No. 101312-4

Court of Appeals No. 55248-5-II
Pierce County 19-1-03970-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff / Respondent,

v.

JESSE D. HALE,
Defendant / Petitioner.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO,
AND
THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
PIERCE COUNTY

PETITION FOR REVIEW

KATHRYN RUSSELL SELK, No. 23879
Counsel for Petitioner

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street,# 176
Seattle, Washington 98115
(206) 782-3353

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

FEDERAL CASES

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. *IDENTITY OF PETITIONER AND DECISION BELOW*

Jesse Hale, Petitioner, appellant below asks the Court to grant review of a portion of the opinion issued by the Court of Appeals, Division Two, on August 23, 2022, in *State v. Hale,* __ Wn. App.2d ___, (2022 WL 3591797) (unpublished) (*see* Appendix A).

B. *ISSUES PRESENTED FOR REVIEW*

1. Where the charge is failing to register as a sex offender and the only issue at trial is whether the accused was residing in a group home where he was registered, is the testimony of a Department of Corrections Community Corrections officer about whether she believed he was living at the required address improper opinion testimony in violation of the right of the accused to a fair trial with the jury serving as sole trier of fact?

   This Court has set forth factors to consider in determining when testimony amounts to an improper opinion. Should review be granted under RAP 13.4(b)(1) because the Court of Appeals decision misapplied and changed two of those factors?

2. Should review be granted because the Court of Appeals used an incomplete analysis regarding the prosecutorial misconduct and further improperly found certain testimony was not hearsay?

3. Mr. Hale agreed to a factual stipulation in order to prevent the jury from hearing the details of a prior sex offense. On review, he raised several arguments challenging the constitutionality of

> the juvenile sex offender registration statute. Division Two then declared that these issues could not be addressed under the "invited error" standard.
>
> Should review be granted to address whether this significant extension of the "invited error" standard was proper given the importance of this kind of trial stipulation?

C. *STATEMENT OF THE CASE*

Petitioner Jesse D. Hale was convicted by a jury in Pierce County superior court of failing to register as a sex offender as a third offense. CP 3-4, 91-109; RCW 9A.44.128, RCW 9A.44.130, RCW 9A.44.132(1)(b).

When he was 13 years old, Mr. Hale was accused of a sex offense and at 14, as a result, he was ordered to register as a sex offender. RP 191, 199-200. Years later in this case he was accused of failing to register as a third offense. CP 3-4.

The accusation was that Mr. Hale was not residing in the group home where he was officially registered. Mr. Hale, who was homeless, had signed a "month to month, indefinite" lease for a bed, shelf, and a drawer in a "three-man room" at that group home. RP 162. Although he paid for that lease for several months ahead in August of 2019, on August 27 the onsite manager for the group home contacted Mr. Hale's

Community Corrections Officer ("CCO") and a detective in the sex offender registration unit about whether Mr. Hale was still living in the home. RP 162-69, 174, 231-43.

The manager admitted it was not his job to keep track of the residents and he often did not see the people who lived at the home. RP 158-61.

Mr. Hale's new CCO, Sally Saxon, had gotten verification of the address from Mr. Hale on August 21. RP 234-36. After the manager's call, however, the CCO went to the group home and saw, on the bed Mr. Hale was said to be renting: clothing, jeans, a shirt, a "lot" of shoes, and mail addressed to Mr. Hale. RP 234-36. The building registry showed that night that Mr. Hale had signed in. RP 165.

The only question at trial was whether Mr. Hale was still "residing" in the room for the purposes of the sex offender registration requirement. Before trial, Mr. Hale moved to exclude opinion testimony from any officers that Mr. Hale was not living there. RP 17-18, 28-31. He argued such testimony would amount to "implied opinion of guilt or innocence." RP 18-29. He also pointed out that jurors were more likely to give special weight to an officer than "a standard witness," so an

officer's testimony, "I believe he wasn't living there" would be highly prejudicial. RP 29-31.

One of the problems was that it was a DOC condition that Mr. Hale sleep at the group home every night, but that was not the requirement to prove "residence" for the purposes of the sex offender registration statute. RP 17-19. Counsel pointed out that a DOC opinion that Mr. Hale was not meeting that DOC condition was irrelevant and would be confusing and prejudicial. RP 29-31. The trial court told counsel, "object at the time." RP 31.

Throughout trial, the state's attorney continued to try elicit opinions from officers about whether they thought Mr. Hale was living at the home. A detective who received an email from the group home manager told jurors that he had "received information that Mr. Hale possibly was not living in his registered address." RP 174. Counsel objected, "[h]earsay," and the court allowed the evidence only for explaining the investigation but "not for any other purpose." RP 174.

A moment later, the prosecutor again asked the detective, "were you able to verify whether the defendant was

there or not?" RP 176. Again, counsel objected to that hearsay; again the objection was sustained. RP 176. The prosecutor then asked the detective why he had not done a "verification check" by going to the home to make sure Mr. Hale was living at the house and the detective started saying he "had information that [Mr. Hale] wasn't there, so I - - ." RP 176-77. Counsel's hearsay objection was sustained and the testimony stricken. RP 176-77.

A little later, on direct examination of CCO Saxon, the prosecutor asked the CCO if she had received "information that the defendant was no longer residing at the address." RP 231. Counsel's hearsay objection was overruled, with the trial court saying it was admissible as "information acted on." RP 231. The CCO said she had received such information from the group home's manager and the prosecutor asked, "did you confirm with [the manager] whether or not the defendant was there?" RP 232. Again, the court sustained a hearsay objection. RP 232.

