

No. 36491-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DOMINGO TORRES RAMOS, JR.,

Appellant.

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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

The Honorable Chris Wickham, Judge  
Cause No. 07-1-00168-2

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BRIEF OF RESPONDENT

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Carol La Verne  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to support Findings of Fact 5, 6, 9, and 10.

2. Whether there was sufficient evidence to support Ramos's conviction for failure to register as a sex offender.

3. Whether Ramos was denied the opportunity to contest his classification as a Level II sex offender, and if so, whether that constitutes a due process violation.

4. Whether the trial court violated Ramos's due process rights by refusing to allow him to call witnesses that he claimed would present exculpatory evidence regarding a charge for which he was not convicted.

5. Whether RCW 4.24.550(6)(b) violates the separation of powers doctrine because it delegates to county sheriffs the responsibility to classify sex offenders.

6. Whether sex offenders are disparately classified by different county sheriffs, and if so, whether that violates Ramos's equal protection rights.

## B. STATEMENT OF THE CASE.

The State generally accepts the appellant's statement of the case, even though it contains a good deal of argument, with some exceptions:

1. Ramos states that although he was informed of his risk level, he was not given an opportunity to contest that classification. [Appellant's Brief, 4] There is nothing in the record to substantiate that; there is no testimony that he attempted to contest his

classification and was prevented from doing so. He claimed to disagree with his classification and makes vague reference to questioning it, [RP 188-190] but the only occasion that he can recall was at the time he asked for a copy of the October 16<sup>th</sup> letter, and “it wasn’t a really strong disagreement.” [RP 189]

2. Ramos asserts that the Thurston County Sheriff assigns risk level without using any particular methodology. [Appellant’s Brief, 5] There was no testimony to that effect, and the basis for this comes solely from a hypothetical question posed by the defense attorney to Dr. Brett Trowbridge, whose testimony was presented as an offer of proof [RP 9-10], which was not admitted by the trial court. [RP 205] There was limited testimony about the procedure used by the sheriff’s office to assess risk level, but the defense objected to such testimony and it was not pursued. [RP 123-24]

3. Ramos states as fact that he received the letter from the sheriff’s office directing him to report on October 16, 2006, but not the one changing the date to October 9, 2006. [Appellant’s Brief, 6] That was his testimony, which was uncorroborated. Similarly, he asserts as fact that on October 16, 2006, he signed a number of forms without an opportunity to review them and without receiving

copies. [Appellant's Brief, 6] That was his uncorroborated testimony.

4. Ramos asserts that the clerk in the sheriff's office who provided him with the documents he signed testified that she did not give him a copy of any document, nor does she give sex offenders copies of the quarterly report notices. [Appellant's Brief 6]. That was not her testimony. She testified that her procedure was to give individuals an unsigned copy of the form they had just signed. [RP 89] She did not specifically recall giving a copy to Ramos, but assumed that she had followed procedure. [RP 94]

5. Ramos asserts that in finding him not guilty of failing to report on October 9, 2006, the court found that the fact he appeared at the sheriff's office on October 16 "strongly corroborated" his claim that he had not received the second letter. [Appellant's Brief 9-10] What the court said was that his actions "seem to corroborate" his story. [RP 221]

### C. ARGUMENT

1. There was sufficient evidence to support the court's findings of fact 5, 6, 9, and 10.

Where the trial court has weighed the evidence, the appellate review is limited to determining whether substantial

evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence' exists when there is a sufficient quantum of proof to support the trial court's findings of fact." Organization to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793(1996). Where findings of fact and conclusions of law are supported by substantial but disputed evidence, an appellate court will not disturb the trial court's ruling. State v. Smith, 84 Wn.2d 498, 527 P.2d 674 (1974); State v. Chapman, 84 Wn.2d 373, 526 P.2d 64 (1974). See also, House v. Erwin, 83 Wn.2d 898, 524 P.2d 911 (1974).

