SUPREME COURT NO. 91543-1

NO. 70720-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN ROY,

Petitioner.

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

The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Benjamin Isaac Grant Roy, the appellant below, asks this court to review the Court of Appeals decision referenced in Section B.

B. COURT OF APPEALS DECISION

Following the denial of Roy's motion for reconsideration on February 18, 2015, Roy requests review of the Court of Appeals decision in State v. Roy, noted at ___ Wn. App. ___, 2015 WL 260842, No. 70720-5-I (Wash. Ct. App. Jan. 20, 2015).

C. ISSUES PRESENTED FOR REVIEW

1. When the Court of Appeals fails to address the arguments an appellant raises to support his assignments of error in a criminal case, must this court grant review to honor his constitutional right to appeal?

2. For a bank to qualify as a "financial institution" under the first degree robbery statute, the bank must be "authorized by federal or state law to accept deposits in this state." The testimony the State presented in attempt to meet this element of first degree robbery was not based on personal knowledge, was hearsay, and failed to comport with the best evidence rule. The circumstantial evidence was only that the bank had employees and customers that were present, that the bank held itself out as a bank, and that the bank had not been shut down by law

enforcement. Did the State fail to carry its constitutional burden of proving every element of first degree robbery beyond a reasonable doubt?

3. Hearsay testimony that was not based on personal knowledge and did not comply with the best evidence rule constituted the only evidence presented to the jury regarding the bank's legal authority to accept deposits. Must the admission of this inadmissible evidence have materially affected the outcome of trial within a reasonable probability?

4. Roy did not dispute that his DNA was collected or that it resulted in a match. Was the State's presentation of testimony regarding a search warrant compelling Roy to submit DNA irrelevant and unfairly prejudicial, and did this testimony materially affect the outcome of trial within a reasonable probability where the State's evidence against Roy was concededly weak?

5. Is review appropriate under RAP 13.4(b)(1), (2), and (3) because the Court of Appeals decision conflicts with decisions of this court and with other Court of Appeals decisions as well as because the case involves significant constitutional questions?

D. STATEMENT OF THE CASE[1]

On November 29, 2011 a man walked into a Lake Stevens bank, yelled, "nobody fucking move," approached a bank teller, and demanded cash. 1RP[2] 1086-90, 210, 213-14, 216, 224, 287, 293, 304, 469; 2RP 4, 13. The robber left after collecting the money. 1RP 192, 232, 294.

Eyewitness accounts did not result in a positive identification, as descriptions of the suspect varied widely. See 1RP 190-92, 198, 214, 248, 251-52, 254, 272, 279, 281, 295, 300, 305. Physical evidence found nearby was processed and tested for DNA, but produced no matches. 1RP 376-77, 401-02, 387-88, 571-73, 633.

DNA from the robbery was later tied to DNA from a robbery of a nearby Rite Aid, of which Roy was convicted. 1RP 634; CP 62-63. Based on this match, police obtained a warrant to collect Roy's DNA in order to test it against the DNA recovered from the bank robbery investigation. CP 63. This DNA matched with a probability of one in 1000. 1RP 587.

At trial two major issues came to light. First, the defense asserted the State was required to prove the bank was authorized under federal and state law to accept deposits. 1RP 562-63; CP 65; RCW 9A.56.200(1)(b); RCW

[1] For a more complete statement of the facts, Roy respectfully refers this court to his opening brief. See Br. of Appellant at 4-9, 14-18.

[2] This brief cites the verbatim reports of proceedings as follows: 1RP—July 15, 16, 17, 18, 19, and 22, 2013; 2RP—July 31, 2013.

7.88.010(6). In an attempt to prove this essential element of first degree robbery, the State merely recalled Travis Olsen, who worked at the bank as an investment assistant and personal banker. 1RP 680. Olsen based his testimony on a deposit account agreement the bank maintains with its customers, despite not having the document in court. 1RP 681-83. The trial court allowed this testimony over defense objections based on hearsay, lack of personal knowledge, and best evidence. 1RP 677-78, 681-82.