The prosecutor then asked the CCO if she took "any additional steps to verify whether the defendant was at that address." RP 232. CCO Saxon said she had sent an officer to

investigate and started relating what the officer had reported back when the defense objected, again, and the court sustained the hearsay objection, striking the improper answer. RP 232-33.

Next, the CCO tried to declare what others had told her about Mr. Hale, saying, "we verified through talking to other housemates that Mr. Hale had not been - - " RP 233-34. Counsel's hearsay objection cut her off and the objection was sustained. RP 233-34. The CCO said officers doing a "house check were trying to "verify" someone was living at a particular address and had property there, then went on, saying the role was "to also verify that they are residing at the address every single night, as required." RP 234. The defense objected under ER 404(b) and the objection was sustained, with the jury instructed to disregard. RP 234.

Just a moment later, the prosecutor again tried to elicit similar testimony, asking the CCO, "on that day when you went to do the home verification check, were you able to gather whether or not the defendant was living there?" RP 237-38. The CCO said, "I was able to verify that he was not." RP 238. Counsel objected that this testimony called for "a

legal conclusion" and "[g]oes to the ultimate issue," but the judge sustained only as to "hearsay." RP 238. After the judge suggested the prosecutor rephrase, the following exchange then occurred:

> [PROSECUTOR]: Based off of your personal knowledge and observations of what was seen at the house during the verification check, **did you form an opinion of whether the defendant was there?**
>
> [OFFICER]: **It was apparent that he was not living there.**

RP 238 (emphasis added).

In closing argument, the prosecutor argued that Mr. Hale was guilty of failing to register because he was "no longer living" at the group home either having moved to a new "fixed residence" or no longer having such a residence. To prove Mr. Hale was not living at the group home, the State relied on his statements but also said that "we know" that Mr. Hale "**was no longer living at the registered address"** because of the detective's testimony that she had "**received information that he was no longer living there"** - even though that evidence was not admitted as substantive evidence, as counsel pointed out through objection. RP 290 (emphasis

added). The prosecutor continued that the detective had not just "received information the defendant was not there" but that the house manager had "confirmed via email . . . that the defendant in fact - - " RP 291. Counsel objected that this testimony was excluded as hearsay, and the court sustained the objection. RP 291.

The prosecutor persisted, however, declaring that the detective "**confirmed the defendant was no longer living at that address.**" RP 291 (emphasis added). Counsel repeated, "[s]ame objection," and the court sustained, instructing the jury to disregard. RP 291. The prosecutor then said that the group manager had "realized the defendant wasn't there" and testified that there was "no indication to him that the defendant was living at that address." RP 291-92. Regarding the probation officer, the State's attorney told jurors, "[y]ou also **heard from the defendant's probation officer, Sally Saxon, that the defendant was not living there.**" RP 291 (emphasis added). The prosecutor said the CCO had "confirmed" with the house manager "that the defendant hadn't stayed there," and then gone to the home "**to verify in person for herself that the defendant was no longer at that**

address." RP 291-92 (emphasis added).

The prosecutor then listed what the CCO said she had seen at the home as "indicative of the fact that he wasn't staying there." RP 291-93. One of those "facts" was that the CCO had said "**none of his personal belongings in those drawers.**" RP 293 (emphasis added). Counsel objected that this "fact" was excluded as hearing and the judge just said the jury would "determine the facts that were proved." RP 293. The prosecutor then repeated this "fact," stating the CCO had "**determined that those were his drawers, but there were things in those drawers that didn't belong to the defendant but actually belonged to other people**." RP 293 (emphasis added). Counsel repeated the objection with the same result. RP 293. The prosecutor then declared, "[b]ecause the defendant wasn't living there." RP 293.

The prosecutor also told jurors the defendant had admitted "**that he's not staying at the house every night, as he's supposed to do."** RP 29 (emphasis added). Over objection to "[f]acts not in evidence," the prosecutor said that the manager had rented out the bed "after he realized the defendant was no longer living there[.]" RP 300.

D. *ARGUMENT*

1. REVIEW SHOULD BE GRANTED TO ADDRESS DIVISION TWO'S FAILURE TO APPLY THE PROPER STANDARDS FOR IMPROPER OPINION EVIDENCE

This Court has repeatedly taken review of cases in order to clarify the law on improper opinion testimony of witnesses. *See, e.g.*, *State v. Quaale*, 182 Wn.2d 191, 340 P.3d 123 (2014); *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008); *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007); *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002); *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001); *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1985); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987).

It should do so again here. Division Two's decision fails to follow several of this Court's decisions and depends upon reasoning which is legally unsound.

Under ER 702, an expert witness may "express opinions concerning their fields of expertise when those opinions will assist the trier of fact." *Montgomery*, 163 Wn.2d at 590. Under ER 701, lay witnesses may give opinions based on "rational perceptions that help the jury understand the witness' testimony and that are not based upon scientific or specialized

knowledge." 163 Wn.2d at 591.

However, this Court has held that it is unfairly prejudicial for any witness to testify to her opinion as to the veracity or credibility of the defendant of any witness or to give an opinion as to the defendant's guilt, "whether by direct statement or inference." *Black*, 109 Wn.2d at 348; *see Kirkman*, 159 Wn.2d at 197; *Demery*, 144 Wn.2d at 759. Such opinions are improper because they violate the defendant's constitutional right to a jury trial, which includes the right to the "independent determination of the facts by the jury," i.e., invade "the exclusive province of the finder of fact." *Demery*, 144 Wn.2d at 759 (*quoting*, *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993)); *Black*, 109 Wn.2d at 348. Even if there is no objection below, where there is an "explicit or almost explicit" opinion on the defendant's guilt or veracity or that of a victim the error may compel reversal as a manifest constitutional error. *Kirkman*, 159 Wn.2d at 936.

