70720-5

70720-5

NO. 70720-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN ROY,

Appellant.

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

The Honorable Bruce I. Weiss, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Benjamin Isaac Grant Roy was convicted of first degree robbery, but his trial suffered from numerous errors. First, the trial court permitted testimony regarding a warrant that authorized collection of Roy's DNA. Because Roy did not dispute that his DNA was collected or that it provided a match to the State's evidence, testimony regarding the warrant was irrelevant and prejudicial, and should have been excluded. Second, the State failed to provide sufficient evidence that Chase Bank qualified as a financial institution, an essential element of the first degree robbery statute. The direct evidence regarding this element consisted of hearsay testimony that was not based on personal knowledge and there was not sufficient circumstantial evidence to convince a rational juror that Chase Bank met the statutory definition of financial institution. Each of these errors alone or the accumulation of them entitles Roy to a reversal of his conviction and a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in permitting irrelevant and prejudicial testimony regarding a warrant that compelled the collection of Roy's DNA when Roy did not dispute that his DNA was collected or that the collected DNA resulted in a match.

2. The State presented insufficient evidence that Chase Bank qualified as a statutorily defined financial institution, an essential element of the crime of robbery in the first degree.

3. The trial court erred in admitting incompetent testimony that was not based on personal knowledge regarding Chase Bank's status as a statutorily defined financial institution and that instead was based on the witness's impression and/or understanding.

4. The trial court erred in admitting hearsay testimony that referred to an out-of-court document to prove that Chase Bank qualified as a statutorily defined financial institution when that document did not fall under the business records exception to the hearsay rule and when that document was never entered into evidence as the best evidence rule required.

5. The trial court erred to the extent it indicated it could take judicial notice of Chase Bank's legal status as a statutorily defined financial institution.

6. There was insufficient circumstantial evidence that Chase Bank qualified as a statutorily defined financial institution as no rational juror could have drawn reasonable inferences from the evidence presented to conclude that Chase Bank so qualified.

7. In the event that the preceding errors alone are not reversible, their cumulative effect denied Roy a fair trial.

Issues Pertaining to Assignments of Error

1. When there was no dispute regarding the fact that Roy's DNA was collected or that the collected DNA resulted in a match, was evidence that the DNA was collected pursuant to a warrant irrelevant?

2. When there was no dispute regarding the fact that Roy's DNA was collected or that the collected DNA resulted in a match, was the probative value of the fact that the DNA was collected pursuant to a warrant, if any, substantially outweighed by the risk of unfair prejudice?

3. When the State presented a case with little definitive evidence and admitted as much on the record, and the court agreed with this admission, was permitting irrelevant and unfairly prejudicial testimony regarding the existence of a search warrant not harmless and therefore reversible error?

4. Must witnesses testifying to a bank's legal status as a statutorily defined financial institution have actual personal knowledge of the bank's status as a statutorily defined financial institution?

5. May witnesses testifying to a bank's legal status as a statutorily defined financial institution base their testimony on out-of-court documents not admitted into evidence and not available in court when the testimony occurs?

6. Do documents not admitted into evidence and not available in court when witnesses refer to such documents to testify to a bank's legal status as a statutorily defined financial institution fall under the business records exception to the hearsay rule?

7. Does the best evidence rule require the admission of documents into evidence when witnesses refer to such documents to testify to a bank's legal status as a statutorily defined financial institution?

8. May Washington courts take judicial notice of a bank's authority under state and federal law to accept deposits or to lawfully engage in basis?

9. Was the circumstantial evidence presented insufficient to support a reasonable inference by jurors that Chase Bank qualified as a statutorily defined financial institution?

10. Does the cumulative effect of the assigned errors, if the errors do not each themselves warrant reversal, require reversal?

C. STATEMENT OF THE CASE

1. Factual background

On November 29, 2011, shortly before 5:00 p.m., a man walked into the Lake Stevens branch of Chase Bank, yelled, "nobody fucking move," approached a bank teller, and demanded cash from the teller's drawer, which

amounted to $3049. 1RP[1] 186-90, 210, 213-14, 216, 224, 287, 293, 304, 469; 2RP 4, 13. From various witness descriptions, it appeared that the suspect was armed with a firearm that he had wrapped in a black plastic bag. 1RP 188-89, 217, 278, 292-93. After collecting the money, the robber promptly fled. 1RP 192, 232, 294

As the robbery began, the teller was able to activate her emergency switch to notify law enforcement. 1RP 189. Officers quickly arrived, set up a containment area to preserve the suspect's scent for a K-9 unit, and began interviewing witnesses. 1RP 313, 315, 464-70, 496-97, 631, 633.

