

NO. 41368-0-II

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

STATE OF WASHINGTON, RESPONDENT

v.

DONALD OLIVA SALAVEA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 09-1-05694-5

Brief of Respondent

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

1. Was defendant brought to trial within the time allotted in CrR 3.3 where the court granted continuances for good cause?
2. Did the court properly admit officers' opinion testimony where the officers formed their opinions based on training and experience, and did not express an opinion of guilt?

B. STATEMENT OF THE CASE.

1. Procedure

On December 21, 2009, the Pierce County Prosecutor's Office charged defendant, Donald Salavea, with one count of failure to register as a sex offender, and one count of escape from community custody, and sought a bench warrant for his arrest. CP 1-2. The court issued a bench warrant on December 23, 2009. Supp. CP (Order for Bench Warrant). Defendant was arrested on the warrant, then arraigned on January 5, 2010. Supp. CP (Sheriff's Return on Bench Warrant; Order for Hearing 1/5/2010). At arraignment, the court set a trial date of March 3, 2010, within the 60 days time for trial allowed for a detained defendant. Supp. CP (Order for Hearing 1/5/2010). Defendant remained in custody. 1RP 3; 2RP 4, 11; 3RP 3; 5RP 3; 6RP 2; 7RP 2; 8RP 3, 5, 7; 10RP 3.

On February 9, 2010, the court ordered that defendant undergo a competency examination by Western State Hospital. CP 5-8. The court found defendant competent to stand trial on February 24, 2010. CP 9-10.

Defense counsel requested a continuance on March 2, 2010, because he was scheduled to be on Army Reserve duty. CP 11; 2RP 4. Defendant disagreed with defense counsel's request for more time. *Id.* The court found good cause and continued the trial until May 11, 2010. *Id.*

Defense counsel requested a continuance on April 20, 2010, because he would be on Army Reserve duty and needed more time to prepare. CP 255; 1RP 3-4. Defendant disagreed with his counsel's request for additional time. The court found good cause, and continued the trial until June 1, 2010. *Id.*

The State requested a continuance on May 20, 2010, because the prosecution had discovered new evidence which could lead to additional charges, and had extended a new plea offer to the defense. CP 12; 2RP 6. The State would require additional time to prepare for trial if defendant did not accept a plea offer. 2RP 6. Defense counsel did not object to the continuance. 2RP 6. Defendant agreed that his counsel would need time to review the evidence but did not want the case continued. 2RP 8. The court found good cause and continued the case until June 17, 2010. CP 12.

On June 7, and June 16, 2010, the State filed amended informations amending the charging period, and adding two charges of tampering with a witness and two charges of violation of a protection order. CP 13-15, 25-28.

Defense counsel requested a continuance on June 16, 2010, because he would be unavailable while he served Army Reserve duty.¹ CP 16; 2RP 15. The court found good cause and continued the case until August 16, 2010, over defendant's objection. *Id.*²

On July 22, 2010, the State filed a third amended information, charging defendant with one count of failure to register as a sex offender, one count of escape from community custody, one count of tampering with a witness, and two counts of violation of a protection order with a domestic violence aggravator. CP 33-36.

On August 16, 2010, the court set the case over until the following day because no courtrooms were available. CP 37; 3RP 3. Defendant voiced his objection to the continuance. *Id.* Time for trial was not tolled. CP 37.

¹ Defendant filed a pro se motion to dismiss for violation of his right to speedy trial on June 16, 2010. CP 17-21.

² Time for trial was erroneously marked as 63 days on the order continuing trial to entered on June 16, 2010. CP 16. Time for trial was also erroneously reflected on the orders for continuance entered on August 16, 2010, and August 17, 2010. CP 37, 256.

