

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. ARSENEAU,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
00 APR 21 PM 01:30
STATE OF WASHINGTON
BY DEPUTY *KW*

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

The Honorable Sally Olsen, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

FILED 1-18-20

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal.....	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENTS</u>	6
1. THE COURT LACKED AUTHORITY TO IMPOSE COMMUNITY CUSTODY FOR FAILING TO REGISTER AS A SEX OFFENDER BECAUSE THIS OFFENSE IS NOT A “SEX OFFENSE”.....	6
2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF CHANGE OF RESIDENCE IN THE CRIME OF FAILURE TO REGISTER AS A SEX OFFENDER.....	16
3. THE PROSECUTOR’S PREJUDICIAL COMMENTS DURING CLOSING AND REBUTTAL ARGUMENTS DENIED MR. ARSENEAU HIS RIGHT TO A FAIR TRIAL.....	18
D. <u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Ammons,
105 Wn.2d 175, 713 P.2d 719 (1986).....12

State v. Ammons,
136 Wn.2d 453, 963 P.2d 812 (1998).....14

State v. Baeza,
100 Wn.2d 487, 670 P.2d 646 (1983).....22

State v. Bandura,
85 Wn. App. 87, 931 P.2d 174,
rev. denied, 132 Wn.2d 1004 (1997).....22

State v. Barrow,
60 Wn. App. 869, 809 P.2d 209,
rev. denied, 118 Wn.2d 1007 (1991).....24

State v. Beaver,
148 Wn.2d 338, 60 P.3d 586 (2002).....14

State v. Belgarde,
110 Wn.2d 504, 508, 755 P.2d 174 (1988),
aff'd, 119 Wn.2d 711, 599 P.2d 837 (1992).....27

State v. Casteneda-Perez,
61 Wn. App. 354, 810 P.2d 74,
rev. denied, 118 Wn.2d 1007 (1991).....24

State v. Claflin,
38 Wn. App. 847, 690 P.2d 1186 (1984),
rev. denied, 103 Wn.2d 1014 (1985)23

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Continued

State v. Delgado,
148 Wn.2d 723, 63 P.3d 792 (2003).....14,17-19

State v. Ford,
137 Wn.2d 472, 973 P.2d 452 (1999).....15

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980).....22

State v. Huson,
73 Wn.2d 660, 440 P.2d 192 (1968),
cert. denied, 393 U.S. 1096 (1969).....23

State v. King,
111 Wn.App. 430, 45 P.3d 21 (2002).....10, 16, 17, 19, 23

State v. McGee,
122 Wn.2d 783, 864 P.2d 912 (1993).....14

State v. Moen,
129 Wn.2d 535, 919 P.2d 69 (1996).....15

State v. Nelson,
131 Wn. App. 175, (2005).....14, 16

State v. Reed,
102 Wn.2d 140, 684 P.2d 699 (1984).....23-25

Seattle v. Slack,
113 Wn.2d 850, 784 P.2d 494 (1989).....22

State v. Stover,
67 Wn. App. 228, 834 P.2d 671 (1992).....26

<u>State v. Ziegler</u> , 114 Wn. 2d 533, 789 P.2d 79 (1990).....	26
--	----

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	11
--	----

<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	22
--	----

<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).....	22
---	----

<u>United States v. Cronic</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	7
---	---

<u>United States v. Richter</u> , 826 F.2d 206, (2nd Cir. 1987).....	24, 27
---	--------

TABLE OF AUTHORITIES

Page

OTHER STATE CASES

People v. Montgomery,
103 A.D.2d 622, 481 N.Y.S.2d 532 (1984),
review denied 64 N.Y.2d 891 (1985).....27

STATUTES, RULES AND OTHERS

RCW 9.94A.030.....10, 11

RCW 9.94A.030(27).....17, 18

RCW.9A.44.130(11).....2, 8, 9, 10, 13

RCW 9.94A.030(42).....9,10-11, 13-16, 18, 19

RCW 9A.44.130.....10. 11. 16

RCW 9A.44.712.....13, 15, 18, 19

RCW 9A.44.715.....13,15, 19

RCW 10.73.90

RCW. 69.50.....13

RCW 69.52.....13

RAP 2.5.....15

U.S. Const. amends. 6.....12

U.S. Const. amends 8.....12

TABLE OF AUTHORITIES

Page

STATUTES, RULES AND OTHERS, Continued

U.S. Const. amends 1412, 22

Wash. Const. art. I, 22.....12

A. ASSIGNMENTS OF ERROR

1. The trial court was not authorized to impose community custody for failing to register as a sex offender because it is not a sex offense.

