surrounded by the borders of both when standing in King County. However, if a bank teller were standing in King County behind a counter placed on the King County border, and a customer approached the other side of the counter, the customer would be within Washington State but not within King County. That is analogous

to the situation here. The robber was within the Albertson's, but not within the bank.

The fallacy of the State's argument is demonstrated by a hypothetical scenario: imagine if there were a line of 100 people at the bank counter in the Albertson's, such that the line wound around the store, through the frozen-foods aisle, then the bread aisle, then back to the dairy section in the opposite corner from the bank counter. If a person waiting at the end of the line near the milk committed a robbery, would that be "within" a financial institution? What about the person in the middle of the line near the ice cream? Common sense dictates that the answer is "no" in either circumstance. [1]

The only difference here is that the robber was at the front of the line, and therefore was standing *at* the counter. But he was no more "*within*" the bank than the person at the end of the hypothetical line in the milk section above. There was no border or enclosure within which the robber stood that would render him "within a financial institution." The State bears the burden of proving that the robbery was committed within the boundaries of the bank, and it failed to meet that burden. Mr. Haff acknowledged in his opening brief that if the robber had been in the

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[1] The robbery would likely not be "against" a financial institution, either, but proof of the "against" element is not at issue in Mr. Haff's case.

bank's office or the vault, the first-degree robbery statute would apply. But because he was only "at" the bank and not "within" it, the statute does not apply, and this Court should reverse. *Cf. Engel*, 166 Wn.2d at 581 (strictly construing "fenced area" to require actual fence enclosing entire area, and holding statute did not apply where area was totally enclosed but part of enclosure consisted of natural terrain).

2. The trial court violated Mr. Haff's constitutional right to due process by admitting the teller's in-court identification of Mr. Haff as the perpetrator.

As explained in the opening brief, the teller's in-court identification of Mr. Haff as the perpetrator should have been suppressed because the teller did not choose Mr. Haff as the perpetrator in a montage presented shortly after the event, presumably because the perpetrator wore a hat pulled down low, the interaction was short, and the teller was focused on the note and the cash drawer. Thus, the in-court identification should have been suppressed under the Fourteenth Amendment because the circumstances were unduly suggestive and the identification was unreliable. Furthermore, it should have been suppressed under article I, section 3 of our state constitution, which provides stronger protection against unreliable evidence than its federal counterpart. *See* Br. of Appellant at 11-31.

The State does not address the state constitutional issue at all, despite the fact that Mr. Haff presented extensive argument on the question, including an analysis pursuant to *State v. Gunwall*, 106 Wn.2d 54, 720 P.3d 808 (1986). The failure of the State to present argument on this issue should be construed a concession of error. *See United States v. Caceres-Olla*, 738 F.3d 1051, 1054 n. 1 (9th Cir. 2013) ("In his opening brief, Caceres–Olla maintains that his conviction did not constitute 'sexual abuse of a minor,' another enumerated 'crime of violence' within Guideline 2L1.2(b)(1)(A), because section 800.04(4)(a) prohibits sexual conduct with minors of 14 years and older and does not require an element of 'abuse.' The government did not respond to this argument, and so has waived reliance on that 'crime of violence' variant."); *In re J.J.*, 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999) (failure of reply brief to address findings filed following opening brief constitutes concession that there was no prejudice); *United States v. Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977, 983 (9th Cir. 1999) (failure of government to defend district court's ruling in appellate brief constitutes implicit concession of error).[2]

[2] Strangely, although the State does not address the argument Mr. Haff made, it does address an argument Mr. Haff did *not* make, namely, the admission of the other teller's out-of-court identification. *See* Br. of

As to the federal constitutional issue, the State writes:

> Defendant contends the process by which Montgomery was asked whether the perpetrator of the robbery was present in the courtroom was unduly suggestive. Defendant cites no legal support for his argument.

Br. of Respondent at 11. This Court should not tolerate such patent false accusations in appellate briefs. In fact, Mr. Haff quoted two cases verbatim in making this argument:

> With respect to the first prong of the test, "it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant." *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997); *accord United States v. Archibald*, 734 F.2d 938, 941, 943 (2d Cir. 1984). "Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor." *Archibald*, 734 F.2d at 941.

Br. of Appellant at 14. In addition to discussing the direct application of *Rogers* and *Archibald*, Mr. Haff cited eleven other cases in support of his Fourteenth Amendment argument. Br. of Appellant at 12-17.