This Court has set forth factors the reviewing courts are to use to determine whether statements are impermissible

opinion testimony. *See Demery*, 144 Wn.2d at 765. Those factors are:

> (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence fbefore the trier of fact.

Quaale, 182 Wn.2d at 200. Division Two cited this standard, but then failed to properly apply it, in multiple ways.

This Court has held that the testimony of a state officer may be especially prejudicial because "an officer's testimony often carries a special aura of reliability." *Kirkman*, 159 Wn.2d at 928; *Demery*, 144 Wn.2d at 765.

Division Two recognized that CCO Saxon was a probation officer, but then departed from this Court's holdings. *See* App. A at 8. Instead, citing *Kirkman*, Division Two held that jurors would not give the CCO's testimony special weight because she only "testified as a fact witness," so that

> her opinion that Hale was not living in the house was a lay opinion based on her personal knowledge and observations and *did not carry any special indication of reliability that may be present with scientific or expert testimony*.

App. At at 8 (emphasis added).

This Court should grant review under RAP 13.4(b)(1).

The Court has never held that the special aura of reliability government officers hold with jurors is based upon whether the officer is a "fact witness" or giving "scientific or expert testimony." *See Montgomery*, 163 Wn.2d at 595; *Demery*, 144 Wn.2d at 765. In *Demery*, the Court held that "[a]n officer's live testimony offered during trial, like a prosecutor's statements made during trial," may often carry such an aura and thus be "especially likely" to influence jurors. *Demery*, 144 Wn.2d at 762-63. The Court did not focus solely on the content of the testimony in reaching that conclusion. *Id*.

Notably, *Kirkman* does not hold as Division Two here indicated and the facts of that case are completely different. In *Kirkman*, a detective who interviewed a victim prior to trial and gave her a "competency protocol" first testified at trial about that protocol. 159 Wn.2d at 930-31. *Kirkman* did not involve an officer testifying as to his opinion about credibility, veracity or guilt.

In *Kirkman*, however, the Court indicated that jurors will not give the testimony of an officer a "special aura of reliability" if the officer is testifying solely about a protocol used pretrial. 159 Wn.2d at 931. This seems to suggest that

the juror will stop seeing a testifying officer in a positive light and giving that officer special status as a witness simply based on the content of the testimony, rather than his status. It is this language in *Kirkland* which the court of appeals misread as holding that jurors suddenly give no extra reliability to an officer's testimony if the officer testifies as a "fact witness" instead of an expert. *See* App. A at 8.

This Court should grant review to clarify that jurors give special weight to testimony given by officers such as CCO Saxon because of the status of the officer as an agent of the government and that when an officer tells jurors her belief that a sex offender is not living at the registered address, that opinion is especially problematic and prejudicial because of its unique weight.

Division Two also failed to properly apply the second, third, fourth and fifth factors for determining when testimony is improper opinion. The Court said the "nature of the testimony" and charges showed that the testimony was not an "opinion on Hale's guilt," because the CCO did not declare her opinion on "whether Hale had a duty to register or knowingly failed to register." App. A at 8-9. For the fourth

and fifth factors, the type of defense and other evidence before the jury, the Court of Appeals declared that the CCO's opinion that Mr. Hale was not residing at his registered address was not an improper opinion on guilt. App. A at 9.

These holdings mistake the law. As Division Two recognized, a person *not residing* at their registered address is guilty of failing to register if they have not either changed their registered address or reported themselves for no longer having a fixed residence. App. A at 7; *see* RCW 9A.44.130(6)(a). A "fixed residence" is specifically defined as a building a person habitually, lawfully uses as a living quarties "a majority of the week," even if it is a shelter or group home or is temporary, so long as the person has a personally assigned living space where they are permitted to store belongings. *See State v. Batson*, 194 Wn. App. 326, 377 P.3d 238 (2016); RCW 9A.44.128(5). The question of whether Mr. Hale was residing at the group home was an *essential* part of proving guilt, and the CCO's opinion went directly to that issue.

This Court should grant review once again to address the confines of our law on improper opinion testimony and the

proper application of the factors this Court has set forth for determining when an officer's testimony is such testimony.

2. DIVISION TWO ERRONEOUSLY HELD THAT THE INADMISSIBLE HEARSAY AND PROSECUTORIAL MISCONDUCT DID NOT EXACERBATE THE ERRORS

Review should also be granted because the lower appellate court decision again failed to follow the standards set forth in this Court for examining the prosecutorial misconduct issue and further improperly determined that certain evidence was not hearsy.

After it erroneously found that CCO Saxon's testimony was not improper opinion, the Court of Appeals then did not correctly apply the standard for determining when admitted prosecutorial misconduct requires reversal. On appeal, the State conceded that the prosecutor committed such misconduct by citing as substantive evidence the lower court explicitly limited to other purposes at trial. App. A at 11-13.

The Court of Appeals properly accepted the State's concession about those repeated improprieties, but then declared there was "no substantial likelihood" the detective's testimony affected the verdict. App. A at 12. However, it used an incomplete analysis.

An appellate court determines if there is a "substantial likelihood" a prosecutor's misconduct affected the verdict by looking at the prosecutor's statements "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied sub nom Russell v. Washington*, 514 U.S. 1129 (1995). Division Two only used one part of this analysis, reaching its conclusion based solely on the jury instructions, i.e., that the jury was properly instructed about the limits during the testimony and was also instructed that they were the sole judges of the evidence. App. A at 12.

