70296-3

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NO. 70296-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN A. HAFF,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JOHN J. JUHL
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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2. Did permitting Montgomery's in court identification violated defendant's due process rights?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

In August of 2011, U.S. Bank had a branch located in the north Marysville Albertson's grocery store. The branch consisted of three teller lines, an office, a vault room, and an ATM. It was a bank within a store. RP[1] 145, 161, 181-182, 202, 468-470.

On August 9, 2011, Casey Montgomery and Tyson Farley were working at the U.S. Bank branch in the north Marysville Albertson's when a tall, thin, white male, wearing a dark coat and hat, walked up to the teller line and dropped a note in front of Montgomery. The male placed his hands on the counter and waited there while Montgomery read and responded to the note. After Montgomery read the note, he handed the male cash from the

[1] RP designates the consecutively paginated verbatim report of proceedings of the trial on February 19-21, 2013. Other hearings are designated by date, e.g. RP (4/3/13).

bank's teller drawer and the male walked away. The transaction lasted approximately twenty seconds. The incident was captured on video. Exhibit 4; RP 145-153, 156, 162-165.

After the male left Montgomery pulled the alarm and called the police. Both Montgomery and Farley gave statements to the police describing the suspect and what happened. Police collected the note as evidence. The note was examined for latent fingerprints and prints matching Stephen August Haff's left thumb and index finger were identified on the note. A photo montage including Stephen Haff, defendant, was created and on August 17, 2011, Detective Shackleton showed separate copies of the montage to both Montgomery and Farley. Montgomery did not identify anyone from the photo montage as the robbery suspect. Farley picked defendant as the robbery suspect from the photo montage stating that he was 70% sure. At trial, both Montgomery and Farley identified defendant as the robber. Montgomery said he was 100% certain and Farley said he was still 70% sure. Defendant did not object to either of the in court identifications. RP 154-159, 163-175, 188-189, 303-308, 320-325.

Photos from the video of the robbery were shown to Allen, Kelly and Daniel Stickney, people living with defendant at the time

of the robbery. Each of the Stickneys identified defendant as the robber. A dark hat was located at the Stickney's residence. Defendant's DNA was found in the hat. RP 215-216, 232-234, 262-270, 284-286, 439, 456-461. Additionally, a letter defendant attempted to send to Daniel Stickney from jail was intercepted. In the letter defendant indicted that Daniel Stickney had helped defendant plan the robbery. RP 352-353, 383-385, 431-436.

B. PROCEDURAL HISTORY.

On September 7, 2011, defendant was charged with First Degree Robbery. CP 114-115.

On October 25, 2012, defendant filed a Motion to Suppress Identification moving to suppress the photo montage identification of defendant made by Montgomery and Farley, and to prohibit in-court identification of defendant by Montgomery and Farley. The State's response was filed on November 8, 2012. On November 19, 2012, the court heard testimony from Detective Shackleton, the person who presented the photo montages to Montgomery and Farley. The court also considered the actual montages that were viewed by Montgomery and Farley, and the descriptions of the suspect given to the police by Montgomery and Farley. Defendant acknowledged that there was no authority prohibiting asking if a

witness can make in-court identification, and agreed the issue should be addressed during trial if it comes up. The court found that there was nothing unduly suggestive about the photo montages, and that the State can ask a witness whether or not the witness can identify a person in court. CP 89-91, 92-100; RP (11/19/12) 3-27.

The case proceeded to trial on February 19-21, 2013, and the jury found defendant guilty as charged of First Degree Robbery. Defendant was sentenced to 48 months confinement. Defendant appealed. CP 4-5, 6-18, 43; RP 522-525; RP (4/3/13) 27-37.

III. ARGUMENT

Defendant argues that the State presented insufficient evidence to prove the robbery was committed "within" a financial institution. Brief of Appellant at 5-11. The crux of defendant's argument is: "The robbery occurred 'within' an Albertson's grocery store, but it did not occur 'within' the U.S. Bank." Id. at 7. To the contrary, the evidence showed that the robbery occurred 'within' the U.S. Bank branch that was 'within' the Albertson's grocery store.

