

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

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STATE OF WASHINGTON,

Respondent,

v.

HUE E. DEEN

Appellant.

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STATE OF WASHINGTON  
BY *EB*  
DEPUTY

FILED  
COURT OF APPEALS  
DIVISION II

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

The Honorable Carol Murphy, Judge  
Cause No. 08-1-01592-4

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Deen's conviction for failure to register as a sex offender, pursuant to RCW 9A.44.130(11)(a), should be affirmed when the charging information alleged all the essential elements of the crime and the defendant was not prejudiced by the language of the document.
2. Whether defense counsel was ineffective for failing to request a limiting instruction.
3. Whether sufficient evidence exists to convict Deen of failure to register as a sex offender.
4. Whether Deen's conviction should be affirmed when the rule of lenity does not apply, given that the term "residence" as applied to *this case* is not ambiguous.
5. Whether the State committed prosecutorial misconduct.
  - a) Whether the State committed prosecutorial misconduct when the prosecutor requested the Court declare Milleson a "hostile witness."
  - b) Whether the State committed prosecutorial misconduct by suggesting to the court that a witness be advised of her legal rights as they related to a potential charge of perjury.
  - c) Whether the State committed prosecutorial misconduct by asking the witness a question that produced an incriminating response, without first explaining to the witness her legal rights.
  - d) Whether the State committed prosecutorial misconduct by arguing in closing that Milleson's taped statement to Detective Frawley was substantive evidence.

B. STATEMENT OF THE CASE.

I. PROCEDURAL FACTS.

The State accepts Deen's statement of the procedural facts.

II. SUBSTANTIVE FACTS.

Detective Frank Frawley with the Thurston County Sheriff's Sex Offender Registration Office testified that he received a tip from a Pierce County Detective alleging that Deen, a sex offender registered in Pierce County, was actually living in Thurston County. (RP Vol. I 37-38) Detective Frawley investigated the tip and determined that Deen had been registered in Thurston county at 3307 College Street Apartment G-2, Lacey, Washington, but had moved to 16610 156<sup>th</sup> Avenue Court East in Buckley, Pierce County. (RP Vol. I 44-55) Deen registered his new address with the Pierce County Sheriff's Office in January 2008. (RP Vol. I 44-55) However, the Department of Licensing listed his home address as the College Street address. (RP Vol. I 45-46)

Beginning on August 12, 2008, Detective Frawley drove by the College Street address between 7:30 and 8:00 a.m. and between 4:00 and 5:30 p.m., and observed Deen's vehicle parked at the College Street address seven to eight times in a 17-day

period. (RP Vol. I 53) Detective Frawley also observed Deen driving his vehicle on one occasion. (RP Vol. I 53)

On August 29, 2008, at 8:51 a.m., Detective Frawley knocked on the door of the College Street apartment. (RP Vol. I 59) Deen and his girlfriend, Erin Milleson, answered the door in pajama-type clothing and looked as if they had just woken up. (RP Vol. I 63) Detective Frawley told Deen that he was investigating whether Deen had been living in Thurston County while registered in Pierce County. (RP Vol. I 63) Deen became upset and denied living in Thurston County, stating that he had just spent the night at the College Street apartment to help his girlfriend, Erin Milleson, move out. (RP Vol. I 66-69) When Detective Frawley asked Deen if he could search the apartment Deen granted permission and stated "you can check, there's nothing in there, we're moving out of the house." (RP Vol. I 68, 104)

A search of the apartment revealed no evidence, as everything had already been removed from the apartment except several pieces of furniture. (RP Vol. I 70-72) After the search, Detective Frawley obtained a taped statement from Erin Milleson. (RP Vol. I 72) Milleson stated that Deen had been staying with her

at the College Street apartment continuously for half the month of July and all of August 2008. (RP Vol. II 43-44)

Based on Milleson's taped statement, Detective Frawley arrested Deen for failing to register with the Thurston County Sheriff's Office. (RP Vol. I 76) As Deen was being handcuffed and taken to the police car he yelled to his girlfriend, "Just tell them I was here last night, I only spent the night here last night." (RP Vol. I 77) Deen also shouted, "Don't tell them anything other than I spent the night last night." (RP Vol. II 24)

While in the Thurston County Jail, Deen called Milleson and told her, "Don't tell them anything, tell them you were coerced, tell them that you didn't mean to give that statement [to Detective Frawley], you felt bad, you felt scared." (RP Vol. II 24) This conversation was conducted on the jail phone and was recorded. (RP Vol. II 24)

