

NO. 41368-0-II

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

STATE OF WASHINGTON,
Respondent,
v.
DONALD OLIVA SALAVEA,
Appellant.

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY *[Signature]*
DEPIIY

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. The court failed to bring appellant to trial within the speedy trial period established in CrR 3.3.

2. The court improperly admitted officers' opinions that appellant was guilty of the charged offense.

Issues pertaining to assignments of error

1. Where the court failed to ensure that appellant was brought to trial within the time specified in CrR 3.3, must appellant's convictions be reversed and the charges against him dismissed?

2. Appellant was charged with failing to register as a sex offender, and the State argued he was not living at his registered address when two police officers did an address verification. After describing what they saw in the house, the officers were allowed to give their opinion that appellant was not living there. Where the evidence of guilt was not overwhelming, does improper admission of the officers' opinions that appellant was guilty require reversal?

B. STATEMENT OF THE CASE

1. Procedural History

On December 21, 2009, the Pierce County Prosecuting Attorney charged appellant Donald Salavea with failure to register as a sex offender

and escape from community custody. CP 1-2. The charges were amended three times, and the State added one charge of tampering with a witness and two charges of violation of a protection order. CP 13-15, 25-28, 33-36. After 13 continuances of the trial date, the case proceeded to jury trial before the Honorable Frank E. Cuthbertson. The jury entered guilty verdicts, and the court imposed a standard range sentence. CP 213-14, 216, 218, 220, 235. Salavea filed this appeal. CP 221.

2. Background Facts

a. Failure to register and escape charges

Donald Salavea was convicted of class A felony sex offenses in 1999. CP 44. Salavea was also convicted of failing to register as sex offender on March 5, 2004, and August 25, 2004. 6RP¹ 64-66. He is required to register for life. CP 44.

Salavea first registered with the Pierce County Sheriff's Department on August 1, 2003, when he was released from the juvenile detention facility following his sex offense convictions. 6RP 67-69. He registered on August 28, 2008, on May 18, 2009, and again on August 20, 2009, after being released from custody. 6RP 75-76, 79-81, 87. Since

¹ The Verbatim Report of Proceedings is contained in 13 volumes, designated as follows: 1RP—8/16/10, 2RP—8/17/10, 3RP—8/18/10, 4RP—10/11, 12, 13/10; 5RP—10/14/10, 6RP—10/18-19/10, 7RP—10/20/10, 8RP—10/21, 25, 26/10; 9RP—10/29/10, 10RP—3/2,10, 5/20/10 & 6/16/10, 11RP—4/20/10, 12RP—9/16/10, 13RP—10/4/10

August 2008, Salavea has used his parents' address in Tacoma when registering with the sheriff's office. 6RP 76, 84, 88, 132; 8RP 88.

Salavea was in jail for a violation of his probation conditions from September 16, 2009, through October 23, 2009. 7RP 16. He was held at the Cowlitz County Jail because of space availability issues. 6RP 148. When he was released and transported back to Pierce County, Salavea reported to his community corrections officer. 7RP 16. At that point Salavea was fitted with a global positioning system ankle device. He was informed that he was required to wear the device at all times and keep it charged, but he was not restricted to any particular location. 7RP 20, 30; 8RP 120.

Two days later Salavea removed the monitoring device, and a warrant was issued for his arrest. 7RP 20; 8RP 91. Salavea's community corrections officer looked for him at his father's address but was unable to find him, and it did not appear he was living there. 7RP 23. Eventually, Salavea turned himself in before the warrant was served. 6RP 146-47. He was charged with escape from community custody. CP 1-2. At trial, Salavea admitted cutting off the GPS monitoring device without permission. 8RP 91-92.

Salavea was also charged with failing to register as sex offender when he was not found at his registered address during an address

verification on October 29, 2009. Two detectives went to Salavea's registered address. 6RP 98-99, 112. They spoke to his sister, who allowed them to enter the house. 6RP 100, 114. In the bedroom the detectives were told Salavea used, they saw a pair of men's jeans and a pair of men's sneakers, but no other clothing was visible. 6RP 100-01, 116. The officers did not look inside the dresser in the bedroom or in any closets for other clothing, nor did they look in the bathroom for toiletries or other personal effects. 6RP 103, 116, 119.