2. The state failed to prove the essential element of change of residence in the crime of failure to register as a transient sex offender.

3. The prosecutor denied appellant his right to a fair trial by impermissibly expressing his personal opinion during closing and rebuttal arguments.

Issues Presented on Appeal

1. Did the trial court exceed its statutory authority by imposing community custody for failing to register as a sex offender where that crime is not a sex offense?

2. Did the state fail to prove the essential element of change of a residence in the crime of failure to register as a transient sex offender?

3. Did the prosecutor deny appellant his right to a fair trial by impermissibly expressing his personal opinion during closing and rebuttal arguments?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On October 29, 2007 Mr. Arseneau was charged with one count of failure to register as a sex offender in violation of RCW 9A.44.130(11)(A). CP 1-5. Mr. Arseneau pleaded not guilty and the matter was set for trial. Mr. Arseneau was found guilty by a jury, the honorable Sally Olsen presiding. CP 28-37.. The court imposed a sentence that included community custody. Id. This timely appeal follows. CP 38.

2. SUBSTANTIVE FACTS

a. Facts Relevant to Crime Charged

Mr. Arseneau was required to register as a sex offender for a 1991 sex offense conviction. RP 51.1 The police version of the evidence and the civilian version of the evidence differ. On October 23, 2007 officer Kent Mayfield of the Bremerton police investigated the possibility that Mr. Arseneau might not be living at his registered address. RP 19-20. Mayfield went to the address of Lori Brown, Mr. Arseneau's wife and asked to speak with Mr. Arseneau. According to Mayfield, Ms Brown informed the officer that Mr. Arseneau was not there. RP 20. Officer Mayfield went to Mr. Arseneau's registered address at 2461 Snyder St. # 3 and spoke with Mr.

1 RP refers to the verbatim report of the January 15, 2008 trial proceedings.

Kelly, who informed him that Mr. Arseneau had moved out a week earlier to his recent surgery and inability to manage the stairs at the Snyder street residence. RP 16.

Mr. Kelly informed the officer that Mr. Arseneau was not on the lease because he did not want the landlord to know that a registered sex offender was living with him. RP 15. Mr. Kelly told the officer that Mr. Arseneau was in the hospital for one month following his surgery and that he visited him 5-6 times. RP 14. Mr. Kelly speaks with a voice box that is somewhat difficult to understand. RP 13.

On October 24, 2007, Kenny Davis, a detective with the Bremerton Police followed up on the investigation and went to visit the location of Mr. Arseneau's registered address. At 2461 Snyder St. RP 26-27. Detective Davis spoke with Mike Kelly the resident at 2461 Snyder. According to Davis, Mr. Kelly told him that Mr. Arseneau moved out a month earlier and that Mr. Arseneau only left behind a tool box. RP 28-29. Officer Mayfield's report indicated that Mr. Kelly stated that Mr. Arseneau moved out a week earlier. Detective Davis did not enter the apartment. 22-25

Davis went to 2136 21st Street to contact Mr. Arseneau but no one was home. RP 30. One or two days later, Davis arrested Mr. Arseneau at

2136 E 21st Street. RP 31. Davis admitted that Mr. Arseneau's presence at another address did not indicate that he lived there and could simply have been a visitor. RP 35.

The police contacted Charlene Flynn who lived in Apt. # 1 at 2461 Snyder St. RP 35-36. Ms. Flynn knew Mr. Arseneau and Mr. Kelly and did not know that Mr. Arseneau was living with Mr. Kelly. RP 37. Mr. Kelly did not ever inform Ms. Flynn that Mr. Arseneau was living with him because Ms. Flynn was in a relationship with a close friend of the landlord and Mr. Kelly did not want the landlord to know about the living arrangement. RP 41, 52-54. Ms. Flynn was away from her apartment a lot but knew that Mr. Arseneau slept at Mr. Kelly's apartment. RP 40.