An appellate court need only review findings of fact to which error has been assigned; unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Ramos argues that Findings of Fact 5 and 6 are incorrect because Detective Leischner did not testify that he had an independent recollection of having a telephone conversation with him. On the contrary, he did. The detective testified that he could not remember the extent of the phone call, but that he directed

Ramos to come to the sheriff's office to sign a new form and be given the next report date. He testified he had an independent memory of speaking with Ramos. [RP 132-33, 150] Ramos does not challenge Finding of Fact 2:

2. The Court found the testimony of Detective Leischner of the Thurston County Sheriff's Office (TCSO) Sex Offender Registration Unit very credible.

Thus, this finding is a verity on appeal. Hill, *supra*.

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415 -16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Ramos vigorously challenged the detective's testimony at trial, but the court found him to be credible. Further, as to Finding of Facts 5 and 6, the issue of the telephone call is not relevant to this appeal because Ramos was acquitted of failing to register on October 9, 2006. [RP 221-22]

Ramos asserts that there was insufficient evidence to support the trial court's finding that he had been notified of the January 8, 2007 report date and the consequences of failing to report. Finding of Fact 9.

The evidence presented at trial included Exhibit 2, the document that Ramos signed on October 16, 2006, which clearly, in large, bold print, states that the next quarterly reporting date is Monday, January 8, 2007. He denies receiving a copy of this document, even though the clerk at the sheriff's office testified that, while she could not specifically remember Ramos, it was her procedure to give each sex offender who signed the document another, unsigned copy of the notice. The crux of Ramos's argument is that an offender does not receive constitutionally sufficient notice of a reporting date when he is provided a form containing that information, given time to read it, and he then signs the form.

Based upon the clerk's testimony, the court could have found that Ramos received a copy of the document containing the date of January 8, 2007 for the next reporting. However, even if he did not, he still received notice by being handed the page which he signed and returned. He cites to no authority for his assertion that

this does not constitute notice. At trial, he had a list of excuses—he didn't have his glasses, he signed documents without reading them because he thought he would get copies later, he wasn't given time to read the document, he doesn't comprehend English all that well [RP 193-96]—but he also testified that he “understood vaguely” that his next reporting date was in January and that “I do know I was acting on something.” [RP 195-96] This is not a failure of due process. This is, if it were true, a failure of a defendant to make even the minimum effort to comply with his statutory obligations.

Ramos attempts to present himself as a nearly deaf, disabled man with bad eyesight and poor English skills. Yet he testified that although he flunked third grade because he didn't speak English, he never flunked after that. [RP 194] He received the letter telling him to report on October 16 [Exhibit 3, RP185] and understood it. He received and understood the notification of his sex offender classification [Exhibit 5, RP 124-5] and had had conversations with Detective Leischner about his reporting. [RP 121, 126] It is the obligation of the State to provide notice of reporting dates. It is not the obligation of the State to baby-sit and spoon-feed sex offenders required to register, to provide information in English, Spanish, and Apache, to ask whether or not

he has his glasses, to inquire whether he read and understood information on a form which he signed. Ramos received notice of the January 8, 2007 reporting date. He may or may not have received it in the form of a piece of paper he could hold in his hand, but he received it.

Ramos challenges Finding of Fact 6 because the court found that he was arrested on January 23, 2007, whereas the trial record shows only that he was arrested in January. It is unclear why this makes any difference, but the court did have before it the Defendant's Trial Memorandum [CP 12-41] in which, on page 4 of 7, he informed the court that he was arrested on January 24, 2007. [CP 15] Further, the Plaintiff's Memorandum for Bench Trial [CP 7-9] included the date of arrest as January 23, 2007. [CP 8] There was sufficient evidence in the record for the court to find an arrest date of January 23, 2007.

2. There was sufficient evidence to support Ramos's conviction for failure to register as a sex offender.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, *supra*, at 71. This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the

function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, *supra*, at 709.

Ramos asserts that State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996), stands for the proposition that evidence equally consistent with both innocence and guilt is not sufficient to support a conviction. Aten, however, is a corpus delecti case, and holds that evidence which supports both criminal and noncriminal inferences is insufficient to prove corpus delecti. Aten, *supra*, at 660.

