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Division I
State of Washington

NO. 72158-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN BATSON JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An offender who is convicted in another state of a felony that requires registration as a sex offender in the state of conviction is, as a result, required to register as a sex offender in Washington. Has Batson established that this provision is an unconstitutional delegation of legislative authority to other states?

2. Batson is required to register as a sex offender in Washington based on laws that were enacted after his predicate sex offenses. Has Batson established that application of the sex offender registration statute based on those predicate crimes is a violation of the prohibition on ex post facto laws?

3. Batson is required to register although it is possible that a person could be convicted of the Arizona predicate crime based on an act that would not constitute a crime in Washington. Has Batson established that this application of the statute is a violation of the guarantee of equal protection of the laws?

4. Testimony as to Batson's custody status was improperly admitted. His custody status, to the extent it was material, was established by other evidence. Was the error harmless?

5. The evidence established that Batson was required to register as a sex offender, that he registered using the address of a homeless shelter that did not qualify as a fixed residence, and that he failed to report weekly as required. Was the evidence sufficient to support the jury's guilty verdict?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Benjamin Batson, Jr., was charged with failure to register as a sex offender, in violation of RCW 9A.44.132(1)(b). CP 411-12. The State alleged that Batson had been convicted on two or more prior occasions of felony failure to register as a sex offender. CP 411. Pretrial motions to dismiss were denied by the Honorable Patrick Oishi. 3RP 3-16.¹

The Honorable Regina Cahan presided over a jury trial. 4RP 1. The jury found Batson guilty as charged. CP 460-62. The court imposed a standard range sentence of 10 months of confinement and 36 months of community custody. CP 464-67.

¹ The Report of Proceedings is in twelve volumes, referred to in this brief as follows: 1RP – 5/1/14; 2RP – 5/15/14; 3RP – 5/23/14; 4RP – 6/9/14; 5RP – 6/10/14; 6RP – 6/11/14; 7RP – 6/12/14; 8RP – 6/17/14; 9RP – 6/18/14; 10RP – 6/20/14; 11RP – 7/1/14; and 12RP – 9/9/14.

Batson filed a motion for arrest of judgment, asserting that the evidence at trial was insufficient to support his conviction. CP 474. The trial court denied the motion. 12RP 18; Supp. CP ___ (Sub no. 133, Order Denying Defendant's Motion Arresting Judgment, 9/12/14).

2. SUBSTANTIVE FACTS

In 1984, Batson was charged with two counts of sexual misconduct with a minor under 18, two counts of sexual assault, and kidnapping, in Pima County, Arizona. CP 98-99. He pled guilty to two counts of felony sexual misconduct with a minor under 18 and was sentenced to five years in prison (two consecutive terms of two and a half years). CP 100-02; Ex. 17, 26. As a result of this conviction, he is required to register as a sex offender in Arizona if he resides there. CP 450.

In 2003, Batson was convicted of two counts of felony failure to properly register as a sex offender in Florida. Ex. 16. In 2007, Batson again was convicted of felony failure to properly register as a sex offender in Florida. Ex. 15.

On April 6, 2009, Batson registered as a sex offender with the King County Sheriff. Ex. 9; 8RP 38. He declared that he was

homeless and gave an address at the Union Gospel Mission in Seattle. Ex. 9, 8RP 40-42. On March 18, 2011, the King County Sheriff's office received and recorded a letter from Batson, providing notice that he was no longer in King County, he was now in the Olympia jail. Ex. 8, 8RP 39, 42-43.

In 2011, Batson was charged with failure to register as a sex offender in King County, during the charging period August 1 to October 14, 2010. Ex. 2. He pled guilty to that offense. Ex. 25. At the sentencing hearing in that case, on June 21, 2011, Batson's attorney asserted that he had been confused but now understood his obligation to register. Ex. 30. On the identification page of the judgment and sentence, Batson wrote the address of the Union Gospel Mission as his address. Ex. 2; Ex. 9.

On December 19, 2011, Batson registered a change of address with the King County Sheriff's office. Ex. 7; 8RP 44. He declared that his residence was the St. Martin de Porres shelter in Seattle. Ex. 7. That shelter is a shelter for homeless persons, with 212 mats in a common sleeping area. 8RP 109-11. The shelter does not assign living space to individuals who sleep there. 8RP 114. It has a waiting list every night, but allows anyone who stays the night to have a mat for the next night. 8RP 113-14.

The Pierce County prosecutor charged Batson with felony failure to register during the charging period March 19, 2009, to December 18, 2011. 8RP 83. After learning that Batson had registered in King County in April 2009, the charging period was reduced to a period in March 2009; then the case was dismissed based on the State's concession that it could not prove that the Arizona crimes were comparable to Washington sex offenses, which in 2009 was necessary to establish a duty to register. 8RP 89-94. When that case was dismissed on April 11, 2013, Batson was released from custody and was told that the prosecutor believed that under current law he was required to register going forward. Ex. 23, at pp. 2, 8-9; 8RP 96-98.