Second, the trial court permitted a detective to testify regarding the DNA search warrant. 1RP 655. The defense strenuously objected that the search warrant was irrelevant and prejudicial given that Roy did not dispute that his DNA was collected or that it resulted in a match. 1RP 647-48, 652-53. The trial court overruled the objections. 1RP 655, 689.

The jury convicted Roy of first degree robbery. 1RP 793-96; CP 30. The State recommended the lowest available sentence of 46 months because "there was not a lot of definite evidence" presented at trial. 2RP 3. The trial court agreed and imposed this sentence, noting it "wouldn't have been shocked if the verdict were the opposite of what it was." 2RP 12. Roy appealed. CP 1.

On appeal Roy challenged the admission of the DNA search warrant testimony on relevancy and prejudice grounds, as well as the admission of Olsen's testimony regarding the bank's lawful operations. Br. of Appellant

at 1-2, 9-18, 21-26. Roy also argued the State failed to provide sufficient evidence that the bank was legally authorized to accept deposits. Br. of Appellant at 2, 18-33.

The Court of Appeals affirmed but failed to address Roy's arguments regarding the search warrant's relevancy. Roy, slip op. at 4-5. Instead, the court assumed the warrant evidence was relevant and held Roy could not demonstrate prejudice. Id. at 5. The court did not address Roy's arguments regarding the inadmissibility of Olsen's testimony either and concluded there was sufficient circumstantial evidence to convict Roy. Id. at 7-8.

E. ARGUMENT

1. THE COURT OF APPEALS' REFUSAL TO CONSIDER MANY OF ROY'S ARGUMENTS SUPPORTING HIS ASSIGNMENTS OF ERROR VIOLATED ROY'S CONSTITUTIONAL RIGHT TO APPEAL, NECESSITATING THIS COURT'S REVIEW

Article I, section 22 of the Washington Constitution provides that in "criminal prosecutions the accused shall have . . . the right to appeal in all cases . . . ." This right to appeal includes the right to effective assistance of counsel. State v. Rolax, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985).

The right to an appeal necessarily includes the Court of Appeals' consideration of arguments written by appellate counsel. This is perhaps the most significant part of the appeal right, as written legal argument presents the appellant's primary means to challenge trial court errors.

> In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); see also State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998) ("[T]his court will reach the merits if the issues are reasonably clear from the brief, the opposing party has not been prejudiced[,] and this court has not been overly inconvenienced."). When an appellant in a criminal case properly raises and briefs several arguments and the State has an opportunity to respond, there is no reason for the Court of Appeals not to consider the arguments. The Court of Appeals' failure to address an appellant's arguments in such circumstances strips the constitutional right to appeal of its substance. This is what occurred in Roy's appeal.

As discussed in greater detail in the following sections of this brief, Roy challenged several of the trial court's evidentiary rulings. He disputed the presentation of testimony regarding the existence of a DNA search warrant on relevancy grounds. Br. of Appellant at 1, 9-18. The State responded. Br. of Resp't at 9-13. The Court of Appeals acknowledged Roy argued the search warrant testimony was irrelevant but did not address the substance of or provide any analysis regarding Roy's relevancy arguments.

Roy, slip op. at 4-5. The court instead assumed the warrant was relevant and proceeded to address ER 403 prejudice. Roy, slip op. at 5. Roy pointed this shortcoming out to the Court of Appeals in his motion for reconsideration, arguing that courts must address the evidence's relevancy as a logical predicate to ER 403 analysis. Mot. for Reconsideration at 1-2. The Court of Appeals again refused to address Roy's arguments.

Roy also challenged the State's presentation of testimony regarding the bank's status as a statutorily defined financial institution. He asserted the testimony elicited by the State was not based on personal knowledge, was hearsay, and violated the best evidence rule.[3] Br. of Appellant at 2, 21-26. The State did not really address Roy's arguments. See Br. of Resp't at 13-15. Neither did the Court of Appeals. See Roy, slip op. at 8-9. Instead, the Court of Appeals relied on the very testimony that Roy challenged on various evidentiary grounds to affirm Roy's conviction, and it did so without analyzing a single one of Roy's arguments that the evidence was inadmissible. Id.