Ramos argues that the State failed to present evidence that he failed to register every 90 days. He was charged under RCW 9A.44.130; subsection (7) applies specifically to his circumstances:

All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. . . .

RCW 9A.44.130(7). This statute appears to contemplate a quarterly reporting at a date chosen by the sheriff's office—if it literally meant every 90 days for each individual offender, there would be no need for the sheriff to specify a date—it would occur on the 90<sup>th</sup> day, and

it would occur whether or not it was during regular business hours. However, even taking the language literally, the State complied with the statute. It was Ramos who did not.

Ramos was directed to appear for registration on October 9, 2006. He failed to do so, but appeared on October 16, 2006. [RP 129, Exhibit 2]. Exhibit 2 directed him to report on January 8, 2007. He argues that it is only 84 days between October 16, 2006, and January 8, 2007, which is true, *but if he had appeared as directed on October 9, 2006*, his reporting period would have been 91 days. The sheriff's office set reporting dates 90 days or more apart — there is nothing in the statute to support a conclusion that a defendant can choose his own reporting date and force the sheriff's office to then alter its schedule to conform to his tardy reporting. There is no due process violation; the State followed the statute.

The State does not dispute that due process requires that a defendant be given notice of the date on which he is to report. There cannot be a willful or even knowing violation if he does not know the date. As discussed in the preceding section, Ramos did receive notice of the January 8, 2007, reporting date. He states as fact that the clerk did not give him a copy of the notification document, while her testimony was that it was her practice to give

defendants an unsigned copy of the document containing the date. Even if he did not get a copy, there was no evidence other than his own testimony that he did not have time to read the documents. The clerk testified that she would give the offenders the forms with clipboards and they could take them elsewhere to read and sign. [RP 87-88] Ramos may not like the system the sheriff's office uses to give notice, and if he were in charge he might do it differently, but that does not alter the fact that due process was satisfied when he read the date on the document which he signed.

Ramos argues that he had reported as required for a number of years without any failures, thus showing that he would have appeared on January 8<sup>th</sup> if he had received notice. However, the record does not support him. When he was first required to register in 2001, he objected, but "eventually it would work out and he did register." [RP 120-21] Between then and the time Ramos was incarcerated on another matter in 2006, someone from the sheriff's office either went to his residence in person to verify his address or sent mail for him to return. [RP 140] He was not required to make any effort to report, and thus his lack of reporting failures does not establish his eagerness to comply with the law.

The trial court had ample evidence on which to find Ramos guilty of failure to register. It clearly found the State witnesses more credible than it did Ramos, a determination not subject to review.

3. There was no evidence that Ramos was denied an opportunity to contest his sex offender classification, and thus no due process violation.

Ramos obviously had notice of his classification—there was testimony from both the State’s witnesses and the defendant that he was a Level II offender. He argues that due process requires the State to give him the opportunity to contest that classification. The fact is that Ramos did have that opportunity.

We note such offenders are not without avenues of relief if the Department’s classification recommendation or the local law enforcement agency decision is arbitrary or capricious. These individuals may secure judicial review by writ of certiorari for arbitrary or capricious classification. RCW 7.16.040; CONST. art. IV, §§ 4, 6.

In re Personal Restraint of Meyer, 142 Wn.2d 608, 624, 16 P.3d 563 (2001); see also In re Detention of Enright, 131 Wn. App. 706, 128 P.3d 1266 (2006)—“After release into the community, the offender may petition the superior court to change his classification or relieve him from the duty to register.” Id., at 713-14. There is nothing in the record to indicate that Ramos was prevented from

pursuing a challenge to his classification, nor does he explain why the sheriff's office is required to provide him with an opportunity to challenge his classification at that level.

