

NO. 42535-1-II

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

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STATE OF WASHINGTON, Respondent

v.

BRENT CURTIS MOORE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01792-5

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

I. THE EVIDENCE IS SUFFICIENT TO SUSTAIN MOORE'S CONVICTION FOR FAILURE TO REGISTER AS A SEX OFFENDER.

B. STATEMENT OF THE CASE

Brent Moore is a sex offender who is required to register his address with the Clark County Sheriff's Office. RP 69-70. On March 9, 2010 he registered himself as living at 7201 NE 109th Avenue in Vancouver, Washington. RP 81, 84. The defendant's birthday occurred in September of 2010, and it is the policy of the Clark County Sheriff's Office that registered sex offenders come in within ten days of their birthday in order to be re-photographed. RP 85. When the defendant failed to come in within ten days of his birthday to be re-photographed, Detective McVicker of the Clark County Sheriff's Office began to investigate whether he still lived at his registered address. RP 85. Detective McVicker called the house and spoke with Nancy Moore, the defendant's mother, who also lived at the registered address. RP 86. She told Detective McVicker that he was not there and she hadn't seen or heard from him in several months. RP 86. On October 14, 2010 Deputy Adkins of the Sheriff's Office went to the house at 7201 NE 109th Avenue and spoke to Nancy Moore. RP 94. The defendant was not there. RP 94.

Nancy reiterated that she hadn't seen the defendant for several months and didn't know where he was living. RP 94. Nancy also completed a written statement under penalty of perjury, commonly called a "Smith Affidavit," in which she declared that the defendant had moved out in May or June and left no forwarding address. See Exhibit 1. Deputy Adkins testified that this type of witness affidavit is used in the determination of whether there is probable cause to believe a crime has been committed. RP 95. Specifically, whether there was probable cause for the crime of failure to register as a sex offender. RP 95.

At trial, Nancy Moore testified on direct examination that the last time she saw him prior to his arrest was in May or June of 2010. RP 42. The reason he stopped staying at her house was because he had a warrant for his arrest, according to Nancy. RP 43. Although they had cell phone contact, she deliberately didn't ask him where he was living because she knew he didn't want her to know. RP 43-44. During this time period Nancy worked outside the home during the day for approximately four hours per weekday. RP 46-47. On cross examination, Nancy changed her position and testified that the defendant was living at her home between August 14, 2010 and October 18, 2010. RP 57. She based her testimony on the fact that he maintained clothes at her residence and she believed he had been doing laundry there while she was not there. RP 58. She also

testified there were indications that he had used his bedroom during that period. RP 59. She testified during cross examination that she didn't intend to tell Deputy Adkins that the defendant didn't live there--only that he wasn't there at the time and that she hadn't seen him. RP 61. She testified that in her view she only declared, in her written statement, that the defendant was not there at that time. RP 62. On re-direct examination Nancy changed her story again and admitted that the defendant did not live at her home during that time. RP 63.

Fili Matua is a community corrections officer with the Department of Corrections. RP 104. On February 25, 2011 CCO Matua was part of an interagency team whose purpose that day was to locate wanted sex offenders. RP 105-07. Brent Moore was one of the people the team was looking for that day as there was a warrant for his arrest issued by the Clark County Superior Court for failing to register as a sex offender. RP 106.<sup>1</sup> The team developed information that Moore was located at the house at 6007 NE 105th Avenue in Vancouver. RP 106-07. When they arrived at the house the team encountered Roy Pennington, the owner of the house, in a shop near the house RP 108. Mr. Pennington told them that a woman named Tia was inside the house and gave the officers permission

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<sup>1</sup> Officer Matua referred to the warrant as having been issued by the Clark County Prosecutor's Office. The prosecutor's office can only make application for a warrant, but it must be issued by the Superior Court. Officer Matua misspoke.

to go up to the house and knock. RP 108. When they knocked, Brent Moore answered the door. RP 108. CCO Matua said "Brent Moore?" RP 108. Moore replied "no." RP 108. Matua told Moore he was under arrest and tried to grab his arm. RP 108. Moore pulled away and attempted to close the door on the officers. RP 108. At that point Matua had stepped into the doorway and as Moore closed the door Matua raised his left arm to block the door from being closed. RP 108-09. The glass in the door shattered and Moore took off running through the house. RP 109. After a short foot chase Moore surrendered and was arrested. RP 109.

Moore was charged with failure to register as a sex offender between August 14, 2010 and February 25, 2011, assault in the third degree by assaulting Fili Matua with the intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or herself or another person, contrary to RCW 9A.36.031 (a), and resisting arrest. RP 52-53. He was convicted as charged. CP 93-. This timely appeal followed the judgment. CP 122.