At trial, per Deen's phone instructions, Milleson changed her story and alleged that after January 2008, when Deen moved to Pierce County, Deen never returned to live with her at the College Street apartment. (RP Vol. I 145-51, 155) Milleson further testified that Deen would only stay with her at the College Street apartment two nights a week, on her days off. (RP Vol. I 154) Though

contrarily, Milleson also testified that she received an eviction notice in the beginning of August 2008, just a few weeks before they moved out of the apartment, because the College Street apartment landlord also thought Deen was residing with Milleson again. (RP Vol. II 42, 47) Milleson also testified that Deen's car was at the College Street address because she used it to drive to work. (RP Vol. I 167)

On the stand, pursuant to Deen's instructions, Milleson attempted to discredit her taped statements by claiming they were the product of threats and coercion by Detective Frawley. (RP Vol. I 150, 156-57) Specifically, Milleson alleged that Detective Frawley threatened to arrest her for driving on a suspended license unless she gave a statement indicating that Deen was living at the College Street address. (RP Vol. II 25) Detective Frawley testified adamantly that he never threatened or coerced Milleson into making her statement. (RP Vol. II 48-49) On the stand, Milleson also admitted that at the time the taped statement was taken she acknowledged that the statement was given "freely and voluntarily without any threats or promises" and that the statement was "truthful and accurate to the best of [her] knowledge and belief." (RP Vol. II 29-29)

Deen did not testify in his own defense. Brittany Haase, Milleson's former roommate, testified that Deen moved out of the College Street address in January 2008. (RP Vol. I 60-62) Erica and Joseph Moore, Deen's sister and brother-in-law, both testified that Deen was living with them in Buckley, Pierce County, since January 2008. (RP Vol. II 89, 115-120) The Moores also testified that Deen's belongings were located in their home, he received mail there, and he contributed to the household bills. (RP Vol. II 88-93, 115-119)

#### C. ARGUMENT.

- I. Deen's conviction for failure to register as a sex offender, pursuant to RCW 9A.44.130(11)(a), should be affirmed because the charging information alleged all the essential elements of the crime and the defendant was not prejudiced by the language of the document.

A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The time at which a defendant challenges the charging document controls the standard of review for determining the charging document's validity. State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). When the charging document is challenged after the verdict, the language is construed liberally in favor of validity. Id. at 360. Here, Deen

challenged the information after the verdict so this Court should construe the language liberally and in favor of validity.

A charging document must include all essential elements of a crime, statutory or nonstatutory, “to afford notice to an accused of the nature and cause of the accusation against him.” Kjorsvik, 117 Wn.2d at 97. An “essential element is one whose specification is necessary to establish the very illegality of the behavior.” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

The court uses a two-pronged analysis to determine the constitutional sufficiency of a charging document challenged for the first time on appeal: 1) do the essential elements appear in any form, or by fair construction can they be found in the charging document; and, if so, 2) can the defendant show that he or she was actually prejudiced by the language of the charging document. Kjorsvik, 117 Wn.2d at 105-06.

The first prong of the test looks to the face of the charging document itself. State v. Tandeki, 153 Wn.2d 842, 849, 109 P.3d 398 (2005). The charging document can use the language of the statute if it defines the offense with certainty. State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990).

However, the charging document does not need to mirror the language of the statute. Tandecki, 153 Wn.2d at 846.

RCW 9A.44.130(5)(a) provides that sex offenders who move to a new county must send written notice of the change of address to the new county sheriff at least 14 days before the move and must register with the new county sheriff within 24 hours of moving.

RCW 9A.44.130(11)(a) further provides that “ [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. . . .” (emphasis added).

Here, Deen was convicted of violating RCW 9A.44.130(11)(a). Specifically, Deen “failed to comply with the requirements of the statute” when he failed to provide written notice to the Thurston County Sheriff’s Office of his move from Pierce County to Thurston County 14 days prior to his move and failed to register with Thurston County within 24 hours of his arrival. See RCW 9A.44.130(5)(a).

The two essential elements of the crime of failing to register pursuant to RCW 9A.44.130(11)(a) are: 1) the respondent was previously convicted of a sex offense and 2) the respondent

knowingly failed to register with the sheriff's office. State v. Peterson, 145 Wn. App. 672, 675, 186 P.3d 1179 (2008).

Deen's charging document provides:

In that the defendant, HUE EDWARD DEEN, in the State of Washington, on or between July 28, 2008 and August 29, 2008, having been previously convicted of a sex offense, to wit: a 1998 conviction of Indecent Liberties, and therefore required to register as a sex offender in Washington, did knowingly fail to comply with sex offender registration requirements, to wit: the defendant knowingly failed to report to the Thurston County Sheriff's Office of his change of address as required by law.