The Court of Appeals' refusal to address several of Roy's arguments violated Roy's constitutional right to appeal. Roy's arguments were properly raised. The State had an opportunity to respond. If article I, section

[3] While the trial court did not seem to expressly take judicial notice of the bank's lawful operations, Roy also contended the trial court could not do so in response to the prosecutor's arguments and the trial court's assertion that it might be able to. Br. of Appellant at 26-27. The Court of Appeals did not address this argument either.

22's right to appeal is to mean anything, the Court of Appeals must address the arguments a criminal litigant raises in good faith. The court's failure to do so in this case directly conflicts with this court's opinion in Olson, 126 Wn.2d at 323, and with Division Three's opinion in Grimes, 92 Wn. App. at 973, necessitating this court's review under RAP 13.4(b)(1) and (2). Roy also asks that this court grant review under RAP 13.4(b)(3) to honor his constitutional right to an appeal. On review, Roy contemplates that this court may either address his arguments itself or remand this matter to the Court of Appeals so that it may address his arguments as it should have done in the first instance.

2. THE STATE FAILED TO CARRY ITS CONSTITUTIONAL BURDEN OF PROVING EVERY ELEMENT OF FIRST DEGREE ROBBERY BEYOND A REASONABLE DOUBT, NECESSITATING THIS COURT'S REVIEW

Minimum due process requires the State to prove every element of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This court will reverse a conviction when, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). Because testimony regarding the bank's qualifications as a statutorily

defined financial institution was not based on personal knowledge, was inadmissible hearsay, failed to comply with the best evidence rule, and because circumstantial evidence failed to support a reasonable inference that the bank was a "financial institution" under the technical definition of that term, no rational juror could have found sufficient evidence of this essential element of first degree robbery. This constitutional issue should be reviewed under RAP 13.4(b)(3).

a. The testimony regarding the bank's authority to accept deposits was entirely inadmissible

Under the law of this case, the State was required to prove the bank was a financial institution, which "means a bank, trust company, mutual savings bank, savings and loan association, or credit union authorized by federal or state law to accept deposits in this state." CP 44; State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (jury instructions to which neither party objects become law of the case and delineate elements).

In its failed attempt to meet this burden, the State presented the testimony of one witness, Travis Olsen. Defense counsel repeatedly objected to Olsen's testimony. 1RP 677-78, 681-82.

Olsen testified the bank operated under federal and state laws and regulations, basing this assertion "upon personal activities spent on the day-to-day job and through a deposit account agreement that Chase maintains for

the checking accounts." 1RP 681-82. Olsen also said his "personal understanding" of the bank's lawful authority to accept deposits was grounded in never being "notified that we were operating illegally from law enforcement or anything like that." 1RP 685. Olsen was not a lawyer and was never notified the bank was operating legally. 1RP 685. His testimony that the bank was authorized to accept deposits was nothing more than his unfounded impression. The State did not introduce sufficient evidence "to support a finding that [Olsen] ha[d] personal knowledge of the matter." ER 602. Olsen was not competent to testify about the legality of the bank's operations because he lacked personal knowledge.

The deposit account agreement Olsen testified about was inadmissible hearsay. Olsen said the deposit account agreement stated the bank had legal authorization to accept deposits. 1RP 683-84. This was an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). The testimony was inadmissible hearsay.

The State contended the deposit account agreement fell under the business records exception of RCW 5.45.020. But Olsen did not and could not testify regarding when and how the document was prepared, which are foundational components of the business records exception to the hearsay rule. See RCW 5.45.020. "While the [Uniform Business Records Act] is a statutory exception to hearsay rules, it does not create an exception for the

foundational requirements of identification and authentication." State v. DeVries, 149 Wn.2d 842, 847, 72 P.3d 748 (2003). In DeVries, urinalysis was inadmissible because the doctor who testified regarding its result "did not have a copy of the report before him to consult while testifying." Id. The same is true of the deposit account agreement here.

Nor did Olsen's testimony comply with the best evidence rule, which requires that the best possible evidence be produced. State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979). Under Fricks, the original writing must be produced unless the proponent can show it is unavailable for a reason other than the fault of the proponent. Id. As in Fricks, "the State failed to produce the [deposit account agreement] or make any showing of its unavailability. Under these circumstances the testimony . . . as to its contents was not an acceptable method of proof." Id.