After December 19, 2011, Batson did not report to the King County Sheriff's Office and filed no additional notification of any change of address. 8RP 37-52.

He was charged with the current offense on August 7, 2013. Ex. 27. He was arraigned on August 21, 2013, and released from custody. Ex. 28, 29.

C. ARGUMENT

1. RELEVANT SEX OFFENDER REGISTRATION LAW IN WASHINGTON.

In 1990, the Washington legislature enacted requirements for registration of adult and juvenile sex offenders. 1990 Wash. Laws ch. 3, §§ 401-09. The stated purpose of this legislation was to assist law enforcement and enhance community safety:

The legislature finds that sex offenders often pose a high risk of re-offense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in section 402 of this act.

Id. at § 401. Any person residing in this state who had been convicted of any sex offense was required to register with the county sheriff for the county of the person's residence. Id. at § 402(1). The definition of "sex offense" included specified crimes² and "[a]ny federal or out-of-state conviction for an offense that

² Those sex offenses were: a felony violation of RCW Chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090, or criminal attempt, solicitation, or conspiracy to commit one of those crimes. 1990 Wash. Laws ch. 3, § 602(29)(a) (amending RCW 9.94A.030(29)).

under the laws of this state would be a felony classified as a sex offense [specified in the list].” Id. at 402(5), 602(29).

In 2010, the legislature broadened the definition regarding prior federal and out-of-state convictions that require registration. In addition to requiring registration if the crime of conviction is comparable to a Washington sex offense, registration is required if it is an offense “for which the person would be required to register as a sex offender while residing in the state of conviction.”³ 2010 Wash. Laws ch. 267, §1(6).⁴

In 2011, the legislature expanded the definition of “sex offense” again, now requiring registration for persons convicted of any federal offense classified as a sex offense under 42 U.S.C. § 16911; and any military conviction for a sex offense, including sex offenses under the uniform code of military justice. 2011 Wash. Laws ch. 337, § 2(10). In 2015, the legislature added to the relevant definition of “sex offense”: “Any tribal conviction for an offense for which the person would be required to register as a sex

³ The 2010 legislation provided an exception to the registration requirement for a federal or out-of-state offense if “a court in the person’s state of conviction has made an individualized determination that the person should not be required to register.” 2010 Wash. Laws ch. 267, §1(6). That exception was eliminated in 2011 and is not relevant to this case, which involved a crime in 2013. 2011 Wash. Laws ch. 337, § 2.

⁴ The 2010 law also moved the relevant definition of “sex offense” from former RCW 9A.44.130(10) to a new section, codified as RCW 9A.44.128. 2010 Wash. Laws ch. 267, §§ 1, 2.

offender while residing in the reservation of conviction; or, if not required to register in the reservation of conviction, an offense that under the laws of this state would be classified as a sex offense under [RCW 9A.44.128(10)].” 2015 Wash. Laws ch. 261, § 2(10).

The Supreme Court rejected federal and state constitutional (ex post facto, equal protection, and due process) challenges to Washington’s sex offender registration laws in State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994).

**2. THE 2010 AMENDMENT TO RCW 9A.44.128(10)
IS NOT AN UNLAWFUL DELEGATION OF
LEGISLATIVE POWER.**

Batson contends that the definition of “sex offense” in Washington’s sex offender registration statutes contains an unconstitutional delegation of legislative power because the definition includes out-of-state offenses for which sex offender registration is required in the state of that conviction, even if those offenses are not comparable to Washington sex offenses. This argument is without merit. The legislature has defined the elements of this crime; one element is the existence of an out-of-state conviction. Batson has not established that the legislature’s policy decision to require registration even for those convicted of a

sex offense outside of Washington is an unconstitutional delegation of power. The trial court rejected this constitutional challenge. 3RP 4. This court should affirm that decision.

Statutes are presumed to be constitutional. Ward, 123 Wn.2d at 496. A party raising a constitutional challenge to a statute has the burden to prove that it is unconstitutional beyond a reasonable doubt. Id.

It is a violation of state constitutional principles for the legislature to abdicate or transfer its legislative function to others. Brower v. State, 137 Wn.2d 44, 54, 969 P.2d 42 (1998). But conditioning the operative effect of a statute on an event specified is not a transfer of legislative power to the person or entity who may bring about that event. Id. (quoting Diversified Inv. Partnership v. DSHS, 113 Wn.2d 19, 28, 775 P.2d 947 (1989)). It is the legislature that has determined that the statute would be expedient only in the specified circumstances; the legislative power is not abdicated because the circumstances arise at the discretion of others. Id. (quoting Diversified, 113 Wn.2d at 28). A law is not an unconstitutional delegation of legislative power if “the decision of what event made the legislation effective was made by the Legislature, not the third party.” Id. at 55.