Ramos argues that In re Meyer recognizes three ways for a defendant to establish a liberty interest in his sex offender risk classification. On the contrary, In re Meyer held that no liberty interest arises from either the United States or Washington constitutions. In re Meyer, supra, at 610. He further reviews the “stigma-plus” requirement articulated in Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) and discussed in In re Meyer, arguing that the 2006 amendment requiring Level II and III offenders to report four times a year creates an “injury” that brings the classification to the level of a liberty interest. He fails to identify how his liberty is significantly impacted—he was previously required and still is required to notify the sheriff's office of his current address and of any change of address. The only change is that he must do so four times a year instead of once.

Reporting is not an injury. In State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994), the court held that applying the sex offender registration laws retroactively did not violate the prohibition against ex post facto laws: “Although a registrant may be burdened by the

registration, such burdens are an incident of the underlying conviction and are not punitive for purposes of ex post facto analysis.” It also held that the requirement to register is not punishment, does not inhibit or restrain an offender’s movements or activities, nor is it a deterrent. Id., at 510-511. In other words, any “burden” that accrues to Ramos is a consequence of his underlying convictions for sexual exploitation of a minor, not as a consequence of the reporting statute.

Ramos further argues that the 2006 amendment to the reporting statute created a new offense. It did not. Failure to register had been an offense since the registration statute was enacted. The amendment added an element that the State is required to prove when a defendant has been classified at a risk level of II or III. He argues that this exposes him to additional punishment; it is not clear why this is so, as there is nothing in the record to indicate the penalty is higher for Level II and III offenders for failing to register. The amendment creates an additional burden on the State, which must prove an additional element, not the defendant.

RCW 9A.44.130(7) requires that the State prove that the defendant has been designated at a risk level of II or III. Ramos

attempts to convert this to a requirement that the State prove that he “actually” was a Level II offender, apparently using some method approved by Dr. Brett Trowbridge, or by some objective standard, which he did not identify and which is not in the record, by which all persons could agree on his classification. His argument that the sheriff’s office improperly classified him is based upon the testimony of Dr. Trowbridge, who had not seen Ramos until the day of trial. [RP 24, 32] There is, however, nothing in the doctor’s testimony that identifies the criteria used by the sheriff’s office or explains how it is incorrect or inferior. In fact, Ramos’s attorney refused to accept from the prosecutor documentation of the sheriff’s criteria. [RP 108]

None of that, however, is relevant. The court did not find Dr. Trowbridge’s testimony relevant and did not consider it. [RP 205] The sheriff’s office is responsible for assigning risk level classifications (RCW 4.24.550(6)), and the State must only prove that the defendant has been classified as a risk level of II or III. What another agency may have done is not part of the offense. The only way Ramos will be subject to further incarceration because of his classification level is if he fails to report as required.

That is within his control, and does not constitute the “stigma-plus” component identified in Paul.

4. The trial court did not violate Ramos’s due process rights by refusing to admit the testimony of Dr. Trowbridge, nor by refusing to allow him to call witnesses that he claimed would present exculpatory evidence, particularly because that evidence concerned a charge for which he was acquitted.

Ramos argues that the trial court denied him a fair trial by excluding the testimony of Dr. Trowbridge.

We review a trial court’s decision to exclude expert testimony for abuse of discretion. . . . Admissibility depends on whether “(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.” . . . .

State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004), cites omitted. Here the court found that because the State was required only to prove that the sheriff’s office had classified Ramos as a Level II offender, Dr. Trowbridge’s testimony did not address any issue the court had to decide. It was not an abuse of discretion for the court to refuse to consider it. “[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.” State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing to Washington v. Texas, 388 U.S. 14, 23, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967)). (Hudlow is a rape shield case.)

Ramos claims that the trial court created a “conclusive presumption” that he is “actually” at a Level II risk to reoffend. On the contrary, the court did not presume anything. It merely found that the Thurston County Sheriff’s Office had classified Ramos as a Level II offender. As discussed above, Ramos has other avenues by which to challenge his classification. The trial on a charge of failure to register is not the venue in which to do that.

Washington courts have already found a rational relationship between the registration statutes and a legitimate governmental purpose.

We are persuaded that the Legislature’s classification is not arbitrary but is rationally related to the State’s legitimate interest in assisting local law enforcement. . . We hold that the classifications established in RCW 9A.44.130(3)(a) for the purposes of establishing the deadlines for sex offenders to register do not violate equal protection guarantees.