(CP 3, emphasis added.)

Here, the charging document uses the language of RCW 9A.44.130(11)(a). The charging document includes both elements of the crime by stating that Deen was "previously convicted of a sex offense," and that he "knowingly failed to register." (CP 3) Because both of the essential elements appear in the charging document, the charging information passes the first prong of the Kjorsvik test.

Conversely, Deen argues that the information was deficient because it failed to allege that he did not notify the sheriff in writing within 14 days of the move or register within

24 hours of his change of address, as required by RCW 9A.44.130(5)(a). He contends that these time frames are essential elements of the crime, such that their absence from the information renders the information deficient. Kjorsvik, 117 Wn.2d at 105-06. This argument fails, as it has already been rejected in Peterson, 145 Wn. App. 672.

The State is not required to mirror the statute and include the timeline language from RCW 9A.44.130(5)(a). Specifically, the timelines are “definitional” and not essential elements of the crime. Id. at 674. Rather, the 14 day notice and 24 hour registration timelines merely define what constitutes compliance with the requirements of the statute. Id. at 678.

In Peterson, the defendant was convicted of failure to register as a sex offender under RCW 9A.44.130. Id. at 675. Peterson argued the charging information was constitutionally inadequate because it failed to state whether the defendant was guilty of: 1) failing to register within 72 hours of a change of fixed address in the same county, 2) failing to register within 10 days after a change of fixed residence in a different county, or 3) failing to register within

48 hours after becoming homeless. Id. at 676-77. In other words, Peterson argued the timelines were essential elements because the statute created alternate means of committing the offense. Id.

The court disagreed and noted that there was only one means of committing the crime – knowingly failing to register as required by RCW 9A.44.130. Id. at 678. In doing so, the court noted that “[t]he statute imposes one duty, to register with the sheriff in the county of residence, and one punishable offense, knowing failure to register as required by the statute. Id. at 677-78 (emphasis added). The court further explained that the timeline provisions in RCW 9A.44.130 were characterized as merely articulating the “definition” of what constitutes continuing compliance with the registration requirements of that statute, and therefore did not constitute essential elements of the crime of failure to register. Id. at 677-78.

Here, Deen puts forth the exact same argument that was rejected in Peterson. Id. at 678. The essential elements of Deen’s crime of failing to register are: 1) a prior sex conviction and 2) failure to register as required by the

statute. Id. at 675. The 14 day notification and the 24 hour registration timelines provided in the statute are definitional and are not essential elements of the crime. Id. at 674. Thus, the State was not required to include those provisions in the charging information. Therefore, the charging information is sufficient to pass the first prong of the Kjorsvik test.

The second prong of the test looks beyond the face of the charging document to determine if the language in the charging information actually prejudiced the defendant. Tandecki, 153 Wn.2d at 849 (citing Kjorsvik, 117 Wn.2d at 105-06). Here, Deen has the duty to show that he was actually prejudiced by the language of the charging document. Kjorsvik, 117 Wn.2d at 105-06.

Deen has failed to articulate how he has been prejudiced by the language of the charging information. Nowhere in Deen's brief is there any argument whatsoever as to the prejudicial effect of the charging document. In fact, Deen notes definitively that he "need not show prejudice." (Appellant's Brief 10) Therefore, the second part of the test is met because no prejudice has been shown.

II. Defense counsel was not ineffective for failing to request a limiting instruction.

To establish ineffective assistance of counsel, the two-prong Strickland test must be met. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The defendant must first show that his counsel's performance was deficient. State v. Tarica, 59 Wn. App. 368, 373-74, 798 P.2d 296, 299 (1990), overruled on other grounds, State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Secondly, the defendant must show that such deficient performance prejudiced the defense. Id. This requires a showing that counsel's errors were so egregious that the defendant was deprived of a fair trial. Id.

Courts apply a strong presumption of reasonableness in scrutinizing whether defense counsel's performance was ineffective. Id. If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, ineffective assistance of counsel will not be found. Id. The court should make every effort to "eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992). A reviewing

court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 729 P.2d 56 (1986).

Under ER 613, prior inconsistent statements are admissible for the limited purpose of attacking the credibility of a witness. Wash. R. Evid. 613; 5A K. Tegland, Evidence, Washington Practice § 613.3 (1999). To ensure that prior inconsistent statements are used only as impeachment evidence, trial counsel should request a limiting instruction. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). If no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider the prior statements as substantive evidence. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997); see also Carraway v. Johnson, 63 Wn.2d 212, 214, 386 P.2d 420 (1963) (hearsay statements that are generally only admissible for impeachment purposes can properly be considered by the jury and the court of appeals, if admitted into evidence without objection).

