

No. 43180-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR F. KERCHER, III,

Appellant.

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

The Honorable Bryan Chushcoff, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial misconduct in arguing that the trial court should rely on impeachment evidence as substantive evidence of guilt and the court erred in accepting that improper invitation.
2. Appellant Arthur Kercher III assigns error to Finding XII in the trial court's written findings and conclusions on the bench trial, which provides as follows:

That L[.]K[.] utilized a phone from within the residence to contact her father, Arthur Kercher, II. That L[.]K[.] then provided the phone to Detective Pihl. That Detective Pihl spoke with Arthur Kercher, II[.] on the phone. **That Arthur Kercher, II[,] reported to Detective Pihl that defendant had moved out of his residence approximately two months prior, and that defendant had initially moved out to reside with a friend but that living arrangement did not work out. That Arthur Kercher, II[,] then reported to Detective Pihl that defendant had moved in with his mother.**

CP 14 (emphasis added).

3. The prosecutor committed further misconduct by relying on improper opinion evidence and the trial court again erred in relying on that improper evidence in convicting.
4. Appellant assigns error to finding XIII which provides as follows:

That, at the conclusion of the March 11, 2011 verification check, Detective Pihl classified defendant as having absconded.

CP 15.

5. Appellant assigns error to "Conclusion of Law IV" which provides as follows:

That on or about the period between January 11, 2011[,] through March 13, 2011[,] defendant was not living at the 1105 Third Avenue Northwest in Puyallup, Washington address he had registered with the Pierce County Sheriff's Department.

CP 17.

6. Appellant assigns error to Conclusion IV which provides as follows:

That defendant failed to comply with the Washington State sex offender registration requirements by either failing to reside at his registered address or by failing to notify the Pierce County Sheriff's Department of a new address.

CP 17.

7. Appellant assigns error to Conclusion VII, which provides as follows:

That the defendant is guilty of one count of Failure to Register as a Sex Offender.

CP 17.

8. Without the improperly considered evidence, there was insufficient evidence to support the conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The out-of-court, unsworn statement of a witness which is not otherwise admissible may only be used for impeachment but not as evidence to prove guilt or for other substantive purposes.

Over defense objection, evidence was admitted that appellant's father had made statements to an officer which the prosecution said were not consistent with the testimony that the witness gave at trial. The trial court admitted that evidence for impeachment purposes, and the prosecutor never made any effort to establish that the evidence was otherwise admissible.

Did the prosecutor commit misconduct in arguing that the court should rely on the impeachment evidence as substantive evidence of guilt and did the trial court err in accepting this improper invitation?

2. At trial, the prosecutor also elicited testimony from the officer about his belief that the defendant had committed the crime. Did the prosecutor commit further misconduct and did the trial court further err in relying on that belief as evidence of guilt?
3. Is reversal and dismissal required where there

was insufficient evidence to support the conviction absent the improperly used impeachment and opinion evidence?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Arthur Kercher III was charged by information with failure to register as a sex offender. CP 1; RCW 9A.44.130. A bench trial was held before the Honorable Judge Bryan Chushcoff on February 2 and 6, 2011, after which the judge found appellant guilty as charged. CP 10, 21-37; RP 1, 93.¹ On February 24, 2011, Judge Chushcoff imposed a standard-range sentence. CP 21-37; SRP 8-9. Written findings of fact and conclusions of law in support of the court's decision on the bench trial were entered that same day. CP 11-18.

A notice of appeal was timely filed and this pleading follows. See 41-58.

2. Testimony at trial

Puyallup police officer Joseph Pihl had already put in a full day's work on March 11, 2011, when he went to do some "verification checks" of sex offenders. RP 36-37, 47. On that day, he went to a single family residence on 3rd Avenue in Puyallup, arriving a little after 5 in the evening. RP 37-39. Pihl was looking for Arthur Kercher III, known to his family as "Ricky."² RP 37-39, 106.

¹The verbatim report of proceedings consists of three volumes. The two chronologically paginated volumes containing the February 2 and 6, 2011, trial will be referred to as "RP." The separate volume containing the sentencing proceedings of February 24, 2011, will be referred to as "SRP."

²Appellant, his sister and his father share the same first and last name. For the purposes of clarity, appellant will be referred to by his nickname, "Ricky," and his father by his first name, "Arthur," with no disrespect intended. Because of her age, Ricky's sister will

Ricky was required to register as a sex offender because of a juvenile conviction in 2007 for second-degree rape. RP 2-21. After that conviction, when he was released from the Juvenile Rehabilitation Administration's Maple Lane facility, Ricky had promptly filed a change of registration indicating his release and his move to an address in Buckley, Washington. RP 22. Then, on May 5, 2008, Ricky had filed another change of address form, indicating that he was moving from the Buckley address to an address on 3rd in Puyallup. RP 23-25. In October of 2008, Ricky filed a notice to indicate that he was not in the previously reported high school. RP 26. At the time the officer went to do the verification check, Ricky was still registered at the address in Puyallup. RP 29-47.

