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NO. 58176-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROGER ENGEL,

Appellant.

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DIVISION ONE
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES

1. Was testimony about a witnesses' out-of-court identification harmless error where another witness who had known the defendant for fifteen to twenty years positively identified him in a video and described his distinguishing attributes in detail, where the jury could view a video of the crime and compare that video to the defendant in court, where another witness tentatively identified the defendant from the video, where the defendant's friend confessed to committing the crime with an accomplice, and where the defendant admitting to "scrapping" metal with the defendant around the time of the crime?

2. Was the evidence sufficient to show that Western Asphalt was a "fenced area" under Washington law where the business was surrounded by a combination of barbed wire fencing, a locked gate, a cliff, steep slopes, and piled rocks?

3. Did the trial court properly order DNA testing as a condition of this felony sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Roger Engel was charged on September 16, 2005, with burglary in the second degree. CP 1-3. A jury convicted him as charged. CP 32-37. He was sentenced to two months in the King County Jail and was ordered to provide a DNA sample pursuant to the felony conviction. CP 32-37.

2. SUBSTANTIVE FACTS

Western Asphalt Company is located in Eastern King County near Maple Valley, a largely rural area with few residential sections. RP (3/21) 145. Yvonne O'Leary, comptroller for Western Asphalt, described the property as having a locked gate at the front, RP (3/21) 111, 117, with a fence at "the front part across the entire front entrance and down a distance ... as far as our stock piles." RP (3/21) 118. The stock piles were made of gravel, rock, and other material for making asphalt. Id. The fence "...ends where the stock piles begin..." because the stock piles, due to their nature and changing size, would "completely bury" and destroy any fence that was built. Id. Beyond the stock piles there is no fence because there is a "pretty sizeable drop-off, a hill that goes down." Id.

The Western Asphalt owner, William Peterson, also testified about the layout of the business. He described the front gate as being "fairly large" because they have a lot of truck traffic. RP (3/21) 130. The types of trucks using the yard include large 18-wheelers, one of which is displayed in the photograph admitted as exhibit 1. Peterson testified that the rest of the property was fenced in "to the best of our ability." RP (3/21) 130. He testified that "[w]hat isn't fenced is, I would call the terrain, probably acts as a fence more than anything." Id. That terrain includes "a lot of banks, high banks, a lot of sloping banks that probably encase probably two-thirds of our property there." Id. The other third of the property is enclosed with "chain link fence with barbed wire on the top." Id. The barbed wire was placed on the fencing "as another deterrent." RP (3/21) 131. Peterson also described the lay of the land for the jury using the photographs in exhibits 1 through 4. RP (3/21) 132-35. He noted that "the whole front edge of property, both of our suppliers and ourselves, is fenced on the perimeter on the frontage road." RP (3/21) 161.

In 2005, Western Asphalt was repeatedly targeted by thieves who stole metal from the yard. Eventually, management installed a video surveillance system in an attempt to identify the perpetrators.

RP (3/21) 95-98 (O'Leary); 122-26 (Peterson). The owner, William Peterson, set out some aluminum wheels as "bait" for the metal thieves. In the middle of the night on January 12, 2005, when the business was closed, and the front gate was locked, two men entered the Western Asphalt yard and took the "bait" wheels.

RP (3/21) 99, 122-27. These men did not have permission to be in the yard. RP (3/21) 111, 129.

Detective Johnson was assigned to investigate. He watched the videotape and recognized Shaw as one of the intruders. RP (3/22) 13.¹ He believed, but was not certain, that the other person depicted in the video was Roger Engel, "[b]ased on Roger being one of Gary's associates, and his height and unique moustache. RP (3/22) 14. Detective Johnson asked Detective Michaels to view the video, and Detective Michaels positively identified both people in the video. RP (3/22) 15-16. Later, in March, Detective Johnson contacted Engel on the telephone, and Engel denied any involvement in burglaries at Western Asphalt, but he admitted that he had "done some scrapping" with Gary Shaw "a couple of months ago." RP (3/22) 17-18.

¹ This video was transferred to a DVD disk and admitted at trial as exhibit 5. By supplemental designation filed with this brief, the State has made this disk available for appellate review.

