

NO. 43180-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ARTHUR F. KERCHER, III, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff, Judge

No. 11-1-02626-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exclude impeachment evidence from the substantive evidence presented at trial when determining defendant's guilt?
2. Did defendant waive any error to Detective Pihl's testimony where he did not object to proper testimony below?
3. Did the State produce sufficient evidence to convince a rational fact finder that defendant was guilty of failure to register as a sex offender beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

On June 28, 2011, the State charged ARTHUR F. KERCHER, III, hereinafter "defendant," with one count of failure to register as a sex offender. CP 1. Defendant waived his right to a jury and bench trial proceeded before the Honorable Bryan Chushcoff on February 2, 2012. CP 10; RP 5. Over defendant's objection, the court allowed the State to impeach defendant's father's trial testimony with statements he made to the investigating officer at the scene. RP 120. In finding defendant guilty as charged, the court acknowledged the impeachment evidence, but stated that it was not basing its decision on that evidence. RP 133.

The court sentenced defendant to a low-end, standard-range sentence¹ of 45 days in custody, but converted 30 days of the sentence to community service. CP 21-37.

Defendant filed a timely notice of appeal. RP 41-58.

2. Facts

As of December 10, 2007, defendant was required to start registering his address with the Pierce County Sheriff's Office under the sex offender registration laws. RP 21. On May 5, 2008, defendant registered an address at 1105 3rd Avenue NW, Puyallup, Washington. RP 24-25.

On March 11, 2011, Puyallup Police Detective Joseph Pihl conducted a sex offender verification check at defendant's registered address. RP 38. Detective Pihl arrived at the registered address at approximately 5:00 p.m. and spoke to L.K.², defendant's sister. Defendant was not present and no adults were home, so Detective Pihl did not enter the house. RP 42. Detective Pihl was able to speak to defendant's father, Arthur Kercher, II, by telephone because L.K. called him at work and handed the phone to the detective. RP 42. Based on his conversations

¹ Defendant had an offender score of three, giving him a standard range sentence of zero to twelve months. CP 21-37.

² Defendant's sister, while not a victim in the case, is a minor child. Consistent with the State and court's confidentiality policies, the State will refer to the minor by her initials only.

with L.K. and Mr. Kercher, II, Detective Pihl attempted to search a telephone number for defendant's mother where defendant was staying. RP 44. As a result of his investigation, Detective Pihl classified defendant as having absconded. RP 45.

On March 14, 2011, defendant appeared at the Pierce County Sheriff's Department and changed his registered address to 19702 65th Avenue E, Spanaway, Washington. RP 31.

At trial, L.K. testified that, on March 11, 2011, she was living at the Puyallup address with her father, defendant, and a second brother. RP 51. She testified that defendant was living at the house at the time that the detective visited. RP 53. She acknowledged that she did not provide this information to the detective and that she had told him that defendant had moved out a long time ago. RP 54. L.K. stated that she had believed defendant had moved out because she had not seen or heard from him for two months. RP 54. She did acknowledge that she told Detective Pihl that defendant had moved out two months earlier and, after a brief stay with a friend, eventually moved in with his mother. RP 56. According to L.K., she knew defendant had not actually moved out because her father came home after Detective Pihl's visit and told her that defendant was still living there. RP 62. L.K. testified that defendant actually moved out a few days after the detective's visit. RP 66.

Defendant's father testified on defendant's behalf. RP 71. According to Mr. Kercher, II, defendant had moved out only a day or two

before the detective's visit and was living with his (defendant's) mother. RP 72, 75, 77-78, 81. Mr. Kercher, II, explained that defendant had been planning his move for a couple of months. RP 75. Mr. Kercher, II, denied telling the detective that defendant had moved out two months ago and instead stated that defendant had been "back and forth" between his and defendant's mother's houses while defendant tried to decide where he wanted to go. RP 73, 83. Mr. Kercher, II, acknowledged that defendant did not pay him rent for the month of March, but claimed that defendant had cleaned the house one day in lieu of rent for the month. RP 89. Defendant's mother, Erin Taggert, also testified on defendant's behalf. RP 96. According to Ms. Taggert, defendant moved in with her shortly after March 17, 2011, a Friday, and she took him to register the new address on the following Monday. RP 98. While she testified that defendant was living with his father from January 11, 2011, to March 13, 2011, she admitted that she did not actually know where defendant was living at that time. RP 102.

Defendant testified that he registered his mother's address on March 14, 2008, and that he had moved the weekend prior to registering. 108.