The officer knocked on the door and a younger female, later identified as L.K., answered. RP 39. Also at the door was an unidentified male, whom the officer thought was a boyfriend or friend of the girl but whom L.K. said was actually her other brother. RP 40, 53.

L.K. said her father, Arthur, owned the house. RP 39-40. After talking with L.K., the officer had the girl call her father on the phone. RP 38-42. In his conversation with Arthur, the officer asked permission to get a written statement from L.K., and Arthur consented. RP 43-44. In the statement, the 15-year-old stated her opinion that her brother had moved out and was staying with his mom after having moved out with a friend, "DJ," which did not work out. RP 56.

be referred to as "L.K."

At trial, however, L.K. made it clear that she really had not known whether her brother was still living at the home or not at the time she made the statement to the officer. RP 53-56. L.K. conceded that she told the officer that Ricky had “moved out a while ago” because she just assumed he had as she had not seen him recently. RP 52-56. The whole family was going to be moving out soon, and she knew Ricky was considering moving in with his mom, so she just wrote in her statement “what I thought happened.” RP 56 -57. L.K. said the officer “kind of was like interrogating” her with “a bunch of questions” and she “didn’t really know for sure” the answers. RP 59. Although she thought she told the officer, “I don’t know” when asked whether Ricky was living there, she but did not write that in the statement. RP 59-60. L.K. said she “didn’t really like realize what exactly was going on.” RP 59-60. She also said she did not mean to write in her statement emphatically that her brother had moved out, conceding that she had not really known for sure and should not have written the statement that way. RP 60.

Shortly after the encounter with the officer, L.K. saw her brother at the house. RP 60. She had also later noted that “[a]ll of his stuff was still there and everything.” RP 60. The teen did not call the officer to correct her mistake, however, because he had not left a number or way for her to contact him. RP 60. L.K. also recalled Ricky eating at the home in March of 2011 and showering there, “[j]ust about everyday.” RP 55.

At the time, L.K. was in school and Ricky was working many hours at his job at Taco Bell. RP 54. L.K. had to be at school at 7:34 in the morning and was not home much, getting home on some days at

maybe 2:30 in the afternoon. RP 54. For his part, Ricky often worked the late night shift. RP 54, 64. She did not see him when she woke in the morning, because she just woke up, got ready and left for school. RP 54, 64. In addition, L.K. said, she did not go straight home from school everyday, often walking around downtown with friends and doing other things. RP 64.

L.K. conceded that she was “rarely at home,” would often just go drop her stuff off there and go do her “own thing” until she came home later for dinner. RP 66. Although she had seen Ricky at the home, it was only for a few minutes at a time. RP 68. The teen testified, “I wasn’t really concerned with what my brother was doing. I was kind of doing my own thing.” RP 68.

At the time she made the statement to the officer, L.K. said, she knew that Rick had some of his stuff in the garage. RP 67

When pressed by the prosecutor, L.K. said she was not “lying” when she told the officer that she thought Ricky had moved out, but was instead just expressing her opinion. RP 66.

When her dad came home the day of the verification check, L.K. talked with him about the officer coming over and what L.K. had said about Ricky having moved out. RP 62. Her dad was surprised and said, “he didn’t move out” yet and that Ricky was still “looking around.” RP 62.

Arthur Kercher II, L.K.’s dad, testified that he was working on March 11 when he got the phone call from his daughter and the officer about Ricky. RP 72. Although Arthur told the officer Ricky was not at

the home that day, he did not tell the officer a specific date the son moved out. RP 83. Arthur denied telling the officer that the defendant had moved out about two months ago with a friend or that the move had not worked out because of Ricky's status as a sex offender. RP 74-75, 83. Instead, Arthur remembered telling the officer that Ricky had *wanted* to move out with "DJ" but they could not find an apartment, so Ricky had been trying to figure out where he was going to live when the family moved out of the Puyallup home in April. RP 74-75.

At the time Arthur spoke to the officer, Ricky still had things in the house, scattered throughout, such as clothes, video games and dishes. RP 84. Ricky also had things in the garage and, Arthur said, while Arthur told the officer that Ricky had started living with his mom in Spanaway, it had only been "[o]n that day" or maybe the day before that this had occurred. RP 72-75, 77-78, 83.