At trial the State used prior inconsistent statements of Deen's girlfriend, Erin Milleson, to attack her credibility. (RP Vol. I 150-159) While on the stand, Milleson stated that Deen moved from her apartment in January 2008 to his sister's home in Pierce

County. (RP Vol. I 145-51, 155) Milleson testified that once Deen moved in with his sister, he never returned to live with her, but would visit a few times per week. (RP Vol. I 164-65) For impeachment purposes, the State introduced prior inconsistent statements made by Milleson to Detective Frawley. (RP Vol. I 169) Milleson's prior statements indicated that Deen lived with her for half of July and all of August 2008. (RP Vol. II 43-44, Vol. I 155) Defense counsel failed to request a limiting instruction that would have precluded the jury from treating Milleson's prior inconsistent statements as substantive evidence. Deen now argues that he was denied effective assistance because defense counsel failed to request the limiting instruction.

The failure to request a limiting instruction is not considered ineffective where it may be presumed that counsel decided not to emphasize potentially unflattering evidence. See State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). In analyzing Deen's argument, it is important to note that although Milleson was called as a witness for the State, she was essentially the defense's witness. It would have made little tactical sense for the defense to request a limiting instruction aimed at attacking Milleson's credibility at trial. Rather, the defense had a vested interest in presenting the

witness as credible. A jury instruction addressing her prior contradictory statements might have worked against this interest by emphasizing that she indeed gave conflicting versions of her story. See State v. Barber, 38 Wn. App. 758, 771 n.4, 689 P.2d 1099 (1984), review denied, 103 Wn.2d 1013 (1985) (it is not unusual for trial counsel to not request a limiting instruction regarding evidence that counsel believes is damaging to the client). Thus, defense counsel's failure to request a limiting instruction was a tactical measure used to protect Milleson's credibility.

Because the first prong of the Strickland test is not met, this Court is not required to evaluate whether the defendant was prejudiced by defense counsel's actions. Tarica, 59 Wn. App. at 373 ("A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong."). However, even if Deen could show that the failure to request a limiting instruction was ineffective assistance, there is no reasonable possibility that a limiting instruction would have altered the outcome of his case given the overwhelming evidence of his guilt. Thus, even without Milleson's statements, there is ample evidence showing that between July and August 2008 Deen was

living at 3307 College Street, in Thurston County, with Erin Milleson.

The Department of Licensing database listed Deen's address as 3307 College Street SE, Apt. G-2, in Thurston County, Washington. (RP Vol. I 45) Detective Frawley testified in detail that he saw Deen's vehicle outside the College Street apartment at least seven or eight times in a 17-day period and saw Deen driving the vehicle at least one time. (RP Vol. I 53) Detective Frawley testified that on August 29, 2008 at 8:51 a.m., he knocked on the College Street apartment door and Deen and Milleson answered the door in pajama-type clothing and looked as if they had just woken up. (RP Vol. I 63) Further, Detective Frawley testified that when he asked Deen if he could search the apartment Deen granted permission and stated, "You can check, there's nothing in there, we're moving out of the house." (RP Vol. I 68, 104)

Detective Frawley also testified that as Deen was being handcuffed and taken to the police car he yelled to his girlfriend, Erin Milleson "Just tell them I was here last night, I only spent the night here last night." (RP Vol. I 77). Deen also shouted to Milleson, "Don't tell them anything other than I spent the night last night." (RP Vol. II 24) Even more damning is the fact that Milleson

further testified that Deen called her from the county jail and told her "Don't tell them anything, tell them you were coerced, tell them that you didn't mean to give that statement (to Detective Frawley), you felt bad, you felt scared." (RP Vol. II 24) This conversation was conducted on the jail phone and was recorded by jail personnel. (RP Vol. II 24)

Additionally, Milleson testified that she received an eviction notice in August 2008, just a few weeks before they moved out, because the College Street apartment landlord thought that Deen was residing with Milleson again. (RP Vol. II 42, 47) Given this testimony, Deen has not established that but for his counsel's failure to propose a limiting instruction the result of the trial would have been different. There is sufficient evidence, aside from Milleson's statements to Detective Frawley, to support a conviction. Thus, there is little likelihood that the consideration of Milleson's prior inconsistent statements as substantive evidence affected the outcome of the trial.