Lori Brown lives at 2136 21st Street with her mother and father. RP 55. Although Mr. Arseneau is her husband, he was never allowed to live at that address because Ms. Brown's mother did not want a registered sex offender living in her home. RP 55-57. Mr. Arseneau lived with Mr. Kelly and only planned to stay with him temporarily because Mr. Arseneau was scheduled to begin serving a prison term in June for a recent drug charge. RP 59. Mr. Arseneau's prison term was delayed due to his surgery in September and the complications following that surgery. RP 60-61. Mr. Arseneau was in the

hospital for the entire month of September 2007. RP 60-61.

When Mr. Arseneau was released from the hospital he was very ill and returned to Mr. Kelly's but was unable to climb the stairs to the apartment so he stayed with Ms. Brown for 3 days before her mother insisted that Mr. Arseneau return to Mr. Kelly's apartment. RP 61-63. Ms. Brown stayed overnight with Mr. Arseneau at Mr. Kelly's and helped care for him during his recovery. RP 63, 71-72. During the days, Ms. Brown brought Mr. Arseneau to her mother's home. RP. Mr. Arseneau had a sleeping bag, pillow a few changes of cloths and some fishing gear at Mr. Kelly's apartment where he was living. RP 65. The remainder of Ms. Arseneau's belongings were in storage due to the impending prison sentence. RP 63.

b. Prosecutor's Improper Comments
During Closing Argument.

During closing argument the prosecutor told the jury that Mr. Kelly was a liar and that the police would never lie. 1RP 5-8, 23-24.2 The improper prosecutorial comments are as follows. First the prosecutor informed the jury Mr. Kelly is "speaking out of both sides of his voice box". 1RP 7. The prosecutor continued by arguing as follows:

why would the cops make this up? Why
would the cops say that Mr. Kelly made these

2 1RP refers to the verbatim report of the January 16, 2008 trial proceedings.

statements to them if he didn't? These are two law enforcement officers that have over 50 years of experience combined. They have been around for a long time,. They don't play games like that. In fact, they have been around that long because they don't play games like that. What bias, what motivation did the cops have to sell Mr. Arseneau down the river? There is none. There is none at all.

1RP 8. The prosecutor continued to argue in rebuttal:

[a]sk yourself why the cops would make this up, especially if Mr. Arseneau is going away for the next couple of years, apparently.

1RP 23-24. Defense counsel did not object during closing or rebuttal closing arguments.

C. ARGUMENTS

1. THE COURT LACKED AUTHORITY TO IMPOSE COMMUNITY CUSTODY FOR FAILING TO REGISTER AS A SEX OFFENDER BECAUSE THIS OFFENSE IS NOT A "SEX OFFENSE"

a. A court's sentencing authority is strictly limited by statute.

Sentencing authority derives strictly from statute, subject to the constitutional rights to due process, a jury trial, and prohibition against cruel and unusual punishment. Blakely v. Washington, 542 U.S. 296, 303, 124

S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004); State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986), superceded on other grounds by RCW 10.73.090; U.S. Const. amends. 63, 84, 145; Wash. Const. art. I, 22.6 Sentencing is a critical stage in a criminal proceeding. State v. Bandura, 85 Wn.App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997); see United States v. Cronie, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

b. The Statute Defining The Applicability of Community Custody is Not Ambiguous.

As part of Mr. Arseneau's sentence, the court ordered 36-48 months of community custody. CP 28-37. Trial counsel for Mr. Arseneau did not

3 The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

4 The Eighth Amendment provides, "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted." Washington Constitution, Article I, section 14 likewise states, "excessive bail shall not be required, . . . nor cruel punishment inflicted."