C. ARGUMENT

I. THE EVIDENCE IS SUFFICIENT TO SUSTAIN MOORE'S CONVICTION FOR FAILURE TO REGISTER AS A SEX OFFENDER.

Moore complains that the evidence is insufficient to sustain his conviction for failing to register as a sex offender because, he claims, his mother did not testify that he was not living at her home. Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Moore's claim that the evidence is insufficient fails. He bases his claim on the premise that Nancy Moore did not testify that he no longer lived at her house. He misrepresents Nancy Moore's testimony. Nancy Moore did, in fact, testify that Brent Moore moved out of her home. Contrary to Moore's assertion in his brief that Nancy Moore testified that "during the relevant times the defendant had a key to the residence, he was free to come and go as he pleased, he had his clothes at the house, he had his toiletries in one of the bathrooms, and he washed his clothes at the house when she was gone," she actually limited this time period to the period between August and October of 2010. RP 57-59. Her testimony did not cover the period between May or June and August of 2010, or the period after October of 2010. On re-direct examination she confirmed that between August of 2010 and February of 2011 (the charging period) Brent Moore did not live at her house. RP 63. Moreover, her testimony that the defendant kept toiletries and clothes at her house, had a key to the house and did laundry there did not render the evidence insufficient where the jury was instructed:

A residence is a place where one actually lives or has his home as distinguished from his technical domicile. A residence is a 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. A fixed residence means a residence, which is securely placed or fastened.

permanently and definitely located, or not subject to change or fluctuation.

CP 82. Instruction 15.

Contrary to Moore's claim in his brief, Nancy Moore's written Smith Affidavit was admissible as substantive evidence, not merely as impeachment evidence.<sup>2</sup> Moore claims that this statement was not given under oath subject to the penalty of perjury but this claim fails because the statement contains the following declaration: "I, Nancy Moore,<sup>3</sup> have written or had this statement written for me and this statement truly and accurately reflects my recollection of this incident. I, Nancy Moore,<sup>4</sup> certify, or declare, under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct." See Exhibit 1. This declaration contains her signature. The statement is dated and contains the place it was executed. Under RCW 9A.72.085 and *State v. Nelson*, 74 Wn.App. 380, 874, P.2d 170 (1994), compliance with RCW 9A.72.085 satisfies the requirement of ER 801(d)(1) that the statement be given under oath subject to the penalty of perjury.

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<sup>1</sup> Moore does not claim that Nancy Moore's trial testimony was not inconsistent, in whole or in part, with her written statement. He confines this assignment of error to the claim that it was not "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." See Brief of Appellant at 11.

<sup>2</sup> "Nancy Moore" is a signature at this point on the form, not a printed name.

<sup>4</sup> "Nancy Moore" is a signature at this point on the form, not a printed name.

Moore further complains that the statement was not given "at a trial, hearing, or other proceeding," as required by ER 801(d)(1). Under *State v. Smith*, 97 Wn.2d 856, 861-64, 651 P.2d 207 (1982), and *State v. Nelson*, supra, at 386, an interrogation by a police officer can be deemed an "other proceeding" for purposes of ER 801(d)(1). The *Nelson* Court summarized the *Smith* Court's holding on this point:

[T]he court stated that in determining whether a statement made as a written complaint to investigating officers falls under the "other proceeding" requirement, the purposes of the rule and the facts of each case must be analyzed. In determining whether evidence should be admitted, reliability is the key. In many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness.

*Smith*, at 861. The court then indicated the factors to be considered in assessing the reliability of the prior inconsistent statement: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. *Smith*, at 861-63.

*Nelson* at 387

Here, Nancy Moore voluntarily gave the statement according to her own testimony. Although she testified that she believed her statement merely reflected the fact that Brent Moore was not at her house at that

moment (a claim which is belied by the plain language she used on the form), she did not testify that she involuntarily gave the statement. See RP at 61-62. Second, the statement bears minimal guarantees of truthfulness because Nancy Moore attested with her own signature that her statement truly and accurately reflected her recollection of the incident about which she was being questioned and it is declared to be true (again by her signature) under the penalty of perjury of the laws of the State of Washington. In *Nelson*, supra, at 389, these same facts were found to provide sufficient indicia of reliability. Third, the statement was taken as standard procedure in one of the four legally permissible methods for determining probable cause. These four methods include: (1) the filing of an information by the prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) filing of a criminal complaint before a magistrate. *Nelson* at 387, *Smith* at 862. As in both *Smith* and *Nelson*, Nancy Moore's statement was taken as standard procedure in a police investigation that resulted in the filing of an information. "Absent other indicia of unreliability, our Supreme Court has indicated that this method for determining the existence of probable cause constitutes an 'other proceeding.'" *Nelson* at 391, citing *Smith* at 862-63. Last, under ER 801(d)(1), the witness must be subject to cross examination when giving the subsequent inconsistent statement, which in this case is not contested.

Moore's apparent reliance on *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003) is misplaced because in *Sua*, the written statement in question was neither given before a notary nor declared to be true under the penalty of perjury of the laws of the State of Washington. Nancy Moore's written statement was admissible as substantive evidence under ER 801(d)(1) and it confirmed that Brent Moore moved out of his registered address in May or June of 2010. The evidence is sufficient to sustain his conviction.