Ward, *supra*, at 517. The Ward court noted this language from the Community Protection Act of 1990:

The legislature finds that sex offenders often pose a high risk of reoffense, 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 [RCW 9A.44.130].

Ward, *supra*, at 493.

Ramos argues that a rational relationship exists only if an offender is "actually" correctly classified, and that Dr. Trowbridge testified that the sheriff's method was scientifically invalid. On the contrary, Dr. Trowbridge testified that he had not looked at the criteria used by the Thurston County Sheriff's Office to assign risk levels to sex offenders and did not know if it even had one. [RP 81-82] Ramos's assertion that Dr. Trowbridge found the sheriff's office criteria invalid comes from this hypothetical question posed by defense counsel:

Q: If I told you that the Thurston County Sheriff's Office had a little management committee, sit down, talk about what they thought was important, and then basically come up with a risk assessment approach based on that, and then had some discretion authorized to the head of the sexual offender registration unit, you would vary off of that, would that be a scientific approach?

A: No.

[RP 77] Nowhere in the entire proceedings was there any evidence of what the sheriff's office classification method actually is. Ramos complains because the State did not produce such evidence, but,

when the State attempted to do so as much as possible within the trial court's ruling, defense counsel objected. [RP 112, 124]

Ramos's numerous repetitions of his assertion that the State is required to prove the "real" classification of an offender, not just the classification made by the sheriff's office, does not make it so. Indeed, based upon Dr. Trowbridge's testimony about the various static and dynamic factors, his acknowledgment that there is no "ultimate tool" for scoring offenders, [RP 82], and his acknowledgment that, while he classified Ramos as a Level I offender based on actuarial factors, Ramos did not meet at least one of those indicators (because he was 42 at the time he committed the underlying crimes, he was past the peak ages of 25-35 [RP 49]) it is not at all clear from his testimony that there is a "real" classification for any offender.

Ramos also argues that the trial court abused its discretion by excluding the testimony of two defense witnesses who, he claims, would have testified that he did not have a telephone at the time Detective Leischner testified he had a telephone conversation with Ramos. He identifies two reasons that this constitutes abuse of discretion—the court had not entered an order excluding

witnesses from the courtroom during trial, and they were rebuttal witnesses.

Trial courts have wide discretion to exclude witnesses. Waiting until the last moment to obtain an expert witness, untimely designation of a witness without a reasonable excuse, and a party's failure to submit a witness list are some factors that justify exclusion of witnesses. State v. Grader, 105 Wn. App. 136, 140-41, 18 P.3d 1150 (2001). Here the trial court relied on the facts that the two witnesses had sat through the trial and heard all the testimony, and that they had not been disclosed to the prosecutor. [RP 169]

As to his objection that the court had not ordered exclusion of witnesses, an order excluding would not have mattered. Defense counsel informed the court that he had not identified them as potential witnesses until after they had heard the evidence. [RP 168] They would not have been excluded even if such an order had been entered, and thus this cannot form the basis of an abuse of discretion claim. The assertion by Ramos's attorney that he had not realized that the phone call from the detective would be such a big issue until the State presented its case is suspect. Defense counsel told the court that he needed to call these witnesses because he had planned to offer Ramos's telephone records but he

didn't have them the day of trial. [RP 168] Detective Leischner documented in his police report that he had made such a call [RP 132] and counsel made no objection that he had not received the report as part of discovery. In fact, he raised the issue in his trial memorandum, which is dated June 14, 2007. [CP 14, 18] It is apparent that defense counsel did know before the trial began that these two people would be called as witnesses, and could have excluded them from the courtroom. The fact that the testimony was arguably rebuttal is irrelevant; Ramos's attorney was aware of the issue before the case began, and by definition, much of a defendant's case is going to be rebuttal of State evidence. That is the purpose of providing discovery. Finally, Ramos himself testified that he did not have a telephone in October of 2006. [RP 184] The evidence was before the court. There was no abuse of discretion by the trial court.

