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Supreme Court No. 98640-1
(COA No. 52605-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON ALLAN LUSK-HUTCHINS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jason Lusk-Hutchins petitions this Court for review of the Court of Appeals opinion in *State v. Lusk-Hutchins*, No. 52605-1-II. RAP 13.1(a), 13.3(a)(1), (b), 13.4(b). The opinion (filed May 12, 2020) is attached.

B. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State to present sufficient evidence to prove beyond a reasonable doubt every element of a charged offense. Failure to register requires proof that a registrant failed to comply with a requirement of the registration statute. Here, the State did not prove Mr. Lusk-Hutchins failed to comply with a registration requirement. It did not prove he lacked a fix residence and therefore needed to report weekly, and it did not prove he moved and therefore needed to report a change of address. Should this Court accept review because the Court of Appeals affirmed a conviction based on insufficient evidence due to its misunderstanding of the reporting requirements of the registration statute? RAP 13.4(b)(1)-(4).

2. When interpreting a statute, a court must look first to the plain language of the statute. Here, the Court of Appeals ignored the plain language and instead interpreted the failure to register statute to impose an additional burden on registrants that is absent from the plain language of the statute. The Court construed the statute to require a registrant to report a change in status from lacking to having a fixed residence, even if the

person has not moved and has not otherwise triggered a statutory reporting requirement. Should this Court accept review where the Court of Appeals interpreted the failure to register statute to impose additional reporting requirements that ignore the plain language of the unambiguous statute? RAP 13.4(b)(1)-(4).

3. Every defendant is entitled to have the court actually consider his request for an exceptional sentence below the standard range, and where the court fails to consider a mitigating circumstance or applies the wrong legal standard, the court abuses its discretion. Should this Court accept review where the Court of Appeals affirmed the sentence even though the trial court did not meaningfully consider Mr. Lusk-Hutchins's request and did not apply the appropriate statutory standard, contrary to decisions of this Court and the Court of Appeals? RAP 13.4(b)(1)-(4).

C. STATEMENT OF THE CASE

Mr. Lusk-Hutchins has a duty to register as a sex offender. CP 22. Following his release from custody, he registered with the Cowlitz County sheriff's office on June 26, 2017. CP 22; RP 57; Exs. 7, 8 (p.1), 9.

After several months, Mr. Lusk-Hutchins's community custody supervisor withdrew her permission for Mr. Lusk-Hutchins to live at the home where he had been residing. RP 83. Therefore, Mr. Lusk-Hutchins returned to the sheriff's office on October 24, 2017, and registered as

"transient."[1] CP 22; RP 63-64, 83-84; Ex. 8 (p.2-3). At that time, he also filled out a Resident Sex Offender Transient-Weekly Tracking Log for the preceding week and signed the Transient Check In Log. CP 22; Ex. 10 (p.1, 3). Mr. Lusk-Hutchins listed the address of Jared Sutters at 1000 17th Avenue in Longview as the address at which he stayed for two of the three dates in the preceding week. CP 22; Ex. 10 (p.1).

Mr. Lusk-Hutchins returned to the sheriff's office on October 31, 2017. CP 22. He again signed the Transient Check In Log and filled out a Resident Sex Offender Transient-Weekly Tracking Log. CP 22; Ex. 10 (p.2, 3). Mr. Lusk-Hutchins listed the address of Jared Sutters at 1000 17th Avenue in Longview as the address at which he stayed for six of the seven dates in the preceding week. CP 22; Ex. 10 (p.2). Jarod Sutters, a friend of Mr. Lusk-Hutchins, lived at that address and gave him permission to stay at the apartment. RP 84-85.

Mr. Lusk-Hutchins did not return to the sheriff's office after October 2017. CP 23. The State charged Mr. Lusk-Hutchins with failure to register as a sex offender for failing to comply with his registration requirements from November 7 through December 5, 2017. CP 3-4. Mr. Lusk-Hutchins waived a jury and proceeded to a bench trial. CP 18.

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[1] The State's evidence and arguments all use the word "transient." However, the relevant statute refers to whether a registrant has a "fixed residence," not whether he is "transient." RCW 9A.44.130.

The State's theory at trial was that Mr. Lusk-Hutchins was transient and therefore had a duty to report to the sheriff's office weekly but that he failed to do so after October 31, 2017. RP 41, 115-16. Mr. Lusk-Hutchins argued that he initially reported the loss of his fixed residence as required and then reported weekly as required, but that once he obtained a fixed residence, as evidenced by the logs establishing he stayed at the same address eight times in two weeks, the statute no longer required him to report weekly. RP 116-18.

The State argued in rebuttal that Mr. Lusk-Hutchins failed to comply with his reporting requirements either by not reporting weekly when he was transient or by failing to report "that he's registered at a specific address, not as transient." RP 118. The State focused on his status as either transient or not transient, rather than on the triggering events imposing statutory reporting obligations. *See, e.g.,* RP 121-22. The court convicted Mr. Lusk-Hutchins, finding he failed to comply with his registration obligations for either reason. CP 22-23; RP 127-31.