A. STATUTORY CONSTRUCTION.

When reviewing a statute, the court must give effect to the Legislature's intent. The court's review begins with the plain

language of the statute. Lacey Nursing Ctr. Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995); State v. Liden, 138 Wn. App. 110, 117, 156 P.3d 259 (2007). The first rule in judicial interpretation of statutes is "the court should assume the legislature means exactly what it says. Plain words do not require construction." State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995); City of Kent v. Jenkins, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000). A statute is not rendered ambiguous merely because different interpretations are conceivable. State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996), review denied, 131 Wn.2d 1020 (1997). When a statute is clear and unambiguous, a court may not engage in statutory construction nor consider non-textual considerations such as equity or the rule of lenity. State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996). Undefined statutory terms are given their usual and ordinary meaning, and courts may not read into a statute a meaning that is not there. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998); Nationwide Ins. v. Williams, 71 Wn. App. 336, 342, 858 P.2d 516 (1993), review denied, 123 Wn.2d 1022 (1994). When a term is not defined in the statute, courts may look to the ordinary dictionary meaning. Van Woerden, 93 Wn. App. at 116; State v. Sunich, 76

Wn. App. 202, 206, 884 P.2d 1 (1994). If the statute is clear on its face, its meaning is determined from the statutory language alone. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001); State v. Cramm, 114 Wn. App. 170, 173, 56 P.3d 999 (2002). Where the plain language and intent of the statute so indicate, "[t]he disjunctive 'or' and conjunctive 'and' may be interpreted as substitutes." Mount Spokane Skiing Corp. v. Spokane County, 86 Wn. App. 165, 174, 936 P.2d 1148 (1997); CLEAN v. City of Spokane, 133 Wn.2d 455, 473-474, 947 P.2d 1169 (1997); Bullseye Distrib. LLC v. State Gambling Comm'n, 127 Wn. App. 231,238-240, 110P.3d 1162 (2005). Criminal statutes are given a strict and literal interpretation. State v. Wilson, 125 Wn.2d 212, 216–217, 883 P.2d 320 (1994); Van Woerden, 93 Wn. App. at 116. The court must avoid absurd results when interpreting statutes. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); Liden, 138 Wn. App. at 117.

Here, defendant was charged with first degree robbery. CP 114-115.

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or

> fear of injury to that person or his or her property or the person or property of anyone.

RCW 9A.56.190. "A person is guilty of robbery in the first degree if: ... He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or RCW 35.38.060." RCW 9A.56.200(1)(b). In this statute, "within" is a preposition meaning "inside (a certain area or space)." http://www.merriam-webster.com/dictionary/within (viewed 9/2/14). It is used to show the location of the robbery. Consistent with the definition, a person can be "within" a certain area that is "within" another area, e.g. you can be both within Seattle and within Washington.

The Court Rules and case law recognize that crimes can occur in more than one location. CrR 5.1 (b); State v. Rockl, 130 Wn. App. 293, 296, 122 P.3d 759 (2005) (possession of stolen truck and attempt to elude pursuing police vehicles occurred in King and Pierce Counties); State v. Wilson, 38 Wn.2d 593, 231 P.2d 288 (1951) (prosecution for murder in Clark county when no one could say with certainty whether death of deceased occurred in Clark county where deceased was kidnapped, or in Skamania county where the body of deceased was found) certiorari denied 72 S.Ct. 81, 342 U.S. 855, 96 L.Ed. 644 (1951), certiorari denied 72 S.Ct.

1044, 343 U.S. 950, 96 L.Ed. 1352 (1952); State v. Bogart, 21 Wn.2d 765, 153 P.2d 507 (1944) (contributing to delinquency of minor where defendant wrote letter in one county and sent letter to child in another county directing child to meet defendant in defendant's county). In the present case, the robbery occurred 'within' the U.S. Bank branch that was 'within' the Albertson's grocery store.

B. SUFFICIENCY OF THE EVIDENCE.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, 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. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) ("A claim of insufficiency admits

the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992).

C. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE JURY FINDING BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE ROBBERY WITHIN A FINANCIAL INSTITUTION.

Defendant agrees that the robbery was committed against U.S. Bank, a financial institution. Brief of Appellant at 7; RP 468-470. RCW 35.38.060 includes "a branch of a bank" in the definition of financial institutions. In August of 2011, U.S. Bank had a branch located in the north Marysville Albertson's grocery store. The branch consisted of three teller lines, an office, a vault room, and an ATM. It was a bank within a store. RP 145, 161, 181-182, 202.

On August 9, 2011, Casey Montgomery and Tyson Farley were working at the U.S. Bank branch in the north Marysville Albertson's when defendant walked up to the teller line, dropped a note in front of Montgomery, placed his hands on the counter and waited there while Montgomery read and responded to the note. After Montgomery read the note, he handed defendant the cash from bank teller drawer and defendant walked away. The incident was captured on video that was admitted as evidence and shown to the jury. Exhibit 4; RP 145-153, 162-165. Clearly, Montgomery was within the U.S. Bank branch at the time of the robbery. Additionally, defendant was in the teller line when he dropped the

note in front of Montgomery standing on the other side of the counter, and waited for Montgomery to hand him the cash from bank teller drawer. Clearly, defendant was within the U.S. Bank branch at the time of the robbery when he unlawfully took cash from Montgomery. A rational trier of fact could find beyond a reasonable doubt the element of the crime, "that defendant committed the robbery within and against a financial institution."