Arthur regretted not being more specific and clear with the officer that day. RP 86-89. Because of that failure, Arthur felt that Ricky's having been charged, months later, with failing to register was partially Arthur's fault. RP 86-89.

Indeed, Arthur said, at the time Arthur and the officer spoke, Ricky was still moving out and still sleeping at Arthur's sometimes, although it was not "every single night." RP 84-85. Instead, it was "kind of off and on." RP 78. But Arthur specifically recalled Ricky sleeping there on the night of March 9th. RP 79. In fact, Arthur recalled Ricky being there, along with his car, when Arthur woke up at between 6 and 7 in the morning on March 10th. RP 79.

In general, Arthur did not see Ricky in the morning, because Ricky was usually asleep. RP 80. Arthur did not see his son if Ricky was staying overnight at his mom's or girlfriend's homes, which he did sometimes. RP 80. Ricky had recently been staying maybe one or two nights a week with his girlfriend and about one night a week with his mom, where Ricky was working to get things ready for him to move in. RP 81.

Arthur's 40th birthday was coming up on March 16th and Ricky was helping to get the house ready for the party. RP 77-78. Ricky paid rent to live with Arthur and Ricky's payment in March was by cleaning up for the party. RP 82, 89, 109.

Arthur was not sure what L.K. had told the officer. RP 85. He said that, in hindsight, he should have talked to her to see what she was saying before he agreed to let her make a statement. RP 85. When he got home that night, Arthur and L.K. talked and she said "kind of in passing" that she had told the officer that Ricky did not live there. RP 86. Arthur did not contact the officer to correct this misapprehension because he really did not think there was a need to do so. RP 88.

Arthur made it clear, however, that he would not lie for his son. RP 89.

Officer Pihl testified that, at the time he went to the home, he did not go inside the home to check to see if it appeared that Ricky lived there. RP. The officer justified that decision, saying he stayed outside because L.K. had said that Ricky "was not there." RP 41.

Pihl testified that, as he left, he tried to call a phone number listed

for Ricky but got no answer. RP 44. Pihl then tried to call the phone number for Ricky's mom and said he was "successful." RP 44-45. Pihl did not, however, remember speaking to Ricky's mom, Erin Taggart. RP 45, 97.

For her part, Taggart testified that Ricky had moved in with her sometime in March, on a Friday. RP 97. Prior to that time, from January through March, she thought he was living with his dad but he was not living with her. RP 100-102. Taggart would sometimes see Ricky at night when he was at his work, and did not really know where he showered or slept, although she thought he ate a lot at Taco Bell. RP 101. Although she thought the date Ricky moved in with her was after Ricky's birthday on March 17th, Taggart was not sure. RP 98-99, 103.

Taggart was positive, however, that it was just a few days later, on the following Monday, that she took Ricky to change his sex offender registration address to now list her home. RP 98-103. Ricky said he knew he had three business days to register and complied, although he did not know the actual date he had registered for sure. RP 98-103.

Documents the prosecution admitted showed that it was March 14th, 2011, when Ricky filed a change of address for his sex offender registration. RP 29. The form listed the Puyallup address as his former address and his mom's address in Spanaway as where he was living now. RP 29.

Prior to Ricky moving into her home, Taggart said, she had the room he was going to use filled with her stuff. RP 103. He was helping move her stuff out and slowly moving his stuff in. RP 103. Taggart

testified that, because Ricky worked nights, he did not move all at once and still had stuff in both places. RP 98. It was only when her stuff was all out of the way that he finally said, “that’s the last load,” and Taggert was then ready for him to be moved in. RP 103-104.

Taggert said that, before the day he moved in, Ricky really was not spending the night at Taggert’s home very often, although he had occasionally slept there, maybe once a week. RP 104. When Ricky stayed with Taggert before that day in March, he would sleep on the living room floor. RP 105.

Arthur Kercher III or “Ricky” testified that, in early March of 2011, he was living with his dad. RP 107. His dad was planning to move out to Lakewood, so Ricky started trying to get an apartment with a friend. RP 107. They looked at some places and he was “upfront” about his past, after which people at those places told him, “don’t even bother filling out an application for apartments.” RP 107.

At that point, Ricky said, he figured since he could not get a place, and his mom’s home was closer to his work than where his dad was moving to in Lakewood, Ricky would move in with his mom. RP 107.

Ricky explained that he did not really move in to his mom’s house until the weekend before March 14th. RP 108. He did not have his bedroom set up there until then. RP 108. Instead, he was just taking stuff over slowly while at the same time clearing the stuff out of the room he was going to move into at his mom’s. RP 108.