Mr. Lusk-Hutchins requested an exceptional sentence below the standard range based on his significant and persistent mental health issues. RP 135-41. The court imposed a standard range sentence without considering whether the proposed mitigation met the statutory standard

and without considering whether it offered a sufficient reason to depart from the standard range. RP 141-44.

D. ARGUMENT

1. The Court of Appeals ignored the plain language of the statute and this Court's canons of statutory interpretation to read an additional reporting requirement into the failure to register statute. Consequently, it affirmed Mr. Lusk-Hutchins's conviction based on insufficient evidence.

Mr. Lusk-Hutchins registered when he was released from prison as required. He also reported to appropriate authorities when he ceased to have a fixed residence as required. After initially reporting weekly because he lacked a fixed residence, Mr. Lusk-Hutchins stopped reporting weekly when the residence at which he was staying became his fixed residence. Because this did not involve a move, he did not report a change of address to the sheriff's office, and the statute does not impose a duty to do so. Nonetheless, the trial court convicted him of failing to register.

The Court of Appeals affirmed his conviction because it held the Legislature must have intended to require registrants to report a change in status from lacking to having a fixed residence, despite the absence of such a requirement in the plain language of the statute. Opinion at 5-10. The court manufactured a reporting requirement absent from the plain language of the statute and affirmed Mr. Lusk Hutchins's conviction based on insufficient evidence. This Court should accept review.

a. Courts must strictly construe the failure to register statute and may not impose requirements absent from the plain language of the statute.

Basic principles of statutory interpretation requires courts to rely on the plain language of the statute. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015); *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Courts must give penal statutes "a literal and strict interpretation." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). In addition, where the plain language of the statute is not clear and a statute is ambiguous, the rule of lenity requires courts to interpret the statute in the defendant's favor. *State v. Linville*, 191 Wn.2d 513, 521, 423 P.3d 842 (2018) (rule of lenity "compels the interpretation that is less punitive, not more punitive"); *Conover*, 183 Wn.2d at 712 ("In criminal cases, we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor.").

In addition, courts must strictly construe the failure to register statute. *State v. Dollarhyde*, 9 Wn. App. 2d 351, 355, 444 P.3d 619 (2019). Strict construction requires a narrow interpretation of the statute, and courts may not interpret the statute to impose requirements not included in the statute or to cover conduct unaddressed by the statute. *Delgado*, 148 Wn.2d at 727 (court must literally and strictly construe penal statute).

b. RCW 9A.44.130 imposes reporting requirements triggered by the loss of a fixed residence, the ongoing lack of a fixed residence, or the change of address by moving but imposes no separate requirement triggered by acquiring a fixed residence.

The failure to register statute is comprised of a number of different reporting obligations triggered by certain events. Some obligations apply to all registrants. Other obligations apply only to certain registrants. In order to determine whether a registrant failed to comply with the reporting requirements, one must read the statute as a whole to understand the different reporting requirements and time frames that apply to a particular registrant. *See State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010) (recognizing that "different [reporting] deadlines may apply, depending on the offender's residential status").

RCW 9A.44.130(1)(a) requires all individuals convicted of sex offenses to "register with the county sheriff for the county of the person's residence." Subsection two identifies the information registrants must provide. If incarcerated at the time of conviction, individuals must register with the sheriff in their county of residence upon their release from custody. RCW 9A.44.130(4)(a)(i). In addition, registrants must notify the sheriff when they change their address by moving. RCW 9A.44.130(5). The statute requires reporting within three business days of each of these triggering events. RCW 9A.44.130(4)(a)(i), 9A.44.130(5).

Beyond these initial residential registration requirements that apply to all registrants, when and how often registrants must report depends upon whether the person possesses or lacks a fixed residence. A "fixed residence" is "a building that a person lawfully and habitually uses as living quarters a majority of the week." RCW 9A.44.128(5). A registrant "lacks a fixed residence" where he "does not have a living situation that meets the definition of fixed residence and includes, but is not limited to, a shelter program designed to provide temporary living accommodations for the homeless, an outdoor sleeping location, or locations where the person does not have permission to stay." RCW 9A.44.128(9).

Individuals who have a fixed residence are required to register only when they change their address by moving or when they cease to have a fixed residence. RCW 9A.44.130(5)(a) (requiring notification within three days of a change of address by moving), RCW 9A.44.130(6)(a) (requiring notification within three days of "ceasing to have a fixed residence). Individuals who lack a fixed residence must report in person every single week to the county sheriff's office and "must keep an accurate accounting of where he or she stays during the week" for the entire duration of their reporting period. RCW 9A.44.130(6)(b).

Although the statute imposes upon registrants a clear duty to notify the sheriff when a registrant *ceases* to have a fixed residence, RCW

9A.44.130(6)(a), the statute imposes no countervailing duty to notify the sheriff when a registrant *obtains* a fixed residence. In addition, the statute imposes a requirement upon all registrants to register a "change of address . . . within three business days of moving." RCW 9A.44.130(5)(a). Read as a whole, nothing in the statute requires a registrant to notify the sheriff that he has secured a fixed residence at a known address where he has been temporarily residing if his fixed residence is not a changed address to which he has moved. In other words, if the house where a registrant reported as staying while he lacked a fixed residence becomes his fixed residence, the registrant has not moved, and no reporting duty is triggered.