On August 17, 2010, the court set the case over until the following day because no courtrooms were available. CP 256. Defendant voiced his objection to the continuance. CP 256; 4RP 2. Time for trial was not tolled. *Id.*

The State requested a continuance on Wednesday, August 18, 2010, because the prosecuting attorney would be out of the state on a pre-planned trip from August 26, until September 2, 2010. CP 257; 5RP 6-8. The parties agreed that there were not sufficient days remaining to guarantee the trial could be finished before the deputy's trip. 5RP 5-6. The case could not be reassigned to another prosecuting attorney. 5RP 5-6. Defense counsel did not object to the continuance. 5RP 4. The defendant voiced his disagreement with the court's decision. 5RP 8. The court found good cause to continue the case. CP 257; 5RP 7. The State was set from trial on six other cases for the week of her return, two of which were over a year old. 5RP 7. The court continued the case until September 16, 2010, in order to avoid further scheduling conflicts. *Id.*

Defense counsel and the State jointly requested a continuance on September 16, 2010, because both were in trial on other matters. CP 38; 6RP 3. The State had two witnesses who would be out of town back to back in the weeks following the end of those trials. 6RP 2. Defense

counsel noted that defendant disagreed with the request for a continuance. 6RP 3. The court found good cause and continued the case until October 4, 2010. 6RP 3.

Defense counsel and the State jointly requested a continuance on October 4, 2010. CP 39. Defense counsel was in trial in the morning, and the State was in trial until the end of the week. 7RP 2-3. Defendant disagreed with the requested continuance. 7RP 2. The court found good cause and continued the case until October 11, 2010. CP 39.

On October 11, 2010, the court set the case over until the following day because no courtrooms were available. CP 40; 8RP 3. Defendant disagreed with the continuance. *Id.* Time for trial was not tolled. CP 40.

On October 12, 2010, the court set the case over until the following day because no courtrooms were available. CP 41; 8RP 5-6. Defendant disagreed with the continuance. 8RP 5. Time for trial was not tolled. 8RP 6.

On October 13, the court set the case over until the following day because no courtrooms were available. CP 42; 8RP 7. Defendant disagreed with the continuance. *Id.* Time for trial was not tolled. CP 42.

On October 14, 2010, the court set the case over until October 18, 2010, because no courtrooms or jurors were available. CP 43; 9RP 3-4. Time for trial was not tolled. *Id.*

Trial began on October 18, 2010, before the Honorable Judge Frank Cuthbertson. 10RP 3. The court denied defendant's pro se motion to dismiss for violation of speedy trial. 10RP 21.

On October 26, 2010, the jury found defendant guilty on all counts. CP 213-14, 216, 218-20. By interrogatories on the charge of tampering with a witness, the jury found that defendant had attempted to induce the witness to absent herself from proceedings, and that he had induced her to testify falsely or withhold testimony at the proceedings. CP 215. By special verdicts, the jury also found that the domestic violence aggravators applied. CP 217, 219.

On October 29, 2010, the court sentenced defendant to 51 months on the charge of witness tampering, and 43 months on the charge of failure to register, running concurrently. CP 228-244; 13RP 11-12. The sentences were at the low end of the standard range for defendant's offender score of 18. CP 225-227; 13RP 3. The court also sentenced defendant to 365 days for each charge of violation of a protection order, and 90 days for the charge of escape. CP 248-52; 13RP 11-12. The court suspended the misdemeanor sentences. CP 248-52. Defendant entered a timely notice of appeal on October 29, 2010. CP 221.

2. Facts³

Defendant was convicted of multiple felony sex offenses, resulting in lifelong requirement to register as a sex offender. 10RP 66, 12RP 151. Defendant's community custody officer, Greg Montegue, testified that in September 16, 2009, defendant was taken into custody for community custody violations. 10RP 146; 11RP 13. Defendant was transported to Cowlitz County to be housed because there was more room in that detention facility. 10RP 148. On October 27, 2009, defendant was released from custody, and transported to his community custody officer's office. 11RP 13. Defendant was fitted with a GPS monitor ankle bracelet, and Officer Montegue reminded him that he needed to go register with the Pierce County Sheriff's office within 24 hours. 11RP 18, 43. Defendant did not register at any time after he was released from custody. 13RP 123-24. His most recent registration occurred on August 20, 2009. 10RP 89-90; exhibit 8. At that time defendant registered as living at his father's address, 1415 South 52nd Street, in Tacoma, Washington. 10RP 90.

On October 29, 2009, Detective Scott Yenne, and Sergeant Jennifer Mueller went to 1415 South 52nd Street to conduct an address verification check on defendant. 10RP 96, 111-12. Each officer testified that defendant was not present at that address when they visited. 10RP 99,

³ Defendant challenges only his conviction for failure to register as a sex offender on grounds other than the time for trial. The State will limit its statement of the facts to those relevant on that charge.