5 The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

6 Article I, section 22 provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases

object on grounds that the trial court was not statutorily authorized to impose community custody. RCW 9A.44.715 describes the offenses for which the court is authorized to impose community custody. It provides in relevant part:

(1) When a court sentences a person to the custody of the department for a **sex offense not sentenced under RCW 9.94A.712**, a violent offense, any crime against persons under *RCW 9.94A.411(2)*, or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, or when a court sentences a person to a term of confinement of one year or less for a violation of **RCW 9A.44.130(10)(a)* committed on or after June 7, 2006, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under *RCW 9.94A.850 . . .*

(Emphasis added). RCW 9A.44.715. Mr. Arseneau was not convicted of a sex offense, a violent offense an offense against a person or an offense under RCW 69.50 or 69.52.

“Sex offense” is defined in RCW 9.94A.030(42) in relevant part as, “(a) (i) A felony that is a violation of chapter 9A.44 RCW **other than ***RCW 9A.44.130(11); . . .**”. (emphasis added). RCW 9A.44.130(11) provides:

(11) (a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the

crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection (10)(a) of this section.

Mr. Arseneau was charged with and convicted of failure to register as a sex offender under RCW 9A.44.130(11). By statute, this offense is not a sex offense to which the court may impose community custody.

Questions of statutory interpretation, are reviewed de novo. State v. Nelson, 131 Wn. App. 175, 178, (2005), citing, State v. Ammons, 136 Wn.2d 453, 456, 963 P.2d 812 (1998). Principles of statutory construction require courts to rely upon the plain language of the statute and presume the legislature intended to give meaning to all words used. State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003); State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). Language is unambiguous when it is not susceptible to two or more interpretations. Delgado, 148 Wn.2d at 727, citing, State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993).

A “sex offense” is narrowly limited to those offenses defined as a “sex offense” under RCW 9.94A.030. RCW 9.94A.030(42) expressly exempts RCW 9A.44.130(11) from the definition of “sex offense.” By the

plain terms of the statute, a conviction is not a “sex offense” if it falls within RCW 9A.44.130(11).

By their plain terms, RCW 9A.44.130; RCW 9A.44.715; and RCW 9.94A.030(42) exclude failure to register as a sex offender from the definition of “sex offense”. RCW 9.94A.712 like the above noted statutes is a statute related to sex offenders. It like RCW 9.94A.030 also expressly excludes “failure to register as a sex offender” from the definition of “sex offense”. RCW 9.94A.712 provides in relevant part:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

.....

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(Emphasis added).

If the legislature had intended otherwise, it would not have expressly exempted RCW 94A.44.130(11) from the definition do sex offense. The legislature has amended RCW 9A.44.130 and RCW 9.94A.030 several times,

and has not altered the exemption to the definition of sex offense. As recently as 2006, c 139 § 5, effective July 1, 2006, the legislature amended RCW 9.94A.030 subsection (42)(a)(iii). See also Nelson, 131 Wn.App. at 179 n.2 (noting some of the opportunities the legislature has had to alter RCW 9A.44.130).

The Court of Appeals made the legislature aware of numbering errors in the definition of “sex offense” for purposes of the failure to register statute in its decision in State v. King, 111 Wn.App. 430, 45 P.3d 21 (2002). The King Court noted that a 1999 special legislative session had added a provision to the registration statute, RCW 9A.44.130, without adjusting the applicable definition of sex offense in RCW 9.94A.030. Id. at 434. The unintended result was that people convicted of failing to register for prior sex offenses were not required to register as sex offenders but people who failed to register for kidnapping offenses were required to register. Id. at The King Court remedied this obvious numbering error by adjusting the registration requirement to fit within the obvious legislative purpose. Id. at 435.

Yet the court in King emphasized that the courts were not supposed to supply missing words or revise statutes for the legislature. The court must show great restraint in compensating for presumptive drafting mistakes by the

legislature. Id. Instead, it has long been the rule that “[t]his court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission.” Id. at 435 (quoting Jenkins v. Bellingham Municipal Court, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981)). Only when an omission renders the “sole purpose” of the statute absurd should the court supply a missing element. Id. at 435. The fact that there are inconsistencies in a statute’s scheme does not empower the court’s to alter the wording of a statute. Id. at 436.