The Court of Appeals thus failed to apply the proper analysis and consider the total argument, issues in the case and evidence before the jury in addition to the jury instructions. Application of all of those considerations, however, shows more than a reasonable probability the misconduct affected the verdict. The State's entire focus at trial was to prove that Mr. Hale did not reside at the address he had put on his sex offender registration filings - the group home. The evidence the comments address are the heart of

the dispute at trial - whether Mr. Hale was residing at that home. And the prosecutor *repeated* the mistake.

Division Two also held it was not error for the CCO or officer to testify about what others had said about whether items in the room belonged to Mr. Hale, whether any of his property was in the assigned drawers, and whether the property in those drawers "was verified to be of other individuals in that home" as a result of the CCO's conversations with them. RP 234-35, 240-41. Although this was the only evidence about the drawers and whether Mr. Hale had items in them, and although the prosecutor specifically relied on this evidence in closing, Division Two held that it was not "hearsay." App. A at 10-11.

This Court should grant review on this issue. Throughout trial, the parties fought over the State's repeated efforts to admit testimony from the CCO and detective about what others told them. *See* RP 17, 19, 28, 31, 174, 176, 231-34, 237-38. At the beginning of CCO Saxon's testimony it became clear that she was reporting what other people said they did, for example, she said that one of the CCO's went over and "verified" that a bed did not look lived in and the court

sustained a hearsay objection and struck the testimony. RP 232. The CCO said that she verified through "talking to other housemates" that Mr. Hale had not been there - hearsay objection sustained. RP 233-34. The CCO admitted the shelves and drawers were being used and the many people lived in the home. RP 240-41. In context it was clear that the CCO's "verification" was to talk with people at the home. Given that the entire case was about whether Mr. Hale was residing in the home, the hearsay was highly prejudicial.

These errors did not occur in a vacuum. They permeated the entire trial. And they were all for the same thing - so the State could present to jurors the improper declarations from DOC and police officers that they had heard or thought or believed that Mr. Hale was not residing at the group home at the relevant time. If this Court grants review on either the improper opinion testimony or these evidentiary errors and misconduct, it should grant review on all, because they all corroded the trial.

3. REVIEW SHOULD ALSO BE GRANTED ON WHETHER AN *OLD CHIEF* TYPE OF TRIAL STIPULATION WAIVES CHALLENGES TO THE CONSTITUTIONALITY OF THE UNDERLYING CONVICTION

Review should also be granted on the issues relating to the constitutionality RCW 9A.44.130 as it requires the same sex offender registration rules for both adults and children and deprives juvenile courts of discretion. Mr. Hale argued:

1) RCW 9A.44.130 is unconstitutional under the Eighth Amendment and our more protective Article 1, § 14 when applied to youth, because it imposes a mandatory lifetimes adult sex offender registration requirement for a crime committed as a 13-year old, which is "categorically disproportionate" under *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018);

2) the registration requirements are <u>punishment when imposed on a juvenile</u> under RCW 9A.44.130;

3) RCW 9A.44.130 runs afoul of equal protection in light of this Court's decision in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017);

4) applying more onerous registration requirements enacted after the conviction violated *ex post facto* prohibitions;

5) imposing the automatic, mandatory requirement under the statute violates state and federal substantive and procedural due process rights.

See Brief of Appellant at 19-67.

Instead of addressing those arguments Division Two

held that the "invited error" doctrine applied and that Mr. Hale was not allowed to raise the challenges because he entered into an *Old Chief* style stipulation in order to prevent the State from presenting evidence that his prior conviction was for First Degree Rape of a Child. App. A at 14-15. This Court should grant review of this unwarranted extension of the doctrine of invited error and to clarify the application of a limited *Old Chief* style factual stipulation at trial.

An *Old Chief* stipulation occurs in cases where evidence of another crime of the accused is an essential part of the State's case, such as when having a prior felony is an element. *See Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (1998). In such cases, in order to avoid the greater prejudice of specifics of the prior crime, the accused may agree to stipulate to the minimum facts necessary to prove the relevant element. *See Johnson*, 90 Wn. App. at 62-63.

Thus, in *Johnson*, where the charged crime required proof that the accused was a "felon" and the prior felony was a highly prejudicial sex crime, it was error to refuse to stipulate to the more benign "felon" designation because introduction

of the specific prior risked inciting jurors to declare guilt based on an emotional response to the sex offense rather than the evidence properly admitted at trial. 90 Wn. App. at 63. Such a stipulation is important because the unfair prejudice of a prior offense may substantially outweigh its relevance, but a stipulation provides the government the evidence it needs without invoking such prejudice. *See State v. Garcia*, 177 Wn. App. 769, 777-78, 313 P.3d 422 (2013), *review denied*, 179 Wn.2d 1026 (2014).

Here, the trial stipulation provided:

> The parties have agreed that certain facts are true beyond a reasonable doubt. You must accept as true beyond a reasonable doubt that the person before the court, who has been identified in the charging document as the defendant, was previously convicted of a felony sex offense and, due to that conviction, that [sic] the defendant was required to register in the State of Washington as a sex offender between August 28, 2019[,] and October 29, 2019. The stipulation is to be considered evidence only of elements 1 and 2 of the charged offense. You are not to speculate as to the nature of the prior conviction. You must not consider the stipulation for any other purpose.

CP 50. Division Two found that this stipulation precluded Mr. Hale from challenging the constitutionality of the registration statute on appeal under the doctrine of "invited error." App. A at 14-15.