Salavea's sister testified that Salavea lives at their parents' house, although he was not at home on the day the detectives came to verify his residence. 6RP 132. She testified that Salavea's shoes and clothing were at the house and that he also received his mail there. 6RP 137, 139. Salavea's father testified that Salavea lived with him. He slept in the upstairs bedroom where he kept his clothes, and he received his mail at the house. 8RP 131-32. He testified that Salavea could not be at the house while his sister's children were there, so he came home to eat, sleep, shower, and change after the children left for school in the morning and was gone before they came home. 8RP 133, 138-40, 143.

Salavea testified at trial that he lived at his registered address during the period he was charged with failing to register. 8RP 90. In addition, that address was on his Washington State Identification, he

received his mail there, and he kept his clothes in a dresser and closet at the house. 8RP 90-91.

b. Tampering and protection order charges

On January 14, 2010, Salavea's former girlfriend, Rachel Tia, obtained an order of protection naming Salavea as the respondent. 8RP 40. Salavea was not present at the hearing when the order was issued because he was incarcerated at the Pierce County Jail. 7RP 52; 8RP 65. A corrections deputy at the jail filled out a return of service stating he served Salavea with copy of order on January 20, 2010, but he did not indicate on the form where Salavea was served. 7RP 73. The deputy testified at trial that he remembered handing it to Salavea in his unit at the jail, but Salavea maintained that he never received a copy of the order. 7RP 73; 8RP 93-94.

Over the next couple of months, Salavea made numerous phone calls to Tia, paid for with the money she deposited to his account. 8RP 41-42, 66. Salavea was charged with two counts of violation of a protection order, as well as one count of tampering with a witness based on the substance of these calls. 8RP 62-63; CP 33-36.

C. ARGUMENT AND SUBSTANTIVE FACTS

1. TRIAL DID NOT COMMENCE WITHIN THE TIME ESTABLISHED BY CRR 3.3, AND THE CHARGES AGAINST SALAVEA MUST BE DISMISSED.

Although Salavea was arraigned on January 5, 2010, and he was in custody pending trial, trial did not commence until October 18, 2010. Thirteen continuances of the trial date were granted. Salavea objected on the record to each of these continuances and refused to sign the scheduling orders.

The first continuance was ordered on March 2, 2010, because defense counsel was on military duty. CP 11. Salavea objected to the continuance. CP 11; 10RP 4-5. A second order of continuance was entered April 20, 2010. Supp. CP (Order entered 4/20/10). Defense counsel requested a three week continuance because he would be unavailable during Army Reserve duty from April 23 through May 4, and he needed additional time to prepare. 11RP 3. Salavea again objected, but the court continued the trial to June 1, 2010. 11RP 4.

On May 20, 2010, the court entered the third order of continuance. CP 12. The State informed the court that it had discovered additional evidence that may lead to the filing of additional charges, and it had made a new offer to the defense. Defense counsel was out sick that day and stand-in counsel was present, but the prosecutor informed the court that

defense counsel had been assigned 30 new cases, and he had not had time to review Salavea's case and discuss the new evidence or offer with him. 10RP 6-7. The prosecutor requested a continuance to July 8, 2010. 10RP 8. Salavea again objected to any continuance and argued that his speedy trial rights had been violated. He said he understood that new evidence had to be reviewed, but he asked the court not to continue the trial into July. 10RP 8. The court continued the trial to June 17, 2010, to allow defense counsel to review the new evidence. 10RP 9.

The court continued the case a fourth time on June 16, 2010. CP 16. After Salavea was arraigned on the additional charges, trial counsel moved to continue, informing the court he would be on Army Reserve duty from June 17 through July 5 and from July 9 through July 29. 10RP 11-12, 15. The court found good cause for a continuance, and the parties agreed on August 16, 2010, as the new trial date. 10RP 16. Without explanation, the continuance order set the new speedy trial expiration date at October 15, 2010, and indicated that the time remaining for trial was 63 days. CP 16.

Salavea informed the court that he wanted to move to dismiss for violation of his right to a speedy trial, saying that counsel's duty to the Army Reserve was in conflict with his right to a speedy trial. 10RP 15-16. He filed a pro se motion to dismiss. CP 17-21. On June 22, 2010, he also

filed a pro se motion objecting that his trial was reset outside the time limits of CrR 3.3(2). CP 31-32.

No courtrooms were available when the case came on for trial on August 16, 2010, and the court entered the fifth order of continuance, setting the trial over one day. CP 37; 1RP 4. Salavea objected and reminded the court that he had filed a pro se motion to dismiss. 1RP 3-4. There were still no courtrooms available on August 17, and the court entered the sixth order of continuance. Supp. CP (order filed 8/17/10); 2RP 2. Salavea again objected. 2RP 2. Although there was some question as to the remaining time for trial, the court assured Salavea the delay would not go beyond 30 days. 2RP 4.