In King, the court concluded that to interpret the registration law so that it did not require registration for people with underlying sex offenses but did require registration for those previously convicted of kidnapping offenses would undermine the unambiguous purpose of the legislative amendment requiring registration. Id. Thus, to avoid interpreting the law in such a blatantly irrational way that would undermine the legislature’s recent amendment to the statute, the court supplied the erroneous numbering and corrected the error. Id.

In Delgado, another sex offense case involving statutory construction, the Supreme Court analyzed former RCW 9.94A.030(27) and held that the statute was unambiguous because there was only one interpretation the Court

could can draw from it. That statute expressly listed those qualifying prior convictions which exposed an offender to a sentence of life without parole as a two-strike persistent offender. The statute ended with the limiting language "of an offense listed in (b)(i) of this subsection."⁷ Statutory rape was not listed. The Court held that the list was presumed to be exclusive and the Court's were not authorized to add any offense to the list. Delgado, 148 Wn.2d at 726-77.

“Off an offense listed in (b)(i)“ is an unambiguous and plain reference to the terms set forth in RCW 9.94A.030(27). Likewise, “sex offense” as defined in RCW 9.94A.030(42) makes an unambiguous and plain reference to the exclusion of “failure to register as a sex offender” from the definition of sex offense (“other than RCW 9A.44.130(11)). Following the legislature’s intent to exclude sex offenders from community custody requirements does not render the statute irrational or undermine its purpose. Rather, the

7 (b)(i) Had been convicted of: (A) Rape in the first degree, rape of a child in the first [***4] degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree, with a finding of sexual motivation; . . . and

(ii) Had, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of **an offense listed in (b)(i) of this subsection**. (emphasis added).

legislature intentionally intended to exempt failure to register from the definition of “sex offense”. See also RCW 9.94A.712.

As in Delgado, addressing RCW 9.94A.030(27), RCW 9.94A.030(42) is also not subject to statutory construction and must be given its plain meaning. RCW 9A.44.715 refers to “sex offense”; RCW 9.94A.030(42) defines “Sex offense” to the exclusion of RCW 9A.44.130(11); and RCW 9.94A.712 also expressly excluded “failure to register as a sex offender” from the definition of “sex offense”. The legislature did not make an unintentional error in omitting “failure to register as a sex offender from the definition of a “sex offense”.

Had the legislature intended to include “failure to register as a sex offender “ within the definition of “sex offense” it would not have made an express exemption for this crime; the legislature however chose otherwise. There is no “error” like in King that is explained by a numbering error. Instead, the statutory scheme makes the definition of a sex offense exclusive of the crime charged herein.

Mr. Arseneau was not convicted of a “sex offense” or under any other offense that would require or permit the imposition to community custody. RCW 9A.44.715. Thus the trial court exceeded its statutory authority by

imposing 36-48 months of community custody and this provision of Mr. Arseneau's sentence must be reversed.

Issues such as lack of jurisdiction, failure to establish facts upon which relief may be granted, and manifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right. RAP 2.5(a). Specifically in the context of sentencing, illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) State v. Moen, 129 Wn.2d at 543-48 (imposition of a criminal penalty not in compliance with sentencing statutes may be addressed for the first time on appeal). 8

⁸ In re Personal Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) ("sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional"); State v. Loux, 69 Wn.2d 855, 858, 420 P.2d 693 (1966) (this court "has the power and duty to correct the error upon its discovery" even where the parties not only failed to object but agreed with the sentencing judge), overruled in part by [*478] Moen, 129 Wn.2d at 545; State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) ("challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal"). See also State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) (permitting the State to bring a motion to amend an erroneous sentence nearly two years after sentencing under CrR 7.8); [***7] State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (improperly calculated standard range is legal error subject to review).

Ford, 137 Wn.2d at 477.

Mr. Arseneau's sentence is erroneous and illegal as it is not statutorily authorized; therefore it may be raised for the first time on appeal. State v. Ford, 137 Wn.2d at 477.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF CHANGE OF RESIDENCE IN THE CRIME OF FAILURE TO REGISTER AS A SEX OFFENDER.