This Court should grant review. Under the "invited error" doctrine, a party cannot create an error and then complain of it on appeal. *In re Thompson*, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000). Thus, a defendant cannot enter a plea agreeing that he understood he would receive consecutive sentences and then, on appeal, argue about the consecutive nature of the sentences. *State v. Cooper*, 63 Wn. App. 8, 9, 13, 816 P.2d 734 (1991). Nor can a defendant successfully request a jury instruction and then object that the instruction he requested was improper. *See State v. Henderson*, 114 Wn.2d 867, 869-70, 792 P.2d 514 (1990).

The point of the invited error doctrine is to avoid misconduct of a party by deliberately setting up an error at trial. *See State v. Pam*, 101 Wn.2d 507, 515, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995).

Here, the stipulation was entered to avoid the jury hearing that the prior conviction for which he had to register was *first degree rape of a child*. The stipulation was limited in purpose to proving the two elements. There is no indication that the "affirmative conduct" of entering the stipulation was

done in order to set up an error for later appeal. Notably, the duty to register as a sex offender arises pursuant to legislative mandate, not by order of the court. *State v. Acheson*, 75 Wn. App. 151, 155, 877 P.2d 217 (1994).

Because the Court of Appeals erroneously applied the doctrine of "invited error," it did not examine any of his substantive arguments and they should also now be addressed. App. A at 14-15.

E. *CONCLUSION*

For the reasons stated herein, the Court should grant review.

DATED this 22nd day of September, 2022.

ESTIMATED WORD COUNT: 4825

Respectfully submitted,

KATHRYN RUSSELL SELK, No. 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, PMB #176
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at County Prosecutor's Office via the Court's upload service and caused a true and correct copy of the same to be sent to appellant by depositing in U.S. mail, with first-class postage prepaid at the following address: Mr. Jesse Hale, DOC 887599, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA. 98331.

DATED this 22nd day of August, 2022.

KATHRYN RUSSELL SELK, No. 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, PMB #176
Seattle, Washington 98115
(206) 782-3353

Filed
Washington State
Court of Appeals
Division Two

August 23, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSE DANNEL HALE, Appellant.	No. 55248-5-II UNPUBLISHED OPINION

LEE, J. — Jesse D. Hale appeals his conviction for failure to register as a sex offender (third offense). Hale argues that the trial court erred by admitting improper opinion testimony and inadmissible hearsay, the prosecutor committed misconduct during closing argument, the trial court erred by imposing community custody supervision fees, and the registration requirement is unconstitutional because he was a juvenile at the time he committed the sex offense that resulted in the registration requirement.

We hold that the trial court did not err in its evidentiary rulings, the prosecutor's misconduct during closing argument was not prejudicial, remand is proper for the trial court to consider imposition of the community custody supervision fees because the record is unclear, and Hale's argument that the registration requirement is unconstitutional is not properly before this court. Accordingly, we affirm Hale's conviction but remand for the trial court to consider the imposition of community custody supervision fees.

FACTS

The State charged Hale with failure to register as a sex offender (third offense) between August 28, 2019 and October 20, 2019. Hale had a 1999 conviction for first degree rape of a child that required him to register as a sex offender. Hale was 13 years old when he committed first degree rape of a child.

Prior to trial, Hale moved to prohibit opinion testimony opining that Hale was not living at his registered address. The trial court deferred ruling on the motion and instructed Hale to object to any testimony he believed was improper.

At trial, Hale stipulated that he was previously convicted of a sex offense and that he "was required to register in the State of Washington as a sex offender between August 28th, 2019, and October 29th, 2019." 2 Verbatim Report of Proceedings (VRP) at 157. Hale had registered his address on August 16, 2019, as 2309 Fawcett Avenue.

Jason Turk, the manager of the house at 2309 Fawcett Avenue, testified that Hale had a signed lease agreement and had moved into the house. Turk saw Hale occasionally around the house, but not every day. Turk explained that although he was the house manager and he was responsible for enforcing house rules, he did not personally keep track of every house resident. The residents were also required to check in using a logbook, but that rule was not universally enforced. Turk testified that after August 28, there was no indication that Hale continued to live in the house. Turk did not see Hale after August 28. Turk also boxed up Hale's remaining belongings and rented his space to someone else on September 1.

Detective Christie Yglesias of the Tacoma Police Department was assigned to the sex offender registration unit. Detective Yglesias testified that she conducted an investigation into Hale because she received information that Hale was not living at his registered address. Hale objected, and the trial court ruled:

> I'm going to allow it only for the purpose of why she was investigating, not for the truth of the matter asserted. So the jury's only to consider that for the purposes of why she was investigating, not for any other purpose.

2 VRP at 174. Detective Yglesias explained that her investigation was conducted through email and she did not personally visit the house to verify whether Hale was living there.

Sally Ann Saxon was a probation officer with the Department of Corrections (DOC) monitoring Hale in August 2019. Saxon also received information that Hale was not living at his registered address. Hale objected to this testimony, but the trial court admitted the testimony for the limited purpose of explaining Saxon's actions. Saxon went to the home on August 29 to determine whether Hale was living there. Saxon testified:

> I received information that Mr. Hale had returned the night of the 28th to the residence and had been there for a short period of time. I—on the 29th, me and three other—two other [Community Correction Officers (CCOs)] went to the address and verified that Mr. Hale was not at the address, that there was nothing that had been moved from the previous day, including a roll of toilet paper the CCO had put on his pillow, which I observed that it was still there, and we verified through his talking to other housemates that Mr. Hale had not been—

2 VRP at 233. Hale objected to Saxon's testimony regarding the statements by other housemates as hearsay. The trial court sustained the objection.