A K-9 unit tracked the robber's scent to a nearby field. 1RP 320-21, 420-21. An officer spotted a sweatshirt matching the description that some of the witnesses gave of the suspect. 1RP 321, 422. The K-9 unit indicated that the scent on the sweatshirt matched the suspect's. 1RP 422. Officers also found a $100 bill, which the K-9 unit also matched to the robber's scent. 1RP 426. The following morning, with the aid of daylight, officers also located a portion of a plastic bag and the nozzle of a garden hose. 1RP 379, 475-76.

Eyewitness accounts did not result in a positive identification of the robbery suspect, despite the engagement of a police sketch artist. 1RP 232-

[1] This brief will cite to 1RP to refer to the consecutively paginated six-volume verbatim report of trial proceedings that occurred on July 15, 16, 17, 18, 19, and 22, 2013. 2RP will refer to the verbatim report of sentencing proceedings that occurred on July 31, 2013.

34, 237, 474. Physical evidence found in the field near the bank was processed and tested for DNA. 1RP 376-77, 387-88, 571-73. It produced no matches. 1RP 401-02, 633. The case was closed by Lake Stevens detectives on January 1, 2012. 1RP 401-02.

After almost a year, DNA from the bank robbery was tied to DNA from a subsequent attempted robbery of a nearby Rite Aid, of which Roy was convicted. 1RP 634; CP 62-63. Based on this DNA match, officers applied for and received a warrant to collect Roy's DNA in order to test it against DNA recovered from the Chase Bank robbery. CP 63. The results of this testing showed Roy matched the DNA evidence recovered near the bank with a probability of one in 1000. 1RP 587.

2. Pretrial proceedings

The State charged Roy with first degree robbery "committed within and against a bank, trust company, mutual savings bank, credit union, or savings and loan association that was located within the State of Washington." CP 65.

Prior to trial, the defense moved in limine to exclude any mention of Roy's prior convictions or involvement in the Rite Aid robbery. CP 54-55; RP 48. Particularly, defense counsel was concerned about how the DNA evidence would be admitted against Roy, given that the DNA match came from evidence collected from the Rite Aid robbery. RP 48-50. The court

understood the defense's concern, and ruled that "[t]he way the testimony is going to come in is that this person ran it through some national DNA [data]base and it showed the connection. It's not going to reference that it was in relation to any other case." 1RP 51. However, the court specifically would allow discussion of the database match insofar as it explained why there was a delay in matching Roy's DNA to the Lake Stevens Chase Bank robbery. 1RP 52.

3. Trial

The testimony from trial, consisting of eyewitness and police officer testimony, conforms to the preceding general recitation of facts. However, toward the end of the trial, two major issues came to light.

First, the State realized that it would need to recall a representative from the bank to address whether the bank fell within the definition of "financial institution," an element of the first degree robbery statute that requires a bank to be authorized under federal and state law to accept deposits or to lawfully engage in business in the state. 1RP 562-63; see also CP 65; RCW 9A.56.200(1)(b). In order to prove this element, the State merely recalled an eyewitness to the robbery, Travis Olsen, who worked at Chase Bank as an investment assistant and personal banker. 1RP 680.

Olsen, not an attorney, testified to his impression and understanding that Chase Bank was authorized under state and federal law to accept

deposits and to engage in business activities. 1RP 679-85. Olsen partially based his testimony on a deposit account agreement that Chase Bank maintains with its customers. 1RP 681-83. Olsen did not have the deposit account agreement with him during testimony and the agreement was never admitted into evidence. 1RP 677, 684. Defense counsel objected to Olsen's testimony on the basis of hearsay and lack of personal knowledge, including testimony based on the deposit account agreement. 1RP 677, 681-82. Defense counsel also objected to the fact that the deposit account agreement was not available at trial. 1RP 678.

Second, the trial court permitted the State's detective to testify regarding a search warrant that authorized the State to collect Roy's DNA. 1RP 655. Defense counsel objected to the discussion of the search warrant as 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 defense objections were overruled. 1RP 655, 689.

4. Conviction and sentence

On July 22, 2013, the jury found Roy guilty of first degree robbery. 1RP 793-96; CP 30. At sentencing, the State recommended 46 months incarceration, the lowest available sentence in the standard range, noting that "there was not a lot of definitive evidence" presented at trial. 2RP 3. The court agreed, noting that it "wouldn't have been shocked if the verdict were

the opposite of what it was." 2RP 12. Thus, the court imposed 46 months of incarceration per the state's recommendation and ordered restitution in the amount of $3049. 2RP 13; CP 18. Roy timely appealed. CP 1.

D. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION BY ALLOWING TESTIMONY REGARDING THE DNA SEARCH WARRANT

At trial, the State elicited testimony from Detective Jared Wachtveitl that he collected Roy's DNA pursuant to a search warrant. Roy never disputed that Detective Wachtveitl collected his DNA. Nor did Roy dispute that the DNA collected matched the DNA from the sweatshirt found near the crime scene. Thus, the fact that the collection occurred pursuant to a search warrant was wholly irrelevant. Admission of this irrelevant evidence prejudiced Roy, as the existence of a court order against Roy gave rise to an inference of Roy's guilt. The trial court's failure to engage in any analysis of the warrant's relevance or prejudicial effect was a manifest abuse of discretion. Roy is therefore entitled to reversal of his conviction and remand for a new trial.

This court reviews questions regarding the admissibility of evidence for abuse of discretion. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). A trial court abuses its discretion if

> (1) The decision is "manifestly unreasonable," that is, it falls "outside the range of acceptable choices, given the facts and the applicable legal standard";
>
> (2) The decision is "based on untenable grounds," that is, "the factual findings are unsupported by the record"; or
>
> (3) The decision is "based on untenable reasons," that is, it is "based on an incorrect standard or the facts do not meet the requirements of the correct standard."

Id. (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

a. Evidence of the DNA search warrant was irrelevant

"'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; State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). All relevant evidence is admissible whereas "[e]vidence [that] is not relevant is not admissible." ER 402. Here, it was undisputed at trial that Roy's DNA was collected; it was also undisputed that the collected DNA matched the DNA from the sweatshirt found near the bank. Because Roy did not dispute that the DNA was collected or that it resulted in a match, the use of a search warrant was not a fact of any consequence to the determination of the action. Neither did the existence of a search warrant tend to make the fact of the DNA's collection or accuracy more probable or

less probable. Accordingly, the search warrant was irrelevant and should not have been admitted.

Despite defense counsel's numerous objections on relevance grounds, RP 647, 649, 652-54, the trial court never ruled on the issue of relevance. Instead, the court allowed the testimony regarding the warrant because the jury was not going to learn about why the search warrant issued or its relationship to a separate prosecution. RP 649. In other words, because the testimony was "not going to get [into] any of the facts for why [there was a warrant] other than the fact that [the warrant] was obtained and that's how the DNA was obtained," the court permitted the warrant testimony to proceed. RP 655. The trial court's decision to allow Detective Wachtveitl to testify that he collected Roy's DNA pursuant to a warrant wholly ignored the issue of relevance, failing to address the appropriate legal standard—relevancy—as it applied to the facts of this case. This was plainly an abuse of the trial court's discretion.

b. Any minimal probative value of the search warrant was substantially outweighed by the danger of unfair prejudice

Even if, under some stretch of the imagination, the search warrant Detective Wachtveitl obtained was relevant, testimony regarding the existence of the warrant was unfairly prejudicial under ER 403. ER 403 provides, "Although relevant, evidence may be excluded if its probative

value is substantially outweighed by the danger of unfair prejudice . . . ." In this case, the probative value of the search warrant, if any, was extremely low, but the risk of prejudice posed by juror knowledge of the search warrant was high—only a negative inference could be drawn from a court order that compelled the collection of Roy's DNA. Accordingly, the trial court also should have excluded the evidence under ER 403.

"A search warrant is a form of process." State v. Davidson, 26 Wn. App. 623, 626, 613 P.2d 564 (1980). "A search warrant . . . may be issued by the court upon request of a peace officer or a prosecuting attorney," CrR 2.3(a), but "only if the court determines there is probable cause for the issuance of a warrant," CrR 2.3(c). Probable cause requires sufficient facts so that a reasonable person could conclude that there is a probability that an accused is involved in criminal activity. State v. Gentry, 125 Wn.2d 570, 607, 888 P.2d 1105 (1995); State v. Dalton, 73 Wn. App. 132, 136, 868 P.2d 873 (1994).

Although not all jurors are necessarily familiar with the processes involved in the issuance of a warrant, warrants are such a part of our constitutional system that jurors certainly understand that a search warrant is a court order authorizing law enforcement to conduct a search. Because jurors are aware that a warrant is a court order, to allow evidence of the existence of a search warrant at trial implies that the issuing court had good

reason to justify the search due to evidence of wrongdoing. In this case, where the search warrant was not relevant (or infinitesimally relevant) to the fact that Roy's DNA was collected or that it was a match, the jury's knowledge of the search warrant supports an inference that the court issuing the warrant believed there was enough evidence of Roy's guilt to authorize the search. Thus, after learning of the warrant, a juror would reasonably recognize that a court had made an affirmative determination regarding Roy's guilt. Because the allowance of the search warrant testimony had no effect or purpose other than to allow the jury to make such inferences of Roy's guilt, its probative value was surely outweighed by its unfair prejudice to Roy.

