Supreme Court No. 93822-9

No. 73518-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSE LEDERLE,

Petitioner.

PETITION FOR REVIEW

JAN TRASEN
Attorney for Petitioner
WSBA # 41177

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Washington Constitution

United States Constitution

Rules

Other Authorities

A. IDENTITY OF PETITIONER

Jesse Lederle, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Lederle appealed his convictions for attempted elude and possession of a stolen motor vehicle in Skagit County Superior Court. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The Fourteenth Amendment guarantee of due process requires that the evidence used to convict a criminal defendant be reliable. Where the State failed to show that a dog that allegedly "tracked" to Mr. Lederle: (1) had a proven record of successful tracks, (2) followed the track of the guilty party, or (3) tracked from the source of the crime location, did the trial court err in finding the dog-tracking evidence met the threshold of admissibility? Was evidence sufficient to convict, and was the Court of Appeals decision in conflict with decisions of this Court, requiring this Court grant review? RAP 13.4(b)(1)?

2. Conclusions of law unsupported by findings of fact cannot stand. The trial court entered no findings of fact to support the inference Mr. Lederle was identified as the perpetrator of the charged crimes. Since

identity was the sole contested issue at trial, do the lack of sufficient findings require this Court's review? RAP 13.4(b)(1)?

D. STATEMENT OF THE CASE

On February 23, 2015, someone stole a Ford pickup truck from Draper Valley Farms in Skagit County. RP 26-28. The culprit drove the truck away from the Draper Valley property, past Mount Vernon Police Officer Chester Curry, who was standing on Stewart Street. RP 98. Officer Curry, who was in uniform, hopped into his marked patrol car and engaged the car thief in a chase. RP 102-05. The officer estimated his own speed at 60-70 miles per hour. Id.

When Officer Curry caught up to the stolen truck, the truck had stopped in a residential area. RP 106. The previously new vehicle seemed to be in poor condition; it had blown a tire, was "revving extremely loud," and the officer was "seeing sparking from the rear of the vehicle." RP 104-05. From his patrol car, Officer Curry watched as the driver of the truck opened the driver's side door and fled through a yard. Id. at 106. Curry could not see the driver's face, but described the driver as male, of medium height and build, and wearing a short-sleeved shirt with bright white on the T-shirt. RP 107. Officer Curry waited in his car and radioed for back-up, including a canine officer. RP 106-07.

Police officers also interviewed Melinda Mason, a Mount Vernon resident, who was standing on her porch smoking a cigarette. RP 17. She called the police when she saw a man coming out of her neighbor's building. Id. Ms. Mason first noticed the police "were in the wrong neighborhood," since she could see the blue and red lights behind her. Id. Following her call, the police arrived near her home with a tracking dog within a few minutes. RP 17. Ms. Mason could not identify the man she saw walking out of her neighbor's building; she described him as a white man wearing a blue shirt. RP 23-24. Ms. Mason testified that she watched the man for five minutes before he walked quickly into the wooded area. RP 22-24.

Approximately 20 minutes after Officer Curry called for back-up, Whatcom County Sheriff Department police officer Jason Nyhus, a K-9 handler, arrived with his dog, Hyde. RP 65. Officer Nyhus instructed Hyde to begin a track, but he did not have Hyde begin the track at the location of the stolen truck, in order to obtain the scent of the suspect, as the officer originally intended. RP 69. Instead, the officer had Hyde begin at the location where Ms. Mason had seen a man running into the woods. Id. at 69, 88, 91-92.