D. PERMITTING THE IN COURT IDENTIFICATION OF DEFENDANT DID NOT VIOLATED DEFENDANT'S DUE PROCESS RIGHTS.

Defendant argues that the trial court violated his constitutional right to due process by admitting Montgomery's in-court identification of defendant as the robber. Brief of Appellant at 11-30. 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. In fact, prevailing authority is to the contrary. See United States v. Thompson, 524 F.3d 1126, 1136 (10th Cir. 2008) (holding in-court identification procedure not unconstitutionally suggestive where the procedure used allowed the jury to make its own comparison between the appearance of the perpetrator in the videotapes and the defendant's actual

appearance and robber was a black man and defendant was the only black man in the courtroom); United States v. Curtis, 344 F.3d 1057, 1063 (10th Cir.2003) (requiring the defendant to show his gapped teeth to the jury was reasonable in light of the corroborative testimony of the victims); United States v. Davis, 103 F.3d 660, 670 (8th Cir.1996) (there is no constitutional entitlement to an in-court line-up or other particular methods of lessening the suggestiveness of in-court identification); United States v. Robertson, 19 F.3d 1318, 1322 (10th Cir.1994) (requiring the defendant don the cap and dark glasses that had been worn by the bank robber in front of an eyewitness and the jury).

The Supreme Court has recently clarified that due process rights of defendants identified in the courtroom under suggestive circumstances are generally met through the ordinary protections in trial. Perry v. New Hampshire, ___ U.S. ___, 132 S.Ct. 716, 728–729, 181 L.Ed.2d 694 (2013). These protections include the right to confront witnesses; the right to representation of counsel, who may expose flaws in identification testimony on cross-examination and closing argument; the right to jury instructions advising use of care in appraising identification testimony; and the requirement of proof

beyond a reasonable doubt. Id. Here, many of the safeguards noted in Perry were present in defendant's case.

In light of these authorities, the in-court identification procedure complained of was neither so impermissibly suggestive as to violate defendant's due process rights, nor was the admission of the in-court identification testimony so clearly erroneous as to warrant relief under plain error review.

1. The Out-Of-Court Photographic Identification Procedure Was Not Suggestive.

Prior to trial defendant brought motions to suppress the photo montage identification of defendant made by Montgomery and Farley. CP 92-100. The court heard testimony from Detective Shackleton who showed the photo montages to Montgomery and Farley; considered the actual montages that were viewed by Montgomery and Farley; and the descriptions of the suspect given to the police by Montgomery and Farley. RP (11/19/12) 3-25. The court found that there was nothing unduly suggestive about the photo montages. RP (11/19/12) 25-27.

An out-of-court photographic identification meets due process requirements if it is not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

State v. Vaughn, 101 Wn.2d 604, 605, 682 P.2d 878 (1984); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). To establish a due process violation, defendant must first show that an identification procedure is suggestive. Linares, 98 Wn. App. at 401. The Court in Vaughn, clarified that courts should examine the five reliability factors developed by the United States Supreme Court in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), only if the defendant meets his threshold burden of demonstrating that the identification procedure itself is suggestive. Vaughn, 101 Wn.2d at 608. The Courts noted that the reliability factors were developed to overcome the presumption that identification evidence obtained through a concededly suggestive procedure is automatically inadmissible. Brathwaite, 432 U.S. at 114; Vaughn, 101 Wn.2d at 607-608. "When there is no evidence of suggestiveness in the photographic identification procedure, the inquiry ends; in such a case, any uncertainty or inconsistency in identification testimony goes only to its weight, not to its admissibility." Vaughn, 101 Wn.2d at 610; State v. Eacret, 94 Wn. App. 282, 285, 971 P.2d 109 (1999). This rationale properly leaves reliability determinations to the jury when no suggestive identification procedures are shown. Linares, 98 Wn. App. at 402.

"[T]he due process clause does not condition admissibility of identification testimony on proof of its reliability." State v. Linares, 98 Wn. App. 397, 403, 989 P.2d 591 (1999). Under ER 602, a witness must testify concerning facts within his personal knowledge. Vaughn, 101 Wn.2d at 611. It is the provenance of the jury to determine what weight should be given to the testimony. Linares, 98 Wn. App. at 403.

Here, defendant does not challenge the trial court's finding that the photo montage shown to Montgomery was not suggestive. Brief of Appellant at 12, n. 2. Unchallenged findings are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009), State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Defendant has failed to meet his burden of showing that the identification procedure was suggestive. Linares, 98 Wn. App. at 401. Therefore, consideration of the Brathwaite reliability factors is not before the court. Vaughn, 101 Wn.2d at 608. Since due process does not condition admissibility of identification testimony on proof of its reliability, the jury alone decides what weight to give to the testimony of Montgomery's in-court identification of defendant. Linares, 98 Wn. App. at 403.

