NO. 42525-4-II

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

STATE OF WASHINGTON, Respondent,

v.

STEPHEN LEWIS, Appellant.

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

The Honorable John R. Hickman, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 8

1. THE TRIAL COURT ERRED BY PERMITTING THREE STATE'S WITNESSES TO TESTIFY TO THEIR "OPINION" ON THE ULTIMATE ISSUE ON THE CASE AND ONE STATE'S WITNESS TO TESTIFY TO HER BELIEF THAT ANOTHER WITNESS AND THE DEFENDANT WERE LYING 8

E. CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Boney, 977 F.2d 624 (D.C.Cir.1992) 9

WASHINGTON CASES

State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). 12

State v. Allen, 50 Wn.App. 412, 417 n. 1, 749 P.2d 702, *review denied,* 110 Wn.2d 1024 (1988) 9

State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) 8, 9, 12

State v. Carlin, 40 Wn.App. 698, 700, 700 P.2d 323 (1985) 9

State v. Demer, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) 11, 12

State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) 10

State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967) 8, 9

State v. Jones, 59 Wn.App. 744, 750 n. 2, 801 P.2d 263 (1990) 9

State v. Sanders, 66 Wn.App. 380, 387, 832 P.2d 1326 (1992) ... 10, 11

State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) 13

State v. Wilber, 55 Wn.App. 294, 297, 777 P.2d 36 (1989) 9, 12

RULES, STATUTES AND OTHER AUTHORITIES

ER 403 9
ER 701 9
ER 702 9
ER 704 9

A. ASSIGNMENTS OF ERROR

1. The trial court erred by permitting a witness to testify to her opinion that another witness was lying for the defendant.
2. The trial court erred by permitting three witnesses to testify to their "expert opinion" that Mr. Lewis did not actually reside at his registered address.
3. The trial court erred by relying on the erroneous testimony of witnesses on issues of credibility and ultimate fact in substitution of the judgment of the trier of fact.
4. The trial court erred by finding based on improperly admitted evidence that Mr. Lewis did not reside at his registered address.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by permitting a police officer and two community corrections officers to testify to their "opinion" that Mr. Lewis did not reside at his registered address and allowing the CCO to testify to her belief that the

homeowner was "covering for" Mr. Lewis when he said Mr. Lewis did live there.

C. STATEMENT OF THE CASE

Stephen Lewis was charged with failing to comply with the registration laws during the period of December 11, 2009 to April 12, 2010. CP 1-3. It was uncontested that Mr. Lewis had a requirement to register and that he had registered his address as 1422 S. Washington Street, Tacoma, on December 11, 2009. RP1 65, CP 49-50. Two residents of the registered address testified in the trial. Rachel Eschenfelder testified that Mr. Lewis did not live in their basement. RP2 168. Ms. Eschenfelder's live-in boyfriend, Rodron Neal, testified that he gave Mr. Lewis permission to live in the house and that he was sleeping on the couch in the basement. RP2 200.

According to Ms. Eschenfelder, she knew Mr. Lewis as a friend of her boyfriend. RP2 164. Mr. Lewis had her permission to have his mail sent to their house and kept a suitcase with his personal belongings in the basement "man-cave." RP2 172, 173. In the four months in which Mr. Lewis was registered as living at their address, Ms. Eschenfelder had seen him two to three times,

once with his girlfriend. RP2 174. However, Ms. Eschenfelder testified that she was not aware that DOC had approved her house as Mr. Lewis' residence and did not know that he lived there. RP2 177, 168. She also testified that he never slept there to her knowledge. RP2 168.

Mr. Neal testified that he told Mr. Lewis he could live in their house, but with the condition that Mr. Lewis was not allowed to be in the house when Mr. Neal was not. RP2 199-203. Mr. Neal worked with DOC to get approval for Mr. Lewis to live at the house. RP2 200. According to Mr. Neal, Mr. Lewis lived at his house and slept there most nights between December and April 12. RP2 199-200. During the four months that he lived there, Mr. Lewis would always call Mr. Neal before going to the house, and usually picked up Mr. Neal from work late in the evening and drove him home so they arrived together. RP2 204. He testified that Ms. Eschenfelder knew Mr. Lewis was sleeping downstairs, but did not see him much. RP2 228.