The legislature has concluded that convicted sex offenders who live in Washington should be required to register with the county sheriff where they live. The legislature's identification of out-of-state convictions that will trigger that registration obligation is not an improper delegation of power, it is the specification of an event that the legislature has identified as warranting a registration requirement.

The pre-2010 definition of sex offense relating to out-of-state convictions required that the crime would be classified as a sex offense under Washington law. Former RCW 9A.44.130(10). Courts interpreting that definition required the elements of the out-of-state offense to include all of the elements of the comparable Washington offense. State v. Werneth, 147 Wn. App. 549, 554, 197 P.3d 1195 (2008); State v. Howe, 151 Wn. App. 338, 343-44, 212 P.3d 565 (2009). In two cases, courts found that sex offenses against children committed in other states did not require registration in Washington because the elements did not match Washington crimes. Howe, 151 Wn. App. at 348 (California conviction for lewd acts on a child under 14); Werneth, 147 Wn. App. at 554-55 (Georgia conviction for child molestation).

In 2010, the legislature amended the definition of a sex offense to close this loophole, which had allowed some dangerous sex offenders who lived in Washington to avoid registration if their conviction was in another state. The legislature added the provision that Batson challenges, requiring registration for offenses that would require registration “as a sex offender” if the offender was residing in the state of conviction. RCW 9A.44.128(10)(h).

Cases involving delegation to other branches of state government are inapposite here, where the legislature has simply identified the fact of specific out-of-state convictions as a predicate that mandates sex offender registration. As Batson concedes, the prohibition on delegation of legislative power is typically applied in cases involving delegating authority to administrative agencies within the state. App. Br. at 10. E.g., State v. Simmons, 152 Wn.2d 450, 98 P.3d 789 (2004). Where the legislature delegates authority, it must provide standards and there must be procedural safeguards. Id. at 455. Here, however, the legislature has not delegated decision-making, it has identified a fact (an out-of-state conviction) that triggers the registration requirement. The legislature has made a similar policy decision in choosing to rely upon the federal designation of crimes as felonies for purposes of

including a prior federal conviction in an offender score under the Sentencing Reform Act. RCW 9.94A.525(3).

Batson has provided no authority that suggests that a policy decision to rely upon a conviction in another jurisdiction as a relevant fact is an unconstitutional delegation of legislative power. This court can conclude that he has found none. Roberts v. Atlantic Richfield, 88 Wn.2d 887, 895, 568 P.2d 764 (1977).

Batson's reliance on State v. Dougall, 89 Wn.2d 118, 570 P.2d 135 (1977), is misplaced. The court in Dougall held that when the legislature defined "controlled substance" as any substance designated in a changeable list published in the Federal Register, it violated due process (providing inadequate notice of the crime) and, in the alternative, it impermissibly delegated legislative power by adopting future federal rules. Id. at 122-23. The challenged definition of sex offense is not changeable, however.

The greatest part of Batson's argument is a challenge to the legislative policy decision reflected in the 2010 amendment. But the question of what prior convictions should require registration as a sex offender is not for the courts. It is the responsibility of the legislature to balance public policy and enact laws. Northwest Animal Rights Network v. State, 158 Wn. App. 237, 245, 242 P.3d

891 (2010). It is not the role of the judiciary to second-guess the legislature's decision. Id. While the legislature will have included some offenders with out-of-state convictions who may not have been convicted of a sex offense in this state, its choice to ensure that serious sex offenders would be included, even if their crime of conviction did not match each element of a Washington crime, was the legislature's responsibility.

Batson's assertion that some states have different political or social values than Washington is undoubtedly correct. Legislators are not ignorant of that reality. The legislation may be over-inclusive in some instances, but that does not negate the importance of including dangerous sex offenders excluded under the prior definition.⁵

If this Court determines that the 2010 amendment to RCW 9A.44.128(10)(h) was an unlawful delegation of legislative authority, the court should strike only the following language "an offense for which the person would be required to register as a sex

⁵ Batson's claim that individuals convicted of prostitution under the CANS laws in Louisiana would have to register in Washington is incorrect, because they are no longer required to register under Louisiana law. Doe v. Jindal, 851 F. Supp. 2d 995 (E.D. La. 2012); see Crimes Against Nature by Solicitation (CANS) Litigation, Center for Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/crimes-against-nature-solicitation-cans-litigation> (last visited 10/8/15).

offender while residing in the state of conviction; or, if not required to register in the state of conviction.” The remaining language, “Any out-of-state conviction for [. . .] an offense that under the laws of this state would be classified as a sex offense under this subsection,” should not be stricken. Ordinarily, only the constitutionally infirm part of an enactment will be invalidated, leaving the remainder. In re Parentage of C.A.M.A., 154 Wn.2d 52, 67, 109 P.3d 405 (2005). The court will strike the entire statute only if it cannot believe the legislature would pass the remaining portion without the invalid part, or the elimination of the invalid part defeats the purposes of the statute. Id. Because the challenged provision is an amendment that adds a category of offenses to the existing law, neither exception applies.