A material witness warrant was originally issued to compel Gary Shaw's attendance at trial, but he came to court before being arrested. RP (3/20) 40, 57 and (3/21) 137-41. When Shaw testified, he acknowledged that he had been convicted of burglary and possession of stolen property, RP (3/22) 2, that he was friends with Engel for about a year and a half, RP (3/22) 3, that he had confessed his involvement in the Western Asphalt crimes, RP (3/22) 5, and that he had told police who committed the crimes with him. RP (3/22) 6. Shaw also admitted that he "scrapped" metal, meaning he took metal to the junkyard and exchanged it for money. RP (3/22) 6-7.

After Shaw testified, and following the morning recess, the prosecutor indicated that she intended to call paralegal Pete DeSanto to the witness stand to testify that Shaw had, the day before, identified himself and Engel on the DVD. Engel objected that such testimony violated the Confrontation Clause, the state constitution, and the evidence rules. RP (3/22) 34-36. In particular, he noted that since the prosecutor had never asked Shaw to identify Engel as the person depicted in the video, he had no reason to cross-examine Shaw on that point. Id. The objections were overruled. RP (3/22) 36.

In response to questioning by the prosecutor, DeSanto testified that the day before he had shown Shaw the videotape of the Western Asphalt burglary, and that Shaw had positively identified himself as one person in the video, and he identified Engel as the second man. RP (3/22) 42-43.

Detective Michaels testified that he both lives and works in the Maple Valley area near Western Asphalt. RP (3/21) 145. He has known Engel for fifteen to twenty years "from numerous interactions through living in the area and just seeing and talking to him." Id. They are on a first-name basis and have spoken to each other "[f]ifty, sixty times." RP (3/21) 146. Det. Michaels also knows Gary Shaw and his girlfriend quite well, and stops to visit him "probably once or twice a week." Id. He has seen Shaw with Engel in the past. RP (3/21) 147.

Det. Michaels testified that in January, 2004, Det. Engel asked him to review a videotape to see whether he could identify the people who appeared on the tape. RP (3/21) 148. When he watched the tape, he recognized Shaw and Engel. Id. At trial, the tape was played for the jury, during Det. Michaels' testimony, and the detective explained the distinguishing features he noted on the

tape that made him conclude Engel was the man depicted.

Det. Michaels testified that it was

"...the way walked [sic], his size, also hair coming out.² More specifically, his moustache³ when he turned his face at this point. I have known Roger too long, I have never known him not have [sic] a moustache like he has on today. And the profile is -- I'm positive it was him.

RP (3/21) 149. Det. Michaels also focused on Engel's gait, "... just the way he carried himself...his walk, the bounce in his step." Id. The detective noted the relative size of Shaw compared to Engel, as depicted on the video "as they walk side-by-side." At trial, Engel was asked to walk across the courtroom in the presence of the jury, so that they could see for themselves how he moved, and compare their observations with the person on the video. RP (3/22) 45-46.

² This comment is apparently a reference to the hair that protrudes from under the hat of the person in the video. See Exhibit 5. Det. Michaels also mentioned that he had seen Engel in the past wearing a hat. RP (3/21) 149.

³ In closing argument, the prosecutor referred to Engel's moustache as a "...handle bar type, style moustache..." RP (3/22) 71. Engel did not object to this characterization.

C. ARGUMENT

1. ALLOWING DESANTO TO TESTIFY ABOUT SHAW'S STATEMENT OF IDENTIFICATION WAS ERROR, BUT HARMLESS.

Engel claims that witness DeSanto should not have been permitted to testify that Shaw made a mid-trial, out-of-court identification of Engel from the video of the Western Asphalt burglary. He is correct. Shaw's statement to DeSanto was a testimonial statement offered to prove the truth of the matter asserted, i.e., that Engel was depicted in the video. Pursuant to Crawford v. Washington,⁴ Engel should have had an opportunity to cross-examine Shaw about this statement. Ordinarily, Crawford does not apply when a witness testifies at trial, even if the witness is unable or unwilling to discuss the events in question, because the witness' presence ensures the "opportunity" to cross-examine, which is all the Confrontation Clause guarantees. However, the Clause also requires that the opportunity to confront occur when the defendant has a motive to cross-examine the witness. State v. Mohamed, 132 Wn. App. 58, 67, 130 P.3d 401 (2006) (citing United

⁴ 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

States v. DiNapoli, 8 F.3d 909, 912 (2d Cir.1993) (dissimilar motive in prior proceeding)).