Caselaw supports such a narrow reading of the statute, based on its plain language. For example, in *Dollarhyde*, the defendant reported weekly as a registrant lacking a fixed address. 9 Wn. App. 2d at 353-54. The State alleged the defendant failed to provide a complete and accurate accounting as to where he stayed every night, and so it alleged he failed to comply with the weekly reporting requirement. *Id.* The court rejected this argument and reversed the conviction, finding the State failed to prove that the sheriff specifically requested an accurate accounting from the defendant when he reported each week. *Id.* at 355-56. The court noted, "Statutes establishing procedures leading to a loss of liberty are construed strictly." *Id.* at 355 (citing *In re Det. of Cross*, 99 Wn.2d 373, 379, 662

P.2d 828 (1983)). The court found a strict construction of the statute requires “a clear and specific request” for an accounting of every night’s stay at each weekly reporting. *Id.*

Similarly, in *State v. Pickett*, the court reversed a failure to register conviction. 95 Wn. App. 475, 476, 975 P.2d 584 (1999). The trial court read the former statute to require homeless registrants to report. *Id.* The Court of Appeals again narrowly construed the statute and reversed the conviction because the former statute “neither provides a way of registering for homeless individuals who have no permanent place of residence nor requires that all such offenders establish a residence upon release.” *Id.*

c. Mr. Lusk-Hutchins complied with the registration requirements.

Applying the principle of strict construction here, the controlling statute does not require a registrant to report when an individual obtains a fixed residence. The statute imposes a requirement to report weekly while a registrant lacks a fixed residence. RCW 9A.44.130(6)(b). The statute clearly defines what it means to possess or lack a fixed residence. RCW 9A.44.128(5), 9A.44.128(9). Here, Mr. Lusk-Hutchins reported weekly while he lacked a fixed residence, in compliance with RCW 9A.44.130(6)(b). CP 22; Exs. 8, 10; RP 63, 83-85.

Likewise, the statute imposes a requirement to report a change of residence resulting from a move. RCW 9A.44.130(5)(a). "The phrase 'change his or her residence address' can only apply when a person establishes a different residence or replaces one residence with another." *State v. Breidt*, 187 Wn. App. 534, 543, 349 P.3d 924 (2015). Where a registrant does not move, no reporting obligation is triggered. *Peterson*, 168 Wn.2d at 773 (distinguishing case where registrant "never moved in the first place," and so finding "the duty to register was not triggered"). Mr. Lusk-Hutchins did not establish a different residence by moving from one place to another. Therefore, he had no obligation to report a change of residence by moving under RCW 9A.44.130(5)(a).

Mr. Lusk-Hutchins reported in person, weekly, while he lacked a fixed residence, in compliance with RCW 9A.44.130(6)(b). CP 22; Exs. 8 (p.2-3), 10; RP 63, 83-85. Once Mr. Lusk-Hutchins stayed at the location he reported to the sheriff for six out of his seven reported days, that location became his fixed residence. Ex. 10 (p.2); RCW 9A.44.128(5) (defining "fixed residence" as "a building that a person lawfully and habitually uses as living quarters a majority of the week."). Once Mr. Lusk-Hutchins no longer lacked a fixed residence, the statute did not require him to continue to report weekly. In fact, if Mr. Lusk-Hutchins had

continued to report this address weekly as a transient, he would violate the rule prohibiting him from staying in one place the majority of the week.

Mr. Lusk-Hutchins's transition to a fixed residence did not involve a move. Because he did not change his residence by moving, the requirement of RCW 9A.44.130(5)(a) to register a change of address within three business days of moving fails to apply. Therefore, Mr. Lusk-Hutchins did not fail to comply with either reporting obligation imposed by the statute, and the State presented insufficient evidence that Mr. Lusk-Hutchins was guilty of failure to register. The below chart summarizes how Mr. Lusk-Hutchins complied with all reporting requirements.

TRIGGERING EVENT	STATUTORY OBLIGATION IMPOSED	MR. LUSK-HUTCHINS'S ACTIONS	RECORD
release from incarceration	must register with sheriff within three business days from time of release 9A.44.130(4)(a)(i)	Mr. Lusk-Hutchins did register with Cowlitz County Sheriff's Office June 26, 2017	CP 22 RP 57 Exs. 7, 8, 9
loss of fixed residence	must register with sheriff within three business days after ceasing to have a fixed residence 9A.44.130(6)(a)	Mr. Lusk-Hutchins did report to the sheriff the loss of his fixed residence on October 24, 2017	CP 22 RP 63, 83 Ex. 8 (p.2-3)
lack a fixed residence	must report weekly, in person, to the sheriff 9A.44.130(6)(b)	Mr. Lusk-Hutchins did report weekly, in person, to the sheriff, on October 24 and October 31, 2017	CP 22 RP 63, 83-85 Ex. 10
acquire a fixed residence	no statutory obligation until move	Mr. Lusk-Hutchins stayed at residence in last report	RP 84-85

d. <u>This Court should accept review because the Court of Appeals affirmed Mr. Lusk-Hutchins's conviction based on insufficient evidence.</u>

The Court of Appeals rejected Mr. Lusk-Hutchins's argument because it found the legislature could not have intended this interpretation. Opinion at 5-10. The court reasoned that because the legislature enacted

the registration statute to protect communities, it must have intended a registration requirement in instances similar to Mr. Lusk-Hutchins, even if the statute did not require it. Opinion at 9-10. However, where the language of the statute is plain and unambiguous, courts resort to neither legislative intent nor history. *Conover*, 183 Wn.2d at 711-12. Here, the imposition of specific reporting requirements triggered by specific circumstances is clear, and the court erred in looking further than the statute itself.