Ricky was clear that he sometimes slept at his mom’s house, every now and then, not only before moving in when he was cleaning out the

room but also when his mom and grandfather needed help with things like yard work. RP 108.

When asked about his work schedule at Taco Bell, he explained that his schedule usually involved the swing shift but sometimes would require him to be at work at 8 in the morning, so he would then leave at 7:00 a.m. or so. RP 114. His sister would be in the shower and he would get up, get dressed and leave. RP 113-14. More often, he would work the evening shift, leaving about an hour before his shift, which would start at 4 or 6 in the afternoon. RP 115. Although his sister sometimes came home from school at about 2:30 p.m., he agreed with her that they did not see each other in the afternoon very much, if at all. RP 115. Instead, he explained, he just “did my own thing.” RP 115-16.

Ricky did not think it was “odd” that he and his sister did not run into each other more. RP 115. Nor did he think his little sister “should keep track of her older brother.” RP 115.

Even later, when they were both living at their mom’s house and he was no longer working, Ricky and L.K. would see each other only “rarely.” RP 116.

D. ARGUMENT

THE PROSECUTOR AND THE COURT ERRED IN RELYING
ON IMPROPER EVIDENCE TO CONVICT AND THE
REMAINING EVIDENCE IS INSUFFICIENT TO SUPPORT
THE CONVICTION

Under both the state and federal constitutions, any conviction must be support by sufficient evidence in the record. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.3d 628 (1980), reversed in part and on other

grounds by, Washington v. Recuenco, 548 U.S. 307, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2008); Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Sixth Amend.; Fourteenth Amend.; Art. I, § 22. Where the prosecution fails to meet its burden of proof, reversal and dismissal with prejudice is required. See State v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In this case, Ricky's conviction for failing to register as a sex offender should be reversed, because the conviction depended upon improper consideration of impeachment evidence and an officer's opinion on guilt.

a. Improper reliance on impeachment evidence as substantive evidence of guilt

First, the prosecutor committed misconduct and the trial court erred in using inadmissible hearsay evidence as substantive evidence of guilt. Hearsay is a statement, other than the one made by a witness at trial, offered at trial for the purposes of proving the matter asserted. ER 801(c). In general, hearsay is inadmissible unless specifically permitted by the rules of evidence or by statute. See ER 802.

Under ER 801(d)(1)(i), where a witness has made an out-of-court statement which is inconsistent with his testimony at trial, that evidence is inadmissible hearsay and may not be used as substantive evidence unless specific requirements are met. See State v. Nieto, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). If the evidence does not meet those requirements, it may not be used to prove guilt or for any substantive purposes. See State v. Sua, 115 Wn. App. 29, 60 P.3d 1234 (2003).

In this case, the prosecutor improperly urged the court to rely on the “impeachment” evidence of the statements Arthur made to Officer Pihl during the verification check visit as evidence of guilt, and the trial court improperly accepted that invitation. Further, without the improper use of the evidence, the conviction cannot stand.

i. Relevant facts

At trial, in rebuttal, the prosecutor sought to have Officer Pihl testify about what Arthur had said to the officer when they spoke on the phone the day of the verification visit. RP 118. After Pihl testified that he told Arthur he was trying to verify that Ricky was living at Arthur’s home, the prosecutor asked the officer what Arthur said in response. RP 119. Counsel then raised a hearsay objection and the prosecutor responded, “[o]ffered for impeachment purposes, Your Honor.” RP 119. The court said the prosecutor had to “confront the witness,” Arthur, rather than using the procedure the prosecutor was trying to use. RP 119.

At that point, the prosecutor said he could “do it through the report as well, with this officer.” RP 119. The prosecutor then asked the officer, “when you had your conversation with Mr. Kercher Senior[,] were you able to learn where the defendant was residing?” RP 119. Counsel again objected, “calls for hearsay.” RP 119. The court instructed the prosecutor that he could ask specific rather than “open-ended” questions. RP 120.

At that point, the following exchange occurred:

Q: Detective, when you spoke with Mr. Kercher Senior did he tell you that the defendant had moved out approximately two months prior?

A: Yes.

Q: And when you spoke with Mr. Kercher Senior did he also tell you that he -- "he" meaning the defendant -- had attempted to move out with a friend?

A: Yes.

Q: But that had not been successful?

A: Yes.

Q: And did Mr. Kercher Senior then also tell you that the defendant had then moved in with his mother?

A: Yes.

Q: Meaning the defendant's mother?

A: Yes.