Saxon also testified that she observed one pair of jeans and a shirt on the bed that was assigned to Hale, but did not find other clothing or hygiene items. She went on to testify:

> We also verified the areas that was assigned to him and to that bed. None of his property were in those drawers. The property that was in there was verified to be of other individuals in that home.

2 VRP at 235. Hale objected based on hearsay, and the trial court overruled his objection. Saxon also observed a toilet paper roll on Hale's bed. Saxon explained that CCOs sometimes placed strange items on a person's bed to see if they were moved the next day. The following exchange took place:

> [STATE:] Okay. And so on that day when you went to do the home verification check, were you able to gather whether or not the defendant was living there?
>
> [SAXON:] I was able to verify that he was not.
>
> [HALE]: Objection, Your Honor. Calls for a legal conclusion. Goes to the ultimate issue.
>
> [COURT]: Well, I'm going to sustain it on hearsay, not on ultimate issue, if the—to the extent the testimony's based on anyone else's observations. So if you want to rephrase it as to information she has personally seen, you can rephrase.
>
> [STATE:] Based off your personal knowledge and observations of what was seen at the house during the verification check, did you form an opinion of whether the defendant was there?
>
> [SAXON:] It was apparent that he was not living there.

2 VRP at 237-38. Saxon also explained that another person she was supervising had moved into Hale's bed at the house on September 1.

On September 4, Saxon received a voicemail from Hale. In the voicemail, Hale said that he was not at the house every night and knew that DOC had gotten the sign-in sheets from the

house. He said he had been to the house the night before DOC came but was not at the house in the morning after that.

Before closing argument, the trial court instructed the jury that the "lawyer's statements are not evidence." Clerk's Papers (CP) at 56. The trial court also instructed the jury on the effect of the parties' stipulation:

> The parties have agreed that certain facts are true beyond a reasonable doubt. You must accept as true beyond a reasonable doubt that the person before the court, who has been identified in the charging document as the defendant, was previously convicted of a felony sex offense and, due to that conviction, that the defendant was required to register in the State of Washington as a sex offender between August 28, 2019 and October 29, 2019.

CP at 65. And the trial court instructed the jury that to convict Hale of failure to register as a sex offender, the State must prove (1) Hale was convicted of a felony sex offense; (2) Hale was required to register as a sex offender between August 28 and October 20, 2019; and (3) during the charged period, Hale knowingly failed to comply with a requirement of sex offender registration.

The State argued during closing argument:

> Not only did the defendant not register, but he was no longer living at the registered address. And how do we know that? Because Tacoma Police Detective Christie Yglesias, who then at the time worked for the sex offender registration unit, testified that the defendant was last required to stay at 6309 [sic] Fawcett Avenue, but she received information that he was no longer living there. And that —
>
> [HALE]: Objection, Your Honor. That evidence wasn't admitted as substantive evidence.
>
> [COURT]: The jury will determine what was proved based on the testimony that was allowed by the Court.

> [STATE]: She received information the defendant was not there, and so she contacted the house manager of that residence, Jason Turk, and confirmed via email with Jason Turk that the defendant in fact—
>
> [HALE]: Objection, Your Honor. That was evidence that was ruled to be hearsay.
>
> [COURT]: That objection is sustained.
>
> [STATE]: That she confirmed the defendant was no longer living at that address.
>
> [HALE]: Same objection.
>
> [COURT]: Sustained. Jury will disregard.

3 VRP at 290-91.

The jury found Hale guilty as charged. The trial court imposed a standard range sentence of 43 months. The judgment and sentence also included a community custody condition requiring Hale to pay community custody supervision fees.

Hale appeals.

ANALYSIS

A. OPINION TESTIMONY

Hale argues that the trial court erred by admitting improper opinion testimony. Specifically, Hale contends that Saxon's testimony that Hale was not living at the house was an improper opinion on guilt.[1] We disagree.

[1] Hale also argues that the trial court erred by admitting Saxon's testimony that she had been able to verify Hale was not living at the house because it was a legal conclusion and inadmissible. But the trial court sustained Hale's objection, so the trial court did not improperly admit the testimony Hale now challenges as inadmissible.

1. Legal Principles

We review decisions to admit evidence for an abuse of discretion. *State v. Quaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). The trial court abuses its discretion when its decision is manifestly unreasonable or when the decision is based on untenable grounds or reasons. *Id.* at 197. "'Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion.'" *Id.* at 196 (quoting *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001)).

A lay witness may testify to opinions "based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); ER 701(a). Under ER 704, opinion testimony that is otherwise admissible "is not objectionable because it embraces an ultimate issue" that the jury needs to decide.

However, in criminal trials, opinions on guilt are improper because such opinions violate the right to an independent determination of facts by a jury. *Quaale*, 182 Wn.2d at 199. To determine whether testimony was impermissible opinion testimony on guilt, we consider the following factors:

> (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.

Id. at 200.

To find a person guilty of failing to register as a sex offender, the State must prove that the defendant "has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly

fails to comply with any of the requirements of RCW 9A.44.130." RCW 9A.44.132. A person has a duty to register if they have been convicted of a sex or kidnapping offense. RCW 9A.44.130(1)(a). If a person has registered and subsequently changes their address, they must provide the county sheriff with a change of address within three business days of moving. RCW 9A.44.130(5)(a). Alternatively, if a person lacks a fixed residence they must notify the county sheriff within three business days of ceasing to have a fixed residence. RCW 9A.44.130(6)(a).