Nonetheless, the next day the prosecutor asked for a continuance to September 16, 2010. 3RP 3. The prosecutor explained that the parties agreed that the trial would take at least five days, but since she was scheduled to leave the state the next week, there would not be enough time to finish the trial before she left. 3RP 3. She informed the court that her vacation had been set since spring and her plane tickets had already been purchased. 3RP 6. She was due back on September 1, but she had six other cases set the week of September 7 and three more set on September 14, and she asked for a continuance until September 16. 3RP 7. The court asked the prosecutor about handing the case off to someone else, but she

explained that she was the only deputy prosecuting attorney authorized to try failure to register cases. 3RP 5. The court found good cause for a continuance under the circumstances and entered the seventh order of continuance, setting the trial for September 16, 2010. Supp. CP (order entered 8/18/10)

Neither the prosecutor nor defense counsel could explain why the time for trial had been set at 63 days in the June 16 order. The court's judicial assistant explained that someone had entered a wrong date in LINX which needed to be corrected. The court found that it was clearly no more than 30 days. 3RP 4-5. Defense counsel asked the court to make the 30 days time for trial calculation retroactive to August 16, when the case began trailing, but the court said that since it was finding good cause for a continuance, the number would be reset at 30 days. 3RP 8. Inexplicably, the court's order of continuance indicated a speedy trial expiration date of November 18, 2010. Supp. CP (8/18/10 order).

On September 16, 2010, the State asked for an eighth continuance. Both the prosecutor and defense counsel were in trial on another case, which was expected to finish by the end of the day, and two material witnesses had overlapping vacations beginning the following Monday. 12RP 2. The court granted the motion and continued the trial to October 4, 2010. CP 38. Salavea again objected. 12RP 3.

The court entered the ninth order of continuance on October 4, because both attorneys were in trial on other cases. CP 39. Defense counsel objected to the continuance, arguing that he would be finished with his other trial that morning and could proceed to trial in Salavea's case that afternoon. 13RP 2. The court noted the objection and continued the trial to October 11, 2010. 13RP 3-4. The court entered the tenth, eleventh, twelfth, and thirteenth orders of continuance on October 11, 12, 13, and 14 because no courtrooms were available. CP 40-43. The case finally proceeded to trial on October 18, 2010.

A defendant who is held in jail must be brought to trial within 60 days of arraignment, unless a period of time is excluded from the time for trial. CrR 3.3(b)(1), (c)(1). When a period of time is excluded from the speedy trial period, the speedy trial period extends to at least "30 days after the end of that excluded period." CrR 3.3(b)(5). A delay pursuant to a properly granted continuance is excluded from the time for trial period. CrR 3.3(e)(3).

A motion for continuance is properly granted only if it is "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). While the court's decision to grant a continuance under CrR 3.3(f)(2) is generally reviewed

for an abuse of discretion, a violation of the time for trial rule is reviewed de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

Once the 60-day time for trial period expires without a lawful basis for further continuances, CrR 3.3 requires dismissal and the trial court loses authority to try the case. State v. Saunders, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009); CrR 3.3(h). “The rule's importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely trial and its requirement that criminal trials take precedence over civil trials.” Saunders, 153 Wn. App. at 220 (citing CrR 3.3(a)(1)-(2)).

In Saunders, the trial court granted six continuances over the defendant's objections. For the last three, neither party demonstrated that continuances were required in the administration of justice. One was granted to allow for further negotiations, despite the defendant's statement that he was done negotiating and ready to go to trial. The other two were granted because the case had not yet been assigned to the deputy prosecutor who would try the case. There was some discussion about a particular trial prosecutor just coming off a seven week long trial, but as of the last continuance date, the case was still in the negotiating unit and had not been assigned to anyone for trial. The trial court recognized that there

was no satisfactory reason for the continuances but granted them anyway.

Saunders, 153 Wn. App. 212-15.

On appeal this Court noted that, while a specific prosecutor's unavailability due to another case may be justify a continuance, the record showed that the reason for the continuance was that the State had failed to assign the case to a prosecutor for trial. Id. at 219. Because the State provided no meaningful explanation for the requested continuances, the court abused its discretion in granting them. This Court reversed Saunders's convictions and remanded for dismissal of the charge with prejudice. Id. at 221.