None of the evidence the State presented regarding the bank's authority to accept deposits was admissible. The Court of Appeals' reliance on Olsen's inadmissible testimony directly conflicts with this court's decisions in Fricks and DeVries, as well as ER 602, necessitating this court's review under RAP 13.4(b)(1).

b. That a bank has employees and customers does not support a reasonable inference that the bank is authorized under federal and state law to accept deposits

Relying on State v. Liden, 138 Wn. App. 110, 156 P.3d 259 (2007), the Court of Appeals determined that the fact the bank had employees and customers supported a reasonable inference the bank was authorized under federal and state law to accept deposits. Roy, slip op. at 8-9.

"[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Vasquez, 178 Wn.2d at 16. Whether a bank has employees has no bearing on the question of whether state or federal laws authorize it to accept deposits. It does not logically follow from testimony that employees were working at the time of the robbery that the bank has legal authority to accept deposits. Nor did the Liden court or the Court of Appeals here provide any supporting analysis for this faulty proposition. See 138 Wn. App. at 119-20; Roy, slip op. at 8-9.

More problematically, the Court of Appeals here and in Liden relied on pure tautology. They determined that, because eyewitnesses testified they were there to make deposits, the bank must have lawful authority to accept them. Liden, 138 Wn. App. at 120; Roy, slip op. at 8-9. Thus, according to the Court of Appeals, a bank must be authorized to accept deposits because persons make them and persons must make deposits because the bank is

authorized to accept them. This court should not sustain this specious reasoning. The State must demonstrate something more than question begging to prove a bank has legal authority to accept deposits, an essential element of first degree robbery.

The bank holding itself out as such and never having been shut down by law enforcement does not support a reasonable inference the bank had lawful authority to accept deposits. See 1RP 682. Under this logic, triers of fact would be required to accept any entity's legal authority to accept deposits when that entity calls itself a bank and police have not shut it down.

Had the State been prepared to prove every element of first degree robbery, it could have easily done so by presenting a witness who had actual knowledge of the bank's legal authority. This court should hold the State to its constitutional burden of proving every element of first degree robbery beyond a reasonable doubt by granting review under RAP 13.4(b)(3) and reversing.

3. ALTERNATIVELY, THE TRIAL COURT'S MULTIPLE EVIDENTIARY ERRORS ENTITLE ROY TO A NEW TRIAL

a. Because Roy did not dispute that his DNA was collected or matched, the warrant compelling him to provide DNA was irrelevant and prejudicial

"'Relevant evidence' means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." ER 401. Evidence that is not relevant is not admissible. ER 402. Roy did not dispute his DNA was collected or that it resulted in a 1-in-1000 match. The use of a search warrant to collect Roy's DNA was therefore not a fact of any consequence to the determination of the action. Nor did the search warrant tend to make the fact of the DNA's collection or accuracy more probable or less probable. The warrant evidence was inadmissible.

As discussed, the Court of Appeals did not address Roy's relevancy argument and instead concluded Roy could not demonstrate ER 403 prejudice. Roy, slip op. at 5. But the Court of Appeals' analysis on this issue finds no support in the law or common sense.

Only a negative inference can be drawn from a court order that compelled the collection of Roy's DNA. Indeed, most people understand that if a court issues a warrant, there must be some evidence of wrongdoing to justify a compulsory search. Testimony regarding the warrant allowed the jury to infer Roy was guilty, as no other implication arises from a court's choice to issue a warrant. Where the search warrant was not probative of the fact Roy's DNA was collected or matched, evidence of its existence was outweighed by its unfair prejudice to Roy under ER 403.