2. Not Improper Opinion Testimony On Guilt

In considering the factors for determining whether the testimony was impermissible opinion testimony on guilt, we conclude that Saxon's opinion that Hale was not living at the house was not an improper opinion on guilt. First, the type of witness involved does not indicate that the opinion testimony was improper. Although Saxon was a probation officer, she testified as a fact witness, and her opinion that Hale was not living in the house was a lay opinion based on her personal knowledge and observations and did not carry any special indication of reliability that may be present with scientific or expert testimony. *See State v. Kirkman*, 159 Wn.2d 918, 931, 155 P.3d 125 (2007) (detective's testimony regarding interview protocols did not contain a "special aura of reliability" beyond the reliability conferred on any sworn witness).

As to the second and third factors, the specific nature of the testimony and the nature of the charges show that Saxon's testimony was not an opinion on Hale's guilt. The State charged Hale with failure to register; thus, the State was required to prove that Hale had a duty to register and that he knowingly failed to comply with registration requirements during the charging period. Saxon's statement did not opine on whether Hale had a duty to register or knowingly failed to

register. Thus, because Saxon did not offer an opinion on whether Hale failed to comply with registration requirements, her testimony was not an opinion on guilt.

Similarly, the fourth and fifth factors (the type of defense and other evidence before the jury) show that Saxon's testimony was not an improper opinion on guilt. Here, Hale's defense was a general denial, and Hale argued that the State failed to prove that he failed to comply with the registration requirements because the State failed to prove where Hale was or what he was doing after September 1. Saxon's opinion that Hale was not living at the house based on her observations on August 29 is limited in scope and does not address the entire charging period. Also, there was other evidence regarding whether Hale was living at the house, including Turk's testimony, Saxon's personal observations from her verification check, testimony that another person rented Hale's bed starting September 1, and Hale's own voicemail message left for Saxon stating that he was not at the house every night. Looking at the evidence as a whole, Saxon's opinion that Hale was not living at the residence was not an opinion on guilt that invaded the province of the jury.

Considering all the factors, the trial court did not abuse its discretion in admitting Saxon's testimony because Saxon did not offer an improper opinion on Hale's guilt. Therefore, the trial court did not err.[2]

[2] Hale also appears to argue that the trial court erred by deferring ruling on Hale's motion in limine to exclude opinion testimony and requiring Hale to object at the time of testimony. Hale has not provided any argument or authority supporting his assertion that the trial court erred by deferring ruling on the motion in limine. *See State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (when an appellant fails to provide argument or authority, "[we] are not required to construct an argument on behalf of appellants"). Therefore, we decline to address this argument.

B. HEARSAY

Hale argues that the trial court erred by admitting Saxon's testimony that the property in the drawers in the room belonged to other people living in the home. We disagree.

1. Legal Principles

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). However, "[t]his court reviews whether a statement was hearsay de novo." *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 688-89, 370 P.3d 989 (2016).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless an exception applies. ER 802.

2. Not Hearsay

Hale asserts that Saxon was "allowed to testify about what she was told by others about whether items in the room belonged to Mr. Hale, that '[n]one of his property' was in the drawers and '[t]he property that was in there was verified to be of other individuals in that home.'" Br. of Appellant at 16 (quoting 2 VRP at 235). As an initial matter, Saxon was not permitted to testify to what other housemates told her because the trial court sustained the hearsay objection to that testimony.

Saxon testified:

Further, whether the trial court erred in deferring ruling on the motion in limine is moot because, for the reasons explained above, Saxon's testimony was not an improper opinion on guilt.

> We also verified the areas that was assigned to him and to that bed. None of his property were in those drawers. The property that was in there was verified to be of other individuals in that home.

2 VRP at 235. Hale's hearsay objection to this testimony was overruled. Hale argues this testimony was "classic hearsay" because it was the out-of-court statements of the housemates about what property belonged to Hale. Br. of Appellant at 16. But Saxon did not testify to statements made by any other person. Nor did Saxon testify that her testimony that none of Hale's property was in the drawers or that the property in the drawers belonged to other individuals was based on what others told her. And Saxon did not testify about how she verified the information. Saxon testified to her observations, her actions, and her conclusions. Therefore, Saxon's testimony was not hearsay.

Because Saxon's testimony was not hearsay, the trial court did not allow inadmissible hearsay and did not err by overruling Hale's hearsay objection.

C. PROSECUTORIAL MISCONDUCT

Hale argues that the prosecutor committed misconduct during closing argument by referencing aspects of Yglesias' testimony that were not admitted as substantive evidence. The prosecutor's arguments were improper, but not prejudicial.

To prevail on a claim of prosecutorial misconduct, Hale must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). First, we determine whether the prosecutor's conduct was improper. *Id*. at 759. If the prosecutor's conduct was improper, we must then determine whether the conduct was prejudicial.

Id. "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Id.* at 760.

Hale identifies two statements in closing argument as improper. First, Hale argues that the prosecutor improperly relied on Detective Yglesias' testimony that she received information that Hale was not living at the house. Second, Hale argues that the prosecutor improperly argued that Detective Yglesias confirmed Hale was not at the house. Hale objected to both statements. The State concedes that the prosecutor's statements were improper. We accept the State's concession because the State was arguing evidence that was excluded or admitted for a limited purpose. However, even though the prosecutor's statements were improper, Hale cannot show the statements were prejudicial.

The State's argument that Detective Yglesias received information that Hale was no longer living at the house had no substantial likelihood of affecting the verdict. Although the trial court did not sustain or overrule Hale's objection, the trial court stated that it was for the jury to determine what was proved. And the trial court had instructed the jury at the time of Detective Yglesias' testimony it was to consider that testimony only for the purpose of why she was investigating. Further, the trial court instructed the jury that the State's argument was not evidence. Because we presume the jury follows the trial court's instructions, there is not a substantial likelihood that the jury improperly considered the reference to Detective Yglesias' testimony as substantive evidence affecting the verdict. *See State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014) (presuming that juries follow the court's instructions absent evidence to the contrary).