Mr. Lusk-Huskins complied with applicable reporting requirements of the registration statute. The Court of Appeals affirmed the conviction because it erroneously read an additional requirement into the statute. This Court should accept review.

2. **The Court of Appeals affirmed a sentence where the trial court did not actually consider Mr. Lusk-Hutchins's request for an exceptional sentence under the appropriate statutory standard, in conflict with opinions of this Court and the Court of Appeals.**

   a. The Sentencing Reform Act authorizes courts to impose mitigated sentences below the standard range.

In the Sentencing Reform Act (SRA), the legislature established presumptive standard range sentences based on an assessment of the appropriate punishment for a particular offense adjusted for an offender's criminal history. RCW 9.94A.505(2)(a)(i), 9.94A.510, 9.94A.530. Despite these presumptive guidelines, courts may impose a sentence below the standard range where an individual establishes mitigating circumstances

by a preponderance of the evidence and the court finds the mitigating circumstances offer a substantial and compelling reason to depart from the standard range. RCW 9.94A.535.

RCW 9.94A.535(1) contains a nonexhaustive list of mitigating circumstances on which a court may rely to impose a sentence below the standard range. In addition, courts may consider *any* mitigating circumstance if it was not necessarily considered by the legislature in establishing the standard range sentence and is "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *State v. O'Dell*, 183 Wn.2d 680, 690, 358 P.3d 359 (2015) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)); *see also* RCW 9.94A.010 (SRA "structures, but does not eliminate, discretionary decisions affecting sentences").

Defendants may appeal a standard range sentence where a sentencing court refuses to exercise its discretion, abuses its discretion, or misapplies the law. *State v. Corona*, 164 Wn. App. 76, 78, 261 P.3d 680 (2011) (citing *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)); *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A court abuses its discretion where it misapplies the law or fails to understand the scope of its discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Defendants are entitled to "actual consideration" of their request for an exceptional sentence, and courts must exercise "meaningful discretion" in deciding whether a departure is appropriate. *Grayson*, 154 Wn.2d at 335. In addition, a court's erroneous belief that it cannot consider circumstances justifying an exceptional sentence provides grounds for appeal. *O'Dell*, 183 Wn.2d at 697. A court commits reversible error when it refuses to consider meaningfully a sentencing option. *Grayson*, 154 Wn.2d at 341-42.

b. <u>Mr. Lusk-Hutchins moved for an exceptional sentence based on mitigating circumstances that distinguished his crime from others in the same category and demonstrated his diminished culpability.</u>

Mr. Lusk-Hutchins moved for an exceptional sentence based on his significant and persistent mental health issues. RP 135-41. Mr. Lusk-Hutchins suffers from a host of mental health issues, including Asperger's syndrome, bipolar disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, anxiety, agoraphobia, and panic attacks. RP 79-80. In addition, Mr. Lusk-Hutchins receives disability benefits when he is in the community. RP 87. These health issues, along with episodic homelessness, his struggle to comply with the restrictive rules of community custody, and his inability to secure appropriate assistance to address these struggles, contributed to Mr. Lusk-Hutchins's ability to

comply with his registration requirements. *See generally* RP 79-87, 135-37, 140-41.

These mitigating circumstances provided a basis for a departure for a host of possible reasons. For example, Mr. Lusk-Hutchins's mental health issues could qualify as a statutory mitigating circumstance if they significantly impaired either his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. RCW 9.94A.535(1)(e). *Cf. State v. Boyd*, 1 Wn. App. 2d 501, 525-28, 408 P.3d 362 (2017) (Becker, J., dissenting) (recognizing difficulty homeless registrants with mental health issues may have in complying with "burdensome" weekly in-person reporting requirements). A defendant does not need to prove his mental health rises to the level of a complete defense for a court to consider it as mitigation at sentencing. *See State v. Jeannotte*, 133 Wn.2d 847, 851-55, 947 P.2d 1192 (1997).

In addition, Mr. Lusk-Hutchins's mental health issues provided a possible basis for an exceptional sentence as a non-statutory mitigating circumstance. Courts may consider any relevant mitigating circumstances in sentencing, provided the defense proves the circumstance by a preponderance of the evidence and the circumstance offers a substantial and compelling reason to depart. RCW 9.94A.535; *O'Dell*, 183 Wn.2d 680. *O'Dell* held that courts may consider personal factors relevant to the

particular defendant in determining the propriety of an exceptional sentence. In so holding, *O'Dell* recognized that courts may consider any circumstance that could "amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." *Id.* at 696. *O'Dell* demonstrates courts must consider a defendant's culpability in a broader context and that a defendant's culpability relates to more than simply his actions at the time of the crime, considered in a vacuum.