2. The Claimed Error Must Be A Manifest Error Affecting A Constitutional Right.

At the pre-trial suppression hearing defendant acknowledged that there was no authority prohibiting asking if a witness can make an identification in court, and agreed the issue should be addressed during trial if it comes up. RP (11/19/13) 20-21. The court concluded that the State could ask a witness whether or not the witness can identify a person in court. RP (11/19/12) 27. Defendant did not object to Montgomery's in-court identification at trial. RP 154-160. "[A] litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Issues not raised below will not be considered on appeal. State v. Danis, 64 Wn. App. 814, 822, 826 P.2d 1096 (1992).

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); State v. Lyskoski, 47 Wn.2d 102, 108, 287 P.2d 114 (1955). The policy of the rule is to "encourag[e] the efficient use of judicial resources.

The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. O'Hara, 167 Wn.2d at 98.

An exception to the general rule that an assignment of error be preserved is when the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); O'Hara, 167 Wn.2d at 98. To raise an error for the first time on appeal, defendant must "identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial." Id.; State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). If the court determines the claim raises a manifest constitutional error, it is still subject to a harmless error analysis. O'Hara, 167 Wn.2d at 98; State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (the exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The court does not assume the alleged error is of constitutional magnitude. O'Hara, 167 Wn.2d at 98; Scott, 110 Wn.2d at 687. The court assess whether the asserted claim, if correct, implicates a constitutional interest as compared to another form of trial error. O'Hara, 167 Wn.2d at 98; Scott, 110 Wn.2d at 689–691.

> In instances where the allegation is that the defendant's due process rights were violated because he or she was denied a fair trial, the court will look at the defendant's allegation of a constitutional violation, and the facts alleged by the defendant, to determine whether, if true, the defendant's constitutional right to a fair trial has been violated.

O'Hara, 167 Wn.2d at 98-99. Defendant has not shown that the identification procedure violated due process. See D, 1, above.

After determining the error is of constitutional magnitude, the court must determine whether the error was manifest. O'Hara, 167 Wn.2d 91, 99. In normal usage, "manifest" means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. "Affecting" means having an impact or impinging on; in short, to make a difference. A purely formalistic error is insufficient. Lynn, 67 Wn. App. at 345. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." O'Hara, 167 Wn.2d at 99; Kirkman, 159 Wn.2d at 935. To demonstrate actual prejudice, there must be

a plausible showing by defendant that the asserted error had practical and identifiable consequences in the trial of the case. Id.

A harmless error analysis occurs after the court determines the error is a manifest constitutional error. O'Hara, 167 Wn.2d at 99; Scott, 110 Wn.2d at 688.

> The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.

O'Hara, 167 Wn.2d at 99-100. Even errors of constitutional magnitude may be so insignificant as to be harmless. Chapman v. California, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Harrington v. California, 395 U.S. 250, 251-252, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). The court applies the overwhelming untainted evidence test. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Under this test, the court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Watt, 160 Wn.2d at 636.

3. The Untainted Evidence Satisfies The Harmless Error Test.

Here, the evidence shows the perpetrator walked up to the teller line, dropped a note in front of Montgomery, and waited while Montgomery read and responded to the note. The perpetrator was wearing a dark hat. After Montgomery read the note, he handed defendant the cash from bank's teller drawer and the perpetrator walked away. The incident was captured on video that was admitted as evidence and shown to the jury. Exhibit 4; RP 145-153, 162-165. Farley, Montgomery's co-worker, identified defendant as the robber. RP 165-175. The note was examined for latent fingerprints and prints matching defendant's left thumb and index finger were identified on the note. RP 188-189, 305, 320-325. When shown photos from the video, people living with defendant at the time of the robbery identified him as the robber. RP 215-216, 232-233, 284. A dark hat containing defendant's DNA was located where defendant had resided around the time of the robbery. RP 233-234, 262-270, 285-286, 439, 456-461. Additionally, a letter defendant attempted to send from jail to Aaron Stickney was intercepted. In the letter defendant indicted that Stickney was his accomplice in the robbery. RP 352-353, 383-385, 431-436.

Here, even without Montgomery's in-court identification of defendant, overwhelming untainted evidence establishes that defendant was the robber. Because overwhelming untainted evidence establishes the fact that the State sought to prove with Montgomery's in-court identification, the admission of that evidence was harmless beyond a reasonable doubt. Watt, 160 Wn.2d at 640.

IV. CONCLUSION

For the reasons stated above, the appeal should be denied and defendant's conviction affirmed.

Respectfully submitted on September 5, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
JOHN J. JUHL, WSBA #18951
Deputy Prosecuting Attorney
Attorney for Respondent