The Court of Appeals said it was "unlikely that Roy suffered unfair prejudice," endorsing the detective's testimony "that obtaining a warrant is a

normal procedure and that authorities cannot just ask people to give DNA without one. Most people understand that this is true." Roy, slip op. at 5. The Court of Appeals cited no authority for this cursory proposition, ostensibly because no authority exists to support it. Police ask for consent to collect DNA every day. E.g., State v. Gauthier, 174 Wn. App. 257, 261, 298 P.3d 126 (2013) ("Before obtaining a warrant or court order, [the detective] requested a cheek swab sample of Gauthier's DNA."). When people consent, there is obviously no need for a warrant. The Court of Appeals failed to provide convincing or reasoned analysis to show Roy was not prejudiced by the warrant testimony and instead rejected Roy's prejudice argument on an erroneous factual assertion contradicted by its own observation in Gauthier.[4] Review is appropriate under RAP 13.4(b)(2).

b. The trial court's multiple evidentiary errors materially affected the outcome of trial

When trial courts admit evidence in error, on review the error is prejudicial if it is reasonably probable that, had the error not occurred, the outcome of trial would have been materially affected. State v. Benn, 161

[4] The Court of Appeals also claimed, "Roy does not challenge the admission of this testimony that clearly explained the basis for the warrant." Roy, slip op. at 5. This makes no sense. Roy challenged any mention of the warrant's existence because it was irrelevant and prejudicial. Br. of Appellant at 1, 3, 10-18; 1RP 646-49, 652-55. Had the trial court properly excluded the reference to the warrant, it would necessarily have excluded any testimony explaining the basis for obtaining the warrant.

Wn.2d 256, 266 n.4, 165 P.3d 1232 (2007). This standard is met in light of the concededly weak case against Roy.

As discussed above, Olsen's testimony regarding the bank's legal authority to accept deposits was not based on personal knowledge. Olsen also testified regarding the contents of a deposit account agreement that was not available, which violated both the hearsay and best evidence rules. These errors surely affected the outcome of trial, as the State did not present any other evidence regarding the bank's legal authority. It is certain that jurors relied on this evidence in determining the State had proved the bank was legally authorized to accept deposits beyond a reasonable doubt. The trial court's erroneous admission of this evidence undoubtedly affected the outcome of Roy's trial.

The negative inference that jurors could draw from the existence of a search warrant compelling the collection of Roy's DNA was also prejudicial enough to affect the trial's outcome within a reasonable probability.

Witnesses were not able to give a consistent description of the bank robber and their testimony widely varied in terms of height, weight, build, age, coloring, and clothing as well as whether the robber had a gun. See, e.g., 1RP 190-92, 189, 198, 214, 217, 248, 251-52, 254, 272, 278-79, 281, 295, 300, 304-05; CP 62.

The DNA analyst testified one in 1000 individuals could have contributed the DNA that inculpated Roy, a far cry from the numbers usually generated from DNA evidence. See, e.g., State v. McConnell, 178 Wn. App. 592, 599, 315 P.3d 586 (2013) (probability of random match one in 19 quadrillion). In addition, the analyst stated other pieces of evidence did not contain a sufficient amount of DNA to meet the Washington State Patrol Crime Lab's validated testing procedures and identified hairs that were never tested. 1RP 557, 571, 588. There was also a chain of custody or evidence tampering issue with a sweatshirt from which the DNA was collected. The sweatshirt arrived at the lab in brown butcher paper but no one could explain why it had been packaged that way. 1RP 507, 514-15, 521.

Both the State and the trial court conceded on the record that the evidence against Roy was weak. The State recommended the lowest possible standard-range sentence because "there was not a lot of definitive evidence." 2RP 3. This surprised the trial court given its impression of the prosecutor as "one of the ones that's really on the more stringent and strict side." 2RP 8. The trial court also noted, "the reason for this recommendation is, although the jury convicted him, the State didn't think their case was as strong as it was in other circumstances" and, "I wouldn't have been shocked if the verdict were the opposite of what it was." 2RP 8, 12.

Given that the prosecutor and the trial judge stated the case against Roy was weak, it should go without saying that any negative inference drawn against Roy—such as the existence of a court order compelling him to submit DNA—could reasonably have affected the jury's verdict. Combined with the contradicting descriptions of the suspect and the underwhelming physical evidence, the admission of the irrelevant and prejudicial testimony regarding the DNA search warrant was not harmless error.

The Court of Appeals failed to adequately address Roy's challenges to the testimony regarding the search warrant and the bank's legal qualifications to accept deposits. Instead, the Court of Appeals permitted the trial court's erroneous evidentiary rulings to stand without analysis, and these rulings conflicted with several decisions of this court. This court should accordingly grant review under RAP 13.4(b)(2) and reverse.