Here, Mr. Lusk-Hutchings presented mitigating circumstances that distinguished his crimes from others in the same category and addressed his lack of culpability: his mental health. These issues also bore on Mr. Lusk-Hutchins's culpability and ability to comply with the reporting requirements. Courts always have the authority to depart based on factors that "relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant." *State v. Law,* 154 Wn.2d 85, 89, 110 P.3d 717 (2005). Because these are not factors "the legislature *necessarily* considered . . . when it established the standard range," the court could have considered it as mitigation at Mr. Lusk-Hutchins's sentence. *O'Dell*, 183 Wn.2d at 690.

c. <u>The Court of Appeals affirmed the sentence even though the trial court failed to apply the correct legal standard and failed to consider meaningfully Mr. Lusk-Hutchins's motion for a sentence below the standard range based on mitigating circumstances.</u>

While the trial court acknowledged Mr. Lusk-Hutchins has mental health issues and noted the idea of an exceptional sentence "has some traction with me," it imposed a standard range sentence without considering whether the defense established the mitigating circumstances by a preponderance of the evidence and without considering whether substantial and compelling reasons justified an exceptional sentence as required by RCW 9.94A.535. RP 143. Instead, the court considered this evidence only for purposes of determining the appropriate sentence *within* the standard range. RP 143. The court did not consider whether this evidence justified a *departure from* the standard range. The court made no findings and did not apply the standard of RCW 9.94A.535. This demonstrates the court did not recognize its ability to depart from the standard range.

Instead of following the statutory scheme, the court balanced Mr. Lusk-Hutchins's request for an exceptional sentence against "the concern for the safety and protection of the community." RP 144. The court's substitution of its own balancing test instead of applying the statutory standard constitutes an abuse of discretion. *Corona*, 164 Wn. App. at 78.

Here, the record does not establish that the court actually considered the merits of Lusk-Hutchins's request for an exceptional sentence under the statutory standard. The court did not determine whether Mr. Lusk-Hutchins's mitigating circumstances provided a substantial and compelling reason to depart.

The Court of Appeals' opinion rejecting Mr. Lusk-Hutchins's challenge and affirming the sentence conflicts with opinions of this Court and the Court of Appeals. The opinion jeopardizes the right to have a court actually consider a motion for an exceptional sentence based on mitigation under the proper standard, presenting a matter of substantial public interest. This Court should accept review. RAP 13.4(b)(1)-(4).

E. CONCLUSION

For the reasons set forth above, Mr. Lusk-Hutchins respectfully requests this Court grant review.

DATED this 10th day of June, 2020.

Respectfully submitted,

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APPENDIX

May 12, 2020, Opinion

State v. Lusk-Hutchins, 52605-1-II

Filed
Washington State
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON ALLAN LUSK-HUTCHINS, Appellant.	No. 52605-1-II UNPUBLISHED OPINION

LEE, C.J. — Jason A. Lusk-Hutchins appeals his conviction and sentence for failure to register as a sex offender. Lusk-Hutchins argues that (1) there was insufficient evidence to support his conviction because the statute does not require a sex offender to notify the Sheriff's Office when they obtain a fixed residence, (2) the superior court erred by failing to consider his request for an exceptional sentence below the standard range, and (3) the superior court erred by imposing certain legal financial obligations (LFOs). We affirm Lusk-Hutchins's conviction and standard range sentence. However, we reverse the imposition of LFOs and remand to the trial court to strike the interest on LFOs provision and to determine whether to impose the criminal filing fee or the DNA collection fee under the current LFO statutes.

FACTS

On December 18, 2017, the State charged Lusk-Hutchins with failure to register as a sex offender. The complaint alleged that Lusk-Hutchins had 2 or more prior convictions for failure to register. Lusk-Hutchins waived his right to a jury trial.

Christine Taff testified at Lusk-Hutchins's bench trial. Taff was the support specialist for the Cowlitz County Sheriff's Office (CCSO) Registered Sex Offender Unit. Taff testified that transient sex offenders were required to check in with the CCSO every Tuesday between 8:30 AM and 5 PM.

Taff also testified that, on June 26, 2017, she completed Lusk-Hutchins's registration and informed him of the statutory registration requirements. On October 24, Lusk-Hutchins returned to the CCSO and registered with a new address of "transient." Verbatim Report of Proceedings (VRP) at 61-62. Lusk-Hutchins again checked in with the CCSO on October 31. Taff noted that Lusk-Hutchins's registration log showed he stayed at 1000 17th Avenue Apartment 202 six nights between October 24 and October 31. Taff stated that Lusk-Hutchins failed to check-in with the CCSO November 7, 14, 21, 28, and December 5.

Lusk-Hutchins also testified at his trial. Lusk-Hutchins testified that on October 24, his corrections officer approved of him living at 1000 17th Avenue Apartment 202, with his friend.

Following the bench trial, the trial court entered the following findings of fact,

> 1. On June 26, 2017, based upon [] convictions for Rape of a Child in the Third Degree, Failure to Register as a Sex Offender (2nd conviction), Failure to Register as a Sex Offender [(]3rd conviction), Failure to Register as a Sex Offender (4th conviction), and Indecent Liberties without Forcible Compulsion [Domestic Violence (DV)], the Defendant registered with the Cowlitz County Sheriff's Office (CCSO) as a sex offender.