Mr. Lewis testified that he lived at 1422 S. Washington from December 11, 2009, until returning to custody on April 13, 2010. RP2 234. He slept in Mr. Neal's "man-cave" on the couch in the basement. RP2 238. He kept his personal belongings in a

suitcase in the basement. RP2 238. Because Mr. Neal had told him Mr. Lewis could not be in the house when Mr. Neal was not, Mr. Lewis was never there except to sleep, which he did five nights a week on average. RP2 239, 241. That meant that Mr. Lewis generally arrived home with Mr. Neal between 10 p.m. and 12 a.m. and left either before 5:30 a.m. for work or sometime later in the morning if he was off work. RP2 250-252. Mr. Lewis thought that Ms. Eschenfelder knew he was living there, but they kept different schedules and were, by design, not up and around at the same times. RP2 256.

The only other witnesses at trial were two Community Corrections Officers and two police officers. CCO Pamela Bohon supervised Mr. Lewis from January 15, 2010 until he returned to custody. RP1 100. She saw Mr. Lewis in her office once a month. RP1 100. During the duration of her supervision, she attempted (or had another CCO attempt) to visit Mr. Lewis at his registered address three to six times. RP1 118-19. The visits were all unscheduled and occurred between 8 a.m. and 4 p.m.[1] RP1 119-

[1] At the time, DOC policy did not require scheduled visits in these circumstances, but since this time, the policy changed to require a scheduled visit after two unsuccessful attempts. RP1 111-112.

122. Mr. Lewis told her left early in the morning for work and only slept at the house at night. RP1 110.

On February 18, 2010, Mr. Neal was home when Ms. Bohon visited. RP1 105, 107. Mr. Neal confirmed that Mr. Lewis lived there and showed her to where Mr. Lewis slept in the basement. RP1 107. Ms. Bohon did not see any of Mr. Lewis' belongings in the open. RP1 104.

Over defense objection, Ms. Bohon was asked if she had formed an opinion of whether Mr. Lewis was living there—Ms. Bohon testified that her opinion was that it was "very unlikely that he was living there." RP1 113. Also over defense objection, Ms. Bohon was asked: "Did you form the belief or have the concern that Neal was covering for the defendant," to which she answered, "Yes." RP1 131-32. She said she based her opinion on the conversations she had with Mr. Neal, the fact that she had not made contact with Mr. Lewis at the residence, and that she did not see Mr. Lewis' belongings. RP1 132-33.

CCO Kelly Stave was responsible for Mr. Neal's supervision. RP1 137. She testified that she was not involved with Mr. Lewis' supervision and never went to the basement during the time Mr. Lewis was living there. RP1 140-141. She had been in the

basement area in the past, however, and testified that it was partially finished and "habitable." RP1 142. She had given Mr. Neal DOC's permission for Mr. Lewis to live with him. RP1 139. Ms. Stave did not testify to ever having visited the house to confirm Mr. Lewis' residence. RP1 143. However, when she visited Mr. Neal there, she had not seen Mr. Lewis. RP1 140, 144. In the seven occasions she attempted contact with Mr. Neal at the residence during the four months in question, there were only two occasions where anyone was home. RP2 157-59.

Over defense objection, the prosecution asked Ms. Stave, "Did you form an opinion of who lived there?" and she answered, "yes," Mr. Neal and his girlfriend and kids and no one else. RP1 145.

Sgt. Jennifer Mueller of the Tacoma Police, testified to visiting the house on April 14, 2010, to conduct a "verification check" on Mr. Lewis' residence.[2] RP1 74. She spoke with Ms. Eschenfelder, who was the only one home, along with her children. RP1 76. Ms. Eschenfelder told her that when Mr. Lewis stayed there, it was in the basement and she showed Sgt. Mueller to the

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[2] Mr. Lewis had been sentenced in King County on an unrelated charge and taken into custody on April 13, 2010. RP1 80, RP2 231.

basement. RP1 78-79, 87. Sgt. Mueller observed that the basement was partially finished and there was some furniture, including a couch. RP1 78. Although she saw a suitcase, she did not open it. RP1 78. Sgt. Mueller testified that it did not appear to her anyone was living in the basement because she did not see a bed or any personal items. RP1 78.