The trial court failed to engage in any analysis of the prejudicial effect of the search warrant testimony, despite defense counsel's numerous objections. See 1RP 646-49, 652-54. By failing to respond to the objections before it and by failing to engage in the appropriate balancing of probative value and unfair prejudice as ER 403 required, the trial court manifestly abused its discretion.

c. The trial court's error in allowing testimony regarding the search warrant was not harmless

Because the prejudicial risk posed by the DNA search warrant was so high and because the State's case against Roy was so weak, permitting the

warrant testimony would have affected the outcome of the jury's verdict. The trial court's error in allowing this testimony was therefore not harmless.

When trial courts admit evidence in error, on review the error is prejudicial if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), abrogated in part on other grounds by Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); see also State v. Ashurst, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). This standard is met in light of the otherwise concededly weak and conflicting evidence against Roy.

First, not only was there no eyewitness identification of Roy, witnesses' descriptions of the bank robber's height, weight, clothing, and other features varied greatly. The bank teller, Farah Siko, from whom the bank robber took cash, described the culprit as a "couple, few inches, if anything" taller than she. 1RP 192. She testified that her height was 5'6". 1RP 191. Siko also described the robber's build as "slender, skinny . . . anywhere from 140, like, I don't know, 165 [pounds]." 1RP 192. She also thought he looked like he was in his early twenties. 1RP 192. In addition, Siko described the robber's clothing as a black zipped up hooded sweatshirt,[2] blue jeans, and a gray bandana. 1RP 190, 198. Siko admitted that she would

[2] The sweatshirt recovered was hooded but was a pullover, without a zipper. 1RP 405.

not be able to recognize the bank robber were she to see him again. 1RP 191.

In contrast, Jody Nardis, a former bank employee, described the robber's clothing as a "no[n] hoody . . . zip-up sweatshirt" that was inside out. 1RP 214. Nardis estimated that the robber was six feet tall in "good physical shape." 1RP 548.

David Look, who testified that he almost hit someone running across the street while driving by the bank, described the purported robber to be around six feet tall with a medium build. 1RP 248. He also indicated that the suspect had light, sandy hair. 1RP 248. Look testified that the robber was wearing a "poofy" jacket. 1RP 248. Look also worked with a sketch artist after seeing the bank robber. 1RP 251-52. Look indicated that the sketch artist's first rendition "looked too young and too soft" and that this was "an older individual" in contrast to Siko's testimony that the robber was in his early twenties. 1RP 252, 254. On cross examination, Look also admitted that he had described the robber's jacket to investigating officers as a "zipped up, black Carhart jacket with a hood." 1RP 272.

James Glenn, who was in the bank when the robbery occurred, testified that the robber's hair "seemed dark. I believe dark color." 1RP 279. Glenn indicated that the suspect had an average build and was around 5'10", perhaps shorter. 1RP 281. Glenn was also the only witness who was

certain he saw a gun, 1RP 278-79, despite other witnesses testifying that the robber was holding something in his hands that was wrapped in black plastic and merely appeared to be a gun. 1RP 189, 217, 304; CP 62.

Travis Olsen, a bank employee, gave yet another description. He indicated that the robber had a hooded sweatshirt, an overcoat, and jeans. 1RP 295. He also stated that the robber appeared to be 18 years old, around 5'9", and about 150 pounds. 1RP 300. Connie Swanson, a patron of the bank, stated that the robber was anywhere from 5'8" to 5'10" and seemed "kind of stocky." 1RP 305.

These various descriptions of the suspect's appearance demonstrate that the evidence presented to the jury was varied and contradictory. Given this conflicting testimony among eyewitnesses, any negative inference against Roy—such as the existence of a warrant mandating the collection of his DNA—could have changed the outcome of the trial.

Second, although DNA from the sweatshirt found in a field across from the bank was consistent with Roy's DNA, the testifying analyst, Mariah Low, stated that one in 1000 individuals could have been a contributor to the sweatshirt DNA. 1RP 587. This is a far cry from the numbers usually generated by DNA evidence. See, e.g., State v. McConnell, ___ Wn. App. ___, 315 P.3d 586, 589 (2013) (probability of a random match 1 in 19 quadrillion). Low also testified that the plastic bag and the hose

nozzle found in the same field as the sweatshirt did not contain a sufficient level of DNA to meet the Washington State Patrol Crime Lab's validated procedures for testing. 1RP 571. Low also never tested hairs found on the sweatshirt. 1RP 557, 588.