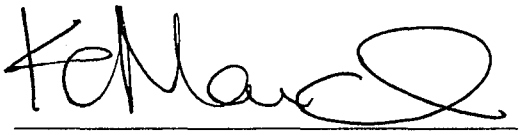
F. CONCLUSION

The direct and circumstantial evidence did not suffice to prove that the bank qualified as a statutorily defined financial institution. The evidence the State provided regarding the bank's legal authority to accept deposits was entirely inadmissible. Testimony regarding a search warrant compelling the collection of Roy's DNA was irrelevant and prejudicial. The Court of Appeals failed to address these arguments, depriving Roy of his constitutional right to appeal on these issues. Roy asks this court to grant review, reverse the Court of Appeals, reverse his convictions, and remand for dismissal of this prosecution, or, alternatively, remand for a new trial that comports with the rules of evidence.

DATED this 20th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. BENJAMIN ROY, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 70720-5-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BENJAMIN ROY
DOC NO. 368036
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 98331

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF MARCH 2015.

x Patrick Mayovsky

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 70720-5-I
Respondent,	)	DIVISION ONE
v.	)	
BENJAMIN ISAAC GRANT ROY,	)	UNPUBLISHED
Appellant.	)	FILED: January 20, 2015

Cox, J. — A jury convicted Benjamin Roy of first degree robbery of a financial institution. Roy appeals and argues that the trial court abused its discretion in allowing the State to elicit testimony that police officers obtained a sample of his deoxyribonucleic acid (DNA) by means of a search warrant. He also contends that insufficient evidence supports his conviction because the evidence failed to establish that the branch of Chase Bank where the robbery occurred is a financial institution within the meaning of RCW 9A.56.200. Because sufficient circumstantial evidence supports Roy's conviction and he fails to show any other error, we affirm.

On November 29, 2011, a man entered the Lake Stevens branch of Chase Bank just before closing. The man wore a dark hooded sweatshirt, inside out, with the hood pulled over his head, a bandana covering his face, and gloves. He yelled "Nobody fucking move" while holding an object covered in black plastic that appeared to be a gun and waving it from side to side. The man moved

toward Farah Siko, a lead teller and the only person at a teller station at the time. The man pointed the object at Siko and demanded all of the cash in her drawer. Siko activated an emergency switch under the counter to notify law enforcement and gave the man all the cash in her top drawer, approximately $3,000. After taking the cash, the man fled the bank on foot.

Around that same time, David Look was driving through the intersection in front of the Chase Bank branch when a man wearing a hooded sweatshirt darted into the street from the direction of the bank. Look had to slam on his brakes to avoid hitting the man. The hood fell off and Look briefly saw the man's face and described him as a white male, in his late twenties or early thirties with sandy hair.

Police officers arrived at the bank shortly after the robbery. They called for assistance from a K-9 unit. The dog followed a scent from the bank door to a nearby field consistent with the suspect's path as indicated by witnesses. The dog traced the scent to a discarded black hooded sweatshirt and a $100 bill that police officers found in the field. Near these items, police officers found fresh bicycle tracks. They did not locate a suspect.

When they returned the following day to search the area in the daylight, police officers recovered a garden hose nozzle shaped like a gun and covered in a black plastic. The police sent the items retrieved to the Washington State Crime Laboratory for DNA testing.

About a year after closing the case, Lake Stevens police officers learned from the crime lab that DNA from the evidence pertaining to the Chase Bank

robbery was tied to DNA evidence collected during the course of an investigation into a later crime committed by Benjamin Roy. That crime was an attempted robbery of a nearby drugstore. Based on information about the DNA match, police officers obtained a search warrant to obtain a DNA sample from Roy. Tests comparing Roy's DNA with DNA extracted from the sweatshirt showed that Roy was a substantial contributor to the mixed sample of DNA and that the probability of a match was one in 1,000 individuals.

The State charged Roy with first degree robbery committed within and against a financial institution, in violation of RCW 9A.56.200(1)(b). Based on the testimony of several bank employees and customers who witnessed the robbery, the testimony of police officers, a forensic scientist, and Look, and evidence of bank surveillance photographs taken during the commission of the robbery, the jury convicted Roy as charged. The court imposed a standard range sentence.