Although Officer Nyhus did not share any information about his or Hyde's training or their record for successful tracking, he did state that

Hyde has been trained "to look for humans." RP 71. Following Officer Nyhus's command, Hyde tracked through Ms. Mason's backyard, tracking in a northeasterly direction until the area became wooded and more remote. RP 71-73. After a short track, Hyde alerted on Mr. Lederle. RP 74. Mr. Lederle did not respond to Officer Nyhus's commands to come out, or to his warnings that the dog would be "deployed" unless Lederle complied. RP 74-75. Officer Nyhus "commanded the dog to bite the suspect," by having the dog bite Mr. Lederle twice – in the forearm and in the buttocks. RP 75. Mr. Lederle yelled, "Why am I being attacked? I was just sleeping here." He also stated that he was a transient. RP 124-25. Upon his arrest, Mr. Lederle was transported to the hospital with several puncture wounds from the attack. RP 61-62, 81-82. Mr. Lederle was wearing a black shirt. RP 137.

No witness identified Mr. Lederle as the same man who had been seen earlier. Officer Curry could not confirm Mr. Lederle was the driver he had seen exit the stolen truck, and Ms. Mason could not confirm he was the man she had seen walking through her yard. RP 17-18, 24, 107.

Mr. Lederle was charged with attempting to elude a pursuing motor vehicle and possession of a stolen motor vehicle. CP 26-27. He was also charged with several misdemeanors, to which he pled guilty, including resisting arrest and making a false report.

He appealed, raising the sufficiency and identification issues raised herein. On October 3, 2016, the Court of Appeals affirmed his convictions. Appendix.

He seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

1. The admission of unreliable "dog tracking" evidence violated Mr. Lederle's due process right to a conviction by sufficient evidence.

An accused person has the right to a fair trial, and this right includes the guarantee that the evidence used to convict him will meet the most basic requirements of fairness and reliability in the ascertainment of guilt or innocence. U.S. Const. amend. XIV; Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); see also State v. Ahlfinger, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988) (upholding exclusion of polygraph evidence, although relevant and helpful to accused's defense, given "the State's legitimate interest in excluding inherently unreliable testimony."). "Due process does not permit a conviction based . . . on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court."

California v. Green, 399 U.S. 149, 187 n. 20, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring).

In Washington, dog tracking evidence is admissible only if a sufficient evidentiary foundation is laid to demonstrate the evidence's reliability. State v. Loucks, 98 Wn.2d 563, 568, 656 P.2d 480 (1983). The proponent of the evidence must show:

> (1) the handler was qualified by training and experience to use the dog, (2) the dog was adequately trained in tracking humans, (3) the dog has, in actual cases, been found by experience to be reliable in pursuing human track, (4) the dog was placed on track where circumstances indicated the guilty party to have been, and (5) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow.

Id. (quoting State v. Socolof, 28 Wn. App. 407, 411, 623 P.2d 733 (1981)).

The Loucks Court emphasized that the "dangers inherent in the use of dog tracking evidence" can only be alleviated by the presence of "corroborating evidence identifying the accused," in order to sustain a conviction. 98 Wn.2d at 567.

In Loucks, a police dog trailed a scent from the scene of a burglary to a nearby residence, where the defendant was found sleeping in a stairwell. Id. at 565. The defendant in Loucks was convicted, even though he was excluded as a source for the blood and fingerprints at the

burglary scene and nothing else seemed to tie him to the crime. This Court reversed, holding that the above conditions are a merely the minimum conditions required for admissibility. Id. In addition to dog tracking evidence, a case must still be supported by sufficient corroborating evidence to sustain a conviction. Id. at 567-69.

A minority of states refuse to admit evidence of dog-tracking altogether, apparently agreeing with Justice Souter: "[t]he infallible dog, however, is a creature of legal fiction." Illinois v. Caballes, 543 U.S. 405, 411, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) (Souter J., dissenting). In State v. Storm, the Montana Supreme Court decried our country's "vicious" legacy of bloodhounds to track and terrorize fugitive slaves. 125 Mont. 346, 383-84, 238 P.2d 1161 (1951) ("The slaves were kept intimidated, and these dogs were doing their work effectively, regardless of their accuracy."). Montana does not permit dog tracking evidence, due to concerns over the human trainer's influence over the animal; the unreliability of the evidence; as well as the court's grave concerns over the brutality of the practice. Storm, 125 Mont. at 376.