In addition, defense counsel's voir dire of Low revealed a chain of custody or evidence tampering issue with regard to the sweatshirt. The sweatshirt arrived at Low's laboratory wrapped in brown butcher paper, and no one testified to having wrapped butcher paper around the sweatshirt or could explain why it arrived at the lab that way. 1RP 507, 514-15, 521.

Because the identification evidence was not conclusive, and was otherwise placed in doubt, any negative inference regarding the existence of a warrant against Roy was prejudicial enough to affect the outcome of the trial within a reasonable probability.

Finally, at sentencing, both the State and the trial court conceded 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. The court expressed surprise by the State's recommendation given the court's impression that the prosecutor was "one of the ones that's really on the more stringent and strict side." 2RP 8. The trial court also noted that "the reason for this recommendation is, although the jury convicted him, the State didn't think their [sic] case was as strong as

it was in other circumstances." 2RP 8. The court itself conceded that it "wouldn't have been shocked if the verdict were the opposite of what it was." 2RP 12. Thus, the court imposed the lowest standard-range sentence of 46 months per the State's sentencing recommendation. 2RP 13.

Given that the prosecutor and the trial court properly conceded that the case against Roy was weak, without much definitive evidence, it should go without saying that any negative inference drawn against Roy could reasonably have affected the jury's verdict. Combined with the contradicting descriptions of the suspect and the underwhelming physical evidence, the admission of irrelevant and prejudicial testimony regarding the DNA search warrant was not harmless error.

When a trial court errs in admitting irrelevant, prejudicial evidence, the appropriate remedy is reversal of the judgment and remand for retrial. State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971). Accordingly, this court must reverse Roy's conviction and remand for a new trial.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT THE BANK QUALIFIED AS A FINANCIAL INSTITUTION

This court reviews the sufficiency of the evidence by asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Because the testimony regarding Chase Bank's qualifications as a statutorily defined financial institution was not based on personal knowledge, and otherwise contained inadmissible hearsay, and because there was not enough circumstantial evidence for the jury to reasonably infer that Chase Bank qualified as a financial institution, no rational juror could have found sufficient evidence of this essential element of first degree robbery. Accordingly, this court must reverse Roy's conviction.

a. The elements of robbery

The legislature has defined the crime of robbery as follows:

> 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. Under RCW 9A.56.200(1), a person guilty of robbery in the first degree if

> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
>
> (i) Is armed with a deadly weapon; or
>
> (ii) Displays what appears to be a firearm or other deadly weapon; or
>
> (iii) Inflicts bodily injury; or
>
> (b) He or she commits a robbery within and against a financial institution a defined in RCW 7.88.010 or 35.38.060."

The State did not charge in the information that Roy was armed with or displayed what appeared to be a firearm or deadly weapon, or that Roy inflicted bodily injury on anyone. CP 65. Instead, the State's charge against Roy was based solely on the robbery's occurrence within and against a financial institution. CP 65.

For the purposes of the first degree robbery statute, a "'[f]inancial 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." RCW 7.88.010(6). A "financial institution," can also mean "any state bank or trust company, national banking association, stock savings bank, mutual savings bank, or savings and loan association, which institution is located in this state and lawfully engaged in business." RCW 35.38.060.

In this case, the State failed to introduce sufficient evidence that Chase qualified as a financial institution, as no evidence, direct or circumstantial, demonstrated that the bank was authorized under state or federal law to accept deposits or to engage in business.

b. The testimony regarding Chase's qualifications as a financial institution was not based on personal knowledge, was hearsay, and did not qualify under the best evidence rule

The State presented the testimony of Travis Olsen in an attempt to meet its burden of proving that Chase qualified as a statutorily defined financial institution. However, Olsen, an investment assistant at Chase, had absolutely no legal knowledge regarding Chase's authority to accept deposits or engage in business within Washington. Olsen's testimony regarding Chase's deposit agreement with customers, on which Olsen relied to demonstrate personal understanding of Chase's legal operations, was also inadmissible hearsay. In addition, because the deposit agreement was not in Olsen's possession and was not admitted into evidence, Olsen's testimony alone was insufficient for jurors to rely on under the best evidence rule.

i. Olsen lacked personal knowledge of Chase's legal operation and lawful acceptance of deposits

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602.

Olsen stated that Chase took deposits and opened accounts given his "understanding" that "Chase operates by . . . federal regulations, federal laws, and state laws, as well . . . ." 1RP 681. Olsen's "understanding" was "based 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's "personal understanding" was also based on never being "notified that we were operating illegally from law enforcement or anything like that." 1RP 685. However, Olsen acknowledged that he was not specifically notified that Chase was operating legally and that he was not specifically notified under whose legal authorization Chase was operating. 1RP 685.