III. Sufficient evidence exists to convict Deen of failure to register as a sex offender.

Due process requires that the State "bear the 'burden of persuasion beyond a reasonable doubt of every essential element

of a crime." State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996) (quoting State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994), cert. denied, 115 S. Ct. 299, 130 L. Ed. 2d 212 (1994) (citations omitted)). Findings of fact supported by substantial evidence will not be reversed on appeal. Urban v. Mid-Century Ins., 79 Wn. App. 798, 807, 905 P.2d 404 (1995), review denied, 129 Wn.2d 1030 (1996) (citations omitted). Where the sufficiency of the evidence is challenged, the standard is whether the reviewing court believes, after viewing the evidence at trial most favorably to the State, that any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. State v. Hutchins, 73 Wn. App. 211, 215, 868 P.2d 196 (1994). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1968 (1992).

This court gives deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). Appellate courts will

not disrupt a trier of fact's credibility determinations. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In this case, the State was required to prove beyond a reasonable doubt that Deen changed his residence from Pierce County to Thurston County and knowingly failed to provide written notice of the move within 14 days and failed to register within 24 hours of the move. (CP 65) On appeal, Deen alleges the evidence is insufficient to show that Deen's "residence" was not in fact 16610 156<sup>th</sup> Avenue Court East, Buckley, Pierce County, Washington during the alleged charging period. (Appellant's Brief 15)

In State v. Stratton, this court defined "residence" as:

The act . . . of abiding or dwelling in a place for some time: an act of making one's home in a place . . . ; the place where one actually lives or has his home distinguished from his technical domicile; . . . a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit . . . ; a building used as a home.

130 Wn. App. 760, 124 P.3d 660 (2005).

In State v. Pray, the defendant appealed his conviction for failing to register with the county sheriff as a sex offender, pursuant to RCW 9A.44.130. 96 Wn. App. 25, 26, 980 P.2d 240 (1999). In Pray, the defendant moved out of his Seattle residence and began

looking for an apartment in Bellingham. Id. at 26. Upon arriving in Bellingham, Pray stayed for a few days with friends and then moved into two different hotels, staying at each for approximately five days. Id. at 26. The defendant was convicted of failing to register his change of residence with the Whatcom County Sheriff's Office. Id. at 27. The defendant alleged that he was not required to register his friend's address or the motel addresses because he had not yet established a new "residence" in Bellingham; arguing that "only permanent residences trigger the registration requirement." Id. at 28, 30.

The appellate court was not persuaded and affirmed the convictions. Id. at 31. The court noted that Pray was required to register with Whatcom County Sheriff's Office even though his friend's house and the motels were "temporary living arrangements." Id. The court reasoned that "[t]he purpose of the sex offender registration statute is to assist law enforcement agencies' efforts to protect their communities against reoffense by convicted sex offenders . . . [and] [r]egistration provides law enforcement agencies with an address where they can contact a sex offender." Id. at 28-29 (citing LAWS OF 1990, ch. 3, § 401).

Here, just as in Pray, sufficient evidence exists to find that between July 28 and August 29, 2008, Deen changed his residence from Buckley, Pierce County, to 3307 College Street Apartment G-2, Lacey, Thurston County, Washington. In addition to the abundance of evidence provided *supra* in section II, Milleson's own statements to Detective Frawley were also admitted as substantive evidence when defense counsel failed to make a hearsay objection and request a limiting instruction. (RP Vol. I 169); see Myers, 133 Wn.2d at 36 (if no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider the prior statements as substantive evidence). Thus, in determining Deen's guilt, the jury was allowed to consider Milleson's statement that Deen stayed with her at the College Street apartment continuously for half the month of July and all of August 2008. (RP Vol. II 43-44; RP Vol. I 169) Just as in Pray, Deen's stay at the College Street apartment for half of July and all of August was, at a minimum, a "temporary living arrangement," subject to the registration requirements. Pray, 96 Wn. App. at 29-30.

Further, allowing Deen to designate the Buckley address as his "registered address" while he lives elsewhere at 3307 College

Street, an undisclosed place, defeats the registration statute's public protection purpose of law enforcement knowing where sex offenders actually reside. Thus, sufficient evidence exists to support a conviction for failure to register as a sex offender.

IV. Deen's conviction should be affirmed because the rule of lenity does not apply given that the term "residence" as applied to *this case* is not ambiguous.

When a statute fails to provide a definition for a term, the court will use the standard dictionary definition. Stratton, 130 Wn. App. at 764. If the term is ambiguous, the rule of lenity requires that the court interpret it in favor of the defendant, absent legislative intent to the contrary. Id. at 764-65. A term is ambiguous if it is susceptible to more than one meaning or reasonable interpretation. State v. Bernard, 78 Wn. App. 764, 768, 899 P.2d 21 (1995).