Similarly, in this case, the State failed to present a legitimate reason for the continuance granted on August 18, 2010. The prosecutor's explanation was that she was scheduled to leave town the next week on vacation, and since the trial would take five days, there was no longer time to complete the trial before she left. A deputy prosecutor's reasonably planned vacation is generally good cause for continuance. State v. Kelley, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). But here, it was not the vacation that necessitated the continuance but the prosecutor's failure to inform the court of her vacation at a time when a continuance could have been avoided. By the time the prosecutor finally mentioned her plans, the case had been trailing for three days. The parties had been ready for trial,

but there were no courtrooms available. Had the prosecutor told the court of her plans at the beginning of the week, the court would have had the opportunity to investigate other arrangements, such as giving Salavea's trial a higher priority when assigning courtrooms.

Courtroom unavailability is not a valid basis for a continuance beyond the time for trial period. Kenyon, 167 Wn.2d at 137. A court can allow a continuance due to court congestion only when it makes a detailed record of the unavailability of courtrooms and judges, and the court must take action to alleviate court congestion. Id.

In Kenyon, the trial court continued a trial for "unavoidable or unforeseen circumstances" because he was presiding over another criminal trial and the second judge of the two-judge county was on vacation. Id. at 134; CrR 3.3(e)(8). The Supreme Court held that the "trial court should have documented the availability of pro tempore judges and unoccupied courtrooms" because, under CrR 3.3(f)(2), it is "required to 'state on the record or in writing the reasons for the continuance' when made in a motion by the court or by a party." Kenyon, 167 Wn.2d at 139.

Here, as in Kenyon, the court did not take the action it was required to take under the rule. If the court had investigated ways to alleviate the court congestion when Salavea's case came on for trial on August 16, presumably the prosecutor's planned vacation would have

come to light. The court should have been on notice of the need to try Salavea that week, and his trial could take priority in assigning available courtrooms and/or securing a judge pro tempore. The court's failure to investigate ways to alleviate the court congestion led to scheduling conflict and violated Salavea's right to a speedy trial. See Kenyon, 167 Wn.2d at 139.

When the court ordered the continuance on August 18, there was some confusion as to the time remaining for trial following the continuance ordered on June 16. The court resolved that confusion, concluding that the time for trial following the June 16 continuance to August 16 should have been 30 days. 3RP 5. The court dismissed defense counsel's request to clarify that the 30 days started running on August 16, reasoning that it was granting a new continuance and the time for trial would be reset to 30 days following that continuance. Nonetheless, the record indicates that the time for trial did not stop running when the case was set over for courtroom unavailability on August 16 and August 17. 2RP 2-3; 3RP 9. Thus on August 18, there were 28 days remaining, requiring that Salavea be brought to trial by September 15, 2010. He was not brought to trial within in that time.

The rule allows for a one-time cure of a violation of the speedy trial period, permitting the court to continue the case after the time for trial

has expired. CrR 3.3(g). A continuance granted under this provision may not exceed 14 days when the defendant is detained in jail, however. Id. Here, the time for trial expired on September 15, and the court granted another continuance on September 16, setting a new trial date of October 4. This continuance exceeded 14 days and thus did not cure the speedy trial violation. Since Salavea was not brought to trial within the time limits of the rule, the charges against him must be dismissed with prejudice. See CrR 3.3(h).

2. IMPROPER ADMISSION OF THE OFFICERS' OPINIONS THAT SALAVEA WAS GUILTY OF FAILING TO REGISTER REQUIRES REVERSAL.

At trial, detectives Jennifer Mueller and Scott Yenne testified about conducting a registration verification at Salavea's address on October 29, 2009. They testified that Salavea was not at the house when they arrived but his sister allowed them to enter the house to look at his bedroom. Both detectives described what they saw, each noting that the only men's clothing they saw was a pair of jeans and a pair of shoes. They both described the layout of the room and the furniture it contained.

The prosecutor asked Mueller to describe what she would expect to find in a bedroom belonging to a man, based on her experience in conducting hundreds of address verifications. Mueller responded that she would not assume it would be any different than her own bedroom, which

contained clothing and personal effects. 6RP 104. The prosecutor then asked, “Now, based upon your training and experience as well as your observation of the bedroom that was indicated belonged to the defendant, did you believe or did you form a belief as to whether or not the defendant was residing at that location?” 6RP 104. Defense counsel objected that the question was ultimately one for the jury, not an opinion poll for the police department. 6RP 104. The court overruled the objection, telling the witness to go ahead and answer. 6RP 104. Mueller responded,

Yes. Based on what I saw in the bedroom at the top of the stairs, I came to form the opinion that, no, the defendant, in fact, did not live there. I did not find the amounts of clothing that you would find normally in a bedroom or clothing of the type that somebody of that age would wear. There was mostly women’s clothing and women’s items in the bedroom upstairs.