Q: At any point in time, did Mr. Kercher Senior tell you that he was uncertain as to whether or not the defendant was residing with him?

A: No.

RP 120-21.

A few moments later, in reciting the testimony and evidence he was arguing proved Ricky's guilt, the prosecutor declared:

During the conversation with Ms. Kercher, Ms. Kercher, herself, dialed her father and got him on the phone, and the officer has some conversation with Mr. Kercher. During that conversation with Mr. Kercher, Senior, **Mr. Kercher, Senior, informed the officer that the defendant had moved out approximately two months prior and that initially he moved out with a friend but that hadn't worked out and so the defendant had then moved in with his mother.**

At no point in time during that conversation did Mr. Kercher[,] Senior[,] express any confusion to the detective about where his son was actually residing, and at no point in time during the conversation did Mr. Kercher[,] Senior[,] tell the detective that the defendant was still residing with him.

RP 122-23 (emphasis added).

In finding Ricky guilty of failing to register, the court first declared that it was “mindful” that the prosecution was required to prove substantive evidence - “not merely impeachment evidence” - to support the conviction. RP 132. The court noted that, although there were still some of Ricky’s things at Arthur’s house and he was still moving things out, that his father had said “[h]e was not living at my house every single night.” RP 135. The court also relied on Arthur’s saying that he thought that his son had already moved in with his mother at that point. RP 135. The court said that it appeared that Ricky was “no longer residing at the” home with his father at least three business days before and that the court would “guess” that he had moved out “far longer ago than that. RP 136. The court concluded that, although the case was based on “inferences and circumstances,” if Ricky had been living there, his father or L.K. would have “affirmatively sa[id] so at the time,” and because they did not, it proved guilt. RP 136.

In his written findings of fact and conclusions of law after the bench trial, the judge reached the conclusion of guilt based on “the foregoing Findings of Fact,” which included the following factual finding:

That L[.]K[.] utilized a phone from within the residence to contact her father, Arthur Kercher, II. That L[.]K[.] then provided the phone to Detective Pihl. That Detective Pihl spoke with Arthur Kercher, II[.] on the phone. **That Arthur Kercher, II[,] reported to Detective Pihl that defendant had moved out of his residence approximately two months prior, and that defendant had initially moved out to reside with a friend but that living arrangement did not work out. That Arthur Kercher, II[,] then reported to Detective Pihl that defendant had moved in with his mother.**

CP 14 (emphasis added).

- ii. The evidence was improperly used by the prosecutor and the court as substantive evidence

Both the prosecutor and the trial court erred in relying on the impeachment evidence as evidence of guilt, because the requirements for such use were not met. See Nieto, 119 Wn. App. at 161. Those requirements are 1) the declarant must testify at trial and be subject to cross-examination, 2) the prior statement must be inconsistent with the declarant's testimony, and 3) the prior statement must have been given under oath, subject to penalty of perjury, at a trial, hearing, or other proceeding under oath such as a deposition. See ER 801(d)(1); Sua, 115 Wn. App. at 48. The proponent of the evidence is required to satisfy all of the requirements in order for the evidence to be considered in any way other than impeachment. See Nieto, 119 Wn. App. at 161.

Here, the prosecution failed to meet that burden. A statement which is not made under oath and subject to penalty of perjury at another proceeding is not admissible as a "prior inconsistent statement" under ER 801(d)(1); see Sua, 115 Wn. App. at 48. The prosecution presented no evidence whatsoever that Arthur's phone statements to Pihl were made "under oath," under penalty of perjury, or anything similar.

As a result, the statements were not admissible for any purpose other than impeachment. See Nieto, 119 Wn. App. at 161. And impeachment evidence is not "proof of the substantive facts encompassed in such evidence." State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). Put another way, "impeaching and contradictory statements are 'admitted only to destroy the credit of the witnesses, to annul and not to

substitute their testimony.” Johnson, 40 Wn. App. at 378-79, quoting, State v. Thorne, 43 Wn.2d 47, 53, 260 P.2d 331 (1953).

State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005), is instructive. In that case, the defendant was accused of having a sexual relationship with an 18-year old high school student. To prove the charged crimes, the prosecution was required to prove that the defendant had sexual intercourse with the victim.

At trial, however, the victim denied that she and the defendant were sexually involved. 130 Wn. App. at 559. To impeach that claim, the prosecutor offered testimony that the victim had told a friend about having sex with the defendant, as well as testimony from an officer that, when asked if she wanted officers to tell her mother that she and the defendant were sexually involved, the victim had said “[n]ews like this, a mother should hear from her daughter.” 130 Wn. App. at 559. The prosecution told the court that the questions of the friend and the officer were to be used to impeach the denial of having made the statements that sexual intercourse had occurred. 130 Wn. App. at 570. In closing statements, the prosecutor then argued that the statements the victim had made to the officer and friend proved that the alleged sexual intercourse had, in fact, occurred. 130 Wn. App. at 570-71.