Olsen's "understanding" per his work activities, a document that was not available during testimony or admitted into evidence, and never having been notified of Chase's illegal activity do not qualify as personal knowledge that Chase was authorized under state or federal law to engage in business and to accept deposits in Washington. Rather, at best, Olsen expressed his opinion or impression of Chase's lawful operation, which is not equivalent to knowledge under ER 602. Moreover, where such opinion testimony relates to a core element that the State must prove, there must be a substantial factual basis supporting the testimony. State v. Farr-Lenzini, 93 Wn. App. 453, 462-63, 970 P.2d 313 (1999), abrogated in part on other grounds by LAWS OF 2003, ch. 101, § 1 (codified as amended at RCW 46.61.024 (2010)). Olsen had no basis for opinion or knowledge regarding Chase's legal authority to accept deposits or to operate in the state. Olsen was therefore not a competent witness to testify to the legality of Chase's

operations. See Overton v. Consol. Ins. Co., 145 Wn.2d 417, 430, 38 P.3d 322 (2002) (holding witness without knowledge was incompetent to testify).

ii. Olsen's testimony regarding Chase's deposit agreement was inadmissible hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "A 'statement' is . . . an oral or written assertion." ER 801(a).

Olsen testified that his understanding of Chase's legal operation and acceptance of deposits was based in part on a "deposit account agreement that Chase maintains for the checking accounts." 1RP 681-82; see also 1RP 683. According to Olsen, this agreement pertained to Chase's legal authorization to accept deposits because it "dictate[d] . . . the relationship between the bank and its customers." 1RP 683-84. Olsen's testimony was that the deposit account agreement stated that Chase had legal authorization to accept deposits and operate a business. This was an out-of-court statement offered to prove the truth of the matter asserted—that is, to prove that Chase had legal authority for its operations. "Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001),

overruled in part on other grounds by State v. Rangel-Reyes, 119 Wn. App. 494, 499 n.1, 81 P.3d 157 (2003). Olsen's testimony regarding the deposit account agreement was inadmissible hearsay.

Contrary to the State's suggestion during trial, see 1RP 658, the business records exception to the hearsay rule did not permit Olsen's testimony regarding the deposit account agreement. RCW 5.45.020 provides,

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and *the mode of its preparation*, and if it was made in the regular course of business, *at or near the time* of the act, condition or event, and if, in the opinion of the court, the sources of information, *method and time of preparation* were such as to justify its admission.

(Emphasis added.) Olsen provided no testimony regarding the mode of the deposit account agreement's preparation, when the deposit account agreement was prepared, or the method and time of preparation. "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, the court held that the trial court manifestly abused its discretion by permitting a laboratory report of DeVries's urine test through

the testimony of a physician. Id. Our supreme court commented, "Critically, the doctor *did not have a copy of the report before him to consult while testifying*." Id. (emphasis added). Like the doctor in DeVries, Olsen did not have the deposit account agreement with him when he provided its hearsay statements to the jury. 1RP 676. Therefore, the deposit account agreement was not admissible under the business records exception to the hearsay rule. The court erred by permitting Olsen to testify to its contents.

iii. The best evidence rule required admission of the original or a duplicate of Chase's deposit agreement

Even if the deposit agreement relied on by Olsen was within Olsen's personal knowledge and qualified under the business records exception to the hearsay rule, the best evidence rule required the actual admission of the deposit account agreement into evidence. "To the extent that the matter is a corporate act or is not one of personal knowledge but can be proved only by resort to corporate records, the best evidence rule applies." State v. Mahmood, 45 Wn. App. 200, 203, 724 P.2d 1021 (1986).

The best evidence rule "generally requires that 'the best possible evidence be produced.'" State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (quoting Larson v. A. W. Larson Constr. Co., 36 Wn.2d 271, 217 P.2d 789 (1950)); see also ER 1001-08. Generally, the best evidence rule requires an original writing to be produced unless the proponent can show

that the writing is unavailable for a reason other than the fault of the proponent. Fricks, 91 Wn.2d at 397.

