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State of Washington  
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No. 53925-0-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

AARON JOSEPH OWENS,

Appellant.

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On Appeal from the Thurston County Superior Court  
Cause No. 18-1-01809-2 (18-1-01809-34)  
The Honorable Carol Murphy, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it entered written Findings of Fact 8 and 9 because they improperly characterize impeachment evidence as substantive factual findings.
2. The trial court erred when it improperly used impeachment evidence as substantive evidence of guilt.
3. The trial court erred when it found Aaron Owens guilty of failure to register as a sex offender.
4. The trial court erred when it denied Aaron Owens' Motion for Arrest of Judgment.
5. The State failed to meet its constitutional burden of proving all of the elements of the crime of failure to register as a sex offender.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where a statement that Aaron Owens' father made to law enforcement about Aaron's living arrangements was admissible as impeachment evidence, and there were no grounds to object to its admission for that purpose, can Aaron Owens' still object to the use of the impeachment evidence as substantive evidence of guilt? (Assignments of Error 1 & 2)

2. Did the trial court err when it found Aaron Owens guilty of failure to register as a sex offender, where the trial court used impeachment hearsay evidence as substantive evidence of guilt, and that was the sole evidence that Aaron Owens did not live at his registered address? (Assignments of Error 1, 2 & 3)
3. Did the trial court err when it denied Aaron Owens' Motion for Arrest of Judgment, where the trial court used impeachment hearsay evidence as substantive evidence of guilt, and that was the sole evidence that Aaron Owens did not live at his registered address? (Assignments of Error 1, 2 & 4)
4. Was the State's evidence insufficient to convict Aaron Owens of failure to register as a sex offender, where the substantive evidence of guilt was insufficient to establish that Aaron Owens did not live at his registered address? (Assignments of Error 3 & 5)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Aaron Joseph Owens with one count of failure to register as a sex offender (RCW 9A.44.132(1)(a)). (CP 3)

He was found guilty by the court following a bench trial. (06/18/19 RP 98-99; CP 17) The trial court later denied Aaron's Motion for Arrest of Judgment.<sup>1</sup> (CP 18-19; 08/19/19 RP 4-6, 10) The trial court imposed a standard range sentence of four months. (08/19/19 RP 17; CP 28, 29) Aaron filed a timely Notice of Appeal. (CP 46)

B. SUBSTANTIVE FACTS

As a result of a 1992 guilty plea to one count of first degree child molestation, Aaron Owens is required to register as a sex offender with law enforcement.<sup>2</sup> (CP 15; 06/18/19) Aaron was aware of this duty. (CP 15; 06/18/19 RP 51) On May 21, 2018, Aaron completed a registration form and listed his address as 2409 Maxine Street SE in Thurston County, which is his father's residence. (CP 16; 06/18/19 RP 9, 29, 44)

On June 21, 2018, Thurston County Sheriff's Deputy Cameron Simper went to the Maxine Street residence to verify that Aaron was living there. (06/18/19 RP 28-29; CP 16) He did not see Aaron at the residence that day, but did contact Aaron's father,

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<sup>1</sup> For the sake of clarity, Thomas Owens will be referred to as Thomas, and Aaron Owens will be referred to as Aaron throughout this brief.

<sup>2</sup> The Statement of Facts presented in this brief is a blend of witness testimony from trial and the trial court's written Findings of Fact entered after trial.

Thomas Owens. (06/18/19 RP 11, 12, 31-32; CP 16)

According to Thomas, Sergeant Simper asked whether Aaron Owens was there, and Thomas said “not at this time.” (06/18/19 RP 13, 14) Thomas denied ever telling Sergeant Simper that Aaron did not live at the Maxine Street residence. (06/18/19 RP 13)

Thomas testified that Aaron did live at that residence between June 21 and July 2, 2018, that Aaron had his own room there and got his mail there, and that Aaron’s children also lived at the house. (06/18/19 RP 21-22) Thomas also testified that Aaron lived in a house across the street for over a year, but that Aaron moved into the Maxine Street residence by June of 2018, and lived there through the month of July. (06/18/19 RP 23-25)

Sergeant Simper conducts 12-15 residence verifications a day and did not take any notes about his conversation with Thomas, but testified that nearly a year later he still recalled exactly what Thomas said. (06/18/19 RP 33, 34, 36) According to Sergeant Simper, he asked Thomas whether Aaron Owens lived at the residence and Thomas said his son did not live there. (06/18/19 RP 32)

Aaron testified that he moved into the Maxine Street

residence in May of 2018, and he still resided there in June of 2018. (06/18/19 RP 56, 65) At the time, Aaron was working long and untraditional hours at a local recording studio, and also occasionally traveled overnight for his job. (06/18/19 RP 51, 58) Due to this and Thomas' own work schedule, Aaron rarely saw his father in person. (06/18/19 RP 51-52, 80-81) Aaron also testified that Thomas had lately become more forgetful and confused about facts and past events. (06/18/19 RP 56-57, 59)