3. REQUIRING BATSON TO REGISTER AS A SEX OFFENDER IS NOT AN EX POST FACTO VIOLATION.

Batson contends that requiring him to register violated the prohibition against ex post facto laws. U.S. Const. art. 1, § 10; WA Const. art. 1, § 23. This argument has been rejected by the Washington Supreme Court. State v. Ward, 123 Wn.2d 488, 496-511, 869 P.2d 1062 (1994). Batson has not established that the

current sex offender registration law differs significantly from the law at that time, and has not sustained his burden to establish that the statute is unconstitutional beyond a reasonable doubt. The trial court rejected this constitutional challenge, finding Ward controlling. 3RP 4. This Court also should follow Ward and reject Batson's argument.

The ex post facto clauses prohibit states from enacting a law that increases the punishment for an act after it was committed. Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). The prohibition on ex post facto laws applies only to laws that inflict criminal punishment. Ward, 123 Wn.2d at 499.

The court in Ward concluded that Washington's sex offender registration requirement does not constitute punishment. Id. at 510.

The court summarized its analysis:

The Legislature's purpose was regulatory, not punitive; registration does not affirmatively inhibit or restrain an offender's movement or activities; registration per se is not traditionally deemed punishment; nor does registration of sex offenders necessarily promote the traditional deterrent function of punishment. Although a registrant may be burdened by registration, such burdens are an incident of the underlying conviction and are not punitive for purposes of ex post facto analysis. We hold, therefore, that the Community Protection Act's requirement for registration of sex offenders, retroactively applied to Ward and Doe, is not punishment. Thus, it does not violate ex post facto prohibitions under the federal and state constitutions.

Id. at 510-11.

Batson argues the decision in Ward should be revisited because of three changes, but only two of the changes are relevant to the analysis, and neither of those is significant to the Ward analysis. These changes are not sufficient to sustain Batson's burden of establishing a constitutional violation.

First, Batson asserts that changes in the physical acts required to register impose a significant disability and restraint. But the court in Ward concluded that "the physical act of registration creates no affirmative disability or restraint." Ward, 123 Wn.2d at 500. It found that collecting information does not restrain offenders, and that sex offenders are free to move provided they comply with the registration requirements. Id. at 501. The court concluded that registration alone imposes burdens of little, if any, significance. Id.

Division Two has rejected the argument that the more recent requirement that transient offenders report weekly renders the registration requirement punitive. State v. Enquist, 163 Wn. App. 41, 49, 256 P.3d 1277 (2011). The court rejected an ex post facto challenge brought on that basis. Id. at 49.

Second, Batson asserts that the threat of prosecution for violation of the registration requirements is a significant restraint. He presents no analysis or authority supporting the theory that the nature of the penalty for non-compliance establishes a restraint and the State has found no authority suggesting that it is. The increase in penalty for some violations of the statute is irrelevant to the issue of whether the registration requirements are punitive.

Third, Batson argues that dissemination of information about registered sex offenders is broader because of the use of electronic media. However, the statute authorizing dissemination of information, RCW 4.24.550, includes the limitations that Ward requires. Ward relied on the limitation in former RCW 4.24.550(1), which authorized release of information when the release is “necessary for public protection.” Ward, 123 Wn.2d at 503. The court held that “a public agency must have some evidence of an offender's future dangerousness, likelihood of reoffense, or threat to the community, to justify disclosure to the public.” Id.

The 2013 version of RCW 4.24.550 authorized two types of disclosures.⁶ In subsection 1, disclosures other than those made under subsection 5 were authorized “when the agency determines

⁶ This version, in effect at the time of this crime, was enacted by 2011 Wash. Laws ch. 337, §1. The current version has slight differences. See 2015 Wash. Laws ch. 261, § 1.

that disclosure of the information is relevant and necessary to protect the public and counteract the danger created by the particular offender,” and the extent of disclosure must be rationally related to the level of risk posed by the offender, the locations where the offender resides or is regularly found, and the needs of the community for information to enhance safety. Former RCW 4.24.550(1), (2). Subsection (5) authorized a statewide offender registration website, available to the public, posting all level II and level III registered sex offenders, and level I registered sex offenders while they are out of compliance with registration requirements. Former RCW 4.24.550(5)(a). As to level III offenders, who represent a “high risk to sexually reoffend within the community at large,”⁷ the website shall contain the offender’s name, relevant convictions, address by hundred block, physical description and photograph. RCW 4.24.550(5)(a)(i). As to level II offenders and level I offenders who are out of compliance, the same information is to be provided if it is permissible under state and federal law. RCW 4.24.550(5)(a)(ii).