Under these very unusual facts, where the prosecutor never elicited Shaw's identification of Engel during Shaw's testimony, and where it is unclear from the record whether defense counsel even knew that Shaw had made this out-of-court identification -- or that DeSanto was going to testify about it -- Engel would not have had any motive to "confront" Shaw regarding this identification. State v. Rohrich, 132 Wn.2d 472, 478, 939 P.2d 697 (1997). In Rohrich, the court held that "[t]he opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses." The same reasoning would arguably apply here. Thus, the statement should not have been admitted.⁵

Still, admission of evidence in violation of the Confrontation Clause can be harmless error, State v. Saunders, 132 Wn. App.

⁵ It is also questionable whether the statement was admissible under ER 801(d)(1)(iii). Statements of identification are not deemed hearsay because traditionally they were considered reliable if made in close temporal proximity to the crime. State v. Bockman, 37 Wn. App. 474, 82 P.2d 925 (1984). Shaw's identification from the video occurred *during* trial. The ordinary rationale for the rule would seem inapplicable to this situation.

592, 604, 132 P.3d 743 (2006), and the error was harmless beyond a reasonable doubt in this case. Overwhelming evidence, independent of Shaw's out-of-court identification, proved that Engel was the person in the video. Detective Johnson testified that, based on the video, he was certain that Shaw was one of the burglars. That suspicion was confirmed by Shaw, who admitted participation in the crime, thus corroborating the detective's early identification from the video. Det. Engel also believed -- but was not certain -- that the second person in the video was Roger Engel, in part based on his moustache.

In March of 2004, Engel admitted to Det. Engel that he knew Shaw, and that he had "scrapped" metal with Shaw a few months earlier, which would coincide with the January burglary at Western Asphalt.

Even more damaging, however, was the testimony of Det. Michaels, who said he had known Engel for fifteen to twenty years, had spoken with him fifty or sixty times, and with whom he was on a first-name basis. He described Engel in detail and invited the jury to review the DVD for themselves and compare it to the man who was in court. In particular, he noted the distinctive moustache, the distinctive walk which included a slight bounce in

his step, the relative size of Shaw and Engel as depicted in the video.

Finally, the jury in this case had the video so they could form their own opinion as to whether Engel was the person on the film. Even better, since Shaw had testified, the jury could consider the relative size of Shaw and Engel since they were both present at the same time in the courtroom. They could then compare those observations to the video images. Taken together, this evidence of identification was overwhelming, uncontroverted, and supports the conclusion that any mention of the out-of-court identification was harmless beyond a reasonable doubt.

2. WESTERN ASPHALT WAS A "FENCED AREA" UNDER THE DEFINITION OF "BUILDING" BECAUSE THE PROPERTY WAS SURROUNDED BY A COMBINATION OF BARBED WIRE FENCING, A LOCKED GATE, TOPOGRAPHICAL OBSTACLES, AND PILED ROCK.

Engel claims his burglary conviction must be reversed because the State failed to prove that he entered a "fenced area." His argument should be rejected. The common understanding of a "fenced area," includes an area partially enclosed by a fence, where the fence -- together with other obstacles or features of

topography -- completes an enclosed or contained area. The fence need not be an area that is wholly enclosed by a fence.⁶

The meaning of a statute is a question of law reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). The court's fundamental objective is to ascertain and carry out legislative intent. State v. Alvarez, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). Words used in a statute must be considered in the context of the general object, purpose, and subject matter of the statute in order to give effect to that intent. Streng v. Clarke, 89 Wn.2d 23, 569 P.2d 60 (1977). "Where the language of a statute or rule is plain and unambiguous, the language will be given its full effect." City of Seattle v. Guay, 150 Wn.2d 288, 300, 76 P.3d 231 (2003). Language in a statute or rule is not ambiguous unless it is susceptible to more than one reasonable meaning. Id. Nor can a court "add words or clauses" to an unambiguous statute when the legislature has chosen not to include that language.