In the end, however, it makes no difference. Ramos was acquitted of failing to report on October 9, 2006, the incident which the testimony would have concerned.

5. RCW 4.24.550(6)(b) does not violate the separation of powers doctrine by delegating to the county sheriffs the power to classify sex offenders.

Ramos argues that the legislature impermissibly delegated its power and authority to the county sheriffs by passing RCW 4.24.550(6), directing them to assign risk level classifications to all offenders regarding whom information will be disseminated. As a threshold matter, the record does not indicate that this argument was raised at trial. Generally, an argument not raised at trial is deemed waived. State v. Melcher, 33 Wn. App. 357, 360, 655 P.2d 1169 (1982). The State takes the position that the court should not consider this issue at all.

However, should the court wish to review the issue, the State maintains that there is no impermissible delegation of powers in RCW 4.24.550.

It is a fundamental principle that the legislative, executive, and judicial branches of the government are separate from each other. However, the separation of powers doctrine does not require that the branches of government be “hermetically sealed off from one another.” The purpose of the doctrine is to ensure that the “fundamental functions of each branch remain inviolate”. Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). When the doctrine is violated, the injury is not to an individual, but to a branch of government.

Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded. The maintenance of a separation of powers protects institutional, rather than individual, interests.

. . . . .

[W]e have noted that cooperation and coordination among the branches is to be encouraged, and only when such cooperation changes to unwarranted coercion or intrusion should the judiciary exercise its authority to sustain its separate identity.

Id., at 136-37.

The determination of crimes and punishment is a legislative function subject to only limited review in the courts. . . . The legislature's authority may be delegated only when the legislature has provided (1) appropriate standards to define what is to be done, and what administrative body is to accomplish it, and (2) procedural safeguards to control arbitrary administrative action.

State v. Ermert, 94 Wn.2d 839, 847, 621 P.2d 121 (1980) (cites omitted).

The authority delegated to the county sheriffs to classify the risk level of sex offenders is not legislative, but administrative. It is the "power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." Melcher, *supra*, at 361. Melcher involved a challenge to RCW 46.61.506(3), which gave the state toxicologist the authority to



approve the methods of chemical analysis for determining breath or blood alcohol content in driving under the influence cases. The alcohol level of a driver's breath or blood is one element of the crime of driving under the influence of alcohol and/or drugs, just as the risk level assigned by the sheriff to a sex offender is one element of the crime of failure to report.

As previously noted, the Melcher court said that the delegation to the toxicologist's office was not legislative, but administrative. The legislature defined the crime and delegated to the toxicologist the administrative job of establishing measurement procedures. "By defining the crime (legislation) and delegating to the state toxicologist the duty of establishing measurement procedures (administration), the statute is not open to attack for unconstitutional delegation of legislative power." Melcher, supra, at 361. The duty to classify the risk level of sex offenders is the same kind of administrative task as was assigned to the toxicologist's office.

Statutes are presumed constitutional and the burden is on the challenger to prove it unconstitutional beyond a reasonable doubt. Ward, supra, at 496.

Initially, we note that where legislation tends to promote the health, safety, morals or welfare of the public and the legislation bears a reasonable and substantial relation to that purpose, every presumption will be indulged in favor of constitutionality. . . . The challenging party must prove beyond a reasonable doubt the challenged statute is unconstitutional. . . .

Melcher, *supra*, at 359 (cites omitted). The primary intent of the registration statutes is to aid law enforcement in protecting the public by providing a mechanism for increasing access to relevant information. Ward, *supra*, at 508. It is important to note that it is a crime to fail to register as a sex offender and report as required, because such failure thwarts the legislative purpose of gathering and disseminating information that will protect the communities. It is not to deter future crimes, id., or even to control sex offenders. The requirement to register is not punishment. id., at 495.