The trial court found that Sergeant Simper was credible when he testified that Thomas said Aaron did not live at the Maxine Street residence. (06/18/19 RP 98; CP 16) The court found that Thomas and Aaron were not credible when they testified that Aaron lived at the residence but they rarely saw each other. (06/18/19 RP 97-98; CP 16) Based on this evidence, the court found that Aaron was not residing at the Maxine Street address during the charging period, and that he was guilty of failure to register as a sex offender. (06/18/19 RP 98-99; CP 16-17)

#### **IV. ARGUMENT & AUTHORITIES**

Trial court erred when it found Aaron guilty of failure to register as a sex offender, and when it denied Aaron's motion for arrest of judgement, because the admissible substantive evidence

did not prove that he did not live at his registered address.

A. STANDARDS OF REVIEW

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvane*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14.

“Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *State v. Homan*, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014) (citing *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). “‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Homan*, 181 Wn.2d at 106. This court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A motion for arrest of judgment is a challenge to the sufficiency of the evidence. *State v. Pleasant*, 38 Wn. App. 78, 80, 684 P.2d 761 (1984) (citing *State v. Randecker*, 79 Wash.2d 512, 487 P.2d 1295 (1971)). In ruling on such a motion, both the trial

court and the reviewing court should assume the truth of the State's evidence and view it in a light most favorable to the State. *Pleasant*, 38 Wn. App. at 80. The appellate court should determine whether the evidence is legally sufficient to support the trier of fact's finding of guilt. *Pleasant*, 38 Wn. App. at 80.

B. THOMAS OWENS' HEARSAY STATEMENT CANNOT BE USED AS SUBSTANTIVE EVIDENCE OF GUILT BECAUSE IT WAS ADMISSIBLE AS IMPEACHMENT EVIDENCE ONLY.

Thomas testified that Aaron lived at the Maxine Street address in June and July of 2018, and testified that he only told Sargent Simper that Aaron was not home at that particular time. (06/18/19 RP 11-12, 13, 14) Sargent Simper later testified that Thomas told him that Aaron did not live at the Maxine Street address. (06/18/19 RP 32) The trial court included this testimony in its written findings of fact and relied on the substance of Thomas' statement to find Aaron guilty of failure to register. (06/18/19 RP 97, 98; CP 16) This was error by the trial court, and this statement should not be considered by this Court for proof of guilt, because Thomas' statement was admissible as impeachment only and not as substantive evidence.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the

truth of the matter asserted. ER 801(c). Generally, hearsay is not admissible unless specifically permitted by the rules of evidence, by court rules, or by statute. ER 802. A witness' prior inconsistent statement may not be hearsay, and therefore admissible, if the statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." ER 801(d)(1). Thomas' statement to Sargent Simper does not meet this requirement, and therefore was not admissible under the hearsay rules.

However, "the rules concerning impeachment should not be confused with the hearsay exception for prior inconsistent statements." 5D Karl B. Tegland, WASH. PRAC., COURTROOM HANDBOOK ON WASHINGTON EVIDENCE ER 613, § 613:2 (2019 ed.). Under ER 607 and ER 613, a witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible as hearsay.<sup>3</sup> *State v. Dickenson*, 48 Wn. App. 457, 466, 740 P.2d 312 (1987).

But such impeachment evidence affects the witness'

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<sup>3</sup> The State is allowed to impeach its own witness using a prior inconsistent statement. ER 607.

credibility, and is not probative of the substantive facts encompassed by the evidence. *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005) (citing *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985)). “A prior inconsistent statement that is admissible under Rule 613 but not Rule 801 is not substantive evidence and will not support a verdict or finding.” 5D Tegland, WASH. PRAC., § 613:2. Therefore, Thomas’ statement to Sargent Simper was admissible to impeach Thomas’ credibility, but not as substantive evidence of Aaron’s living arrangements.

The State asserted below that Aaron’s failure to object to the admission of the statement during trial precludes him from challenging its use as substantive evidence, and that the court can consider Thomas’ statement in any manner and for any purpose it wishes. (08/19/19 RP 8; CP 21-22) The trial court agreed that the lack of objection at the time the statement was admitted precluded any later objection to its consideration as substantive evidence. (08/19/19 RP 10) This is incorrect for several reasons.

First, the evidence was not inadmissible, and any objection likely would have been overruled. Trial judges have great discretion in the admission of evidence at trial and in decisions to admit or exclude evidence. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903

P.2d 960 (1995). Furthermore, in a bench trial, it is presumed that the judge follows the law and considers evidence solely for proper purposes. *E.g.*, *State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970); *State v. Bell*, 59 Wn.2d 338, 360, 368 P.2d 177 (1962).