Over defense objections, Sgt. Mueller was asked by the State, "Based on your observations, did you form an opinion of whether the defendant lived there?" RP1 79. She was permitted to testify that it was her opinion that Mr. Lewis did not live there. RP1 80.

Mr. Lewis was tried by bench trial. In overruling the defense objections to the "expert opinions" of law enforcement that Mr. Lewis did not reside at his registered address the court ruled that,

> if proper foundation is, in fact, laid, they can render an issue as to whether they believe the defendant was living there or not. What weight I give to that opinion obviously is based on the Court's discretion in observing what weight that any jury would give to a witness' testimony.

RP1 70. The Court then overruled the defense objections to Sgt. Mueller, Ms. Bohon and Ms. Stave testifying that Mr. Lewis did not reside at his registered address. RP1 78, 113, RP2 145. The Court

also overruled the defense objection to Ms. Bohon's testimony that she believed Mr. Neal was lying for Mr. Lewis. RP1 131-32.

The Court noted in its findings that Sgt. Mueller and Ms. Bohon, expressed the opinion that Mr. Lewis did not live at the residence and that both were credible. CP 51, 52. The Court also found that Ms. Eschenfelder and Ms. Stave were credible. CP 53, 54. The Court found that Mr. Neal and Mr. Lewis were not credible. CP 54. Based on this evidence, the Court found that Mr. Lewis had violated the registration requirement by failing to reside at his registered address. CP 55. Mr. Lewis was found guilty of Failure to Register and sentenced to 43 months. CP 55, 64. This appeal timely follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY PERMITTING THREE STATE'S WITNESSES TO TESTIFY TO THEIR "OPINION" ON THE ULTIMATE ISSUE ON THE CASE AND ONE STATE'S WITNESS TO TESTIFY TO HER BELIEF THAT ANOTHER WITNESS AND THE DEFENDANT WERE LYING.

The general rule is that no witness, lay or expert, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *see also State v. Garrison,* 71 Wn.2d 312, 427 P.2d 1012 (1967). Such testimony has been characterized as

unfairly prejudicial because it "invad[es] the exclusive province of the finder of fact." *Black,* at 348. Such an opinion violates the defendant's right to a trial by an impartial jury and his right to have the jury make an independent evaluation of the facts. *State v. Wilber,* 55 Wn.App. 294, 297, 777 P.2d 36 (1989).

Although opinion testimony may not be excluded under ER 704 solely on the basis that it encompasses ultimate issues of fact, it must be "otherwise admissible" and is therefore subject to the requirements of ER 403, ER 701, and ER 702. *State v. Jones,* 59 Wn.App. 744, 750 n. 2, 801 P.2d 263 (1990); *State v. Allen,* 50 Wn.App. 412, 417 n. 1, 749 P.2d 702, *review denied,* 110 Wn.2d 1024 (1988); *see also* ER 704, Judicial Council Comment; *United States v. Boney,* 977 F.2d 624 (D.C.Cir.1992). An opinion which lacks proper foundation or is not helpful to the trier of fact is not admissible under ER 701 or 702. An otherwise admissible opinion may be excluded under ER 403 if it is confusing, misleading, or if the danger of unfair prejudice outweighs its probative value.

Courts have held that whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an "ultimate issue" is evaluated based on the specific circumstances of each case, including the type of witness involved,

the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *See generally State v. Sanders,* 66 Wn.App. 380, 387, 832 P.2d 1326 (1992). However, "the closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be." *State v. Farr-Lenzini*, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999).

A police officer may be permitted to testify to actual observations, but not as to the ultimate issue of fact. For example, in *State v. Sanders,* 66 Wn.App. 380, 832 P.2d 1326 (1992), a prosecution for possession of cocaine with intent to deliver, a police officer opined that the lack of drug user paraphernalia in the defendant's home indicated the occupants did not use drugs regularly. Division I rejected the claim that the testimony amounted to an opinion on guilt because the officer did not explicitly state an opinion on guilt or credibility, the testimony was based solely on physical evidence and on the officer's experience, and the testimony was not inconsistent with the defendant's testimony. *Sanders,* 66 Wn.App. at 388-89.