By the nature of their high risk classification, providing this basic information about level III offenders falls within the Ward

⁷ RCW 4.24.550(6)(b).

requirement that the information is necessary for public protection.

The Ward standards are incorporated by the limitation on disclosure of information concerning lower risk offenders.

Batson complains that his general location and physical identifiers are available on the website, “even though the underlying conduct is lawful in Washington.” App. Br. at 27. But the link he provides also indicates that he has been classified as a level III offender, the highest risk level. App. Br. at 26 n. 7. Thus disclosure of that information is necessary for public protection. Batson’s argument that the information released about him is not relevant to public safety fails for the same reason. His characterization of himself as a low-risk offender is not supported by the record.

The court in Ward rejected the argument that public stigma is a punishment. It found that public stigma is not a result of registration or of release of information to the public; any “badge of infamy” arises from private reactions to the crime by members of the public. Ward, 123 Wn.2d at 506.

Because the limitations on disclosure of information in the 2013 version of RCW 4.24.550 are consistent with the standards established in Ward, the disclosure provisions do not warrant

reconsideration of that court's holding that application of the statute to crimes before its effective date is not an ex post facto violation. Ward concluded that publicity or other burdens that may result from disclosure arise from the offender's future dangerousness, not as punishment for past crimes. Ward, 123 Wn.2d at 504.

4. THE 2010 AMENDMENT TO RCW 9A.44.128(10) DID NOT RESULT IN A VIOLATION OF EQUAL PROTECTION.

Batson contends that the 2010 amendment to RCW 9A.44.128(10) violates his right to equal protection of the laws. The amendment was a rational effort to ensure that dangerous sex offenders from other states would be required to register in Washington even if the elements of their out-of-state crimes do not match the elements of a Washington sex offense. Batson has not established that the statute is unconstitutional beyond a reasonable doubt. The trial court rejected this constitutional challenge. 3RP 6-14. This Court also should reject it.

Batson contends that he is similarly situated to a person who has consensual sex with a 16-year-old in Washington, and because that person has not committed a sex offense in Washington (and would not be required to register), his right to equal protection of

the laws requires that he be relieved of the obligation of registration. Batson's equal protection claim fails for two reasons: (1) the legislature had a rational basis to require offenders to register if they have an out-of-state conviction that requires registration in that state; and (2) a defendant who was convicted of a sex offense in another state is not similarly situated with a person who has consensual sex with a 16-year-old in Washington.

The federal and state equal protection clauses have been consistently construed to be identical. State v. Gordon, 153 Wn. App. 516, 524, 223 P.3d 519 (2009), rev'd on other grounds, 172 Wn.2d 671 (2011). Both constitutions guarantee that similarly situated persons receive like treatment under the law. U.S. Const. amend. XIV; WA. Const. art. I, § 12.

When a statutory classification affects only physical liberty, the rational relationship test is applied. Ward, 123 Wn.2d 516. The Supreme Court in Ward held that the rational relationship test is applicable to the sex offender registration statute. 123 Wn.2d at 516. Batson concedes that is the applicable legal standard. App.Br. at 35.

The rational relationship test is the most relaxed and tolerant review under the equal protection clause: the legislative

classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives. Ward, 123 Wn.2d at 516. "The legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest." Id.

The purpose of the sex offender registration statute is to assist law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders, by requiring sex offender registration. 1990 Wash. Laws ch. 3, § 401. That is a legitimate state interest. Ward, 123 Wn.2d at 517.

It is rational to conclude that offenders convicted of crimes that require registration in the jurisdiction of the conviction should be subject to the registration requirement in this state. In its original version, the statute only required registration for offenders who had an out-of-state conviction for a crime that under Washington law would be a felony sex offense. However, in practice, the comparison of out-of-state convictions to Washington crimes was difficult, and dangerous sex offenders were being excused from registration because of minor differences in the laws of other States. E.g., Howe, 151 Wn. App. at 348 (California conviction for lewd acts on a child under 14 did not require registration); Werneth,

147 Wn. App. at 554-55 (Georgia conviction for child molestation did not require registration). The expansion of the definition of out-of-state convictions that constitute a sex offense for purposes of the registration statute was a rational correction of that problem.