Under Washington law, "[a] person is guilty of burglary in the second degree if, with intent to commit a crime against a person or

⁶ Even if this court reverses the burglary conviction for violation of the confrontation clause, the sufficiency of the evidence argument must be addressed because, if correct, the remedy is a remand for dismissal rather than retrial.

property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling. RCW 9A.52.030(1). "Building, ... in addition to its ordinary meaning, includes any dwelling, *fenced area*, vehicle, railway car, cargo container, or any other structure..." RCW 9A.04.110(5) (italics added). "Fenced area" is not separately defined in the criminal code. Historically, fenced areas were not considered "buildings" for purposes of defining a burglary. See State v. Wentz, 149 Wn.2d 342, 347-49, 68 P.3d 282 (2003) (discussing former RCW 9.19.020 (1909) and State v. Roadhs, 71 Wn.2d 705, 707-09, 430 P.2d 586 (1967)). After 1975, however, the legislature added the term "fenced area" to the definition of "building," thus bringing such areas within the purview of the statute. "Fenced area" has no separate statutory definition.

Absent a contrary legislative intent, an undefined term is given its ordinary meaning. Wentz, at 352 (citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992)). The ordinary meaning of a fenced area includes an area that, by a combination of topography, barriers, and fencing, is closed off to the public. In Wentz, the concurring justices implicitly endorsed this ordinary usage when they observed:

It is apparent, therefore, that not all fenced areas are, automatically, "buildings." First, as noted, they must enclose **or contain** an area (**or be so situated as to complete an enclosed or contained area**). In addition, the area enclosed cannot simply be realty. The fence must serve to circumscribe an area so as to protect property or people-to close off the space from unwanted intruders. Unlike the majority, I believe the underlying theory of the burglary statutes is the protection of persons or property and punishment for invasions that involve a risk of criminal harm or actual harm to persons or property. I do not believe the legislature intends that an impenetrable barrier is required, but there must be a barrier designed for the security of people or the contents of the enclosed area.

Wentz, at 357 (emphasis added). If a fence can "be so situated as to complete an enclosed or contained area" then it follows that the fence, itself, need not be the sole means of enclosure or containment. In other words, if the fence "completes" the enclosure, then something in addition to the fence may be considered a suitable barrier. Moreover, an "impenetrable barrier" is not required, suggesting that even a fenced area with gaps could be a "building" under the burglary statute.

Engel essentially argues that the term "fenced area" means an area *wholly* enclosed by a fence. This interpretation is inconsistent with ordinary understanding of the term, and would be inconsistent with statutory language. RCW 9A.04.110(5) does not

say that an area must be "completely fenced" or "totally fenced" or "completely enclosed by fencing." Rather, it simply refers to a "fenced area." In common parlance, an area that is inaccessible due to fencing and topography is a "fenced area." Otherwise, businesses like Western Asphalt would be forced to spend thousands of dollars to erect useless fences in areas that are plainly inaccessible, or clearly off-limits to the public, just to ensure that thieves would be prosecuted as burglars. Also, Engel's restrictive definition of "fenced area" would mean that many areas commonly protected by the burglary statute would not be protected. For instance, a backyard that is fenced on three sides, with a building forming the fourth side, would not be a "fenced area" under his definition, because the fence is only three-sided. This is not consistent with the legislature's intent in expanding the definition of "building" to include a fenced area.

Sufficient evidence was submitted to show that the work yard at Western Asphalt was a "fenced area" under the ordinary meaning of that term. When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State, and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d

1069 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. Id.

Western Asphalt was surrounded by natural and man-made obstacles that served to enclose the yard. There was barbed wire fencing, a locked gate, a large pile of rocks deliberately placed to form a barrier, a steep hillside covered in vegetation, a vertical cliff, a steep slope angling downward. The barbed wire fence and locked gate were "so situated [at Western Asphalt] as to complete an enclosed or contained area." Wentz, at 357. This was a factual question for the jury and, taking all evidence in the light most favorable to the State, the evidence was sufficient to persuade a reasonable fact-finder that this was a "fenced area" under the statute.