On appeal, the Clinkenbeard Court first noted that it was proper to impeach a witness with an out-of-court statement of a material fact which is inconsistent with in-court testimony, “even if such a statement would otherwise be inadmissible as hearsay.” 130 Wn. App. at 570. However, the Court pointed out, impeachment evidence is intended to address only

the witness' credibility "but is not probative of the substantive facts encompassed by the evidence." Id., citing, Johnson, 40 Wn. App. at 377. By arguing that the statements provided evidence that the sexual intercourse had occurred, the Clinkenbeard Court held, the prosecutor had used the evidence as "substantive evidence of guilt at trial." 130 Wn. App. at 570-71. The Court concluded that the arguments of the prosecutor were "improper use of impeachment testimony as substantive evidence." Id.; see also, Sua, 115 Wn. App. at 38 (prosecutor used impeachment evidence as substantive evidence of guilt when arguing that the statements intending to impeach should be used as evidence the witness "told the truth" in making the statements and that those statements were evidence of guilt).

Thus, statements admitted for impeachment purposes are "not substantive evidence and must be disregarded" by a court in determining whether there is sufficient evidence to convict. See State v. Metcalf, 14 Wn. App. 232, 236, 540 P.2d 459 (1975), review denied, 87 Wn.2d 1009 (1976).

Here, in arguing that the evidence of Arthur's statements should be admitted over Ricky's timely objection, the prosecutor argued that she would use that evidence for impeachment purposes, but never once argued that it was admissible for other purposes. RP 119-21. Nor did she ever try to establish the requirements of ER 801(d)(1). But in closing argument, in arguing guilt, the prosecutor specifically cited as evidence the "conversation with Mr. Kercher, Senior" (Arthur) and the "facts" the prosecutor said that conversation established, i.e., that Arthur had "informed the officer that the defendant had moved out approximately two

months prior and that initially he moved out with a friend but that hadn't worked out and so the defendant had then moved in with his mother," as well as that Arthur had "[a]t no point in time" during that statement expressed "any confusion" about where his son was residing or say that his son was "still residing with him." RP 122-23.

Thus, the prosecutor clearly relied on the impeachment evidence not solely to impeach but for the truth of the matter asserted i.e., that Ricky had moved out two months earlier, moving in with a friend at first and then moving in with his mother. But as the Supreme Court recently declared, impeachment evidence, including prior inconsistent statements, is "offered solely to show the witness is not truthful" and "may not be used to argue" guilt **"or even that the facts contained in the prior statement are substantively true."** State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008) (citation omitted) (emphasis added).

Despite its impropriety, the misconduct of the prosecutor on this point would not have compelled reversal had the trial court not accepted the prosecutor's improper invitation. In general, where there is a bench trial, it is presumed the trial judge knows the rules of evidence and does not consider evidence for any improper purpose. See State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). But that presumption is overcome where, as here, there is evidence the trial court relied on the evidence for the improper purpose to make essential findings regarding the case. See State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002).

Here, the record makes it plain that the trial court relied on the

“impeachment” evidence of Arthur’s statements to the officer in finding guilt, despite the court’s declaration that it was “mindful” that such use was improper. In its oral ruling, the court first recognized that the prosecution was required to prove substantive evidence - “not merely impeachment evidence” - to support the conviction. RP 132. But the court then relied on Arthur’s statement that his son had already moved in with his mother at the point that the verification check occurred. RP 135. While admitting that the case was based on “inferences and circumstances,” the court also relied on the fact that Arthur’s statement to Pihl did not include an “affirmative[.]” statement that Ricky was living at Arthur’s home at the time. RP 136.

Further, in the written bench trial findings and conclusions, the court based its conclusion of guilt on “the foregoing Findings of Fact,” which included the following factual finding:

That L[.]K[.] utilized a phone from within the residence to contact her father, Arthur Kercher, II. That L[.]K[.] then provided the phone to Detective Pihl. That Detective Pihl spoke with Arthur Kercher, II[.] on the phone. **That Arthur Kercher, II[.] reported to Detective Pihl that defendant had moved out of his residence approximately two months prior, and that defendant had initially moved out to reside with a friend but that living arrangement did not work out. That Arthur Kercher, II[.] then reported to Detective Pihl that defendant had moved in with his mother.**

CP 14 (emphasis added).