Ramos attacks RCW 4.24.550(6) because he claims it lacks sufficient criteria for assigning risk levels. Local law enforcement is given considerable discretion in making those decisions. One of the reasons the courts have not found a liberty interest in sex offender classification is that the registration statutes are procedural. Enright, *supra*, at 715. In State v. Simmons, 152

Wn.2d 450, 98 P.3d 789 (2004), the court set forth the rule for legislative delegation:

The rule is well established that the legislature may constitutionally delegate authority to an administrative agency to implement statutory directives if two requirements are met. First, the legislature must provide standards to indicate what is to be done and designate the agency to accomplish it. Second, procedural safeguards must exist to control arbitrary administrative action and abuse of discretionary power.

Id., at 455.

Here, the legislature has designated the county sheriff's offices as the agency with final authority to assign risk classifications. In RCW 72.09.345, which created the end-of-sentence review committee, the legislature established these standards:

72.09.345(5) The committee shall classify as risk level I those sex offenders whose risk assessments indicate a low risk of reoffense within the community at large. The committee shall classify as risk level II those offenders whose risk assessments indicate a moderate risk of reoffense within the community at large. The committee shall classify as risk level III those offenders whose risk assessments indicate a high risk of reoffense within the community at large.

72.09.345(6) The committee shall issue to appropriate law enforcement agencies, for their use in making public notifications under RCW 4.24.550, narrative notices regarding the pending release of sex offenders from the department's facilities. The

narrative notices shall, at a minimum, describe the identity and criminal history behavior of the offender and shall include the department's risk level classification for the offender. *For sex offenders classified as either risk level II or III, the narrative notices shall also include the reasons underlying the classification.* (Emphasis added.)

If the local sheriff's office changes the risk level classification as determined by the end-of-sentence review committee, it must explain why:

RCW 4.24.550(10) When a local law enforcement agency or official classifies an offender differently than the offender is classified by the end of sentence review committee or the department of social and health services at the time of the offender's release from confinement, the law enforcement agency or official shall notify the end of sentence review committee or the department of social and health services and submit its reasons supporting the change in classification. . . . .

Because a registered offender can challenge his classification in Superior Court, and because the agencies assigning risk level classification are required to explain their classifications, there are procedural safeguards "to control arbitrary administrative action and abuse of discretionary power", as the Simmons court noted. When determining whether the procedural safeguards are sufficient, Simmons further explained:

Under this approach, we balance (1) the private interest to be protected, (2) the risk of an erroneous

deprivation of that interest by the government's procedures, and (3) the government's interest in maintaining the current procedures.

Simmons, *supra*, at 456.

It is not necessary that the statute itself provide procedural safeguards. "If the statutory delegation provides inadequate guidelines, the procedural safeguards may be provided by the administrative body." Jorgensen Company v. Seattle, 99 Wn.2d 861, 870, 665 P.2d 1328 (1983). The record in this case is silent as to the safeguards put in place by the Thurston County Sheriff's Office, in large part because Ramos objected to any testimony about county procedures.

The private interest to be protected—presumably the interest in not being inconvenienced by reporting every 90 days to the sheriff's office—is not one the courts have found to be of great magnitude.

[W]e disagree with the petitioners' view that the registration and disclosure statutes create substantive interests. In *Ward*, we determined these statutes were not punitive and did not create either an affirmative disability or restraint on sex offenders.

In re Meyer, *supra*, at 619. "Registration alone imposes burdens of little, if any, significance." Ward, *supra*, at 501.

Ramos has no choice about whether to register or not. The fact of his convictions for sexual exploitation of a minor and 9A.44.130(7) require him to register and report. His risk level classification determines how often he must report to the sheriff's office. As a level II, he must report every ninety days. RCW 9A.44.130(7). Given the government's interest in protecting the public and the relatively minor inconvenience of reporting four times a year, and his ability to challenge his classification in court, it cannot be said that the legislature has impermissibly delegated to the sheriffs the duty to classify offenders.

6. The defendant's equal protection rights are not violated by a system whereby sex offenders are classified by the sheriff of the county in which they reside.