The Arizona Court of Appeals has rejected an equal protection challenge to a provision in the Arizona sex offender registration law that is similar to RCW 9A.44.128(10). State v. Lowery, 230 Ariz. 536, 287 P.3d 830 (Ct. App. 2012). In Arizona, registration is required if an offender “is required to register by the convicting or adjudicating jurisdiction.” A.R.S. § 13-3821(A). The court rejected an equal protection challenge, although offenders with out-of-state convictions could be required to register while persons who committed the same underlying act in Arizona would not be. Lowery, 287 P.3d at 834-36. The court held that the requirement of registration based on other states’ convictions was rational although in practice it may result in some inequality. Id. at 836. It noted that the legislature has a legitimate interest in protecting its community by ensuring that the registration scheme is not under-inclusive. Id.

The Washington Supreme Court rejected an equal protection challenge to the sex offender registration law in Ward, supra. 123

Wn.2d at 517. Ward contended that because not every sex offender was required to register, the statute violated equal protection. Id. at 515. The State argued that the limitation in question (excluding those no longer under supervision from the registration requirement) was necessary to limit the number of sex offenders to be monitored to a manageable number. Id. at 517. The Supreme Court held that the classification established was not arbitrary; it was rationally related to the State's legitimate interest. Id. As in that case, the amendment challenged here – an effort to ensure that dangerous sex offenders whose convictions are in other states are required to register – was rational, whether or not the court would make the same policy choice.

Rational basis review is not a license for courts “to judge the wisdom, fairness, or logic of legislative choices.” Heller v. Doe, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).

Legislative generalizations are permissible; a classification does not fail rational-basis review because there is an imperfect fit between means and ends, or it is not made with “mathematical nicety,” or because in practice it results in some inequality. Id. at 321. “The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and

unscientific.” Id. at 321 (quoting Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69–70, 33 S. Ct. 441, 443, 57 L. Ed. 730 (1913)).

Batson’s claim that his obligation to register based on the Arizona conviction “lasts forever” is inaccurate. App.Br. at 38. Batson quotes only part of the single sentence of RCW 9A.44.140(4), which reads in full “Except as provided in RCW 9A.44.142, for a person required to register for a federal, tribal, or out-of-state conviction, the duty to register shall continue indefinitely.” (Emphasis added to portion omitted by Batson). RCW 9A.44.142(1)(c) provides that a person who is required to register based on an out-of-state conviction may petition for relief from registration after 15 years. The facts underlying the offense are one factor that the court is directed to consider in determining whether the petition should be granted. RCW 9A.44.142(4)(b)(i).

Batson argues that the statute is a violation of equal protection only as it applies to him, but does not explain what legal standard such an analysis would involve. The only Washington case to find an as-applied equal protection violation is State v. May, 68 Wn. App. 491, 843 P.2d 1102 (1993). In that case, the violation occurred because the trial court misstated the law in its instructions. Id. at 496-97. The other Washington case cited by Batson involved

a challenge based on due process, not equal protection. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).⁸

Batson argues that the statute violates equal protection as applied to him because he is similarly situated to a person in Washington who has intercourse with a 16-year-old, which would not be illegal. The premise of that argument is flawed as it rests on the assumption that Batson's conduct in AZ was no more than that, which is not a proven fact. Batson was charged in Arizona with two counts of sexual misconduct with a minor under 18, two counts of sexual assault, and kidnapping; in exchange for his guilty plea, it was reduced to two felony charges, for which he received 5 years in prison (two consecutive terms of two and a half years). CP 98-102. This suggests more than a de minimis offense.

It must be noted that Batson's equal protection argument requires a finding as to the facts of the underlying offense. The Arizona crime at issue extends to sexual conduct with a person who is 15 years old. A.R.S. § 13-1405 (sexual misconduct with a minor). Batson would have been thirty years old in 1984, so if the other person involved was 15, his acts would constitute a felony

⁸ One other case refers to an as-applied challenge, but applies the long-established equal protection analysis based on classifications, not based on an individual application of the statute. State v. Clinkenbeard, 130 Wn. App. 552, 567, 123 P.3d 872 (2005).

sex offense in Washington. Ex. 7; RCW 9A.44.079 (third degree rape of a child); RCW 9A.44.089 (third degree child molestation).

Accepting Batson's argument that the facts underlying his out-of-state convictions must be compared to Washington law defeats the purpose of the amendment, which was intended to make it easier to determine who must register and explicitly is designed to include offenders convicted for behavior that would not be comparable to a crime in Washington.