2. On October 24, 2017, the Defendant registered his address with CCSO as transient. The Defendant was provided notice of his requirements as a registered sex offender and his duty as a transient to check in with CCSO on a weekly basis. The Defendant was also provided with notice of his requirements if he were to obtain a fixed residence.

3. On October 31, 2017, the Defendant checked in with CCSO as required. He provided documentation of the addresses where he stayed during the previous week. The defendant indicated that he stayed at 1000 17th Ave Apt 202, Longview, WA six out of the seven nights.

4. The Defendant failed to check in with CCSO on November 7, 2017 as required.

5. The Defendant failed to check in with CCSO on November 14, 2017 as required.

6. The Defendant failed to check in with CCSO on November 21, 2017 as required.

7. The Defendant failed to check in with CCSO on November 28, 2017 as required.

8. The Defendant failed to check in with CCSO on December 5, 2017 as required.

Clerk's Papers (CP) at 22-23. The trial court concluded that, because Lusk-Hutchins was registered as transient, he was required to check in weekly with the CCSO. And if the Defendant intended 1000 17th Ave Apartment 202 to be his residence he was required to notify CCSO within three days and failed to do so. Therefore, the trial court concluded that Lusk-Hutchins was guilty of failing to register as a sex offender.

At sentencing, the State requested the trial court impose a standard range sentence. Lusk-Hutchins requested that the trial court impose an exceptional sentence downward. Lusk-Hutchins argued that his lifetime struggle with mental health issues justified an exceptional sentence downward.

The trial court declined to impose an exceptional sentence and explained,

> I'm going to impose a low-end sentence of 43 months plus 36 months of community custody. I think the exceptional sentence, while it has some traction, I just—am just not fully persuaded that that's the right thing to do here be—especially because of the concern for the safety and protection of the community.

VRP at 144. The court imposed a standard range sentence of 43 months confinement. The court stated that it was imposing "standard non-discretionary costs" and imposed a $500 crime victim's assessment, $200 criminal filing fee, and $100 DNA collection fee. VRP at 144. The judgment and sentence also included a provision imposing interest on all the imposed LFOs.

Lusk-Hutchins appeals.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

1. Legal Principles

Evidence is sufficient to support a conviction if, after viewing the evidence and all reasonable inferences in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Id.* at 106 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

Generally, "following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *Id.* at 105-06. "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the findings are true." *State v. Smith*, 185 Wn. App. 945, 956, 344

P.3d 1244, *review denied*, 183 Wn.2d 1011 (2015). Unchallenged findings of fact are verities on appeal. *Homan*, 181 Wn.2d at 106.

A person commits the crime of failure to register if he or she has a duty to register for a felony sex offense and knowingly fails to comply with the requirements of RCW 9A.44.130. RCW 9A.44.132(1). RCW 9A.44.130(1)(a) requires all adults convicted of a sex offense to "register with the county sheriff for the county of the person's residence." RCW 9A.44.130(6)(b) provides the registration requirements for persons with a duty to register who lack a fixed residence,

> A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request.

And RCW 9A.44.130(5)(a) requires a person to notify the county sheriff within three days of moving when a person changes his or her residence address. "Fixed residence" means,

> a building that a person lawfully and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage. A nonpermanent structure including, but not limited to, a motor home, travel trailer, camper, or boat may qualify as a residence provided it is lawfully and habitually used as living quarters a majority of the week, primarily kept at one location with a physical address, and the location it is kept at is either owned or rented by the person or used by the person with the permission of the owner or renter.

RCW 9A.44.128(5).

2. Sufficient Evidence Supports the Conviction

Lusk-Hutchins does not dispute that he was required to register as a sex offender or that he has prior convictions for failure to register. Instead, Lusk-Hutchins argues that there is no registration requirement that is triggered when a person required to register lacks a fixed residence

and subsequently acquires a fixed residence without moving.[1] Specifically, Lusk-Hutchins contends that,

> Nothing in [RCW 9A.44.130] requires notification of a change of status from lacking to obtaining a fixed residence. In those perhaps rare circumstances where one's so-called status changes but one's address does not, the statute imposes no notification requirement.

Br. of Appellant at 17. Lusk-Hutchins argues that he complied with all registration requirements because he obtained a fixed residence without moving. We disagree with Lusk-Hutchins's interpretation of RCW 9A.44.130.