3. THE TRIAL COURT PROPERLY REQUIRED ENGEL TO PROVIDE A DNA SAMPLE AS PART OF HIS FELONY SENTENCE.

Engel contends that his constitutional rights under both the Fourth Amendment and Washington Constitution Article I, § 7 were violated when he was compelled, pursuant to a felony conviction, to submit a biological sample for DNA analysis. These arguments

should be rejected. The statute is constitutional under both the Fourth Amendment and article I, § 7. Further, there is no need for a state constitutional analysis since Engel has not shown that the State constitution provides any greater protection to convicted felons in their identity than the federal constitution.

a. The Taking Of DNA Samples From Convicted Felons Is Constitutional Under The Fourth Amendment.

As Engel acknowledges, Br. of App. at 37 n.9, this court has held that DNA testing pursuant to a felony conviction was permissible under the federal constitution. State v. Surge, 122 Wn. App. 448, 94 P.3d 345, (2004), review granted 153 Wn.2d 1008 (2005). His federal constitutional claim should be rejected.

b. An Independent State Constitutional Analysis Is Not Required Since Article I, § 7 Does Not Provide Greater Privacy To Convicted Felons In Their Identity.

Engel also argues that RCW 43.43.754 violates article I, § 7 of the Washington Constitution. Specifically, he asks this Court for relief under the Washington Constitution without providing a

complete Gunwall⁷ analysis, simply because in the past Washington courts have found article I, § 7 to provide broader protections in some contexts than the Federal Constitution. This Court should not forgo a Gunwall analysis, particularly with the unique issue raised in this case. The core issue here is not simply whether DNA is a “private affair.” Rather, unlike prior article I, § 7 cases, the issue is whether *convicted felons* have greater privacy interests in their identity under the Washington Constitution than under the Federal Constitution.

Although “there is no longer any question that article I, § 7 provides qualitatively different protections for *Washington citizens*, and in some cases greater protection than the Federal Constitution,” if “there has been no prior determination of an appropriate independent state constitutional analysis *in a particular context*, and no argument is made that a different analysis applies under the state constitution than applies under the Federal Constitution, then we will apply the federal analysis.” State v. McKinney, 148 Wn.2d 20, 49, 60 P.3d 46 (2002) (emphasis added); State v. Reichenbach, 153 Wn.2d 126, 131 n.1, 101 P.3d 80 (2004) (emphasis added).

⁷ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

A Gunwall analysis involves examining six nonexclusive neutral criteria to determine whether article I, § 7 provides greater protection of an individual's privacy interests than its federal counterpart. State v. Boland, 115 Wn.2d 571, 575, 800 P.2d 1112 (1990). Washington has no history of extending greater protections to convicted felons than they enjoy under the Federal Constitution in the area of their identity (or any area).⁸ Engel has cited no examples of Washington laws protecting felons in a manner different than the Federal Constitution requires.

More particularly, there is no authority for the claim that a convicted felon in Washington has a greater privacy right in his identity than does a convicted felon under federal law. Engel has identified no unique Washington interest in providing Washington felons a greater ability to conceal their identities from law enforcement than federal felons have.

⁸ In fact, the Washington Constitution and our statutes clearly recognize diminished constitutional protections for felons in a variety of contexts. See, e.g. Wash. Const. art. VI, § 3 and RCW 29.01.080 (restrictions on voting rights); RCW 2.36.070(5) (not qualified to serve as a juror); RCW 10.79.130 (may be strip searched); RCW 10.98.010 et seq.: (arrest and conviction data will be gathered); RCW 9.41.040 (right to possess firearms restricted); RCW 9.73.095 (inmate telephone calls may be recorded); RCW 42.04.020 (unable to hold elective office).

Moreover, the creation of a DNA databank is of concern to Washington residents, just as it concerns citizens in other states. In fact, the statute at issue here specifically authorizes sharing of DNA collected for Washington's databank with the Federal Bureau of Investigation's DNA databank index. RCW 43.43.754(2). Almost every state in the country has some type of similar DNA collection statute. Landry v. Attorney General, 709 N.E.2d 1085, 1090 (Mass. 1999) (citing cases), cert. denied, 528 U.S. 1073 (2000).