Ramos correctly identifies the rational basis test as the one which applies to a challenge to the sex offender classification statute. *Ward, supra*, at 516. There is no support in the record, however, for his assertion that the Thurston County Sheriff's Office does not employ scientifically valid methodology in classifying sex offenders. As noted above, there was no evidence produced at trial as to the sheriff's office methodology. Nor has Ramos established that the different counties do in fact use different methodologies.

The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue. . . . Matters not in the record will not be considered by the court on appeal. . .

State v. Rienks, 46 Wn. App. 537, 544-45, 731 P.2d 1116 (1987).

Because the record does not support an equal protection challenge, the State maintains that the court should not consider this argument.

However, even if the court chooses to decide this issue, Ramos has not established an equal protection violation. A statute is presumed to be constitutional and a challenger has the heavy burden of overcoming that presumption. State v. Blilie, 132 Wn.2d 484, 494, 939 P.2d 691 (1997). In examining a statute under the rational basis test, the court considers (1) whether the law applies equally to all members within the designated class, (2) whether there are reasonable grounds for distinguishing between those inside and outside the class, and (3) whether the classification has a rational relationship to the law's purpose. Paulson v. Pierce County, 99 Wn.2d 645, 653, 664 P.2d 1202 (1983).

Equal protection is not intended to provide complete equality among individuals or classes but equal application of the laws. A party challenging the application of a law as violating equal protection principles has the burden of showing that the law is

irrelevant to maintaining a state objective or that it creates an arbitrary classification.

Simmons, *supra*, at 458.

RCW 4.24.550(6) applies to all sex offenders; each and every one must be assigned a risk level. There are reasonable grounds for distinguishing between sex offenders and non-sex offenders for public safety reasons. For those same reasons there are reasonable grounds for distinguishing between those at high, intermediate, or low risk to reoffend. Finally, the classification has a rational relationship to the purpose of the law.

“The purpose of the risk assessment level is to establish the extent of the information to be disseminated to the public regarding the released sex offender.” Enright, *supra*, at 714.

It is not the function of the court to question the wisdom of a statute; as long as there is no constitutional impediment the policies underlying the legislation are the business of the legislature. State v. Speaks, 119 Wn.2d 204, 209, 829 P.2d 1096 (1992). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate state goal; the means do not have to be the best way to achieve the goal. State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). Under this

test “a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. A classification may be valid based on rational speculation unsupported by evidence or empirical data. The burden is on the party challenging the classification to show that the classification is purely arbitrary.” In re Commitment of Peterson, 104 Wn. App. 283, 288-89, 36 P.3d 1053 (2000).

In State v. Ward, *supra*, the Supreme Court held that the classification of offenders for the purpose of establishing registration deadlines does not violate equal protection. Id., at 517. Ramos has not demonstrated any reason that a statute designed to implement that legislation should be found unconstitutional.

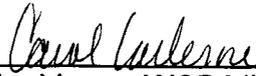
#### D. CONCLUSION

There was sufficient evidence to support the challenged findings of fact as well as Ramos’s conviction for failing to register. There is no record regarding whether or not the Thurston County Sheriff’s Office offered Ramos an opportunity to challenge his classification, but in an event the proper venue for doing that is in the Superior Court. The trial court did not violate Ramos’s due process rights by excluding three of his witnesses. RCW 4.24.550(6)(b) does not violate the separation of powers doctrine,

and Ramos has failed to show that sex offenders are disparately classified by different Washington counties or that, if they are, his equal protection rights have been violated.

The State respectfully asks this court to affirm the conviction.

Respectfully submitted this 11<sup>th</sup> of April, 2008.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

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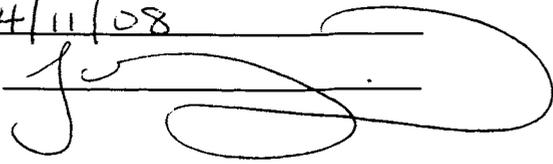
A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on April 11, 2008.

John A. Hays  
1402 Broadway, Suite 103  
Longview, Washington 98632  
Attorney for Domingo Torres Ramos, Jr.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 4/11/08

Signature: \_\_\_\_\_



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