The State's argument that Detective Yglesias confirmed Hale was no longer living at the house also had no substantial likelihood of affecting the verdict. As to this argument, the trial court sustained the objection and ordered the jury to disregard the prosecutor's statement. Because we presume the jury followed the trial court's instructions, we presume that the jury disregarded the statement. Thus, there is no substantial likelihood that the improper statement affected the jury's verdict because the jury is presumed to have disregarded the improper argument and there is no evidence to the contrary.

Because Hale cannot show that there was a substantial likelihood that the prosecutor's improper arguments affected the jury's verdict, his prosecutorial misconduct claim must fail.

D. COMMUNITY CUSTODY SUPERVISION FEES

Hale argues that the trial court erred by imposing community custody supervision fees because Hale is indigent. Although the State does not object to striking the community custody supervision fees, the State does not concede that imposition of community custody supervision fees was improper. We remand for the trial court to consider imposition of the community custody supervision fees.

"Community custody supervision fees are discretionary [legal financial obligations (LFOs)] because they are waivable by the court." *State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020). If the record is unclear whether the trial court intended to impose the community custody supervision fees, remand is appropriate. *Id*. at 537.

Here, neither party addressed community custody supervision fees in their sentencing recommendations. And although the trial court found Hale to be indigent, it did not specifically

address LFOs in its sentencing determination. Based on the record before us it is unclear whether the trial court actually considered or intended to require Hale to pay the community custody supervision fees. Accordingly, we remand to the trial court to consider the imposition of community custody supervision fees.

E. CONSTITUTIONALITY OF REGISTRATION REQUIREMENT

Hale argues that the registration requirement he violated is unconstitutional because he was a juvenile at the time he committed the crime that resulted the registration requirement. The State argues that the constitutionality of the registration requirement is not properly before us because Hale failed to raise the constitutionality of the registration requirement at the trial court. We agree that the constitutionality of the registration requirement is not properly before this court.[3]

By stipulating that he had a conviction that required him to register, Hale invited any error he now alleges. "The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Mercado*, 181 Wn. App. 624, 630, 326 P.3d 154 (2014). "To be invited, the error must be the result of an affirmative, knowing, and voluntary act." *Id*. An appellant "must materially contribute to the error challenged on appeal by engaging in

[3] King County Department of Public Defense, the American Civil Liberties Union of Washington Foundation, and the Washington Defender Association moved for leave to file an amici curiae brief in this case. The motion was denied by a commissioner of this court and amici have moved to modify that ruling.

Generally, we will grant permission to file an amici curiae brief if the brief will assist the court. RAP 10.6(a). Amici assert that an amici curiae brief would assist the court because they provide valuable information that will help the court determine the constitutionality of the sex offender registration requirement as applied to juveniles. However, because the constitutionality of the sex offender registration requirement is not properly before this court, additional information will not assist us. Accordingly, we deny the amici's motion to modify the commissioner's ruling.

some type of affirmative action through which he knowingly and voluntarily sets up the error." *Id*. The invited error doctrine applies even to criminal defendants raising constitutional issues. *Id*. at 629-30.

RCW 9A.44.132 provides that a person is guilty of failure to register if the person had a duty to register under RCW 9A.44.130 and knowingly failed to comply with registration requirements. In challenging his conviction for failure to register, Hale argues that his conviction for failure to register is erroneous and must be reversed because he never should have had a duty to register in the first place. Hale contends he should not have had a duty to register imposed on him in the first place because, as a matter of law, RCW 9A.44.130 is unconstitutional as applied to juveniles.

However, Hale stipulated, and the jury was instructed, that it was true beyond a reasonable doubt that Hale "was required to register in the State of Washington as a sex offender between August 28, 2019 and October 29, 2019." CP at 65. The stipulation was an affirmative, knowing, and voluntary act that allowed the jury to find that Hale was required to register during the charging period. Hale cannot stipulate that he was required to register at trial and now argue that his conviction is erroneous because he did not have a duty to register, especially when Hale did not make any attempt to challenge the registration requirement before deciding to enter the stipulation. Therefore, we decline to address Hale's challenge to the constitutionality of the registration requirement that he raises for the first time on appeal after he stipulated in the trial court that he was required to register as a sex offender.

We affirm Hale's conviction, but, because the record is unclear, we remand for the trial court to consider the imposition of community custody supervision fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Price, J.

RUSSELL SELK LAW OFFICE

September 22, 2022 - 3:50 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	55248-5
Appellate Court Case Title:	State of Washington, Respondent v. Jesse Hale, Appellant
Superior Court Case Number:	19-1-03970-3

The following documents have been uploaded:

- 552485_Petition_for_Review_20220922154946D2103147_1343.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Hale Jess P4r fin.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- ali@defensenet.org
- baker@aclu-wa.org
- calburas@kingcounty.gov
- julia.mizutani@gmail.com
- katherine.hurley@kingcounty.gov
- laurwilson@kingcounty.gov
- pamela.loginsky@piercecountywa.gov
- pcpatcecf@piercecountywa.gov
- pcpatvecf@piercecountywa.gov
- talner@aclu-wa.org

Comments:

Sender Name: Kathryn Selk - Email: KARSdroit@gmail.com
Address:
1037 NE 65TH ST
SEATTLE, WA, 98115-6655
Phone: 206-782-3353

Note: The Filing Id is 20220922154946D2103147