In Fricks, the court considered whether a gas station's tally sheet could be admitted in a robbery case when the "only foundation laid for admission of this hearsay evidence was the manager's testimony that such a tally sheet was kept." Id. The court answered no, holding that "the State failed to produce the document or to make any showing of its unavailability. Under these circumstances the testimony of the manager as to its contents was not an acceptable method of proof." Id. This case is identical to Fricks. The only foundation for the contents of the deposit account agreement was Olsen's testimony that the deposit account agreement existed. The State failed to produce the document or to explain why it was not available. Accordingly, the trial court erred by permitting Olsen's testimony regarding the deposit account agreement.

c. Judicial notice of Chase's lawful operations was not permissible

At trial, the State also asserted that the trial court could take judicial notice of Chase's legal authority to accept deposits and operate as a bank. 1RP 660-61. The court did not seem to expressly do so, but stated that "it seems to me that this type of information is consistent with the type of evidence that courts have taken judicial notice of in relation to the second

category." 1RP 662. The "second category" referred to "facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." 1RP 661-62. Judicial notice presents a question of law that is reviewed de novo on appeal. Fusato v. Wash. Interscholastic Activities Ass'n, 93 Wn. App. 762, 771, 970 P.2d 774 (1999).

Contrary to the trial court's impression, Washington courts have long recognized that they have no authority to take judicial notice of the presence or absence of banks within a particular town. Bartholomew v. First Nat'l Bank, 18 Wash. 683, 685, 52 P. 239 (1898). The same is true that courts "would not be justified in taking judicial notice of the manner in which banks conduct their private business with their customers . . . ." Commercial Bank of Tacoma v. Hart, 10 Wash. 303, 307, 38 P. 1114 (1894), abrogated in part on other grounds by LAWS OF 1925, 1st Ex. Sess., ch. 118, § 1. If courts are not permitted to take judicial notice of the existence of a bank in a particular place or the manner in which banks carry on their business with customers, then courts certainly cannot take judicial notice of the lawfulness of a bank's deposit activities and business operations. The trial court's assertion that it could take judicial notice of Chase's legal operation was incorrect.

d. Circumstantial evidence fails to show that a bank qualifies as a financial institution

The direct evidence presented through Olsen's testimony was entirely inadmissible and cannot serve as the basis for establishing that Chase was a statutorily defined financial institution. However, Division II has held that this element of the first degree robbery statute may be proven by circumstantial evidence. State v. Liden, 138 Wn. App. 110, 119, 156 P.3d 259 (2007). Roy takes no issue with this basic holding, but Liden's sufficiency analysis is readily distinguished, poorly reasoned, and runs afoul of the principle that inferences drawn from circumstantial evidence "must be reasonable and cannot be based on speculation." Vasquez, 178 Wn.2d at 16. A close examination of the circumstantial evidence in this case demonstrates that no rational juror could have reasonably inferred that Chase was authorized by federal and state law to accept deposits or that Chase was lawfully engaged in business, even when viewing the evidence in the light most favorable to the prosecution.

In Liden, the defendant filed a CrR 7.4 motion to arrest his judgment for insufficiency of the evidence. Liden, 138 Wn. App. at 115. Liden argued that the State was required to provide direct evidence that the bank he robbed was lawfully engaged in business or could lawfully accept deposits. Id. The court disagreed, indicating that a requirement that the State submit

direct rather than circumstantial evidence would produce an "absurd interpretation of these 'financial institution' statutes." Id. at 118. Noting that circumstantial evidence was equally reliable as direct evidence, the court held that "the [l]egislature did not intend to require the State to provide direct evidence that a robbed bank is a 'financial institution,' certified or otherwise; assuming its sufficiency, circumstantial evidence will suffice." Id. at 119.

When it turned to the question of sufficiency, the Liden court pointed to three reasons for its holding that the State produced sufficient evidence that the bank in question was a financial institution. Id. First, the court indicated that the robbery note was written on the back of a counter check, which contained the printed words, "'Reserved for Financial Institution Use.'" Id. (emphasis omitted). The court asserted that this statement was "similar to the 'Member FDIC' documents that the Ninth Circuit found to be sufficient circumstantial evidence of another bank's federally insured status in" United States v. Allen, 88 F.3d 765, 769-70 (9th Cir. 1996). Liden, 138 Wn. App. at 119 n.7.

However, neither the phrase "Reserved for Financial Institution Use" nor the phrase "Member FDIC" gives rise to a reasonable inference of a bank's current authority under federal or state law to accept deposits or to be engaged in business. "Reserved for Financial Institution Use" indicates little more than that the bank in question calls itself a financial institution; this is

not proof that it meets the statutory definition of "financial institution" in RCW 9A.56.200(1)(b). The phrase, "Member FDIC" simply indicates that the bank claims to possess membership in the Federal Deposit Insurance Corporation. In the age of failed banks and bank bailouts, possessing FDIC membership is not necessarily the equivalent of being authorized under federal or state law to accept deposits or to engage in business. In any event, the instant case is easily distinguished, as there is nothing in the record that Chase or its employees gave any indication that Chase was an FDIC member or that it called itself a financial institution in writing.[3]

