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Court of Appeals
Division II
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No. 53925-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

AARON JOSEPH OWENS,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 18-1-01809-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 5

 1. The trial court properly denied Owens' CrR 7.4 motion for arrest of judgment because Owens failed to request that the statements of Thomas Owens testified to by Detective Sergeant Simper be limited to only impeachment and other substantive evidence supported the trial court's conclusion that Owens did not reside at Thomas Owens' residence 5

 2. Even if this Court finds that the trial court incorrectly considered Detective Sergeant Simper's testimony regarding Thomas' statements as substantive evidence, without the statements sufficient evidence supported the trial court's conclusion that Owens was guilty. 9

D. CONCLUSION..... 13

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Matthias v. Lehn & Fink Products Corp.</u> , 70 Wn.2d 541, 424 P.2d 284 (1967)	6
<u>Smith v. Shannon</u> , 100 Wn.2d 26, 666 P.2d 351 (1983)	7, 8
<u>State v. Adams</u> , 91 Wn.2d 86, 586 P.2d 1168 (1978)	8
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990)	10
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980)	10
<u>State v. Longshore</u> , 141 Wn.2d 414, 5 P.3d 1256 (2000)	5
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	10

Decisions of the Court of Appeals

<u>Ives v. Ramsden</u> , 142 Wn. App. 369, 174 P.3d 1231 (2008)	11
<u>Spencer v. Badgley Mullins Turner PLLC</u> , 6 Wn. App.2d 762, 432 P.3d 821 (2018)	7
<u>State v. Barber</u> , 38 Wn. App. 758, 689 P.2d 1099 (1984)	7
<u>State v. Clinkenbeard</u> , 130 Wn. App. 552, 123 P.3d 872 (2005)	9
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992)	10

Statutes and Rules

CrR 7.4(a)(3).....	5
ER 103.....	6
ER 105.....	7
ER 613.....	7
ER 801(d)(1).....	7

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied a motion for arrest of judgment when Owens failed to request that the trial court limit the use of statements to impeachment only and other substantive evidence supported the trial court's decision.

2. Whether substantial evidence supported the trial court's finding that Owens did not reside at his registered address when the evidence is viewed in a light most favorable to the state and statements to Detective Sergeant Simper from Thomas Owens are viewed only as impeachment evidence.

B. STATEMENT OF THE CASE.

1. Procedural History.

The Appellant, Aaron Joseph Owens,¹ was charged with one count of failure to register as a sex offender alleged to have occurred on or between June 21, 2018, and July 2, 2018. CP 3. Owens waived his right to a jury trial and proceeded to a bench trial

¹ To avoid confusion, Aaron Owens will be referred to as "Owens" or "Aaron Owens" herein and his father Thomas Owens will be referred to as "Thomas" or "Thomas Owens."

on June 18, 2019. CP 6, RP 1.² Following the bench trial, the trial court entered findings and conclusions finding Owens guilty of the offense charged. CP 15-17.

After the trial court's oral verdict, defense counsel for Owens indicated "there may be an evidentiary basis to ask the court to reconsider its ruling." RP 104. Defense counsel later stated, "it's the notion of whether or not the court can consider Sergeant Simper's statement that Mr. Thomas (sic) told him that Mr. Aaron Owens didn't live there as substantive evidence." RP 105. Defense counsel filed a motion for arrest of judgment nine days later. CP 18-19. The State responded and the trial court heard argument regarding the motion prior to sentencing. CP 20-22, 2 RP 5-10.

During the hearing, the trial court stated, "even if the Court were to not consider certain statements, there were other statements in the record that supported the Court's decision." 2 RP 7. The trial court denied the motion for arrest of judgment stating, "there are several bases for the Court's decision." 2 RP 10. The trial court then stated, "I also am essentially overruling that objection of Defense. There was no objection at the time of the testimony at trial

² The report of proceedings from the trial held June 18, 2019, is herein referred to as RP. The report of proceedings from the August 19, 2019, motion for arrest of judgment and sentencing is herein referred to as 2 RP.

for the Court to rule upon. And because of that, the standard is a bit higher.” 2 RP 10. The trial court then sentenced Owens to the low end of the standard range, 4 months, and allowed options as alternatives to total confinement. 2 RP 17, CP 27-40. This appeal follows.

2. Substantive Facts.

Owens had a duty to register from a prior sex offense conviction and had registered as residing at 2409 Maxine Street SE on May 21, 2018. RP 44, 51, 65. On June 21, 2018, Detective Sergeant Cameron Simper of the Thurston County Sheriff’s Office went to that address to conduct a residence check. RP 28-29. At the residence, Simper spoke with Thomas Owens and did not see anyone else there. RP 31. Thomas told Simper that “Aaron Owens was his son and that he did not live there.” RP 32.