2. The trial court admitted dog-tracking evidence, although it lacked the proper foundation for admissibility.

This case resembles Loucks, as the trial court admitted dog-tracking evidence without sufficient "corroborating evidence identifying the accused as the perpetrator of the crime." 98 Wn.2d at 567.

Like the defendant in Loucks, no DNA evidence tied Mr. Lederle to the crime scene – here, the stolen vehicle. As in Loucks, no party identified Mr. Lederle as the person driving or exiting the vehicle, or attempting to elude the police. RP 107 (Officer Curry could not see driver or identify him). No witness identified Mr. Lederle as the person walking in the neighborhood, either. RP 17 (Melinda Mason could not see the face of man near neighbor's garage or in woods). The record indicates that no "confirmatory" identification was conducted, once Mr. Lederle was arrested in the woods, in order to verify that he was the same individual that Officer Curry had seen exit the truck. Ms. Mason testified that although she watched the man in her yard for five minutes, she, too, did not give an identification following Mr. Lederle's arrest. RP 18, 24.

As to the Loucks factors for admissibility of the dog-tracking evidence, the State failed to establish three of the five conditions for admissibility of Officer Nyhus's testimony concerning the tracking. First, as to both factors (2) and (3), the State failed to show the dog was

adequately trained in tracking humans, or that "the dog has, in actual cases, been found by experience to be reliable in pursuing human track." Loucks, 98 Wn.2d at 566 (emphasis added).

Unlike in Loucks, or in other cases involving dog-tracking evidence, the canine officer here failed to provide substantive testimony about Hyde's specific training and experience. RP 66-68. Officer Nyhus, although an experienced officer with 16 years in the canine unit alone, conceded that Hyde was "a new dog to me; so I've had him for about a year." RP 66 (explaining he has worked with a total of three dogs over his 16-year career). At the time of the track which led police to Mr. Lederle, Officer Nyhus estimated that Hyde was only 20 months old. RP 85. Perhaps due to Hyde's inexperience, Officer Nyhus neglected to share whether Hyde had a successful tracking record.

Second, the State did not establish Loucks factor (4): that "the dog was placed on track where circumstances indicated the guilty party to have been." Loucks, 98 Wn.2d at 566. Rather than starting the track at the stolen truck, as Officer Nyhus had intended, the officer testified that he suddenly decided to start the track at the location where the neighbor had seen a figure walking into the woods. RP 88. Therefore, Hyde was not placed on track to pursue the vehicle-thief's scent at all, as required by

Loucks. Hyde, rather, was asked to pursue the scent of the person walking into the woods, who ultimately turned out to be Mr. Lederle.

This violates the "conditions precedent" established by Loucks, since if the track does not start at the crime scene (here, the stolen truck), the dog alerting to Mr. Lederle in the woods only connects him to the woods, not to the stolen truck. Loucks, 98 Wn.2d at 566 (dog-track evidence insufficient without other corroborating evidence of identification); Rex A. Stockham, Dennis L. Slavin, & William Kift, Specialized Use of Human Scent in Criminal Investigations, Federal Bureau of Investigation, Forensic Science Communications, Vol. 6, No. 3 (July 2004). As the FBI's own publication cautions: "Identifying someone's scent at a crime scene is not an indication of complicity. It simply establishes a direct or indirect relationship to the scene." Stockham, Slavin, & Kift, FBI, supra.

Courts have only found dog-tracking evidence to be sufficiently corroborated where a proper foundation is shown. See, e.g., State v. Salinas, 169 Wn. App. 210, 223, 279 P.3d 917 (2012). Salinas differed from the instant case in several respects. First, the State established Loucks factor (4) (dog placed to track where guilty party has been). In Salinas, Officer Nyhus, the same canine handler used in the instant case, began the track at the victim, rather than at another location, as occurred here. Salinas, 169 Wn. App. at 215.