Thus, the written decision of the court makes it clear that Arthur’s statements to the officer were, in fact, used by the court not just for impeachment but also as substantive evidence of guilt. As this Court has

held, regardless whether the trial court's oral ruling reflects the improper basis of its decision, the appellate court should "decline to look at that ruling" as conclusive evidence of the trial court's decision, because "[a] trial court's oral ruling 'has no final or binding effect unless formally incorporated into the findings, conclusions and judgment.'" State v. Bryant, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995), quoting, State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966); see also, Grundy v. Brack Family Trust, 151 Wn. App. 557, 571, 213 P.3d 619 (2009) (written findings control).

The prosecutor committed misconduct in arguing that the trial court should consider Arthur's out-of-court statement to the officer as evidence of Ricky's guilt. And the trial court erred in accepting that invitation. This Court should so hold.

b. Reliance on improper opinion

The prosecutor also committed misconduct and the court also erred in relying on the officer's opinion as evidence of guilt in convicting.

i. Relevant facts

During trial, Officer Pihl declared, "[i]f we believe that the person is not still living at the address we refer that to the prosecutor's office." RP 36. The officer was also asked to define the term "absconded," and he responded that it "means, to me, that the person is not still living at the address that they had registered at and that their whereabouts are unknown." RP 36. The officer then testified that he had assigned the category "absconded" or not in "compliance" to Ricky after the verification visit. RP 45.

The prosecutor also argued that the court had evidence to support the finding of guilt and that Ricky was not “in compliance” with the registration requirements based in large part upon the testimony of officer about his “belief” in guilt, i.e., that the officer had testified that “at the time that the verification check was performed, . . . [he] **believed that the defendant was not residing at his registered address during the charged time period.**” RP 125-26 (emphasis added).

In its written findings in support of the conviction, the trial court relied on the following finding of fact:

That, at the conclusion of the March 11, 2011 verification check, Detective Pihl classified defendant as having absconded.

CP 15.

- ii. The prosecutor committed further misconduct and the trial court erred in improperly relying on the officer’s opinion as substantive proof of guilt

Again, the prosecutor urged the court to rely on improper evidence as substantive evidence of guilt and again the court erred in accepting that invitation. Where a witness offers testimony which amounts to an opinion “regarding the guilt or veracity” of a defendant or other witnesses, that is improper opinion testimony. See State v. Demery, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001); see State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).

Such testimony is improper because it implicates the defendant’s constitutional right to fair trial before an impartial fact-finder. It is the right of the defendant to have the question of guilt decided by the fact-

finder, not declared by a witness. See State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). And the due process right to such fairness is not limited to those proceedings at which the fact-finder is a jury; it applies to bench trials, too. See, e.g., State ex rel McFerren v. Justice Court of Evangeline Star, 32 Wn.2d 544, 550, 202 P.2d 927 (1949); see also, State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985), overruled in part and on other grounds by, City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994).

As a result, where there is improper opinion testimony before a judge, the Court is faced with an analysis similar to that present when there is a jury. First, was there improper opinion testimony? And second, did such testimony cause sufficient prejudice to compel reversal? See e.g., Kirkman, 159 Wn.2d at 926-28.

Here, although counsel did not object to the officer's opinion, that does not prevent this Court from addressing it on appeal. In cases involving a jury, where the defendant fails to object below, courts have applied the "manifest constitutional error" standard to determine whether the issue is preserved for review. See Kirkman, 159 Wn.2d at 926.

The purpose of requiring an objection below, however, is to give the "trial court the opportunity to prevent or cure the error," by taking actions such as striking the testimony or providing a curative instruction to the jury. Kirkman, 159 Wn.2d at 926. Where, as here, there is a bench trial, it is presumed that the trial court will not rely on improperly admitted evidence in convicting. See Miles, 77 Wn.2d at 601. Thus, it would be an empty requirement to hold that a defendant must object in a bench trial in

order to allow the trial court the opportunity to engage in any unnecessary “cure.”

In any event, here there was “manifest constitutional error.” Such error exists when a witness gives an “explicit or almost explicit witness statement on an ultimate issue of fact” and the error causes identifiable prejudice to a defendant’s constitutional right to trial by an impartial fact-finder. Kirkman, 159 Wn.2d at 927-28.

Here, the statements were clearly explicit or almost explicit statements on the ultimate issue of Ricky’s guilt. To prove Ricky guilty in this case, the prosecutor had to show not only that he had a prior sex offense which required him to register his current address but that he was not in compliance with the registration requirements. See, e.g., State v. Stratton, 130 Wn. App. 760, 766, 124 P.3d 660 (2005); RCW 9A.44.130(11). For an offender who has a fixed residence, the requirement is that they must report in or reregister when they move their registered address or lose their “fixed residence.” See RCW 9A.44.130(5)(a); RCW 9A.44.140(6)(a); RCW 9A.44.130(7).