We review questions of statutory interpretation de novo. *State v. Weatherwax*, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017). "Our 'fundamental objective . . . is to ascertain and carry out the legislature's intent.'" *Weatherwax*, 188 Wn.2d at 148 (alteration in original) (internal quotation marks omitted) (quoting *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d

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[1] Lusk-Hutchins assigns error to findings of fact 2 and 4-8. However, Lusk-Hutchins does not argue that those findings of fact are not supported by substantial evidence. Instead, Lusk-Hutchins argues that he actually complied with the requirements of the statute and, therefore, the trial court erred by finding him guilty. For example, Lusk-Hutchins does not dispute that he failed to check-in with CCSO November 7, 14, 21, 28, or December 5. Lusk-Hutchins argues only that he was not required to check in with CCSO on those days. Because Lusk-Hutchins does not argue that the challenged findings of fact are not supported by substantial evidence, we need not address these assignments of error. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

However, we note that the trial court's findings were supported by substantial evidence. Here, Taff testified that Lusk-Hutchins registered as transient and checked in October 24 and October 31. And Taff testified that Lusk-Hutchins's log sheet showed that one week he stayed at 1000 17th Ave Apartment 202 six out of seven nights. Therefore, Taff's testimony provides substantial evidence to support the trial court's finding of fact 2. And Taff testified that Lusk-Hutchins did not check in November 7, 14, 21, 28, or December 5. Therefore, Taff's testimony provided substantial evidence for the trial court's findings of fact 4-8. Accordingly, the trial court's findings of fact are supported by substantial evidence.

1283 (2010). "We discern a statute's meaning 'from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Weatherwax*, 188 Wn.2d at 149 (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). "A nontechnical statutory term may be given its dictionary meaning." *State v. Smith*, 189 Wn.2d 655, 662, 405 P.3d 997 (2017), *cert. denied*, 139 S. Ct. 324 (2018). In interpreting statutes, we avoid interpreting statutes to have absurd results because we presume the legislature did not intend them. *Weatherwax*, 188 Wn.2d at 148.

Here, Lusk-Hutchins's interpretation of the provisions of RCW 9A.44.130 fails to apply the ordinary meaning of the terms "change of residence address" and "move" within the context of the statutory scheme. Furthermore, Lusk-Hutchins's interpretation of the statute leads to an absurd result that defies the purpose of the statute and could not have been intended by the legislature. Finally, Lusk-Hutchins's interpretation is contrary to our Supreme Court's reading of the failure to register statute in *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010).

Lusk-Hutchins argues that because he stayed six nights at 1000 17th Ave Apartment 202 during the week of October 24, he did not "move" or have a "change of residence address" when that address became his fixed residence. But this argument is contrary to the ordinary meanings of those terms.

Lusk-Hutchins contends that RCW 9A.44.130(5)(a) does not apply to him because he did not move or change residence address. However, the statute uses the phrase "changes his or her residence address" not "changes his or her fixed residence." "[C]hange" means "to make different." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 373 (2002). "[R]esidence" means "the act or fact of abiding or dwelling in a place for some time: an act of making one's

home in a place." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1931. And "address" means "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 25.

When a person who lacks a fixed residence goes on to obtain a fixed residence, that person has made their home in a place and has designated that place as a location where they may be found—a residence address. And when that residence address is different than what it was before, the residence address has changed. Prior to obtaining a fixed residence, a transient person's residence address is nothing. Therefore, when a person who has no fixed residence obtains a fixed residence, the person's residence address has changed.

Under RCW 9A.44.130(5)(a), the person is required to register the new residence address within three days of "moving." Lusk-Hutchins argues that if a person is already at a physical address temporarily, then the person did not move for the purposes of the statute, and therefore, there is no requirement to register with the Sheriff's office. But "move" means "change one's abode or location." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1479. Therefore, the ordinary meaning of the statute would be that the person is required to register with the Sheriff's office within three days of the *change* of residence address. Thus, even if a person has already been physically at an address, once that address goes from a temporary place to stay to a fixed residence, the person has changed his or her residence address and that person has moved for the purposes of the statute. Accordingly, Lusk-Hutchins's interpretation is not consistent with the ordinary meanings of the terms in the statute.

Lusk-Hutchins's interpretation of the statute is also contrary to the purpose of the sex offender registration statute and creates an absurd result. "The purpose of the sex offender registration statute is to aid law enforcement in keeping communities safe by requiring offenders to divulge their presence in a particular jurisdiction." *Peterson*, 168 Wn.2d at 773-74. Based on Lusk-Hutchins's interpretation of the statute, a transient person would not be required to register a fixed residence address when that person stays at an address while being on transient status and that address later becomes his fixed residence, and the person would not be required to regularly check in with the Sheriff's Office. Under this circumstance, the Sheriff's Office would have no knowledge of where that particular sex offender is living. This result is absurd, could not have been intended by the legislature, and is contrary to the purpose of aiding law enforcement in keeping communities safe.

Finally, Lusk-Hutchins's argument is essentially that either the State was required to prove that he lacked a fixed residence or that he moved to a fixed residence, but this is contrary to our Supreme Court's interpretation of RCW 9A.44.130 in *Peterson*. In *Peterson*, our Supreme Court held that residential status is not an element of failure to register. *Id.* at 773. The Supreme Court explained, "[i]n this case, [the defendant's] specific residential status was not essential to proving the criminal act at issue: that he failed to provide timely notice of his whereabouts under any of the statutorily defines deadlines after vacating his registered address." *Id.* at 772. The same reasoning applies here.