117. The defendant's sister, Rose Marie Salavea⁴ was at the address, and permitted the officers to enter the house, and pointed out where defendant was supposed to be staying. 10RP 99, 114-15. The officers testified that the room contained a pair of men's jeans and a pair of men's tennis shoes in the room, but no other indication that a man lived there. 1RP 101, 116.

There did not appear to be any men's toiletries or other personal belongings which would suggest that a man lived in the room. *Id.* The officers did not look in the dresser or the closet because defendant was not present. 10RP 119, 126.

Defendant's community custody officer testified that defendant had never been present at his registered address when he had gone to contact him at the address on multiple occasions. 11RP 23. Defendant's father, Tomoloto Salavea, testified that the community custody officer came to the house weekly. 12RP 132.

Tomoloto's grandchildren lived with him although their mother, Rose did not. 12RP 131, 135. Tomoloto testified that defendant stayed with him during the hours of the day that there were no children present. 12RP 134, 138. The children were at school between 8:00am and 2:30pm, and the remaining 18 hours of the day defendant was not in the home. 12RP 139. Defendant sometimes came to the house during the day to eat

⁴ Because defendant, his father, Tomotolo Salavea, and his sister, Rose Marie Salavea share the same last name, the State will refer to defendant's family members by their first names in order to avoid confusion.

or shower, or rest. 12RP 133. Tomoloto also testified that he was worried about his son because he “[did not] know where he was living.” 12RP 144. Tomoloto and Rose testified that both defendant and Rose received mail at the house, although Rose did not live there. 10RP 140, 12RP 142. Rose lived in her own home, but that she visited the house at least every other day. 10RP 134, 36. Rose also testified that she told the officers conducting the verification check that her brother was not at the house “because his parole officer was looking for him.” 10RP 136.

Defendant testified that he slept at his father’s house at night, and that he kept his clothing in the downstairs closet and in the drawers of a dresser upstairs. 12RP 91, 105.

C. ARGUMENT.

1. DEFENDANT’S TRIAL BEGAN WITHIN THE TIME LIMIT SET FORTH IN CrR 3.3.

A defendant detained in jail must be brought to trial within 60 days after his arraignment, not including any period of time excluded under CrR 3.3(e). CrR 3.3(b)(1). The time for trial after any period excluded under CrR 3.3(e) is never less than 30 days. CrR 3.3(b)(5). Continuances granted under CrR 3.3(f) are excluded from the 60 days, as is the period between a court’s order for a competency evaluation and the order finding defendant competent. CrR 3.3(e)(1),(3). A continuance may be granted on a motion of the court or of a party where it is required in the

administration of justice, provided that the defendant will not be prejudiced in the presentation of his defense. CrR 3.3(f)(2). The court must make a record of the reasons for the continuance. *Id.* “The bringing of such motion on behalf of any party waives that party’s objection to the requested delay.” *Id.*

An allegation of a violation of time for trial is reviewed *de novo* however, “[t]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court, and [an appellate court] will not disturb the trial court’s decision unless there is a clear showing it is manifestly unreasonable, or exercised on untenable grounds, or for some untenable reasons.” *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009), quoting *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (internal quotations removed).

The court found good cause for the continuances granted on March 2, 2010, April 20, 2010, May 20, 2010, June 16, 2010, August 18, 2010, September 16, 2010, and October 4, 2010. CP 11-12, 16, 38-39, 255, 257. All but two of these continuances were requested by defense counsel, although defendant disagreed with his counsel’s decision to request more time. *Id.* It has long been held that the court does not abuse its discretion by granting defense counsel’s request for a continuance simply because defendant objects. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984), cert. denied 471 U.S. 1094, 105 S. Ct. 2169, 85 L.Ed.2d 526

(1985); *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). “The doctrine of invited error ‘prohibits a party from setting up an error at trial and then complaining of it on appeal.’” *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds in State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)). Defense counsel requested that the court continue the case multiple times in order to accommodate his schedule, and allow additional time to prepare. CP 11, 16, 38-39, 255. The court granted each of these motions. *Id.* Defendant cannot now challenge those continuances on appeal.