Roy appeals.

EVIDENCE OF WARRANT TO COLLECT DNA

Before trial, the court granted Roy's motion in limine to exclude reference to his prior convictions and involvement in the subsequent attempted robbery of a drug store near the Chase Bank branch. The court also ruled that in order to explain how Roy became a suspect in the case approximately a year after the crime occurred, the State would be allowed to present limited testimony that a national DNA database was the means by which Roy was identified as a potential suspect, without mentioning his involvement in another crime. To this end, forensic scientist Mariah Low testified that she discovered that Roy was a

potential contributor to the DNA extracted from the evidence by running the DNA through a database about a year after the incident. Low said she then provided Roy's name to law enforcement.

Detective Jerad Wachveitl testified that upon learning that Roy was a potential match, he obtained a search warrant to obtain a DNA sample from him. The detective said it was "normal procedure" to obtain a warrant because law enforcement may not "normally just walk up to people on the street and ask them to give you samples of DNA." Detective Wachveitl also said he did not give Roy the opportunity to consent before procuring the warrant.

Roy objected to the admission of evidence that the police obtained a warrant for a DNA sample. He argued that evidence about the warrant was neither relevant nor necessary because the defense did not dispute that the police obtained a DNA sample from him and submitted it for testing. Roy argued that the evidence led to a "prejudicial impact that something negative" led to the issuance of the warrant. But noting that the testimony would not disclose any information about Roy's later attempted robbery and that jurors probably knew that collecting DNA from an individual involves a legal procedure, the court overruled Roy's objection and allowed the testimony.

As he argued below, Roy contends that the testimony about the warrant was not relevant because "it was undisputed that Roy's DNA was collected." Roy also maintains that the prejudicial impact far outweighed any marginal relevance of the evidence and the evidence was inadmissible under ER 403. ER 403 provides, in relevant part, that, "[a]lthough relevant, evidence may be

excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

To warrant reversal, evidentiary error must be prejudicial.[1] Roy claims that the testimony implied that the warrant was based on evidence of wrongdoing. He maintains that a juror "would reasonably recognize that a court had made an affirmative determination regarding Roy's guilt."

We disagree. It is unlikely that Roy suffered unfair prejudice under ER 403 because the jury learned that the police obtained a DNA sample by means of a warrant. Detective Wachveitl testified that the forensic scientist provided Roy's name as a potential contributor to the DNA after running the DNA through a database. He also testified that obtaining a warrant is normal procedure and that authorities cannot just ask people to give DNA without one. Most people understand that this is true. Roy does not challenge the admission of this testimony that clearly explained the basis for the warrant. The detective's testimony about the warrant explained the circumstances surrounding the warrant and did not reveal Roy's later crime under which the DNA match came to light. The reference to the warrant neither necessarily implied that Roy engaged in other misconduct nor suggested that the court that issued the warrant made any determination of guilt. Roy fails to establish unfair prejudicial error.

SUFFICIENCY OF THE EVIDENCE

Roy claims insufficient evidence supports his conviction because the State failed to establish that he committed robbery against a financial institution. We again disagree.

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[1] State v. Benn, 161 Wn.2d 256, 268, 165 P.3d 1232 (2007).

Under RCW 9A.56.200(1)(b), a person commits first degree robbery when "[h]e or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060." RCW 7.88.010(6) defines a "financial institution" as "a bank, trust company, mutual savings bank, savings and loan association, or credit union authorized by federal or state law to accept deposits in this state." In accordance with these statutes, the instructions informed the jury that in order to convict Roy, it had to find that "the defendant committed the robbery within and against a financial institution." The instructions further provided the following definition of financial institution:

> "Financial institution" means a bank, trust company, mutual savings bank, savings and loan association, or credit union authorized by federal or state law to accept deposits in this state.[2]

Although the first degree robbery statute alternatively allows a jury to find the entity is a financial institution under the definition set forth in RCW 35.38.060, the instructions included only the definition of "financial institution" as provided in RCW 7.88.010(6).