Here, regardless of Lusk-Hutchins's residential status, he did not comply with any requirement of the statute. If Lusk-Hutchins continued to lack a fixed residence, then he was required to check in weekly and he failed to do so. If Lusk-Hutchins had changed his residence

address from transient or no fixed residential address to having a fixed residential address, then he was required to provide notice to the Sheriff's Office within three days. Lusk-Hutchins had no contact with the Sheriff's Office from October 31 to December 5. Therefore, regardless of his residence status he failed to comply with any requirement of the statute. Accordingly, the State presented sufficient evidence to support Lusk-Hutchins's conviction.

B. EXCEPTIONAL SENTENCE

Lusk-Hutchins argues that resentencing is required because the trial court failed to meaningfully consider his request for an exceptional sentence downward. We disagree.

When a defendant requests an exceptional sentence below the standard range, "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). Defendants are not entitled to an exceptional sentence, but "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis omitted). Failure to consider an exceptional sentence downward or the erroneous belief that the trial court lacks the authority to consider an exceptional sentence downward is an abuse of discretion that warrants remand. *Grayson*, 154 Wn.2d at 342; *Garcia-Martinez*, 88 Wn. App. at 329-31. However, "a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion and the defendant may not appeal that ruling." *Garcia-Martinez*, 88 Wn. App. at 330.

Here, the trial court considered Lusk-Hutchins's request for an exceptional sentence downward and weighed that request against the safety and protection of the community. Contrary to Lusk-Hutchins's assertion, the trial court did not misunderstand its authority to impose an exceptional sentence downward. Rather, the trial court concluded that the basis for the exceptional sentence did not outweigh the risk to the community. Here, the trial court clearly considered the facts and determined that, based on the risks to the community, there was no basis for an exceptional sentence. Therefore, the trial court properly exercised its discretion. *Id.* Accordingly, we affirm Lusk-Hutchins's standard range sentence.

C. LFOs

Lusk-Hutchins argues that the trial court erred by imposing the $200 criminal filing fee and the $100 DNA collection fee. Lusk-Hutchins also argues that the trial court erred by imposing interest on the LFOs that were imposed. We agree.

The 2018 amendments to the LFO statutes prohibit sentencing courts from imposing a criminal filing fee on defendants who are indigent as defined in RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h). Also, the amendments to RCW 43.43.7541 state that the trial court must impose a DNA collection fee unless the defendant's DNA has already been collected because of a prior conviction. And no interest shall accrue on nonrestitution LFOs. RCW 10.82.090(1). These amendments went into effect June 7, 2018. LAWS OF 2018, ch. 269. Lusk-Hutchins was sentenced on August 6, 2018, after the amendments to the LFO statutes went into effect.

1. Criminal Filing Fee

The trial court appears to have found Lusk-Hutchins indigent because it specifically intended to impose only "standard non-discretionary" costs. VRP at 144. The text of the judgment

and sentence states that "[t]he court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." CP at 31. But the trial court did not make a specific finding that Lusk-Hutchins was indigent for the purposes of LFOs and, there is no indication that the trial court applied the definition of indigency in RCW 10.101.010(3)(a)-(c).

Under RCW 10.101.010(3)(a)-(c), a person is "indigent" if he or she receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual after tax income of 125 percent or less of the current federally established poverty level. Also, the trial court is not prohibited from imposing the criminal filing fee if the defendant is found indigent under RCW 10.101.010(3)(d) (i.e., unable to pay the anticipated costs of counsel based on available funds). RCW 36.18.020(2)(h). The record fails to show the basis of the trial court's indigency finding under RCW 10.101.010(3). Therefore, we remand for the trial court to determine whether to impose the criminal filing fee under the current version of RCW 36.18.020(2)(h).

2. DNA Collection Fee

Lusk-Hutchins has an extensive criminal history, including a convictions for third degree rape of a child and indecent liberties without forcible compulsion. Lusk-Hutchins also has four prior convictions for failure to register as a sex offender. However, there is no evidence in the record as to whether a DNA collection fee had been collected from Lusk-Hutchins as a result of these convictions. Therefore, we remand to the trial court to determine whether a DNA collection fee is appropriate under the 2018 amendments to RCW 43.43.7541. On remand, the State will have the burden of proving that Lusk-Hutchins's DNA has not previously been collected because

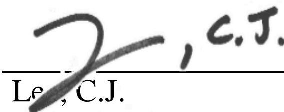
of a prior conviction. *State v. Houck*, 9 Wn. App. 2d 636, 651, 446 P.3d 646 (2019), *review denied*, 194 Wn.2d 1024 (2020).

3. Interest on LFOs Provision

Interest may no longer accrue on nonrestitution LFOs. RCW 10.82.090. Because there was no restitution ordered, the trial court erred by ordering interest to accrue on the nonrestitution LFOs that were imposed.

We affirm Lusk-Hutchins's conviction and standard range sentence. However, we reverse the imposition of certain LFOs and remand to the trial court to strike the interest on LFOs provision and to determine whether to impose the criminal filing fee or the DNA collection fee under the current LFO statutes.

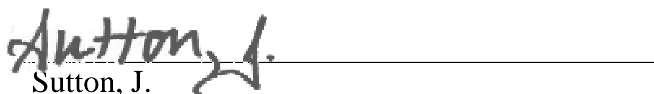
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Lee, C.J.

We concur:

Worswick, J.



Sutton, J.

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☒ petitioner

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: June 10, 2020
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