On rebuttal, Detective Pihl testified that, when he spoke to defendant's father by phone, Mr. Kercher, II, informed him that defendant had moved in with his mother two months prior to his visit. RP 120.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT COMMIT ERROR WHEN IT SPECIFICALLY DECLINED TO CONSIDER IMPEACHMENT EVIDENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

“The admissibility of evidence offered to impeach the credibility of a witness is governed by ER 607, which provides that [t]he credibility of a witness may be attacked by any party, including the party calling [the witness].” *State v. Lavaris*, 106 Wn.2d 340, 344, 721 P.2d 515 (1986).

“In general, a witness’s prior statement is admissible for impeachment purposes if it is inconsistent with the witness’s trial testimony.” *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). The reason for using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times and, from this, the jury may disbelieve the witness’s trial testimony. *Newbern*, 95 Wn. App. at 293.

“Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true.” *State v. Burke*, 163 Wn.2d 204, 219, 181 P.3d 1 (2008) (citation omitted). “Prior inconsistent statements generally do not constitute substantive evidence - they may only be considered to determine witness credibility - whereas party-

opponent admissions may be admitted as substantive evidence.” *State v. Garland*, 169 Wn. App. 869, 282 P.3d 1137, 1145 (2012).

We presume that a trial judge considers evidence only for its proper purpose. See *State v. Bell*, 59 Wn.2d 338, 360, 368 P.2d 177, *cert. denied*, 371 U.S. 818 (1962). Moreover, the danger of prejudice is reduced in a bench trial because a trial judge is in a better position than jurors to identify and focus on the probative quality of evidence and disregard its prejudicial aspects. *State v. Jenkins*, 53 Wn. App. 228, 236–37, 766 P.2d 499, *review denied*, 112 Wn.2d 1016 (1989); see also *State v. Majors*, 82 Wn. App. 843, 848–49, 919 P.2d 1258 (1996) (in bench trial, court is presumed to give evidence its proper weight), *review denied*, 130 Wn.2d 1024 (1997).

Here, the trial court did not consider evidence offered for impeachment purposes as substantive evidence of defendant’s guilt. Defendant’s father testified that he told Detective Pihl that defendant had moved out “a day or two” before the detective contacted him regarding defendant’s whereabouts. RP 77-78. He specifically denied telling Detective Pihl that defendant had moved out two months prior. RP 73. The State recalled Detective Pihl to the stand in rebuttal. RP 117. On rebuttal, Detective Pihl testified that defendant’s father told him that

defendant had moved in with his mother two months prior to the date of the call. RP 120.

Defendant claims that the trial court erred in relying on Detective Pihl's impeachment evidence as substantive evidence of guilt. *See* Appellant's Opening Brief at 11-21. Yet the trial court expressly rejected the impeachment evidence in making a determination of guilt. RP 133. Specifically, the court stated that:

The court is mindful that the State has to produce substantive evidence, not merely impeachment evidence, suggesting that the defendant did not reside there at least for the three days or so prior to the time that he registered on March 14th at the new address in Spanaway.

RP 133. The court also observed that Mr. Kercher, Sr. testified that he did not recall telling the detective that defendant had moved out with a friend.

RP 134. That statement was impeached with the officer's testimony and the court found that Mr. Kercher, Sr. was biased toward "trying to protect his son from these charges." RP 135. The court focused on defendant's sister's trial testimony and statements she made to Detective Pihl, which were admitted without objection. RP 133-34; *see also* RP 54-56. The court determined that, had defendant been living at his registered address, either his father or his sister would have been able to tell the officer that, but neither did. RP 136. Nothing in this holding suggests that the court improperly relied on impeachment testimony in making its decision.

As the court did not rely on impeachment evidence as substantive evidence of defendant's guilt, defendant's claim of error fails.

2. DEFENDANT WAIVED ANY CLAIM OF ERROR TO DETECTIVE PIHL'S TESTIMONY WHERE HE DID NOT OBJECT BELOW AND THE TESTIMONY WAS NOT IMPROPER.

To raise an issue for the first time on appeal, the defendant must show that the issue involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). Our courts have addressed this standard as it pertains to admissibility of witness opinion testimony regarding credibility of victims. In *State v. Kirkman*, 159 Wn.2d 918, 927-34, 155 P.3d 125 (2007), the defendants claimed for the first time on appeal that testimony by detectives and a physician constituted improper opinion evidence regarding victim credibility. The court held that the testimony was properly admitted. The court explained:

Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences.

"Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. "Essential to this determination is a plausible

showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” This reading of “manifest” is consistent with [State v.] McFarland[’s 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). McFarland’s holding that exceptions to RAP 2.5(a) are to be construed narrowly. If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted.

Kirkman, 159 Wn.2d at 935 (some citations omitted) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). In light of this standard, the court further explained the defendant’s burden in showing manifest error:

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim.

Kirkman, 159 Wn.2d at 936. The court also addressed the “actual prejudice” required to raise an issue for the first time on appeal and noted that the defense chose not to object to the testimony as a matter of strategy:

It also appears from the respective records that defense counsel for both Kirkman and Candia chose not to object to the testimony for tactical reasons. Kirkman’s defense counsel had determined to introduce other testimony of A.D.’s reputation for truthfulness. In [State v.] Candia, [noted at 128 Wn.App. 1053, 2005 WL 1753622, at *8,] some of the testimony was helpful to defendant, as the Court of Appeals conceded, stating that Dr. Stirling’s testimony that it was unlikely the defendant could actually penetrate C.M.D. was “favorable to Candia.” Candia now seeks to appeal the admission of a portion of testimony

“which [he] obviously wanted to use in challenging his accuser’s credibility.”

The record in each case also establishes that each jury received specific instructions that they were the sole triers of fact and the sole deciders of the credibility of witnesses. Jury instruction 1 states that jurors “are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each.” Jury instruction 6 states that jurors “are not bound” by expert witness opinions, but “determin[e] the credibility and weight to be given such opinion evidence.” Jurors are presumed to follow the court’s instructions. This court has even found such instructions relevant (and curative) in claims of judicial comment on the evidence.

Kirkman, 159 Wn.2d at 937 (third alteration in original) (some citations omitted).

In contrast, the court in *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), found certain opinion testimony clearly improper. There, the State elicited testimony from several witnesses, including a detective and a chemist, who opined about Montgomery’s guilt and specifically testified that Montgomery met the crime’s intent requirement.

Montgomery, 163 Wn.2d at 587–89. Montgomery argued for the first time on appeal that the admission of the testimony constituted manifest error affecting a constitutional right. *Montgomery*, 163 Wn.2d at 588–95. Our Supreme Court agreed that the testimony “amounted to improper opinions on guilt” and “went to the core issue and the only disputed element, Montgomery’s intent.” *Montgomery*, 163 Wn.2d at 594. But the

court held that Montgomery failed to establish the necessary prejudice because the jury was properly instructed on credibility:

[W]e have found constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences. *Kirkman*, 159 Wn.2d at 934–35.

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. *See id.* at 937, 155 P.3d 125. In *Kirkman*, this court concluded there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors “ ‘are the sole judges of the credibility of witnesses,’ “ and that jurors “ ‘are not bound’ “ by expert witness opinions. *Id.* (quoting clerk's papers). Virtually identical instructions were given in this case. RP at 224, 226. There was no written jury inquiry or other evidence that the jury was unfairly influenced, and we should presume the jury followed the court's instructions absent evidence to the contrary. *See Kirkman*, 159 Wn.2d at 928.

Montgomery, 163 Wn.2d at 595–96.

In *State v. Curtiss*, 161 Wn. App. 673, 697–98, 250 P.3d 496, review denied, 172 Wn.2d 1012 (2011), the court concluded that improper opinion testimony was not reversible error where the trial court properly instructed the jury that it was the sole judge of witness credibility and no evidence indicated the jury was unfairly influenced, thus indicating no unfair prejudice resulted. *See also State v. Haq*, 166 Wn. App. 221, 266–67, 268 P.3d 997, review denied, 174 Wn.2d 1004 (2012), (finding no manifest error where defendant failed to object below, the testimony was not an explicit or nearly explicit opinion on his guilt, and the testimony

was not so prejudicial in the context of the entire trial as to create practical or identifiable consequences).

A trial court's decision to admit opinion testimony is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). As a general rule, no witness, lay or expert, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). However, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578. Moreover, an opinion is not improper merely because it involves ultimate factual issues. *Heatley*, 70 Wn. App. at 578; see also *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (mere fact that an expert opinion covers an issue that the jury has to pass on does not call for automatic exclusion). Lay witnesses may give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based on scientific or specialized knowledge. *Montgomery*, 163 Wn.2d at 591. In other words, a witness can express an opinion on an ultimate issue of fact so long as the witness does not tell the jury what result to reach. *Montgomery*, 163 Wn.2d at 590–91.

Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an “ultimate issue” will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.

Heatley, 70 Wn. App. at 579; *see also Montgomery*, 163 Wn.2d at 591 (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). We afford the trial court broad discretion to determine the admissibility of ultimate issue testimony. *Heatley*, 70 Wn. App. at 579. However, some areas are clearly inappropriate for opinion testimony in criminal trials; these are “expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.” *Montgomery*, 163 Wn.2d at 591.

The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. [I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material. More important, [the officer’s] opinion was based solely on his experience and his observation of [defendant’s] physical appearance and performance on the field sobriety tests. The evidentiary foundation directly and logically supported the officer’s conclusion [that defendant was obviously intoxicated]. Under these circumstances, the testimony [that defendant was obviously intoxicated] did not constitute an opinion on guilt.

Heatley, 70 Wn. App. at 579–80 (internal quotations and citations omitted).

Moreover, under Evidence Rule 701, a witness may testify to opinions or inferences when they are rationally based on the perception of the witness and helpful to the trier of fact. “Where the opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting the opinion.” *State v. Fallentine*, 149 Wn. App. 614, 624, 215 P.3d 945 (2009).

Here, Detective Pihl testified that he went to defendant’s registered address; and after speaking to defendant’s sister and father, concluded that defendant was no longer residing at the registered address and classified him as “abscondend.” RP 45. As in *Heatley*, Detective Pihl’s conclusion is based on his experience in light of his observations of what he found at defendant’s registered address. The evidentiary foundation supports the detective’s conclusions. This testimony, admitted without objection, was not an expression of personal belief as to defendant’s guilt, but was based solely on the detective’s observations and investigation.

Even if the detective’s testimony was error, defendant has not shown that the error is manifest. He has failed to show any prejudice arising from the detective’s conclusion that defendant no longer lived at his registered address. As noted above, a trial court is presumed to consider evidence only for its proper purpose and there is less danger of prejudice when dealing with a bench trial. Rather, the court properly considered the inconsistencies of L.K.’s and her father’s testimony, and found that defendant’s father was not a credible witness. Had the court

found defendant's father credible, it is likely the outcome would have been different. There is no indication that the court relied on improper opinion testimony when it found defendant guilty.

3. SUFFICIENT EVIDENCE WAS ADDUCED TO UPHOLD THE COURT'S DETERMINATION THAT DEFENDANT IS GUILTY OF FAILURE TO REGISTER AS A SEX OFFENDER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). 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 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. This Court should treat the trial court's findings of fact as verities on appeal.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Id.* Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Id.*

The court entered findings of facts and conclusions of law in support of its finding of guilt. CP 11-18. In applying the above law to the case now on appeal, the court should treat all the findings of fact as verities. Defendant assigned error to two of the court's findings. *See* Appellant's brief at 1. There is no argument in the brief, however, as to how these findings are unsupported by the evidence. In *Henderson Homes, Inc v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these

circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also*, *State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

In this case, defendant makes no effort to properly present argument regarding the challenged findings. Defendant specifically assigns error to the court's finding of fact XII and XIII, which state:

XII. That [L.K.] utilized a phone from within the residence to contact her father, Arthur Kercher, II. That [L.K.] then provided the phone to Detective Pihl. That Detective Pihl spoke with Arthur Kercher, II on the phone. That Arthur Kercher, II reported to Detective Pihl that defendant had moved out of his residence approximately two months prior, and that defendant had initially moved out with a friend but that living arrangement did not work out. That Arthur Kercher, II then reported to Detective Pihl that defendant had moved in with his mother.

XIII. That, at the conclusion of the March 11, 2011 verification check, Detective Pihl classified defendant as having absconded.

Appellant's brief at 1.

Substantial evidence supports each of the contested findings.

Detective Pihl testified that he spoke to L.K. at the registered address. RP

40. L.K. retrieved a cordless telephone from the residence and used it to

call her father. RP 42-43. Detective Pihl spoke to Mr. Kercher, II, on the telephone. RP 43.

L.K. testified that Detective Pihl came to her house looking for defendant and that she told him that defendant had moved out “awhile ago.” RP 53-54. She also testified that she called her father on her cell phone and handed the phone to Detective Pihl so he could speak to her father. RP 61. L.K. provided Detective Pihl with a written statement indicating that defendant had moved out two months prior to live with a friend, but was living with his mother instead. RP 56; Exhibit 6.