5. ADMITTING DETECTIVE KNUDSEN'S TESTIMONY REGARDING BATSON'S CUSTODY STATUS WAS HARMLESS ERROR.

Batson contends that testimony of Detective Knudsen concerning Batson's custody status during the charging period was inadmissible hearsay and reversible error. The State concedes that admission of the evidence for the truth of the matter asserted was error, based on the record presented. However, Batson has not established that the error is reversible because, to the extent that it was relevant, Batson's custody status was proven by other evidence. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d

311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

Custody status is not an element of the charge or a defense. Aside from the testimony of Detective Knudsen, there was evidence that Batson was in custody in Pierce County for about a year, until his release on April 21, 2013. Ex. 20; Ex. 30 at p. 2, 9; see 8RP 174 (endorsed in defense closing). There also was evidence that Batson was released from custody on August 21, 2013. Ex. 28. Defense trial counsel did not cross-examine Knudsen concerning his lack of personal knowledge of the accuracy of his information about Batson's custody status, indicating counsel did not consider it a significant matter. Batson's custody status was entirely irrelevant to his defense theory, which was that he believed he was not required to register. 8RP 172-87.. It is difficult to see how the evidence would have materially changed the result under these circumstances.

Batson argues that the error was material because the State did not call any witness to testify that he was not living at the St. Martin de Porres shelter during the charging period, and relied on Batson's custody status to infer that. That argument is premised on the theory that the shelter could qualify as a fixed residence, but the

evidence does not support that theory, as explained in section C.6 of this brief, *infra*.

The State cited Batson's registration at the shelter as confirmation of his status as homeless, requiring weekly reporting. 8RP 159. The State observed that the issue in the case was Batson's knowledge of his obligation to register based on his Arizona conviction. 8RP 160. The prosecutor's only reference to Batson's custody status related to his knowledge of the registration requirements, as established by his arraignment on a charge of failure to register on August 21, 2013, and his release from custody at the time of that arraignment, which was established by an order of release admitted as an exhibit. 8RP 169-70; Ex. 28. At this point, the prosecutor noted the detective's testimony that Batson remained out of custody from the date of the arraignment until September 8, 2013, but that is an inference supported by the evidence even without Knudsen's testimony; it was not disputed. The entire defense closing relied on the theory that Batson was not aware of his obligation to register. 8RP 172-87.

Batson's attempt to illustrate the materiality of this evidence illustrates its immateriality. He asserts that at a post-trial motion to arrest judgment, the prosecutor linked the hearsay concerning

custody status with the argument that Batson must have lost his spot at the shelter. App.Br. at 45. But the prosecutor was not referring to the detective's testimony; she referred to Batson's release on the Pierce County case, which was established by other evidence. 12RP 15-16; Ex. 23. At pp. 2, 8-9. This argument was in response to a post-trial motion that challenged the sufficiency of the evidence that the shelter could not qualify as a fixed residence. The prosecutor argued inter alia that it could not be a fixed residence with an assigned living space when, if a man missed a single night, he lost the chance to stay the following night – the prosecutor noted that Batson would have lost any possible residency there as a result of being in custody until April 11. 12RP 14-17. Thus the testimony of Knudsen regarding Batson's custody status was irrelevant to the defense theory at trial and to the sufficiency argument raised post-trial.

Exclusion of this testimony from Knudsen would not have materially affected the result. Its admission did not constitute reversible error.

6. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S GUILTY VERDICT.

Batson claims there was insufficient evidence to support his conviction because the State did not establish that he did not have a fixed residence, either at a homeless shelter or another location. This argument should be rejected. The evidence established that Batson claimed a homeless shelter as his residence, and the homeless shelter did not have the attributes required of a fixed residence. That evidence was sufficient to support the verdict.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficient evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id.

The trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). The trier of fact is the sole arbiter of credibility. State v. Camarillo, 115 Wn.2d 60, 71,

794 P.2d 850 (1990). The trier of fact may rely on circumstantial evidence alone, and circumstantial evidence is as trustworthy as direct evidence. State v. Gosby, 85 Wn.2d 758, 765-67, 539 P.2d 680 (1975). Thus, the appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Batson was charged with felony failure to register as a sex offender under RCW 9A.44.132(1), between April 19, 2013, and September 8, 2013. CP 411-12. A person is guilty of failure to register as a sex offender under this statute when he has been previously convicted of a felony sex offense, due to that conviction he is required to register in Washington, and he knowingly fails to register as required under RCW 9A.44.130. RCW 9A.44.132. There are many registration requirements. The State elected to proceed based on one theory: that Batson lacked a fixed residence and failed to report weekly, in person, to the county sheriff where he was registered. CP 448-49 (jury instructions); RCW 9A.44.130(6)(a).