In this case, unlike in *Sanders*, the testimony of Ms. Bohon, Ms. Stave, and Sgt. Mueller was inadmissible because it was

improper opinion testimony and commented on the ultimate issue. Whether Mr. Lewis resided in the home was the ultimate issue of fact here. Ms. Bohon, Ms. Stave and Sgt. Mueller all testified over defense objection that, in their opinion, Mr. Lewis was not living in Mr. Neal's home, where he was registered. RP1 113, RP1 145, RP1 78. The officers did not just testify to their observations of the space Mr. Lewis was living in, they testified to their **assumption**—not opinion—that he was not living there. This was an improper and direct comment on the ultimate factual determination in this case. Moreover, this is not proper opinion testimony because there is nothing specialized about reaching a conclusion as to this ultimate fact—there is nothing an officer's "experience" can add to the determination of whether someone is living where he says he is.

Testimony from a law enforcement officer may be especially prejudicial because an officer's testimony often carries a special aura of reliability. *State v. Demer*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). The officers here had no personal knowledge of whether Mr. Lewis lived in the home, nor did they have specialized or expert knowledge to assist in determining if someone resides in a particular home.

Their testimony was also an indirect comment on the credibility of the defendant. By testifying that they did not believe Mr. Lewis lived there—they were indirectly but clearly stating that they did not believe Mr. Lewis when he said that he did live there. Therefore, their "opinion" as to whether they believed that Mr. Lewis was living with Mr. Neal was irrelevant, inadmissible, and an improper comment on the ultimate issue of fact in the case and the defendant's credibility. It was therefore error for the trial court to permit this testimony and to consider it in reaching a verdict in this case.

In addition, Ms. Bohon's testimony goes one step further by directly commenting on the credibility of another witness and on the truth of the defendant's testimony. Because issues of credibility are reserved strictly for the trier of fact, testimony regarding the credibility of a key witness is improper. *See, e.g., State v. Wilber*, 55 Wn.App. 294, 777 P.2d 36 (1989) (officers could not testify to their opinion that the body language of the witness indicated he was not truthful); *see also State v. Alexander,* 64 Wn.App. 147, 154, 822 P.2d 1250 (1992) (by stating his belief that child was not lying about sexual abuse, expert "effectively testified" that defendant was guilty as charged); *see also Black,* 109 Wn.2d at

349 (in rape case, expert testimony that victim suffered from rape trauma syndrome constituted "in essence" a statement that defendant was guilty where defense was consent). Over defense objection, Ms. Bohon was asked: "Did you form the belief or have the concern that Neal was covering for the defendant," to which she answered, "Yes." RP1 131-32. This testimony directly accuses both Mr. Lewis and Mr. Neal of lying and is clearly improper. Therefore, the admission of this testimony over objection was also in error.

The erroneous admission of this improper testimony was prejudicial to the verdict because the entire case was whether the trier of fact believed Mr. Neal and Mr. Lewis or Ms. Eschenfelder. The trial judge specifically stated that the testimony would be used in evaluating credibility. RP1 70. Moreover, the court's findings place emphasis on Sgt. Mueller's and Ms. Bohon's opinions that Mr. Lewis did not reside at Mr. Neal's house and specifically finds it credible. CP 51, 52.

Where there is a violation of an evidentiary rule, the conviction must be reversed if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d

961 (1981). In this case, because the testimony related to the ultimate issue for the trier of fact and directly commented on the credibility of the defendant and his witness, it is reasonably probable that the outcome would have been different without the error. Therefore, the conviction must be reversed.

E. CONCLUSION

The trial court erred by permitting a police officer and two community corrections officers to testify to their "opinions" that Mr. Lewis did not reside at his registered address—the ultimate issue in the case. The trial court further erred by permitting CCO Bohon to testify to her belief that the defense witness was "covering for" the defendant. These errors likely affected the verdict in this case because they touched on the ultimate issue in the case, commented on the credibility of the defendant and his witness, and were used by the court to evaluate the credibility of the other witnesses. Therefore, the conviction for failure to register must be reversed.

DATED: January 11, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 11, 2012, I caused a true and correct copy of this Appellant's Brief to be served on the following:

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