Mr. Kercher, II, testified that L.K. called him and handed the phone to Detective Pihl. RP 72. Mr. Kercher denied telling Detective Pihl that defendant had moved out months earlier, but admitted telling the detective that defendant had “been back and forth between his mom and my place trying to figure out where he was going to go,” and that he had been moving out “little by little.” RP 74-75, 83. Mr. Kercher claimed that defendant had only moved out one or two nights before his conversation with Detective Pihl. RP 78.

On rebuttal, Detective Pihl testified that Mr. Kercher, II, informed him that defendant had moved out approximately two months prior when he attempted to move in with a friend, and had ultimately moved in with his mother. RP 120.

After speaking to L.K and Mr. Kercher, II, Detective Pihl completed a written report which assigned a classification to the verification check. RP 45. Detective Pihl classified defendant as “absconded” or “registered offender that was not in compliance.” RP 45.

The testimony in this case provides substantial evidence in support of the trial court’s findings. Nothing in either finding is unsupported by the record.

Instead of supporting his assignments of error with argument, defendant claims that the trial court improperly relied on impeachment testimony (Appellant’s Brief at 15, 20) and improper opinion testimony (Appellant’s Brief at 22). Defendant makes no argument as to how the evidence in the record fails to support the court’s findings. *See* Appellant’s brief at 12-21. Both findings are, in fact, supported by the record and, as argued above, the court did not consider those facts for any improper purpose. This Court should treat findings of fact XII and XIII as verities on appeal.

- b. The record shows that sufficient evidence supported the trial court’s finding that defendant was guilty of one count of failure to register as a sex offender.

A sex offender has a statutory duty to register with the sheriff of the county of residence. RCW 9A.44.130(1)(a). The offender must keep that registration current as to his or her whereabouts. The statute

establishes different timelines for changing registration if the offender has a fixed address or is homeless. At the time of the events in the current case, an offender with a fixed address who changes addresses within the same county must register with the county sheriff within 72 hours of moving. Former RCW 9A.44.130(5)(a) (2010)³. Violation of the registration requirements leads to the charge of failure to register, a class C felony. RCW 9A.44.130(11)(a).

Here, the evidence shows that defendant was not living at his registered address within 72 hours of registering his new address. Defendant registered his father's address on May 5, 2008. RP 21. On March 11, 2011, Detective Pihl visited the registered address to verify that defendant was still living there. RP 37-38. He concluded that defendant was not living in the house and had not been living there for some time. RP 45. Defendant registered a new address on March 14, 2011. RP 29.

On March 11, L.K. told Detective Pihl that defendant had moved out two months earlier. RP 56. While L.K. tried to recant her statements to Detective Pihl, she ultimately testified that the only reason why she now believed that defendant was actually living at her house was because her father told her defendant was living there later that evening. RP 62-63.

³ On July 22, 2011, the Legislature changed the requirement of 72 hours to three business days. Laws 2011 c 337 § 3.

She did not tell Detective Pihl that defendant was living in the house at the time of his visit, nor did she tell him that he had moved out only a couple of days prior.

Defendant's father testified that defendant was living with him "a day or so" prior, but was definitely not living with him on the day of the detective's visit. RP 72, 75. This is inconsistent with L.K.'s testimony that her father told her that defendant was living at the house the day of the detective's visit. While Mr. Kercher, II, denied telling the detective that defendant had moved out two months prior to his visit, the court found his testimony biased and not credible. RP 135; CP 11-18 (Finding of Fact X[X]III⁴).

Moreover, while defendant's mother testified that defendant had moved in with her on a Friday and she took him to register on the following Monday, she was certain this took place after March 17, 2011, as that was defendant's birthday. RP 97-99.

Neither L.K. nor defendant's mother or father could provide any information that credibly contradicted L.K.'s written statement to Detective Pihl that defendant had moved out two months prior to the detective's visit. The evidence supports a reasonable inference that defendant had moved out two months prior, but had forgotten to register

⁴ The trial court's findings of fact contain scrivener's errors in their numbering. See CP 11-18. The findings skip numbers 14-18 and it appears that number 23 is mislabeled as a second number 8.

his new address until informed that the detective had checked on him. As a rational fact-finder could have found that defendant failed to register within 72 hours of changing his fixed address, this Court should affirm defendant's conviction for failure to register as a sex offender.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction for one count of failure to register as a sex offender.

DATED: December 13, 2012.

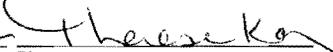
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/13/12 
Date Signature

PIERCE COUNTY PROSECUTOR

December 13, 2012 - 3:54 PM

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