The State, in contrast, cites no cases on point, although it does list several cases in a string cite. Br. of Respondent at 12. The case most relevant in the State's list is *United States v. Davis*, 103 F.3d 660, 670 (8th Cir. 1996). Yet *Davis* supports Mr. Haff's argument. There, the

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Respondent at 13-15. It is unclear why the State set up this straw man instead of addressing Mr. Haff's actual argument.

defendant challenged the in-court identification by an eyewitness who had previously selected the defendant in a lineup with 80%-90% certainty. *Davis*, 103 F.3d at 669-71. The Eighth Circuit was willing to assume that in-court identification procedures in general are suggestive and that the procedure in that case was "arguably suggestive." *See id.* The court affirmed the admission of the identification under the second part of the test, concluding that the identification was nevertheless reliable under the totality of the circumstances. *Id.* at 670. It noted that the witness in question had a good degree of attention on the robber (in part because he was not the victim), provided a detailed description shortly after the event, and, most importantly, chose the defendant from a lineup with 80%-90% certainty. *Id.*

The identification in *Davis* is similar to the identification in this case by the *other teller* – which Mr. Haff did not challenge. *See* Br. of Appellant at 12, n.2. The other teller chose Mr. Haff from a montage with 70% certainty, and again identified Mr. Haff with 70% certainty in court. RP (2/19/13) 175. But teller Casey Montgomery did *not* choose Mr. Haff from a montage shortly after the event. Yet he was permitted to appear in court a year and a half later, when Mr. Haff was the only defendant at the table, and proclaim that he was 100% sure Mr. Haff was the robber. As in *Rogers*, "this identification was impermissibly suggestive and posed a

very substantial risk of irreparable misidentification and, therefore, should not have been admitted." *Rogers*, 126 F.3d at 659. *See* Br. of Appellant at 11-17.

The State also implies that this issue is not properly before this Court. *See* Br. of Respondent at 16. This is incorrect for two independent reasons. First, Mr. Haff raised the issue in the trial court. CP 98. Second, even if he had not done so, a manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

Mr. Haff filed a "Defense Motion to Suppress Identification," in which he stated, "The court should not permit in court identification by either witness." CP 98. He explained, "Casey Montgomery did not identify any of the men in the photomontage as the robber. Thus, he clearly should not be permitted to identify Mr. Haff in the courtroom." CP 98. The court denied the motion, ruling that the prosecutor "can ask a witness on the stand whether or not the witness can identify a person in court. So the motion to suppress is denied." RP (11/9/12) at 27.

Yet the State claims Mr. Haff was required to raise the issue again during the testimony. This is not the rule. A motion to suppress always preserves a suppression issue for appeal; there is no requirement that a litigant move for reconsideration or object multiple times. *See State v. Fisher*, 165 Wn.2d 727, 748 n.4, 202 P.3d 937 (2009) ("the losing party to

a pretrial evidentiary ruling is deemed to have a standing objection where a judge has made a final ruling on the motion, [u]nless the trial court indicates that further objections at trial are required when making its ruling"). Mr. Haff moved to suppress the identification, and the trial court denied the motion. The error was preserved for review.

Even if the issue had not been raised below, this Court could address it because it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). The error is one of constitutional magnitude because the admission of the identification violated the Fourteenth Amendment and article I, section 3. And it is manifest, because it is apparent in the record. The Supreme Court recently clarified this portion of RAP 2.5(a)(3) in *State v. Lamar*, 180 Wn.2d 576, 327 P.3d 46 (2014). There, the Court said that "manifest," for purposes of rule, means "the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *Id.* at 583. "If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest." *Id.* Whether an error is "manifest" is different from whether it is prejudicial; the RAP 2.5(a)(3) analysis should not be confused with harmless error analysis, under which the State must

prove the absence of prejudice beyond a reasonable doubt. *Id.*; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The constitutional error here is manifest because it is apparent on the record, and the trial court had before it all of the facts Mr. Haff relies on in his appeal. Indeed, resort to RAP 2.5(a)(3) is not even necessary because the trial judge had the opportunity to rule on this very issue – and did rule on the issue – following the motion to suppress. Thus, this Court should review the claim and should reverse the ruling of the trial court. Br. of Appellant at 11-31.

Finally, the State cannot meet its heavy burden to prove that the admission of this identification was harmless beyond a reasonable doubt. Br. of Appellant at 30. The State notes that the other teller identified Mr. Haff as the robber, Br. of Respondent at 20, but neglects to mention that he was only 70% certain – which is a far cry from proof beyond a reasonable doubt. The State also relies on the fact that "people living with [Mr. Haff] at the time of the robbery identified him as the robber," but omits the salient fact that these "people" were relatives of the other suspect. The bottom line is that the introduction of this unreliable identification was highly prejudicial, because "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*,

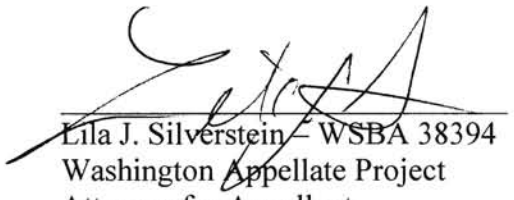
449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting). Accordingly, this Court should reverse and remand for a new trial.

B. CONCLUSION

For the reasons stated above and in the opening brief, Mr. Haff asks this Court reverse his conviction and remand for dismissal of the charge with prejudice. In the alternative, the conviction should be reversed and the case remanded for a new trial.

DATED this 10th day of October, 2014.

Respectfully submitted,



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DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70296-3-I
	)	
	)	
STEPHEN HAFF,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OFOCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	JOHN JUHL, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 10TH DAY OF OCTOBER, 2014.

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