In the absence of a Gunwall analysis in this specific context, and absent any authority to treat Washington felons differently than felons are treated under the Federal Constitution, this Court should decline to decide this case on independent state constitutional grounds.

c. The Compelled Taking Of DNA Is Constitutional Under Article I, § 7 Of The Washington Constitution.

Even if independent state constitutional analysis is warranted in this context, Engel's argument should be rejected. He has failed to show that taking DNA samples from convicted felons for the purpose of establishing identity concerns "private affairs," or that such samples are taken without "authority of law."

“In determining whether a search violates article I, § 7, the court must first decide whether the action in question intruded upon a person’s ‘private affairs.’” McKinney, 148 Wn.2d at 27.

Generally, private affairs are “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” Boland, 115 Wn.2d at 577. Secondly, the court must examine whether the search was done under “authority of law.” In re Personal Restraint of Maxfield, 133 Wn.2d 332, 342, 945 P.2d 196 (1997). If the State has not intruded unreasonably into someone’s private affairs, no search has occurred, and article I, § 7 has not been violated. State v. Goucher, 124 Wn.2d 778, 783-84, 881 P.2d 210 (1994).

Private Affairs. The regulations governing the collection of DNA make clear that it is to be used for three limited purposes: (1) identification of possible suspects in criminal investigations; (2) convicted felon identification databanking; and (3) identification of human remains or missing persons. WAC 446-75-030. Further, the regulations specifically prohibit the use of the DNA for “any research or other purpose not related to a criminal investigation, to identification of human remains or missing persons, or to improving the operation of the system established by the Washington State

Patrol and authorized by RCW 43.43.752 through 43.43.759.”

WAC 446-75-080.⁹ Additionally, it is a crime to disseminate the DNA information to any agency or person other than those permitted by the statute itself. RCW 43.43.810.

The collection of DNA is similar to fingerprinting in both its minimal intrusiveness and its purpose. Citizens arrested and convicted of crimes are not entitled to hold their fingerprints safe from governmental trespass. The State has been mandated to fingerprint individuals arrested for a crime, as well as individuals remanded to custody after conviction of a crime, since 1972. RCW 43.43.735¹⁰; RCW 43.43.745. Further, fingerprints have been required on the original of every judgment and sentence since at least 1977. RCW 10.64.110.¹¹ Even certain citizens not involved in

⁹ See also RCW 43.43.753 (“the DNA identification system used by FBI and Washington state patrol has no ability to predict genetic disease or predisposal to illness”).

¹⁰ This statute also provides that in addition to fingerprinting and photographing arrestees, authorities are permitted to take the palm prints, sole prints, toe prints, or any other identification data of such persons.

¹¹ Washington State has many statutes pertaining to the implementation of identification systems involving criminals: RCW 43.43.560 (setting up the Automatic Fingerprint Identification System); RCW 43.43.715 (exchange of information between criminal justice agencies regarding identification of criminals); RCW 43.43.700 (establishing a section within the Washington State Patrol on identification, child abuse, vulnerable adult abuse and criminal history that includes obtaining identification data from all persons lawfully arrested, charged or convicted of any criminal offense); RCW 43.43.540 (establishing central identification registry of sex offenders and kidnappers).

criminal activity must submit to some monitoring of their identity. RCW 9.41.100 (fingerprinting required to obtain license to carry a firearm); RCW 9.46.070 (fingerprinting required to obtain gambling license); RCW 66.08.030 (fingerprinting required to obtain liquor license).

Washington courts have never held, or even suggested, that the Washington Constitution forbids collection and limited use of a convicted person's identity. In fact, the Court of Appeals has long held that the constitutional right of privacy does not include the interest an individual possesses in his arrest record, including his photograph and fingerprints. State v. Adler, 16 Wn. App. 459, 463-64, 558 P.2d 817 (1976).