In Stratton, the defendant was convicted of failing to report to the local sheriff's office that he was a transient and no longer had a "fixed residence." 130 Wn. App. at 764. Stratton appealed, alleging that he was not required to report because he still had a "fixed residence," even though his home was for sale and he was living inside his car in the driveway. Id.

The court found that RCW 9A.44.130 failed to define the term “residence.” *Id.* at 765. As noted *supra* in section III, the court used the dictionary definition:

The act . . . of abiding or dwelling in a place for some time: an act of making one's home in a place . . . ; the place where one actually lives or has his home distinguished from his technical domicile; . . . a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit . . . ; a building used as a home.

*Id.* at 765 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1931 (1969)) (emphasis added). The court also determined that the definition of “residence,” as applied to the *Stratton* case was ambiguous. *Id.* (emphasis added). Thus, under the rule of lenity the court interpreted the term in favor of the defendant. *Id.*

The court held that the term was ambiguous because the dictionary definition of “residence” “could simply indicate a place where one actually lives, not necessarily limited to a building, or it could be limited to a building used as a home.” *Id.* (emphasis added). The appellate court applied the rule of lenity and reversed the conviction in favor of Stratton, stating that under the dictionary definition, the term “residence” does not necessarily have to be a

building, but can also include a place where one stays, even if it is inside a car. Id. at 766.

Here, Deen cites Stratton for the proposition that the term “residence” is ambiguous and thus under the rule of lenity Deen’s conviction should be reversed and dismissed. (Appellant’s Brief 18) However, as applied here, the dictionary definition of the term “residence” is not ambiguous; thus, the rule of lenity should not be applied.

As applied to this case, there is nothing ambiguous about the definition of “residence.” The dictionary definition essentially states that a “residence” is the act of making one’s home 1) in a place or dwelling, 2) where one actually lives, as distinguished from a technical domicile, and 3) where one intends to return as distinguished from a place of transient visit. Stratton, 130 Wn. App. at 765. There is no question as to the meaning of the terms: “place,” “dwelling,” “where one actually lives,” “technical domicile,” or “place of transient visit.” These terms are not susceptible to more than one meaning or reasonable interpretation. Rather, the issue here is whether sufficient facts exist to prove that Deen “actually lived” at the College Street address and had his “technical domicile” at the Buckley address. Thus, for purposes of this case,

the definition of “residence” is not ambiguous. Consequently, the rule of lenity should not be applied and per *supra* section III, sufficient evidence exists to find that Deen resided at the College Street apartment.

V. The State did not commit prosecutorial misconduct.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). In order to establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and the improper conduct prejudiced his right to a fair trial. Boehning, 127 Wn. App. at 518. Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury's verdict.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996)).

Here, Deen alleges that four instances of prosecutorial misconduct occurred during his trial. (Appellant's Brief 20-24) He contends that the prosecutor: 1) wrongfully attempted to have the

court declare Milleson a “hostile witness;” 2) threatened Milleson with perjury charges; 3) exposed Milleson to potential criminal charges of driving while suspended without the benefit of counsel; and 4) improperly argued to the jury that Milleson’s taped statements to Detective Frawley were substantive evidence. (Appellant’s Brief 20-24)

a) The State did not commit prosecutorial misconduct by requesting the Court declare Milleson a “hostile witness.”

When an appellant cites no supporting authority for a proposition, the court of appeals assumes there is no such authority. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978). Courts will not consider such arguments. Id.; see also State v. Morreira, 107 Wn. App. 450, 457, 27 P.3d 639 (2001) (absent citation to relevant authority and a reasoned argument, a fleeting reference to a complex constitutional issue merits no consideration on appeal).

Here, Deen seems to allege that the State committed prosecutorial misconduct by requesting that the Court declare Erin Milleson a “hostile witness.” (Appellant’s Brief 21) However, Deen cites no authority for such a proposition. The State is also not

aware of any such authority. Thus, this Court should not consider the argument.

However, even if this court were to consider this unsupported argument, Deen cannot show any misconduct by the State or resulting prejudice. ER 611(c) expressly permits an attorney to ask leading questions of a “hostile witness.” Wash. R. Evid. 611(c); (RP Vol. I 12). Thus, requesting the trial court to make such a determination is wholly appropriate.

Further, the prosecutor’s request to have Milleson declared a “hostile witness” was made outside the presence of the jury and was ultimately denied by the judge. (RP Vol. I 8-12) Thus, Deen cannot show that the jury’s verdict was affected.

- b) The State did not commit prosecutorial misconduct by suggesting to the court that a witness be advised of her legal rights as they related to a potential charge of perjury.