Defendant alleges that the court abused its discretion in granting the State’s motion to continue on August 18, 2010, but does not challenge any other continuance. Appellant’s brief at 12. The court granted the motion on August 18, 2010, because the State’s trial deputy would be out of town beginning on August 26, 2010. 5RP 3, 9. The State and defense agreed that the case would take between five and six trial days, and there were not enough days remaining to try the case before the trial deputy’s pre-planned vacation. 5RP 3. Both the court and defense had been aware of the trial deputy’s planned vacation since June 16, 2010, at the latest. CP 16.

The preplanned vacation of a deputy prosecutor is an unavoidable circumstance within the meaning of CrR 3.3. *State v. Kelley*, 64 Wn. App. 755, 765, 828 P.2d 1106 (1992). In *Kelley*, the defendant's case had been assigned to a trial deputy who was expected to be available to take the case to trial. *Id.* at 758. The case was reassigned to another deputy when it became clear the trial would not take place before the original deputy's vacation. *Id.* Due to the beginning of trial on other cases which the second deputy and defense counsel were representing parties, Kelley's case was continued. *Id.* The court reasoned that the scheduling of trials is not a predictable science, and the State reasonably managed its cases. *Id.* at 760. The court also determined that the pre-planned vacation of a trial deputy is an unavoidable circumstance. *Id.* at 765.

Similarly to *Kelley*, the deputy prosecutor in this case had a pre-planned vacation which, when the case was assigned, would not have interfered with the defendant's trial. 5RP 3, 7. Defense counsel had requested continuances on March 2, 2010, and April 20, 2010, because he was unavailable for trial, and needed additional time to prepare for the trial. 1RP 3; 2RP 4; CP 11, 255. On May 20, 2010, the State requested a continuance, which the court granted because the State had extended a new plea offer to the defense based on newly uncovered evidence. CP 12;

2RP 6-7. The court noted, and defendant agreed, that defense counsel needed time to review the new evidence, and discuss the plea offer with defendant. CP 12; 2RP 7-8. On June 16, 2010, defense counsel again requested a continuance because he would be unavailable from June 18 through July 5, 2010, and from July 9 through July 26, 2010. 2RP 14-15; CP 16. The court granted the continuance because of defense counsel's unavailability. 2RP 16; CP 16. Prior to the State's pre-planned vacation, the trial court had granted four months worth of continuances at defense counsel's request. CP 11, 16, 255. The court had granted only seventeen days at the State's request. CP 12. The case had been continued a total of three days because of courtroom unavailability, and time for trial was never tolled for those days. CP 37, 256, 257. It was the combination of circumstances, including substantial requests for additional time from defense counsel, which led to the case being ready for trial at a time when the State's trial deputy was on vacation. The court did not abuse its discretion in finding that the continuance was necessary in the administration of justice.

Defendant argues that it was not the deputy's vacation itself which caused the continuance, but her failure to timely notify the court of that vacation. Appellant's brief at 12-13. Defendant's argument fails for two reasons. First, defense counsel and the court were both notified, at the

latest, on June 16, 2010, that the deputy would be out of the state beginning August 26, 2010. CP 16. Second, as the court noted in *Kelley*, when a case will proceed to trial, or when it will resolve is highly unpredictable. 64 Wn. App. at 763. The court's awareness of the deputy's pending unavailability could not change defense counsel's frequent unavailability, the State's discovery of new evidence which lead to additional charges, or the three days prior to the challenged continuance during which the case had been waiting for a courtroom to open up. CP 11-12, 16, 38-39, 255, 257. No courtroom became available while there was sufficient time to try the case prior to the State's unavailability. SRP 3, 7. Thus, even if the State had informed the trial court and defense counsel as early as arraignment, it is not clear that the August 18, 2010, continuance could have been avoided.

Defendant cites *State v. Saunders*, 153 Wn. App. 209, 220 P.3d 1238 (2009), as analogous to the case at hand. Appellant's brief at 11. However, in *Saunders*, the trial court granted three continuances while noting on the record that it had not heard a good explanation of why the continuances were necessary. 153 Wn. App. at 214-15. On one occasion, the case was continued in order for the State and defense counsel to continue negotiations, despite the defendant's representations that he did not want to negotiate further and wanted to go to trial. *Id.* at 212. On the

other two occasions, the case was continued because it had not yet been assigned to a deputy prosecutor for trial. *Id.* at 214, 219.