The evidence established that Batson registered as a sex offender in King County in April 2009, listing his address as a

homeless shelter (the Union Gospel Mission). 8RP 40-42; Ex. 9. From August 1, 2010 to October 14, 2010, Batson was registered to the Union Gospel Mission. 8RP 47. On March 18, 2011, Batson mailed in a change of address form, indicating he was in the Olympia city jail. 8RP 42-43; Ex. 8. On April 21, 2011, on the identification page of his 2011 judgment and sentence, Batson represented his address was that of the Union Gospel Mission. Ex. 2, 9. On December 19, 2011, he provided the sheriff with another change of address, listing a different Seattle shelter, the St. Martin de Porres shelter. 8RP 44, 110; Ex. 7. On that form, he checked the box next to, and initialed the line stating, "I understand that while I am homeless I must sign-in weekly with the King County Sheriff's Office." Ex. 7.

The record of the dismissal hearing in the Pierce County case, on April 11, 2013, established that Batson was in custody and would be released that day. Ex. 23 at pp. 2, 9. Batson did not report at any point after that date. 8RP 50-53.

The director of the St. Martin de Porres shelter, Robert Goetschius, testified that the shelter serves homeless men. 8RP 110. It does not assign personal living spaces, it has one common living area. 8RP 111. Once a person has chosen a mat, he can

use the same mat as long as he stays continuously at the shelter. 8RP 111, 114. The shelter does provide some storage to men who sleep there, but the storage is remote from the sleeping area, as men only have access to it three times a night. 8RP 112. The shelter has a waiting list, so if a man who has been staying there misses one night, he gives up his mat and must go back to the waiting list. 8RP 111-13. For purposes of analysis of the sufficiency of the evidence, the truth of this testimony is admitted. Salinas, 119 Wn.2d at 201.

In denying Batson's motion to arrest judgment, the trial court concluded that it was a reasonable inference from the evidence that the shelter did not provide an assigned living space. 12RP 18. It noted that only a mat is guaranteed if the man returns nightly. 12RP 18. There was uncontradicted evidence that the shelter provided only mats in a common living area; that does not constitute a personally assigned living space where a person is permitted to store belongings, as the statute requires for a shelter to be a fixed residence.

The jury instruction defining "fixed residence" provided:

A 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 shelter program may qualify as a residence provided it is a shelter program designed to provide temporary living accommodations for the homeless, provides an offender with a personally assigned living space, and the offender is permitted to store belongings in the living space.

CP 454 (Instruction 13).

The evidence supported the inference that Batson was homeless. All of his registrations, as well as his statement of his address in April 2011, were either to homeless shelters or the Olympia jail. He did not provide a change of address to any other location, although he had on two prior occasions notified the sheriff of his change of address. The last address that he provided to the sheriff was the St. Martin de Porres shelter, which a rational juror could conclude did not constitute a residence because it did not assign personal living spaces in which the occupants were permitted to store personal belongings. Further, the jury had evidence that Batson could not have been using the shelter as a residence while he was in the Pierce County Jail, and would not have had a space there when he got out of the jail, so it could not have been his fixed residence at that time.

Batson does not challenge the sufficiency of the evidence that he had been previously convicted of a felony sex offense. The jury was instructed that a person convicted in Arizona of the crime of sexual misconduct with a minor under age 18, a felony sex offense, is required to register for life while residing in Arizona. CP 450. The State presented a certified copy of the judgment and sentence in Arizona, linked to Batson by fingerprints. Ex. 17, 26; 8RP 33. Batson does not challenge the conclusion that he was required to register as a sex offender in Washington during the charging period, or his knowledge that he was required to do so. Batson does not challenge the sufficiency of the evidence that he had two prior convictions for felony failure to register as a sex offender, established by Exhibits 2, 15, and 16. Batson does not challenge the evidence that he did not report weekly as required of a person with no fixed residence.

The jury could reasonably conclude beyond a reasonable doubt that Batson had no fixed residence during the charging period based on the evidence that: between 2009 and 2013 he never asserted that he had a fixed residence; each time he provided an address it was a shelter for homeless persons (or a jail); the last address Batson provided to the sheriff's office was a

homeless shelter; and Batson had filed change of address forms on several occasions – the jury could infer that he would have done so again if he had a new address.

The jury could reasonably have concluded that Batson had no fixed residence during the charging period, and that if he spent some nights at the St. Martin de Porres shelter, that did not qualify as a fixed residence. All of the remaining elements of the offense are unchallenged. The verdict of guilty should be affirmed.

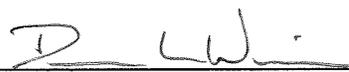
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Batson's conviction and sentence.

DATED this 12th day of October, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Mick Woynarowski, containing a copy of the Brief Of Respondent, in State v. Benjamin Batson Jr., Cause No. 72158-5-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name
Done in Seattle, Washington

10-12-15
Date