Thus, the dog-tracking evidence was admissible in Salinas because, unlike here, the proper foundation for admission was met. 169 Wn. App. 223; Loucks, 98 Wn.2d at 566-68. In addition, as Loucks requires, there was corroborating evidence identifying Mr. Salinas as the perpetrator of the crime. 98 Wn.2d at 567. Mr. Salinas was specifically identified by DNA recovered from the victim and from other items found near the crime scene. Salinas, 169 Wn. App. 223. Therefore, because Salinas satisfied the Loucks factors regarding admissibility of the dog-tracking evidence, as well as sufficient corroboration of the defendant's identity, it is distinguishable from Mr. Lederle's case.[1]

In sum, the State failed to prove that this specific dog, Hyde, was competent to perform this track, or that the guilty party had been at the location in the woods where Hyde was placed to track. Accordingly, Officer Nyhus's testimony about the dog's tracking effort lacked sufficient foundation for admission. Loucks, 98 Wn.2d at 566-68.

[1] In the instant case, although DNA samples were taken from the stolen truck, the record does not indicate any was a match for Mr. Lederle. In addition, although the State presented testimony concerning a bottle recovered from the ground, there was, likewise, no DNA connecting Mr. Lederle to the bottle. RP 117-18.

3. Because the dog-tracking evidence lacked the essential foundation for admissibility, Mr. Lederle was convicted based upon insufficient evidence; this Court should grant review.

Unlike dog-tracking evidence properly admitted, the track in the instant case was admitted without the required "conditions precedent to admissibility." Loucks, 98 Wn.2d at 566 (citing Socolof, 28 Wn. App. at 411). Because the record fails to show the experience or the track record of the dog, as well as because the track was initiated at the wrong location, the evidence lacked the essential foundation for admissibility.

Without the dog track, there was insufficient corroboration of identity. Id. Whether or not Officer Nyhus brought the dog over to the stolen vehicle following Mr. Lederle's arrest and then had the dog pick up the scent of the driver, this was immaterial, as the dog was already covered with Mr. Lederle's DNA by then, having bitten Mr. Lederle repeatedly during the arrest. RP 75 ("It's *fass* is the command that's the German command for bite and hold ... In the right forearm is where he originally bit him.").

At trial, even Officer Nyhus admitted that the second "confirmatory" track was unlikely to lead to a different result from the original track, since the dogs are rewarded for tracking the same person. "They [the dogs] are more inclined to track the person they just tracked because they are basically rewarded for finding them." RP 93.

Given the lack of corroboration or foundation for the dog-tracking evidence, as well as the failure of any witness to identify Mr. Lederle, there was insufficient evidence to convict Mr. Lederle of either charge.

The Court of Appeals declined to consider this error, stating that Mr. Lederle failed to object to the admission of the dog tracking evidence at trial. Appendix at 6 (citing State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). The Court said that trial counsel had thus "rob[bed] the court of the opportunity to correct the error and avoid a retrial." State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). This is not the case, however.

Here, trial counsel for Mr. Lederle brought the tainted dog track to the trial court's attention, both during cross examination of Officer Nyhus and in closing argument. RP 142-43 ("I think that was a serious taint to the situation.").

A conviction may not be entered in the absence of proof beyond a reasonable doubt of every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). An accused person's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784

P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970).

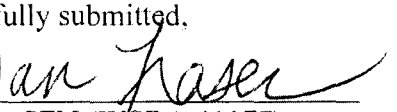
Because the dog-tracking evidence failed to meet the requirements set forth for admission in Loucks, and because the remaining evidence was insufficient to convict, this decision requires this Court's review. 98 Wn.2d at 566-68; RAP 13.4(b)(1). In addition, because Mr. Lederle properly drew the trial court's attention to the impropriety of the dog track evidence in closing argument, the Court of Appeals erred when it failed to reach this constitutional error, pursuant to RAP 2.5(a); RP 143.