Ricky stipulated to the existence of the prior conviction and to the fact that he was required to register; the only question was whether he had failed to comply with the registration requirements by failing to reregister after he moved his residence. The officer said he classified someone as “absconded” when they are no longer living at their registered address, that he classified Ricky as such, that he also categorized Ricky as not in “compliance” with the registration requirements, and that he only referred a case to the prosecution - something which obviously happened here -

when he believed the defendant was not living at their registered address. RP 36, 45. Where an officer gives such an opinion, it amounts to improper opinion testimony. See Montgomery, 163 Wn.2d at 595-96.

And if there was any question that the officer had given his opinion or belief about whether Ricky had failed to comply with the registration requirements - and thus was guilty as charged - the prosecutor made it clear in closing, declaring that the officer had testified that “at the time that the verification check was performed, . . . [he] **believed that the defendant was not residing at his registered address during the charged time period.**” RP 125-26 (emphasis added).

Further, the improper opinion testimony had a direct, observable effect on Ricky’s rights to receive a fair trial, because the trial court *relied* on that evidence in finding guilt. In its written findings in support of the conviction, the trial court specifically relied on the fact “[t]hat, at the conclusion of the March 11, 2011 verification check, Detective Pihl classified defendant as having absconded,” as one of the facts supporting the conclusions of guilt. CP 15. Thus, again, the Miles presumption that a court presiding over a bench trial will not rely on improper evidence in finding guilt has been overcome. Read, 147 Wn.2d at 245. Again the prosecutor invited the trial court to decide Ricky’s guilt on an improper basis and again the court accepted that invitation. This Court should so hold.

- c. Absent the improper evidence, there is insufficient evidence to support the conviction

Reversal and dismissal is required, because without the improper

use of the impeachment evidence and without improper reliance on the officer's opinion, the evidence was insufficient to support the conviction, beyond a reasonable doubt. Evidence is sufficient only if, taken in light most favorable to the state, any rational trier of fact could have found guilt, beyond a reasonable doubt. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In addition, where the improper use of impeachment evidence occurs, reversal and dismissal is required unless there is "substantial evidence that supports the elements of the crime charged." Clinkenbeard, 130 Wn. App. at 571-72. Further, where, as here, improper opinion testimony is admitted and it amounts to manifest constitutional error, as here, the standard of review is that for constitutional harmless error. See State v. Hudson, 150 Wn. App. 646, 656, 208 P.2d 1236 (2009). Under that standard, reversal and dismissal is required unless the prosecution meets the heavy burden of proving the error harmless, beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986).

And that standard is not met unless the prosecution can show that *every rational trier of fact would necessarily* have convicted, absent the evidence. Id.

The prosecution cannot meet that burden in this case. Here, the properly admitted evidence was incredibly thin. That evidence was that the officer went to the registration address and was told by a teenager that her brother no longer lived there - a declaration she admitted she did not know enough to make. The officer conceded that he did not go inside the home to check to see if there were any items which might belong to Ricky

inside. And though Arthur said Ricky had moved out, he also said that had only just happened, so that alone would not support the conclusion, beyond a reasonable doubt, that Ricky had timely failed to register.

Further, the fact that Ricky was not there that day did not mean he did not reside there. Indeed, the definition of “residence” is sufficiently broad as to include even temporary places of abode and places where one has no “design to stay permanently.” See State v. Pray, 96 Wn. App. 25, 26, 29, 980 P.2d 240, review denied, 139 Wn.2d 1010 (1999). The purpose of the registration statute is to provide authorities with information on how to contact an offender in order to keep track of him and protect the community. See Stratton, 130 Wn. App. at 764-66. For that reason, a person’s “residence” need not be the *only* place they stay or have their belongings, so long as they can be contacted there. Id.

Thus, the properly admitted evidence did not prove beyond a reasonable doubt that Ricky had committed the charged crime. It was only with the improper use of impeachment evidence as substantive evidence and only with reliance on the improper opinion testimony that the court convicted. Because there was insufficient evidence to prove Ricky guilty, beyond a reasonable doubt, without the improperly considered evidence, reversal and dismissal is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 31st day of August, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING AND MAIL

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 Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to Mr. Arthur Kercher, 12312 Edgemere Dr. SW, Lakewood, WA. 98499.

DATED this 31st day of August, 2012.

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