Accordingly, there would have been no reason for defense counsel to object to the admission of Thomas' statement during the trial because it was admissible evidence and well within the trial court's discretion to admit it.<sup>4</sup> And defense counsel must presume that the trial court will use the evidence for its proper purpose.

Second, once it became clear to defense counsel that the trial court had not considered Thomas' statement only for its limited impeachment purpose, defense counsel brought the issue to the court's attention. Immediately after the verdict counsel verbally alerted the trial court to the problem, and subsequently challenged its use through a written Motion for Arrest of Judgment. (06/18/19 RP 104-05; 08/19/19 RP 4-6; CP 18-19)

Thomas' statement to Sergeant Simper was admissible

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<sup>4</sup> The likelihood that an objection will be unsuccessful is a legitimate reason for not objecting. See *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 490, 499, 251 P.3d 884 (2010). See also *State v. Hendrickson*, 129 Wn.2d 61, 79–80, 917 P.2d 563 (1996) (if the trial court would have sustained an objection to the introduction of evidence then failure to object to its admission is not ineffective).

evidence. But it was admissible only as impeachment and not as substantive evidence. Aaron's lack of objection to its admissibility does not, under the circumstances here, waive his right to challenge its use as substantive evidence of guilt. Accordingly, the trial court erred when it treated Thomas' statement as substantive evidence. And in reviewing Aaron's conviction for sufficient evidence, this Court should only consider Thomas' statement for its proper impeachment purpose and not as substantive evidence.

C. THE REMAINING SUBSTANTIVE EVIDENCE IS NOT SUFFICIENT TO SUPPORT A FINDING THAT AARON OWENS IS GUILTY OF FAILURE TO REGISTER.

The State did not present sufficient substantive evidence to prove that Aaron did not live at the address where he registered.

As noted above, it is presumed that the judge in a bench trial follows the law and considers evidence solely for proper purposes. *Adams*, 91 Wn.2d at 93; *Miles*, 77 Wn.2d at 601; *Bell*, 59 Wn.2d at 360. This presumption is inapplicable when the judge actually "consider[ed] matters which are inadmissible when making his [or her] findings." *Miles*, 77 Wn.2d at 601. Thus, "[a] defendant can rebut the presumption by showing the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise

would not have made.” *State v. Read*, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002) (citing *Greater Kan. City Laborers Pension Fund v. Superior Gen. Contractors, Inc.*, 104 F.3d 1050, 1057 (8th Cir.1997)).

For example, in *State v. Clinkenbeard*, statements by the victim to other witnesses acknowledging that she and the defendant had sexual intercourse were properly admitted as prior inconsistent statements for impeachment purposes after the victim denied at trial that she had ever had intercourse with Clinkenbeard. 130 Wn. App. at 558-59. But the State later used these statements as substantive evidence of guilt in its closing statements to the jury. 130 Wn. App. at 568. On appeal, Clinkenbeard challenged the State’s use of the statements as substantive evidence and challenged the sufficiency of the remaining evidence to prove his sexual misconduct with a minor conviction. The appellate court agreed with Clinkenbeard and reversed the conviction:

Mr. Clinkenbeard's assertion presents two questions for review. First, did the State improperly use impeachment evidence as substantive evidence of guilt? Second, if the impeachment statements were improperly used, was the remaining evidence sufficient to support the conviction? From the record before this court, it appears that the State did use impeachment evidence as substantive evidence of guilt, and that this was the sole evidence of the

essential element of sexual intercourse in this case. Because there was no other evidence from which a reasonable jury could have found the essential element of sexual intercourse, we hold that there was insufficient evidence to convict Mr. Clinkenbeard of sexual misconduct with a minor and reverse his conviction with prejudice.

*Clinkenbeard*, 130 Wn. App. at 568.

Likewise, it is clear from the record and the written findings in this case that the judge improperly treated Thomas' statement as substantive evidence. In its oral ruling, the court twice referred to Thomas' statement to Sergeant Simper that Aaron did not live at the Maxine Street address. (06/18/19 RP 97-98) And in its written findings of fact, the court states:

8. Sergeant Simper did not see Aaron Owens but contacted Thomas Owens who reported that his son Aaron Owens did not live with them.

...

10 Sergeant Simper's testimony was credible, including where he relayed that Thomas Owens had told him that Aaron Owens did not live at 2409 Maxine St. SE, Lacey, Washington.

(CP 16) Thus, it is clear that the trial court did use impeachment evidence as substantive evidence of Aaron's guilt.