While the State deprives a defendant of due process when it effectively keeps a defense witness off the stand by threatening the witness, State v. Carlisle, 73 Wn. App. 678, 679, 871 P.2d 174 (1994), “[i]t is hardly a threat for a prosecutor to advise a potential witness, who is telling two stories with respect to a defendant’s criminal involvement, that he might be prosecuted for perjury if he

testifies falsely." State v. Shaver, 116 Wn. App. 375, 389, 65 P.3d 688 (2003) (quoting United States v. Simmons, 216 U.S. App. D.C. 207, 670 F.2d 365, 371 (D.C. Cir. 1982)); see also Carlisle, 73 Wn. App. at 679 (when the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution, the prosecutor may provide the witness with a warning of the potential criminal liabilities) (emphasis added).

Appellant alleges that the State committed prosecutorial misconduct by threatening Erin Milleson, with potential perjury charges prior to and on the day of Deen's trial. (Appellant's Brief 21-22) A review of the record shows that Milleson was never "threatened" with potential perjury charges prior to or during the trial. At most, the record reflects that the prosecutor suggested to the trial court, outside the presence of the jury, that Milleson may need to be advised of her legal rights if she intended to testify inconsistent with her taped statement. (RP Vol. I 15) Such action is well within the law and does not constitute prosecutorial misconduct.

At trial, outside the presence of the jury, the prosecutor notified the court that Milleson intended to testify inconsistently with her taped statement to Detective Frawley. (RP Vol. I 15) At the

time, the prosecutor believed that the taped statement was given under penalty of perjury. (RP Vol. I 15) Thus, the prosecutor suggested that the court or counsel advise Milleson of her legal rights prior to her taking the stand. (RP Vol. I 15) The court appointed Kevin Johnson as independent counsel to advise Milleson. (RP Vol. I 19) Once appointed, Milleson's counsel reviewed the transcript of her interview with Detective Frawley and concluded that the statements were not given subject to penalty of perjury, but instead were merely sworn to be truthful and accurate to the best of her knowledge. (RP Vol. I 116-17) Milleson's counsel notified the court, prosecutor, and defense of the mistake and the court dismissed Milleson's counsel. (RP Vol. I 116-122) Milleson subsequently testified inconsistently with her taped interview with Detective Frawley. (RP Vol. I 147-156)

Here, there is no evidence that the prosecutor had any ill motive or knew in advance the statements were not given subject to penalty of perjury. (RP vol. I 15, 119, 121) The record reflects that at the time of discussing the perjury issue, the prosecutor had already submitted her copy of the transcript to the court as the marked exhibit and was relying on Detective Frawley's assurance that the statement was indeed taken under penalty of perjury. (RP

Vol. I 15,121-22) Per Shaver and Carlisle, the prosecutor had a reasonable belief that the witness may be subject to perjury charges and, therefore, did not commit misconduct by requesting the witness be advised of her rights. 116 Wn. App. 375; 73 Wn. App. 678. However, even if this court finds the prosecutor committed misconduct, Deen cannot show that the prosecutor's conduct actually resulted in prejudice.

At trial, Milleson did in fact testify inconsistently and was impeached with her taped statement to Detective Frawley. (RP Vol. I 151-59) Contrary to her taped statement, Milleson testified that Deen moved to Buckley in January of 2008 and never returned to live with her at the College Street address. (RP Vol. I 145-51, 155) Milleson further testified that Deen would only stay with her at the College Street apartment two nights a week, on her days off. (RP Vol. I 154) This testimony tended to exonerate Deen. Thus, it cannot be said that the State's conduct, in any way, prevented Milleson from testifying favorably for Deen. As such, Deen cannot establish that any alleged threat of perjury prejudiced him. Therefore, no prosecutorial misconduct occurred.

Deen also alleges that the prosecutor threatened Milleson with perjury charges prior to trial, when Milleson allegedly went to

the prosecutor's office to "explain herself more" and "fix her statement." (Appellant's Brief 22; RP Vol. I 31-32) Appellant's brief states that Milleson testified that she went to the police station to "explain herself more" and was referred to the prosecutor, who told her that if she changed her story criminal charges would be brought. (Appellant's Brief 22) However, Deen misreads the record. No threats were ever made to Milleson prior to trial.

The only discussion of perjury charges occurred the morning of trial, as indicated above. The prosecutor never spoke to Milleson at the time she allegedly went to the Prosecutor's Office to "fix her statement," let alone threaten perjury charges.