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 31st day of October, 2016.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project
Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JESSE DEAN LEDERLE, Appellant.	)	No. 73518-7-I DIVISION ONE UNPUBLISHED OPINION FILED: October 3, 2016

SPEARMAN, J – Jesse Lederle challenges his convictions of one count of attempting to elude and one count of possession of a stolen motor vehicle. He contends the State failed to establish the proper foundation for admission of dog tracking evidence. But Lederle failed to object to the evidence at trial, and on appeal, he does not allege that admission was a manifest constitutional error. We therefore decline to consider the issue for the first time on appeal and affirm.

FACTS

On the evening of February 23, 2015, Mount Vernon Police Officer Chester Curry responded to a report of suspicious activity in a business parking lot. Curry had just stepped out of his patrol car to talk to the reporting witness when he saw a large white pickup truck speed by at about 50 miles per hour (mph). The headlights were out, and the truck appeared to have a broken tire. Curry later learned that the truck had been stolen.

Curry got into his patrol car and pursued the truck eastbound on Stewart Street. Curry initially lost sight of the truck, but saw it again as it neared Hoag Road

at a speed of 60 to 75 mph. Curry accelerated to about 70 mph and eventually began to close in. By the time Curry approached, however, the truck had slowed considerably. Sparks were flying from the rear, and pieces of tire lay in the street.

Curry activated his overhead lights and followed for about two blocks as the truck turned into a cul-de-sac and stopped. Curry remained in his patrol car about 50 feet behind the truck and watched as a man exited from the driver's door and then fled through a neighboring yard. Curry was unable to see the man's face, but described him as Caucasian, with a medium build and height. Curry noticed "[b]right white" on the man's tee-shirt.[1] Curry testified that the suspect had the same height and build as Lederle.

Curry waited in his patrol car for a few minutes until Officer Green arrived. The two officers then confirmed that no one else was in the pickup. Other officers set up a containment of the area and called for a canine unit.

Sometime between 10:30 and 11:00 p.m., Melinda Mason was smoking a cigarette on the deck of her Mount Vernon home. She watched as a Caucasian man wearing a blue shirt came out from a neighbor's building and walked across her property. After noticing the flashing lights from police activity on a neighboring street, Mason called 911 to report the suspicious man.

About 20-30 minutes after the truck stopped, Officer Jason Nyhus, a K-9 handler with the Whatcom County Sheriff's Office, arrived with his dog Hyde. Nyhus had 16 years of experience as a canine officer and had worked with three police dogs during that period. Nyhus explained that in order to certify a handler to deploy a

[1] Verbatim Report of Proceedings (VRP) at 107.

police dog, the State of Washington requires the handler and each dog to participate in 400 hours of training during a 12-week program.

During his career, Nyhus deployed police dogs "probably thousands"[2] of times. Nyhus had worked with Hyde for about a year. Hyde was "generalist police dog"[3] trained "to track humans, do area tracking for humans, building searches, criminal apprehension ... [and] searches for articles or evidence."[4] Nyhus testified that Hyde had done "very well" in tracking during training "and in real street application."[5] Hyde had participated in several hundred tracks during the year he was with Nyhus.

Officer Curry accompanied Nyhus to Mason's house, where the suspect was last seen. Mason pointed out the spot where the man walked over her lawn. Because no one else had been in the area, the lawn was "totally uncontaminated."[6] Hyde immediately began to track and quickly led Curry and Nyhus through the neighboring yards in a residential area. At various spots along the way, Nyhus was able to see footprints in the grass.

Hyde led Nyhus into a wooded area and then to a man who was concealed among some tree roots and partially surrounded by blackberry bushes. Curry could see a pair of legs behind the bushes.