At trial, when asked if Owens lived in his residence, Thomas testified “He was in and out of the house.” RP 21. He later stated, “when he wasn’t living with me, he had his own place, and that was right across the street from me.” RP 22. Thomas testified, “as far as telling you when he was there and when he wasn’t, I couldn’t, not a year ago.” RP 23. When asked how often his son resided in a house across the street, Thomas answered, “the whole time.” RP

23. Thomas indicated that Owens resided across the street for “over a year.” RP 23. Despite his testimony that he couldn’t say “a year ago,” in response to a question from defense counsel, Thomas answered that Owens was living with him between June and July “of last year.” RP 25.

When specifically asked about his contact with law enforcement, Thomas discussed contact with a Lacey Police Officer but indicated that he did not remember having contact with a Thurston County Sheriff’s Officer. RP 21. Thomas implied that the officer had come after he had retired, indicating “it was this year.” RP 17. Thomas retired in December of 2018. RP 16, 59. Owens later indicated that his father’s discussion with a Lacey Police Officer was related to a different incident that occurred in October. RP 55. Detective Sergeant Simper testified after Thomas Owens at trial. RP 26.

Owens testified on his own behalf. Owens indicated that Thomas had informed him that law enforcement had been to the house looking for him in June. RP 54. Owens testified that he had resided at 1444 Laredo Drive prior to moving to his father’s house. RP 56. He indicated that his prior address would not be mistaken

as across the street. RP 66. Owens later indicated, "I did not live across the street." RP 72. When asked, "In fact, your dad hadn't seen you for months, correct?" Owens responded, "That's not entirely accurate. We hadn't sat and had personal conversations face-to-face for months." RP 72-73. He also indicated there were many times where he would sleep in his car rather than a bedroom in the house. RP 73.

C. ARGUMENT.

1. The trial court properly denied Owens' CrR 7.4 motion for arrest of judgment because Owens failed to request that the statements of Thomas Owens testified to by Detective Sergeant Simper be limited to only impeachment and other substantive evidence supported the trial court's conclusion that Owens did not reside at Thomas Owens' residence.

Criminal Rule 7.4 provides that a defendant may bring a motion for arrest of judgment for "insufficiency of the proof of a material element of the crime." CrR 7.4(a)(3). Evidence is sufficient if any rational trier of fact, viewing the evidence in a light most favorable to the state, could find the elements of the charged crime beyond a reasonable doubt. State v. Longshore, 141 Wn.2d 414, 420-421, 5 P.3d 1256 (2000). Review of a trial court decision denying either a motion for directed verdict or a motion for arrest of judgment requires the appellate court to engage in the same inquiry

as the trial court. Id. at 420. An order granting a motion for arrest of judgment is appropriate if, after viewing the evidence in a light most favorable to the nonmoving party, the court determines there is no substantial evidence or reasonable inference to sustain a verdict for the non-moving party. Id.

In this case, the defense motion for arrest of judgment argued that evidence admitted during trial, that was not objected to, was not substantive and was, therefore, improperly utilized to support the trial court's finding that all elements of the offense were committed. CP 19. In its response to the motion, the State conceded that the testimony by Detective Sergeant Simper regarding statements made to him by Thomas Owens was hearsay. CP 21. The State argued that the failure to object to the evidence as hearsay allowed it to be used for any probative purpose and that the evidence supported the conviction even without consideration of the hearsay statements as substantive. CP 21-22.

In the absence of a proper objection to limit or exclude evidence, the evidence becomes part of the evidence in the case and may be considered by the trier of fact. ER 103; Matthias v. Lehn & Fink Products Corp., 70 Wn.2d 541, 424 P.2d 284 (1967). The State does not contest that the statement of Thomas that

Detective Sergeant Simper testified regarding did not qualify for admission as a prior inconsistent statement under ER 801(d)(1). Had an objection been made, the statement would have been admitted under ER 613.

When evidence which is admissible for one purpose but not admissible for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope. ER 105. Failure to request a limiting instruction waives any error that an instruction could have corrected. State v. Barber, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984). In a 2018 civil case, Division I of this Court found that a failure to request a limiting instruction in a bench trial waived error. Spencer v. Badgley Mullins Turner PLLC, 6 Wn. App.2d 762, 432 P.3d 821 (2018). That decision reflects the broader principle that parties before a court are required “to inform a court acting as a trier of fact of the rules of law that they wish the court to apply.” Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

By not requesting a limiting instruction, Owens did not inform the trial court of the law that he wished the trial court to apply prior to the court’s verdict. Despite a general presumption that the judge in a bench trial follows the law and considers evidence only for proper purposes, it is still required that the party seeking limited

admission notify the Court of the request. State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); Smith v. Shannon, 100 Wn.2d at 37. In Smith v. Shannon, our Supreme Court indicated, in the civil context, that failure to raise the issue during trial or in a motion for a new trial, waived the issue on appeal. Id. at 38.