RCW 9A.44.130 requires convicted sex offenders to register their current residence with the sheriff in the county in which they reside. *Id.*

Subsection (5) provides in relevant part:

(5) (a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send signed written notice of the change of address to the county sheriff within seventy-two hours of moving.

.....

Id.

At issue in the instant case, is whether there was sufficient evidence to establish beyond a reasonable doubt that Mr. Arseneau actually changed his address. In order to convict a defendant of a charged crime, the State bears the burden of producing evidence sufficient to prove every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363, 90

S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Baeza, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). A conviction unsupported by sufficient evidence violates a defendant's constitutional right to due process. U.S. Const. amend. 14;⁹ Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

In considering a claim of insufficiency of the evidence, an appellate court must determine "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." Jackson v. Virginia, 443 U.S. at 323; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The relevant state's evidence demonstrated that Mr. Arseneau may or may not have moved out of Mr. Kelly's apartment and may or may not have been spending the nights with Mr. Kelly and the days with his wife. The evidence was not conclusive and did not rise to the level of proof beyond a reasonable doubt that Mr. Arseneau changed his address and failed to register.

⁹The Fourteenth Amendment provides that No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. 14.

Taking the evidence in the light most favorable to the state, there was insufficient evidence to establish beyond a reasonable doubt that Mr. Arseneau changed his address or was in any way out of compliance with his duty to keep the police apprised of his current address.

Because the state failed to meet its burden of proof as to all essential elements, the conviction should be reversed and dismissed with prejudice.

3. THE PROSECUTOR'S PREJUDICIAL
COMMENTS DURING CLOSING AND
REBUTTAL ARGUMENTS DENIED MR.
ARSENEAU HIS RIGHT TO A FAIR TRIAL.

The prosecutor is a quasi-judicial officer who, in the interest of justice, must act with impartiality. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); see also State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). If he lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he ceases to properly represent the public interest. Reed, 102 Wn.2d at 147. The prosecutor's duty is to seek a verdict "free of prejudice and based on reason." Huson, 73 Wn.2d at 663; State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), rev. denied, 103 Wn.2d 1014 (1985).

a. The Prosecutor's Argument that the
Defense Witnesses Were Biased and
That the State's Witnesses Were

Officers Because of Their Honesty
And Could Never Lie Required the
Jury to Conclude that the State
Witnesses Were Liars to Acquit Mr.
Arseneau; This Misconduct.

Where there is conflicting testimony, it is for the jury to determine which witnesses are telling the truth. United States v. Richter, 826 F.2d 206, 208 (2nd Cir. 1987). Cross examination designed to compel a witness to express an opinion as to whether other witnesses were lying constitutes misconduct. State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991); State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, rev. denied, 118 Wn.2d 1007 (1991).

The Court, in State v. Casteneda-Perez, identified two problems which inhere in this type of prosecutorial misconduct. 61 Wn. App. at 362-63. First, to ask a witness to express an opinion regarding the veracity of another witness invades the province of the jury. Second, and more importantly, such interrogation is misleading and unfair because it suggests that an acquittal requires the jury to conclude that the state's witnesses are lying. Id.; see also, State v. Barrow, supra, at 874-75.

The Supreme Court in Reed, supra explicitly held that a prosecutor may never express his personal opinion. Reed, 102 Wn.2d at 145

[I]t is just as reprehensible for one appearing as a public prosecutor to assert in argument his personal belief in the accused's guilt. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). Here, the prosecutor clearly violated CPR DR 7-106(C)(4) by asserting his personal opinion of the credibility of the witness and the guilt or innocence of the accused.

Id. In Reed, the prosecutor told the jury that the defense experts had nothing to offer except their opinions which were based on the defendant's lies; that the defense team was comprised of a bunch of city liars and that in his opinion the defendant had to be guilty. Reed, 102 Wn.2d at 145-46. The Supreme Court citing a long history of prohibition against this type of misconduct reversed the conviction and remanded for a new trial. Reed, 102 Wn.2d at 147- 48. The Court in Reed held that when a prosecutor expresses his opinion about the veracity of a witness he commits prejudicial misconduct which requires reversal and remand for a new trial. Reed, 102 Wn.2d at 147-48.