Nyhus gave several warnings about the police dog and ordered the man, later identified as appellant Lederle, to come out. When Lederle failed to comply, Nyhus gave Hyde the command to bite and hold. After Hyde bit him on the forearm, Lederle

---

[2] VRP at 67.
[3] Id.
[4] Id.
[5] Id. at 68.
[6] Id. at 71.

flailed his arms and repeatedly asked why he was being attacked. Lederle claimed he was just sleeping at the spot.

The area was surrounded by blackberry bushes, and officers "had to climb over, jump over, and push through blackberries getting to [Lederle]. . . ."[7] Lederle continued to struggle as Curry unsuccessfully attempted to handcuff him. After Nyhus directed Hyde to bite Lederle in the buttocks, Curry was able to handcuff Lederle and take him into custody.

Lederle asked Curry, "Why are you bothering me? I'm transient and sleeping in the woods."[8] Lederle also asked why the officers could not leave him alone. Neither Curry nor Nyhus saw any of Lederle's possessions in the area. Lederle was wearing a dark-colored shirt with large white letters.

Nyhus and Hyde returned to the pickup truck, where Hyde began a second track. Hyde led Nyhus along the route that the suspect took from the truck, eventually reaching the spot where the original track began on Mason's lawn.

At the hospital, Nyhus observed that Lederle had "very minor scratches and abrasions" consistent with the dog bites. Lederle also had scratches and cuts on his hands and forearm that appeared to be from brush or blackberry bushes. Nyhus and Curry received similar cuts from the blackberry bushes during Lederle's arrest.

At some point while officers were pursuing Lederle, a person called 911 and reported shots fired at a location in Mount Vernon. The caller hung up immediately. When the 911 operator called the number back, no one answered. A police detective

---

[7] Id. at 77.
[8] Id. at 125.

later determined that the call came from the cell phone recovered from Lederle at the time of his arrest.

The State charged Lederle with possession of a stolen motor vehicle, attempting to elude a pursuing police vehicle, false reporting, and resisting arrest. Lederle pleaded guilty to the false reporting and resisting arrest charges. Following a bench trial, the trial court found Lederle guilty as charged of the possession and attempting to elude counts. Based on an offender score of 19, the court sentenced Lederle to concurrent standard-range terms totaling 57 months.

DISCUSSION

Lederle contends that the trial court erred in admitting the dog tracking evidence because the State failed to lay the required foundation. He argues that without the dog tracking evidence, the evidence was insufficient to support his convictions.

In Washington, dog tracking evidence is admissible in a criminal prosecution if there is a proper foundation showing the qualifications of the handler and the dog. State v. Loucks, 98 Wn.2d 563, 566, 656 P.2d 480 (1983). In order to establish a sufficient foundation, the proponent must demonstrate:

> (1) the handler was qualified by training and experience to use the dog, (2) the dog was adequately trained in tracking humans, (3) the dog has, in actual cases, been found by experience to be reliable in pursuing human track, (4) the dog was placed on track where circumstances indicated the guilty party to have been, and (5) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow.

Id. (quoting State v. Socolof, 28 Wn. App. 407, 411, 623 P.2d 733 (1981)).

But Lederle failed to object to the evidentiary foundation or to the admission of the dog tracking evidence at trial. Generally, this court will not consider an evidentiary error raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Trial counsel's failure to object to an alleged error "robs the court of the opportunity to correct the error and avoid a retrial." State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). Nor has Lederle alleged a manifest constitutional error that we will consider for the first time on appeal. See RAP 2.5(a); State v. Newbern, 95 Wn. App. 277, 288, 975 P.2d 1041 (1999) (failure to lay an adequate evidentiary foundation does not create a manifest constitutional error). Accordingly, we decline to consider the alleged evidentiary error for the first time on appeal.

Affirmed.

Spearman, J.

WE CONCUR:

Cox, J.

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 – Division Two** under **Case No. 73518-7-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:

☒ respondent Erik Pedersen
Skagit County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 31, 2016