Unlike *Saunders*, the case was not being continued in order to allow the prosecutor and defense counsel to continue negotiating a case which had not changed, it was continued in order to allow defense counsel to review the new evidence with his client and to discuss a new offer knowing that additional charges were likely to arise out of the new evidence. 2RP 9-10; CP 255. Where Saunders had expressed his refusal to negotiate further on the record, here defendant had made no such representation, but rather, had acknowledged the necessity to provide his counsel with additional time to prepare his defense given the new evidence. 2RP 8.

Additionally, in contrast to *Saunders*, where the case was being continued because it had not been assigned to a trial deputy by the prosecutor's officer, here the case was continued at defense counsel's request on multiple occasions while the State stood ready for trial. CP 11, 12,16, 255, 257. The court asked the deputy if it would be possible to reassign defendant's case to another trial deputy, which the State explained was not possible because of the nature of the case, and the trial deputies available. 5RP 5-6. Like *Kelley*, the court did not abuse its discretion in granting the challenged continuance where the particular trial

deputy was unavailable and the State acted diligently in assigning cases given its deputies' availability. Because the court did not abuse its discretion in granting the continuance, the time for trial following the excluded period of the continuance was set to 30 days. CrR 3.3(b)(5). Defendant's right to speedy trial was not violated.

2. THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY FROM POLICE OFFICERS.

"The trial court has considerable discretion regarding the admissibility of both lay and expert testimony and its decisions will be upheld if not manifestly unreasonable or if not exercised on untenable grounds or for untenable reasons." *State v. Stumpf*, 64 Wn. App. 522, 527, 827 P.2d 294 (1992), *see also*, *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L.Ed.2d 1084 (1996).

Inadmissible inferential testimony is that which "leaves no other conclusion but that a defendant is guilty." *State v. Cruz*, 77 Wn. App. 811, 815, 894 P.2d 573 (1995). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578. Washington courts have "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." *Demery*, 144 Wn.2d at 760.

“To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, ‘(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.’” *State v. King*, 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)) (interior quotations omitted).

Here, the witness was Sergeant Mueller, who was assigned to conduct verification checks on registered sex offenders. 10RP 92-93, 107-08. The trial court permitted Officer Mueller to testify, over defendant’s objection, that she had formed an opinion as to defendant’s residence at the address, and that based on what she had seen and her experience and training conducting verification checks, defendant did not live at his registered address. 10RP 104. Defense counsel did not object to Detective Yenne’s similar testimony. 10RP 118. Because defendant did not object to Detective Yenne’s testimony, any error in his testimony was not preserved for appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); *State v. Wilbur-Bobb*, 134 Wn. App. 627, 633-34, 141 P.3d 665 (2006).

Sergeant Mueller testified regarding her attempts to verify that defendant was living at the address where he had previously registered, and her inability to contact him at that address. 10RP 96, 111. Defendant’s defense was that he was living at the address but had simply

never been there when the officers were there. 13RP 90. The jury was also presented with testimony from defendant's sister and defendant, that defendant was living at the previously registered address, and defendant's father testified that defendant came there to shower, eat and rest. 10RP 136; 12RP 133. The jury heard from Sergeant Mueller and Detective Yenne that there did not appear to be any male toiletries or personal belongings, and the only items that appeared to belong to a man were a pair of jeans and a pair of shoes in the bedroom they were told belonged to the defendant. Defendant's community custody officer, Greg Montegue, testified that defendant had never been at the address on the several occasions when had attempted to contact him there. 10RP 101, 110, 116. Officer Montegue also testified that "it didn't appear that defendant was living there." 11RP 23.

Testimony does not become an improper opinion on guilt because it encompasses ultimate factual issues and supports the conclusion that the defendant is guilty. *City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993). "[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." *State v. Wilber*, 55 Wn. App. 294, 298 n. 1, 777 P.2d 36 (1989). In *Heatley*, the arresting officer, in a driving while intoxicated case, testified that "defendant's impairment was due to his use of alcohol." 70 Wn. App. at 576. The court in that case found that the officer's statement was not an impermissible opinion of guilt because it was based on the officer's

observations and experience, and supported by the evidentiary foundation. *Id.* at 579-80.