The remaining findings of fact are not sufficient to support the trial court's conclusion that Aaron was guilty because he "was not residing at 2409 Maxine Street...which is the address he was

registered at[.]” (CP 16) *Homan*, 181 Wn.2d at 105-106. The trial court’s written findings relating to Aaron’s residency are as follows:

5. On May 21, 2018, Aaron Owens updated his address with the Thurston County Sheriff’s Office by signing a registration form which informed him of his duty to register and gave his new address as 2409 Maxine St. SE, Lacey, Washington.
6. During the dates of June 21, 2018 to July 2, 2018, Mr. Owens was registered as residing at his father’s (Thomas Owens), residence located at 2409 Maxine St. SE, Lacey, Washington.
7. On June 21, 2018, Sergeant Simper attempted to verify Aaron Owens’ address by going to 2409 Maxine St. SE, Lacey, Washington.
8. Sergeant Simper did not see Aaron Owens[.]
9. Thomas Owens’ testimony was not credible.
10. Sergeant Simper’s testimony was credible[.]
- ...
12. Aaron Owens’ testimony was credible at times, but the testimony about his level of contact with his father and his level of contact with the 2409 Maxine St. SE address was not credible.

(CP 16) The fact that Sergeant Simper did not see Aaron Owens at the Maxine Street address on June 21, 2018, does not prove that Aaron did not live at that address. No “fair-minded person” could find that Aaron did not reside at the Maxine Street address based only on the fact that Sergeant Simper did not see Aaron at that house on one occasion. *Homan*, 181 Wn.2d at 106.

But even viewing the additional trial testimony in the light

most favorable to the State, the evidence is still legally insufficient to support the trial court's finding of guilt. *Pleasant*, 38 Wn. App. at 80. Sergeant Simper testified that he did not see Aaron at the Maxine Street house when he arrived to verify his residency. (06/18/19 RP 31-32) Thomas stated that at some point in the past year Aaron lived elsewhere. (06/18/19 RP 22-23, 24) Aaron testified that despite living in the same home with his father, they had not seen each other in person in quite some time. (06/18/19 RP 52, 80-81) These facts do not prove that Aaron was not residing at the Maxine Street address between June 21 and July 2, 2018.

The fact that Thomas' and Aaron's explanations about living arrangements were not credible is irrelevant, because it is not the defense's burden to prove where Aaron resided during the charging period. The State bears the full constitutional burden of proving that Aaron did not live at the Maxine Street residence. The State did not meet its burden with testimony that Aaron was not at the house at the exact moment that Sergeant Simper arrived to verify his residency.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of

fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Because the State failed to prove that Aaron did not live at his registered address during the charging period, and because the trial court's findings do not support such a conclusion, Aaron's conviction must be reversed and dismissed with prejudice.

#### **V. CONCLUSION**

The substantive evidence did not establish that Aaron was not residing at the Maxine Street address, and therefore did not prove that he was guilty of failure to register as sex offender. Aaron's conviction must be reversed and dismissed with prejudice.

DATED: December 30, 2019



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STEPHANIE C. CUNNINGHAM  
WSB #26436  
Attorney for Aaron Joseph Owens

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STATE OF WASHINGTON,  
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Appellant.

DECLARATION OF COUNSEL RE:  
ATTEMPTED SERVICE ON APPELLANT

I, STEPHANIE C. CUNNINGHAM, court-appointed counsel for Appellant AARON JOSEPH OWENS, declare as follows:

1. I was appointed to represent Appellant Aaron Joseph Owens on September 12, 2019. At that time, Mr. Owens was incarcerated at the Thurston County Jail. I corresponded with Mr. Owens at that facility, and asked Mr. Owens to notify me upon his release and to keep me informed of his current mailing address or other contact information.
2. I received a letter from Mr. Owens in November, and he indicated he would soon be released and gave me two possible mailing addresses where I could contact him.
3. On November 25, 2019, I sent Mr. Owens a letter addressed to one of the addresses provided. That letter was returned to me marked "unable to deliver as addressed" and "unable to forward." On December 13, 2019, I re-sent the letter to the second address Mr. Owens provided. That letter was also returned to me marked "unable to deliver as addressed" and "unable to forward."
4. On December 30, 2019, I checked the inmate rosters for the Thurston County Jail and also for surrounding county jails, and for the Department of Corrections. Mr. Owens is not listed as being in custody in any of those facilities.
4. I will continue to try to locate Mr. Owens in order to serve him with a copy of the Opening Brief and other relevant appeal documents.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: December 30, 2019



STEPHANIE C. CUNNINGHAM, WSB #26436  
Attorney for Appellant Aaron Joseph Owens

STEPHANIE C. CUNNINGHAM  
ATTORNEY AT LAW  
4616 25TH AVENUE NE, No. 552  
SEATTLE, WASHINGTON 98105  
(206) 526-5001 ♦ SCCAttorney@yahoo.com

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