The collection of DNA is simply another, superior method of establishing identity. Tracking the identity of convicted felons is consistent with the felon's generally diminished privacy interests. A probation officer need have only reasonable suspicion to search a parolee's home. State v. Lucas, 56 Wn. App. 236, 239-40, 783 P.2d 121 (1989). An inmate may have his cell searched without a warrant. In re Personal Restraint of Benn, 134 Wn.2d 868, 909,

952 P.2d 116 (1998).¹² Convicted felons can be ordered to undergo HIV testing if convicted of a sex offense. In the Matter of Juveniles A, B, C, D, E, 121 Wn.2d 80, 96-97, 847 P.2d 455 (1993) (the mandatory HIV testing of sexual offenders does not violate the constitutional right to privacy).¹³

To the extent that Engel would seek to argue that even if felons have diminished privacy interests during the term of their sentence, such interests are restored upon completion of their sentence, making the intrusion mandated by RCW 43.43.754 unconstitutional, this argument is without merit. It is well-established that once an item has been taken from an individual pursuant to a lawful search, he or she no longer has a privacy interest in that item under article I, § 7. See State v. Cheatham, 150 Wn.2d 626, 643, 81 P.3d 830 (2003) (once inmate's shoes were seized as part of lawful inventory search, he

¹² Benn analyzed the issue of cell searches under the Federal Constitution. The fact that no Washington case exists providing greater privacy protections for inmates in this area under article I, § 7 supports the conclusion that the Washington Constitution does not afford any greater protection to inmates.

¹³ In A,B,C,D,E, the Washington Supreme Court used a federal analysis because the parties had "not briefed nor asked for an independent construction of the state constitutional provision based upon the factors established in State v. Gunwall." 121 Wn.2d at 90 n.6. The State has been unable to find any cases applying an article I, § 7 analysis to the mandatory HIV testing required under RCW 70.24.340(1)(a).

had no further privacy interest in those shoes). Similarly, once a felon's DNA is collected, the privacy interest in the DNA that was lawfully taken for identification purposes no longer exists.

Engel has cited no cases in which convicted felons were provided with greater privacy rights under the Washington Constitution than under the Federal Constitution.

Although taking a DNA sample from a private citizen might be an intrusion upon a "private affair," the DNA of an average citizen is not before this Court. DNA samples taken from convicted felons, who have diminished privacy interests, solely for the purpose of analyzing forensic loci to establish identity, do not intrude upon the private affairs of those felons. Article I, § 7 is not violated by Washington's DNA collection statute.

Authority of Law. The authority of law that permits a search of a person's private affairs includes authority granted by a valid statute, the common law, or rules of the court. Gunwall, 106 Wn.2d at 68-69. A search warrant or subpoena, which involves judicial scrutiny, constitutes "authority of law." In re Personal Restraint of Maxfield, 133 Wn.2d 332, 342, 945 P.2d 196 (1997). A judge signs an order authorizing the collection of DNA pursuant to statute at the time of sentencing. Although the signing

of the order is largely pro forma and involves little discretion, a judge must still determine that the individual has been convicted of a felony, and must sign the order authorizing the collection before the DNA may be taken. Therefore, unlike searches with no judicial involvement at all, the search at issue here has some level of judicial involvement. For all of the above reasons, the statutory requirement for the taking of Engel's DNA sample must stand.

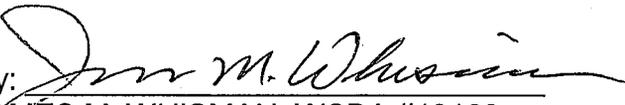
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this court to affirm Engel's judgment and sentence for burglary.

DATED this 2nd day of February, 2007.

Respectfully submitted,

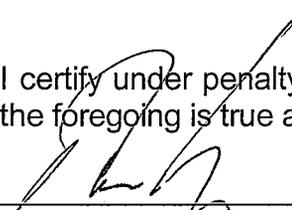
NORM MALENG
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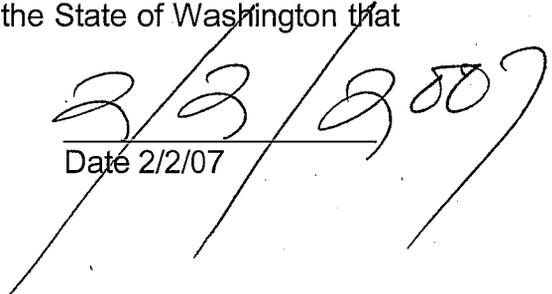
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa Lee, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ROGER ENGEL, Cause No. 58176-7-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington



Date 2/2/07

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