We review a defendant's challenge to the sufficiency of the evidence by asking whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[3] In answering this question, we view the evidence in the light most favorable to the State, drawing all reasonable inferences in favor of the State.[4] We consider circumstantial and direct evidence to be equally reliable.[5]

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[2] RCW 7.88.010(6).
[3] State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999).
[4] State v. Gregory, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006).
[5] State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

In State v. Liden,[6] a jury convicted the defendant of first degree robbery based on a robbery that occurred at the Heritage Bank in Tumwater, Washington. Liden committed the robbery by informing the teller he wanted to make a deposit and after the teller gave him a counter check to provide his account number, he wrote "I have a gun" on the back of the check.[7] The teller gave Liden cash and he fled. Following his conviction, Liden filed a CrR 7.4 motion arguing that the State failed to provide any direct evidence that Heritage Bank was lawfully engaged in banking or had legal authority to accept deposits. While finding ample circumstantial evidence that the bank was a financial institution, the trial court determined that the State failed to provide direct evidence of the bank's legal status and therefore, failed to meet its burden of proof.[8] The court dismissed the first degree robbery conviction, and substituted and imposed a conviction for second degree robbery.

Division Two of this court reversed. Noting that the term "financial institution" is included in numerous crimes within the criminal code, the court stated that there was no evidence that the Legislature intended to depart in this instance from the long-standing rule that circumstantial and direct evidence are equally reliable. The court further held that requiring the State to submit direct, rather than circumstantial, evidence to prove that an entity is a financial institution would be "an absurd interpretation" of the law.[9]

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[6] 138 Wn. App. 110, 156 P.3d 259 (2007).
[7] Id. at 113.
[8] Id. at 115.
[9] Id. at 118.

The court determined that the circumstantial evidence was sufficient to establish that Liden committed robbery against a financial institution. Specifically, the court pointed to the following evidence: (1) the counter check the teller provided to Liden included the text, "Reserved for Financial Institution Use" on the back, (2) the teller testified she was employed by the bank and was working in that capacity at the bank when the robbery occurred, and (3) customers who witnessed the robbery testified that they were there to make deposits.[10]

The circumstantial evidence here is even more significant than that in Liden. As in Liden, the teller who was threatened during the robbery testified that she was an employee of Chase Bank and was engaged in her capacity as a lead teller at the time of the robbery. Siko was employed at the time of trial as branch manager for a different branch of Chase Bank. Two other employees testified that they were working as personal bankers employed by Chase Bank when the robbery took place. According to their testimony, a personal banker at Chase is responsible to assist customers with opening, closing, and servicing accounts. Customers who witnessed the robbery testified about having checking accounts at Chase Bank, doing their banking at the Lake Stevens bank branch, and said they were at the branch to make deposits when the crime occurred.

Travis Olsen, one of the employees who witnessed the robbery and was employed by Chase Bank as an investment assistant at the time of trial, expressly testified that Chase Bank is a bank. He said that Chase operates under federal and state law in offering customer accounts and accepting

[10] Id. at 119.

deposits. Olsen said that his knowledge of the bank's legal status was based on his personal knowledge and day-to-day activities as a bank employee and also based on his knowledge of the deposit account agreement, a document that the Bank maintains. Olsen testified that the bank openly engages in banking and accepting deposits, openly advertises these services, and has never been closed down by legal authorities.

Roy contends that Liden was wrongly decided. He also argues that the evidence to establish Chase Bank's status as a financial institution suffers from the same deficiency as the evidence cited in Liden. According to Roy, the fact that bank employees and customers engage in certain activities does not lead to a reasonable inference that those activities are authorized by law. He maintains that Olsen's testimony was insufficient because he had no knowledge of Chase Bank's legal authority, his testimony about the deposit agreement was hearsay, and because the deposit agreement was not itself admitted into evidence. Although Roy states that he "takes no issue" with the holding of Liden, the essence of his argument is that only direct evidence can establish that an entity is authorized by state or federal law to accept deposits. We reject this position and agree with Division Two's decision in Liden. A reasonable jury could infer from the circumstantial evidence in this case that Chase Bank is a bank that is "financial institution" within the meaning of the controlling statutes.

Finally, Roy contends that cumulative errors prejudiced the outcome of the trial. Because Roy has failed to demonstrate any error, we reject his claim of cumulative error.[11]

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

[11] See State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005).