In Arseneau's case, the offered his personal opinion in his summation by informing the jury that the police could never lie because they were police. RP 7-8; 23-24. The prosecutor expressly told the jury that in order to find the defendant not guilty, they would have to find that both officers were lying. 1RP 6-8, 23-24. This theme was continued by the prosecutor's further comment

that the credibility instruction was in the juror's jury instructions because people "outright lie" and Lorin Brown is "biased". The parting words to the jury during rebuttal closing told the jurors to "ask yourself why the cops would make this up, especially if Mr. Arseneau is going away for the next couple of years, apparently." 1RP 6-7. 23-24.

This deliberate misconduct struck at the heart of Mr. Arseneau's defense because the case turned on credibility. If the jurors thought that they had to find that the police were lying in order to acquit, they would be placing the burden of proof on Mr. Arseneau to prove the lying, instead of placing the burden on the state to prove its case. The prosecutor's comments, therefore, constituted error.

c. Reversal is Required

Absent an objection, reversal is not required unless the prosecutorial misconduct is so flagrant and ill-intentioned that a curative instruction could not have obviated the prejudice. State v. Stover, 67 Wn. App. 228, 834 P.2d 671 (1992); State v. Ziegler, 114 Wn. 2d 533, 540, 789 P.2d 79 (1990).¹⁰

Here, the prosecutor's improper comments during closing argument

¹⁰ Other jurisdictions have recognized the inherent prejudicial impact caused by the type of prosecutorial misconduct at issue herein and have reversed convictions absent defense objections. See, e.g., Richter, 826 F.2d at 208-09; People v. Herlen, 99 A.D.2d 647, 472 N.Y.S.2d 216, 217 (1984).

were neither inadvertent nor unintentional. Because the prosecutor told the jury that the only way to acquit the defendant would be to find that the police lied, which he stated was not possible because they're "cops", the prosecutor knew or should have known that the arguments were improper. Indeed, "prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, [state witnesses] must be lying." Richter, supra, at 209. Another court has held that "it is inconceivable that any prosecutor would be unaware of the impropriety of such conduct. If he is, he fails shamefully in the performance of his public function" People v. Montgomery, 103 A.D.2d 622, 481 N.Y.S.2d 532 (1984), review denied, 64 N.Y.2d 891 (1985).

In State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), aff'd, 119 Wn.2d 711, 599 P.2d 837 (1992), the Supreme Court held that when the prosecutor's "remarks were flagrant, highly prejudicial and introduced 'facts' not in evidence." instructions to the jury to disregard the comments cannot cure such prejudice, thus reversal and remand for retrial is mandatory.

Although there were no objections in this case, a curative instruction would not have obviated the prejudice. The prosecutor's flagrant comments had a demonstrated purpose and were made during closing argument, just before jury deliberation. At this point, the bell could not be "unrung." This

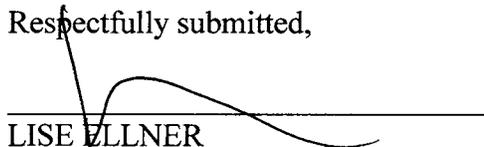
Court should, therefore, reverse Mr. Arseneau's convictions and remand for a new trial.

D. CONCLUSION

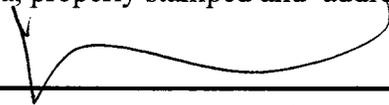
Mr. Arseneau respectfully requests this Court reverse his conviction for insufficient evidence and dismiss the charges; reverse the conviction for prosecutorial misconduct and if a re-trial is granted to remand for resentencing without the imposition of community custody.

DATED this 16th day of April 2008.

Respectfully submitted,


LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Robert Arseneau DOC #624917 Airway Heights Corrections Center 11919 West Sprague Ave. PO BOX 1899 Airway Heights, WA 99001-1899. Service was made on April 17, 2008 by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

03 APR 21 PM 9:30
STATE OF WASHINGTON
BY DEPUTY
Clerk of Superior Court