In this case, Owens first raised the issue in a motion for arrest of judgment. During the hearing on the motion, the trial court stated, "even if the Court were to not consider certain statements, there were other statements in the record that supported the Court's decision." 2 RP 7. When the trial court denied the motion, the trial court stated, "there are several bases for the Court's decision." 2 RP 10. The trial court then stated, "I *a/so* am essentially overruling that objection of Defense. There was no objection at the time of the testimony at trial for the Court to rule upon. And because of that, the standard is a bit higher." 2 RP 10 (emphasis added). By stating that there were several bases for the "Court's decision" the trial court was implicitly stating that it would have reached the same verdict if a timely objection had been made. It was proper for the trial court to deny the motion for arrest of judgment and it was further proper for the trial court to note that the

defense had not informed the court of the rules it wished the trial court to apply during the testimony.

Owens relies upon State v. Clinkenbeard, 130 Wn. App. 552, 123 P.3d 872 (2005), to support his contention that his motion for arrest of judgment should have been granted. In Clinkenbeard, Division III of this Court considered the appellant's claim that the trial court improperly permitted impeachment testimony to be used as substantive evidence of guilt in his case. Id. at 568. Following an objection to testimony, the State "represented to the court that any questions directed" to the witness "were solely for impeachment purposes." Id. 570. Clinkenbeard is distinguishable from this case because a proper and timely objection was made and the trial court limited the scope of the testimony. The case is further distinguishable because the testimony was the "only evidence that established sexual intercourse," an essential element of the charge against Clinkenbeard. As the trial court noted in this case, there were other statements in the record that supported the trial court's decision. 2 RP 7.

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2. Even if this Court finds that the trial court incorrectly considered Detective Sergeant Simper's testimony regarding Thomas' statements as substantive evidence, without the statements sufficient evidence supported the trial court's conclusion that Owens was guilty.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). A reviewing court reviews a finding of

fact mislabeled as a conclusion of law as a finding of fact. Ives v. Ramsden, 142 Wn. App. 369, 395 n. 11, 174 P.3d 1231 (2008).

If findings of fact 8 and 9 are redacted to remove the substance of Thomas' statement to Detective Sergeant Simper, the trial court still found that "Between June 21, 2018 and July 2, 2018, Aaron Owens was not residing at 2409 Maxine St. SE, Lacey, Washington, which is the address he was registered at during that time period." CP 16. Despite the fact that the finding was included in a conclusion of law, it was still a factual finding. The finding was supported by the evidence when viewed in a light most favorable to the State.

When asked if Owens lived at his house during the charged time period, Thomas stated, "He was in and out of the house." RP 21. He later stated, "when he wasn't living with me, he had his own place, and that was right across the street from me." RP 22. Thomas testified, "as far as telling you when he was there and he when he wasn't, I couldn't, not a year ago." RP 23. When asked how often his son resided in a house across the street, Thomas answered, "the whole time." RP 23. Despite his testimony that he

couldn't say "a year ago," Thomas later answered that Owens was living with him between June and July "of last year." RP 25.

When Detective Sergeant Simper went to the residence to check to see if Owens was in fact residing there, Owens was not there. RP 31-32. Owens testified that he had resided at 1444 Laredo Drive prior to moving to his father's house. RP 56. He indicated that his prior address would not be mistaken as across the street. RP 66. Owens later indicated, "I did not live across the street." RP 72. When asked, "In fact, your dad hadn't seen you for months, correct?" Owens responded, "That's not entirely accurate. We hadn't sat and had personal conversations face-to-face for months." RP 72-73. He also indicated there were many times where he would sleep in his car rather than a bedroom in the house. RP 73.

Considering the statement relayed from Detective Sergeant Simper as impeachment only, the statement supports the trial court's determination as to Thomas' credibility. The trial court stated, "I find that Thomas Owens' testimony was conflicting, inconsistent, and at critical points not credible." RP 97. The trial court was certainly in a position to find Thomas' testimony that

Owens resided across the street the whole time credible and his testimony that Owens resided in his residence not credible.

In a light most favorable to the State, the trial court could conclude that Owens was not residing at the Maxine Street residence. This is especially true considering the contradictions in Owens' testimony and the differences between his testimony and Thomas' testimony. This is true even without considering Thomas' statement to Detective Sergeant Simper as substantive evidence. As the trial court stated, "there were several bases upon which the Court made its findings, not just one. And so even if the Court were not to consider certain statements, there were other statements in the record that supported the Court's decision." 2 RP 7.

Sufficient evidence supported the trial court's finding that Owens was not residing at his registered address. The trial court properly denied the motion for arrest of judgment.

D. CONCLUSION.

The trial court properly denied Owens' motion for arrest of judgment because Owens failed to request that the evidence be limited at trial and because substantive evidence, other than hearsay statements, supported the trial court's conclusion that

Owens was not residing at his registered address. The State respectfully requests that the conviction and sentence be affirmed.

Respectfully submitted this 28th day of February, 2020.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: February 28, 2020

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

February 28, 2020 - 9:13 AM

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