The Liden court's second reason for holding that the State's evidence was sufficient was that a witness "testified that she was a [bank] employee and that Liden threatened her while she was working inside [the bank]." 138 Wn. App. 119-20. The fact that a bank has employees alone cannot sufficiently lead to an inference that a bank carries on a lawful business or that it possesses authority under state and federal law to accept deposits. "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Vasquez, 178 Wn.2d at 16. Inferences must "logically be derived from the facts proved, and should not be the

[3] The State attempted to admit into evidence a photograph of the FDIC seal on wall of the Lake Stevens Chase Bank, but the court denied admission of the photograph because it constituted hearsay and because it was not a certified record. 1RP 717-18, 720-21, 725-26.

subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

It is not reasonable to assume that by virtue of having employees, a bank has legal authority to accept deposits or otherwise engage in lawful business operations. One can easily imagine a situation in which a fledgling bank has hired employees but has not completed the work necessary to legally accept deposits. It is also certainly conceivable that a bank with several employees might inadvertently allow its legal authority to accept deposits or engage in business to lapse. The fact that a bank has employees and that these employees testify at trial simply does not logically lead to an inference that the bank was authorized by state and federal law to accept deposits or to engage in business.

Third, the Liden court indicated that because "eyewitnesses testified they were on the premises to make bank deposits (i.e., *banking activity*) when they witnessed" the robbery, the State had produced sufficient evidence that the bank qualified as a financial institution. Liden, 138 Wn. App. at 120. This reasoning is pure tautology: the Liden court concludes that 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 reasoning is invalid. It does not follow as a matter of logic that banks are legally authorized to accept deposits or carry on business because

people might make deposits in and take business to banks. The State must demonstrate something more than question begging to prove that a bank has state and federal legal authorization to accept deposits or engage in business, as RCW 9A.56.200(1)(b) requires.

Aside from the circumstantial evidence discussed in Liden, the other circumstantial evidence the State introduced in this case is also insufficient to demonstrate that Chase operated with legal authority to accept deposits or engage in business. The State elicited testimony from Olsen that Chase practices banking and accepts deposits "openly and notoriously." 1RP 682. Similarly, Olsen testified that Chase had never been "shut down" or "had law enforcement come into the branch and close [it] down." 1RP 682. To infer from handling its deposits and activities openly and from having never been shut down by law enforcement that Chase is authorized under state and federal law to accept deposits and engage in business is equivalent to inferring that a drug dealer who has never been arrested and who openly sells drugs on a street corner is authorized under state and federal law to sell controlled substances. Obviously, this is not a reasonable inference that supports Chase's legal authority to run its business or accept deposits. This type of unreasonable inference does not provide sufficient evidence that Chase is a financial institution as defined by RCW 9A.56.200(1)(b).

The State failed to put forth sufficient evidence that Chase was authorized under federal or state law to accept deposits or that Chase was lawfully engaged in business in order to demonstrate that Chase qualifies as a financial institution under Washington's first degree robbery statute. No rational juror could have concluded that the State's evidence was sufficient. When the State fails to provide sufficient evidence to prove one of the elements of the charged crime, the appropriate remedy is reversal of the conviction. Vasquez, 178 Wn.2d at 18. This court should accordingly reverse the conviction in this case.

3. IF THE TRIAL COURT'S ERRORS ALONE DO NOT WARRANT REVERSAL, THEIR CUMULATIVE EFFECT DOES

Courts reverse a conviction for cumulative error "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The trial court committed several errors in this case, which include its admission of irrelevant and prejudicial testimony regarding the DNA search warrant, failing to engage in appropriate analysis regarding the relevance and prejudicial effect of the search warrant testimony, the admission of testimony not based on personal knowledge, and the admission of hearsay testimony when no exception applied. If this court determines that, individually, these errors do not

require reversal of Roy's conviction, it should conclude that, when taken together, these errors deprived Roy of a fair trial and their cumulative effect requires reversal.

E. CONCLUSION

The trial court erred when it admitted testimony regarding the State's search warrant to compel collection of Roy's DNA. In addition, the direct and circumstantial evidence was insufficient to prove that Chase Bank qualified as a statutorily defined financial institution under RCW 9A.56.200(1)(b). This court must reverse Roy's conviction and remand for retrial.

DATED this 18th day of February, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 70720-5-I
	)	
BENJAMIN ROY,	)	
	)	
Appellant.	)	

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 18TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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[X] BENJAMIN ROY
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SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF FEBRUARY 2014.

X Patrick Mayovsky