II. THE EVIDENCE IS SUFFICIENT TO SUSTAIN MOORE'S CONVICTIONS FOR ASSAULT IN THE THIRD DEGREE AND RESISTING ARREST BECAUSE THE ARREST WAS NOT UNLAWFUL.

Respondent incorporates the legal standard for sufficiency of the evidence from section I, *supra*. Moore claims that his arrest was unlawful because it occurred in the home of a third party, relying on *Hocker v. Woody*, 95 Wn.2d 822, 631 P.2d 372 (1981). Thus, he asserts, his convictions for both assault in the third degree and resisting arrest must be reversed and dismissed because the jury was given insufficient evidence on which it could have found that his arrest was lawful, an element of both assault in the third degree and resisting arrest. See CP 84, 88.

*Hocker v. Woody* was a civil rights action brought under 42 U.S.C.S. § 1983. The issue in *Hocker* was whether the officers in question

had qualified immunity after unlawfully entering the home of one parolee (Ms. Hocker) to arrest another parolee who was visiting the home. The *Hocker* Court, relying on *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642 (1981), observed that “there is no question but that [the officer’s] conduct violated Hocker’s constitutional rights” because the arrest warrant in question only allowed the officer’s to enter the home of the suspect named in the warrant, not a third party’s home. *Hocker* at 825. Subsequently in *State v. Hatchie*, 161 Wn.2d 390, 402, 166 P.3d 698 (2007) the Supreme Court reiterated that the fourth amendment right of a third party to be free from an unreasonable search is violated where law enforcement officers enter the third party’s home to arrest a suspect who does not live there.

*Hocker* and *Hatchie* are readily distinguishable from Moore’s case because in those cases, it was the right of the aggrieved third party that was at issue in the case, not the party sought in the arrest warrant. Mr. Moore has no standing to complain about the potential violation of Mr. Pennington’s (the homeowner) fourth amendment and article 1, §7 right to be free from the law enforcement intrusion into his home. See *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421 (1978) (“[C]apacity to claim the protection of the Fourth Amendment depends...upon whether the person who claims the protection...has a legitimate expectation of privacy in the

invaded place.”); *State v. Simpson*, 95 Wn.2d 170, 174, 622 P.2d 1199 (1980). (“As a general rule, the “rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure.” *Rakas v. Illinois*, 439 U.S. 128, 138, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978); *United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980). Thus, a defendant generally may challenge a search or seizure only if he or she has a personal Fourth Amendment privacy interest in the area searched or the property seized. *Salvucci*, at 86-87; *Rakas*, at 140. The defendant must personally claim a “justifiable,’ . . . ‘reasonable,’ or . . . ‘legitimate expectation of privacy’ that has been invaded by governmental action.” *Smith v. Maryland*, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 99 S. Ct. 2577 (1979); *Rakas*, at 143.”).<sup>5</sup> Nor does a violation of Mr. Pennington’s fourth amendment or article 1, §7 rights vitiate the lawfulness of Moore’s arrest. An arrest warrant provides the authority of law necessary to effectuate an arrest inside a home. *Hatchie*, supra. at 398.

Moore’s claim of unlawful arrest necessarily fails because the jury was instructed that an arrest is lawful if it is made pursuant to an arrest

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<sup>5</sup> This is not a case that would involve the question of automatic standing as the crimes at issue here are not possessory crimes. See generally *State v. Carter*, 127 Wn.2d 836, 904 P.2d 290 (1995).

warrant. CP 90, Instruction 23. Moore did not object to this instruction nor did he propose an instruction which would have told the jury that as a prerequisite to finding the arrest lawful, they must also find that the officers had probable cause to believe that Moore lived at the home in which the arrest took place (notwithstanding whether the trial court would have given such an instruction or whether such an instruction would be proper). In *State v. Goree*, 36 Wn.App. 205, 673 P.2d 194 (1983), the Court of Appeals held that the defendant could not complain on appeal that the trial court allowed the State to argue an improper interpretation of a statute where he did not propose an instruction “presenting his theory of the case.” *Goree* at 207. The Court said:

The proper method to follow, if Mr. Goree believed the State’s interpretation of the statute was incorrect, was to offer the court an instruction correctly stating the law and to provide authority for the interpretation. With such an instruction, the trial court would be able to charge the jury and forbid argument contrary thereto.

*Goree* at 208. Because Moore did not propose an alternate instruction regarding what the jury must find in order to find the arrest lawful, and because Moore did not object to the jury being instructed that an arrest made pursuant to an arrest warrant is lawful, he cannot complain on appeal that the jury found the arrest was lawful. They jury heard evidence that the arrest was made pursuant to an arrest warrant. Thus, the jury was

presented with sufficient evidence that the arrest was lawful. Moore's convictions should be affirmed.

D. CONCLUSION

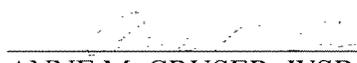
Moore's convictions should be affirmed.

DATED this 15 day of June, 2012.

Respectfully submitted:

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