Similarly to *Heatley*, here Sergeant Mueller testified first to what she had observed at the defendant's previously registered address, and her experience conducting verification checks. 10RP 104, 129. Based on those observations and experience, Sergeant Mueller testified that defendant did not appear to live at the address. *Id.* This was supported by the evidence she had testified to prior to giving an opinion.

Defendant cites *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), as an analogous case. Appellant's brief at 17-18. In *Montgomery*, the defendant was charged with possession of pseudoephedrine with the intent to manufacture methamphetamine. 163 Wn.2d at 583. Multiple police officers and a laboratory technician all testified that they believed defendant intended to manufacture methamphetamine. *Id.* at 587-88. One of the officers testified that he "felt very strongly that [defendant was], in fact, buying ingredients to manufacture methamphetamine." *Id.* The testimony in this case is distinguishable. In *Montgomery* the officers' testimony was opinion about the defendant's intent, which cannot be objectively observed. *Id.* at 591. Here, the officer's testimony was in regard to her observation that defendant did not appear to be living at his father's home where he had previously registered. 10RP 104, 129-30. Her testimony was based on

direct observation, and was not an inference regarding unobservable thoughts.

Even if the court erred in admitting Sergeant Mueller's testimony that defendant did not appear to be living at the home, any error was harmless. The jury was instructed that in order to find defendant guilty of failing to register as a sex offender, "one particular act of Failure to Register as a Sex Offender must be proved beyond a reasonable doubt, and you must unanimously agree as to which act... has been proved." CP186-212 (jury instruction number 5). Detective Yenne and Officer Montegue, defendant's community custody officer, testified that defendant had never been at the address on his registration on any of the multiple occasions they had been there. 10RP 117, 11RP 23. Defendant did not object to this testimony at trial, and does not raise issue with Officer Montegue's testimony on appeal. 10RP 117; 11RP 23; Appellant's brief at 16.

The jury heard that there was only a pair of shoes and a pair of pants in the bedroom that defendant was supposed to have slept in to indicate that a man occupied the room. 10RP 101, 116, 126. In addition, the jury heard testimony from defendant's sister and father about his residence. 10RP 131-140, 12RP 131-144. Defendant's sister testified that she knew defendant received mail at their father's home because she also received mail there, although she did not live there. 10RP 140. Defendant's father explained that the defendant was not permitted to be in

the house when children were present. 12RP 132-33. He also testified that his grandchildren stayed with him, and were in the house from 2:30 in the afternoon, when they came home from school until 8:00 the following morning when they left for school. 12RP 128-39. Defendant would sometimes come home during the hours the children were at school to take a nap, eat, or shower. 12RP 139-40. Defendant's father explained that he was concerned for his son because he "[didn't] know where [defendant] lives." 12RP 144. If defendant were living at the address he was registered at, his father's home, his father would know exactly where he was staying. There is substantial untainted evidence which supports a determination that defendant had committed the crime of failure to register as a sex offender by failing to provide a written notice of change of address or ceasing to have a fixed address within the statutory time lines.

Moreover, the evidence is uncontroverted that defendant did not register within the 24 hour window after his release from custody. Defendant himself testified, "No, I did not go to registration to the sheriff on the 23rd when I was released from Cowlitz County." 12RP 103. Nor did he register at any time following the 24 hour window, despite his contention that the only reason he had not registered during that time was because he didn't want to enter the County-City building wearing the clothes he had on when he was released from custody, and the building had been closed over the weekend. 12RP 123-24. Because there is no evidence to suggest that defendant had registered within the time period

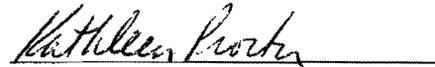
following his release, there is no reasonable probability that the outcome of the trial would have been different but for any error in admitting Sergeant Mueller's opinion testimony.

D. CONCLUSION.

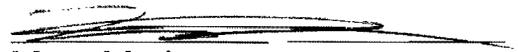
For the aforementioned reasons, the State respectfully requests that the defendant's convictions and sentence be affirmed.

DATED: September 21, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



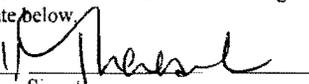
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811



Margo Martin
Rule 9 Legal Intern

Certificate of Service:

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

9.21.11 
Date Signature

PIERCE COUNTY PROSECUTOR

September 21, 2011 - 4:17 PM

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