6RP 104-05.

The prosecutor asked Yenne the same question, and he too gave his opinion that Salavea did not reside at his registered address. 6RP 118. Then again, on redirect, the prosecutor asked, “and based upon your consideration of all this evidence and its cumulative effect, did you formulate an opinion as to whether or not the defendant was residing at the address?” 6RP 129. Yenne again gave his opinion that Salavea was not residing at that address. 6RP 130. Defense counsel did not repeat his objection to this opinion.

A witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236, 1239 (2009). Improper opinion testimony violates the defendant's constitutional right to a jury trial by invading the fact-finding province of the jury. Montgomery, 163 Wn.2d at 590; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). In determining whether testimony constitutes improper opinion as to the defendant's guilt, the reviewing court considers the circumstances of the case, including (1) the type of witness, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591; Hudson, 208 P.3d at 1239.

In Montgomery, the defendant was charged with possession of pseudoephedrine with intent to manufacture methamphetamine, after detectives followed him and a companion from store to store as they individually purchased several items which could be used in the production of methamphetamine. Montgomery, 163 Wn.2d at 584-86. After describing these events at trial, one of the detectives testified, "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in

which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before.” Montgomery, 163 Wn.2d at 587-88. Another detective also testified that “those items were purchased for manufacturing.” Montgomery, 163 Wn.2d at 588. And, after testifying about the ingredients necessary for making methamphetamine, a forensic chemist testified that he concluded the pseudoephedrine was possessed with intent. Montgomery, 163 Wn.2d at 588.

In concluding that this testimony constituted improper opinion evidence, the Supreme Court noted that opinions regarding the intent of the accused are clearly inappropriate. Montgomery, 163 Wn.2d at 591, 593. As the testimony went to the core issue and the only disputed element, the defendant’s intent, it amounted to improper opinion on the defendant’s guilt. Montgomery, 163 Wn.2d at 593.

Similarly, in Hudson, the defendant was convicted of third degree rape. He did not dispute the sexual encounter, or that the alleged victim was injured. At issue was whether the encounter was consensual. The nurse who examined the alleged victim and the coordinator who had reviewed her report testified at trial. Hudson, 208 P.3d at 1237. Both witnesses were permitted to testify over defense objection that the alleged

victim's injuries were related to nonconsensual sex. Hudson, 208 P.3d at 1238.

On appeal, this Court held that the experts' explicit testimony that the injuries were caused by nonconsensual sex amounted to statements that the defendant was guilty of rape. Because the opinions went to the essence of the rape charge and the only disputed issue, they were improper. Hudson, 208 P.3d at 1239-40. Since the case turned on whether the jury believed the defendant or the alleged victim, the error was not harmless. Hudson, 208 P.3d at 1241.

Here, as in Montgomery and Hudson, the officers' opinions invaded the province of the jury. The question before the jury was whether Salavea was residing at his registered address during the charging period. The officers' testimony that, in their opinion, he was not living there, went to the core of the jury's determination.

Moreover, the officers' opinions were not helpful to the jury. Neither officer was familiar with Salavea or his living arrangements, and neither was in a better position than the jury to determine whether Salavea was residing at his registered address. See State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (officer not qualified to testify as to defendant's state of mind while driving). Although the prosecutor purported to ask the officers' opinions in terms of their expertise in

conducting verification checks, it is clear that the first officer was simply comparing the evidence to her home. 6RP 104. The jury was capable of doing that without her opinion. See State v. George, 150 Wn. App. 110, 118-19, 206 P.3d 697 (Officer was in no better position to identify defendant from surveillance video than jury; opinion testimony invaded province of jury), review denied, 166 Wn.2d 1037 (2009).

And the prosecutor's question of second officer made it abundantly clear the prosecutor was asking witness to do job of jury: "based upon your consideration of all this evidence and its cumulative effect, did you formulate an opinion as to whether or not the defendant was residing at the address?" 6RP 129. It is the jury's job to weigh the evidence and determine whether it establishes guilt. The officer's opinion was inadmissible testimony of guilt that invaded the province of the jury.

Trial counsel objected when the prosecutor asked the first officer for her opinion whether Salavea was residing at his registered address. That objection preserved the issue as to the opinions of both officers. When the prosecutor asked the second officer for the same opinion, there was no need for counsel to object again because the court had already overruled the objection to opinion testimony from the investigating officers. A further objection would have been futile, and counsel is not required to risk alienating the jury by interrupting with another objection

or perform futile act to preserve error for appeal. See In re Griffith, 102 Wn.2d 100, 107, 683 P.2d 194 (1984).

In any event, an explicit or nearly explicit opinion on the defendant's guilt or credibility can constitute a manifest constitutional error, which may be challenged for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007); RAP 2.5(a). The officers' opinions that Salavea was not residing at his registered address were explicit opinions of his guilt. Admission of those opinions was a manifest constitutional error, and Salavea can raise the issue on appeal.

This Court employs the overwhelming untainted evidence test to determine if the improper admission of opinion evidence was harmless beyond a reasonable doubt. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004), review denied, 154 Wn.2d 1009 (2005). In this case, the untainted evidence was not so overwhelming as to lead to a finding of guilt.

The jury was instructed that it could convict Salavea of failure to register if it found either that he failed to register within 24 hours of being released from custody or he failed to reside at his registered address.² CP

² The Washington Supreme Court has held that failure to register as a sex offender is not an alternative means offense. State v. Peterson, 168 Wn 2d 763, 771, 230 P 3d 588 (2010) In this case, however, the offense was charged as an alternative means offense, and the jury was instructed as such. CP 33-36, 203. Thus, under the law of the case, the

203; 8RP 159-60. The prosecutor argued that the State had established the second alternative because there were not enough personal effects or clothing visible to prove he lived there and that spending a few hours a day at the house did not constitute residency. 8RP 160-61.

The term “residence” is not defined by statute, but Washington courts have held that “residence” is commonly understood to mean “the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.” State v. Pickett, 95 Wn. App. 475, 478, 975 P.2d 584 (1999); State v. Stratton, 130 Wn. App. 760, 765, 124 P.3d 660 (2005); State v. Pray, 96 Wn. App. 25, 29, 980 P.2d 240, review denied, 139 Wn.2d 1010 (1999). In Stratton, the defendant’s residence did not change when he moved out of his house and started sleeping in his car at the same address. Even though he left daily, his living situation fit the definition of residence because he intended to return and had no definite departure date. Stratton, 130 Wn. App. at 766. Thus, contrary to the prosecutor’s argument, the fact that Salavea spent only a few hours a day at the house did not preclude that address from being his residence.

jury could convict if it found either of the two alternatives See State v. Hickman, 135 Wn 2d 97, 102, 954 P 2d 900 (1998) (jury instructions become the law of the case)

The prosecutor argued, however, that the detectives who conducted the address verification saw no signs that Salavea was living at the residence. For the jury to convict on this basis, it would have to believe that the lack of clothing and personal effects in the areas observed by the officers demonstrated Salavea was not living at the house. But the evidence showed that the officers did not look in drawers or closets for clothes and did not look in the bathroom for personal effects. 6RP 103, 116, 119. And Salavea's father and sister testified that he was living at the house, he kept his belongings there, and he received his mail there. 6RP 132, 137, 139; 8RP 131-32. The untainted evidence does not overwhelmingly establish Salavea's guilt.

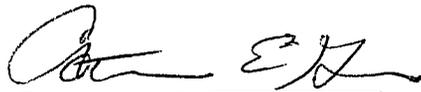
It is well recognized that testimony from police officers carries an "aura of reliability" likely to influence the jury. See Montgomery, 163 Wn.2d at 595 (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). It is likely that the jury was influenced by officers' opinions that Salavea was not living at his registered address, and the improper admission of those opinions that Salavea was guilty was not harmless beyond a reasonable doubt. Salavea's conviction of failing to register must be reversed.

D. CONCLUSION

The trial court failed to ensure that Salavea's case was tried within the time limit established in CrR 3.3. His convictions must therefore be reversed and the charges against him dismissed with prejudice. Additionally, the officers' improper opinion testimony that Salavea was guilty of failing to register requires that conviction to be reversed.

DATED this 18th day of July, 2011.

Respectfully submitted,



CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

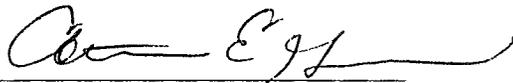
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v Donald Salavea*, Cause No. 41368-0-II, directed to:

Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Donald Salavea, DOC# 866728
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

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



Catherine E. Glinski
Done in Port Orchard, WA
July 18, 2011

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