A detailed reading of Milleson's testimony in the record reflects that she went to the prosecutor's office and was unable to talk with anyone. (RP Vol. I 31-32) She left without changing her statement and never received any follow-up from the prosecutor's office. (RP Vol. I 31-32, 44, 46-47) Milleson was first told of potential perjury charges by her independent counsel, on the morning of Deen's trial, when her counsel advised her of her rights. (RP Vol. I 45) The testimony below shows that Milleson was never threatened by the prosecutor when she allegedly went to the prosecutor's office to "fix her statement."

Milleson: I tried going down to the sheriff's office to fix my statement, and they told me to go to the prosecutor's office. I went there; they said to go back to the sheriff's office. . . I was not able to get anywhere. They were sending me back and forth." (RP Vol. I 31-32)

Defense: "When you gave your testimony yesterday, were you – did you feel – did you feel threatened at all?" (RP Vol. I 32)

Milleson: "Yeah, a little bit" (RP. Vol. I 32)

Defense: "And why did you feel threatened?" (RP vol. I 33)

Milleson: "Because I was told that there was a possibility I could get criminal charges for supposedly changing my story." (RP Vol. I 33)

Defense: "Who told you that they would prosecute you for criminal charges if you changed your story?" (RP Vol. I 33)

Milleson: "The prosecutor." (RP Vol. I 33)

Defense: "And you, in fact, had to meet with an attorney, correct?" (RP Vol. I 34)

Milleson: "Yes, I did." (RP Vol. I 34)

Further redirect:

Prosecutor: "Now, it's also you claim today that I threatened you as well; is that right?" (RP Vol. I 41)

Milleson: "That's right." (RP Vol. I 44)

Prosecutor: "Have we ever talked outside the courtroom, ever?" (RP Vol. I 44)

Milleson: "No, we have not." (RP Vol. I 44)

Further recross:

Defense: "You were appointed an attorney yesterday. Why were you appointed an attorney yesterday?" (RP Vol. I 45)

Milleson: "Because I – they thought that I was going to change my statement, which would have led to criminal charges. . . ." (RP Vol. I 45)

Defense: "So you went to the sheriff's office on the 16<sup>th</sup> of September, correct?" (RP Vol. I 45)

Milleson: "That's correct." (RP Vol. I 45)

Defense: "Did you tell them you wanted to make a new statement?" (RP Vol. I 46)

Milleson: "I believe I did, yes." (RP Vol. I 46)

Defense: "Did any detective or police officer approach you and say . . . 'what's your statement?'" (RP Vol. I 46)

Milleson: "No, they did not." (RP Vol. I 46)

Defense: "You never received a phone call, a follow-up . . . ." (RP Vol. I 46)

Milleson: "No, I did not." (RP Vol. I 47)

Thus, Milleson was never threatened by the prosecutor when she allegedly went to the prosecutor's office to change her statement. Appellant misread the record. Conversely, on the morning of trial, Milleson was informed by independent counsel of her rights as they pertained to a potential charge of perjury.

However, it is not prosecutorial misconduct to have a witness advised that she might be charged with perjury if she testifies falsely.

- c) The State did not commit prosecutorial misconduct when the State asked the witness a question that produced an incriminating response, without first explaining to the witness her legal rights.

In Appellant's brief, Deen alleges prosecutorial misconduct by stating, "the State exposed [Milleson] to potential DWLS charges without the benefit of counsel . . . when Milleson admitted [in her testimony] to driving Deen's car and that her license was suspended." (Appellants Brief 23) Because there is no further support, explanation, or cited authority for this proposition, it is unclear exactly what Deen is alleging is misconduct.

Although the above language uses the phrase, "without the benefit of counsel," for purposes of this brief, the State assumes that Deen is actually alleging that Milleson should have been advised of her Miranda rights prior to giving testimony that would implicate her Fifth Amendment right against self-incrimination. However, since a nondefendant witness need not be given Miranda warnings before testifying in open court, the State did not commit prosecutorial misconduct in failing to do so. See State v. Dictado,

102 Wn.2d 277, 687 P.2d 172 (1984) abrogated on other grounds,  
State v. Harris, 106 Wn.2d 784, 790, 725 P.2d 975 (1986).

The Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be compelled in any criminal case to be a witness against himself.” State v. Hager, 152 Wn. App. 134, 216 P.3d 438 (2009) (citing Wash. Const. art. I, § 9). The Fifth Amendment privilege against self-incrimination is applicable to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). This privilege includes the right of a witness not to give incriminatory answers in any proceeding -- civil or criminal, administrative or judicial, investigatory or adjudicatory. Kastigar v. United States, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

The "Constitution does not forbid the asking of criminative questions." United States v. Monia, 317 U.S. 424, 433, 63 S. Ct. 409, 87 L. Ed. 376 (1943) (Frankfurter, J., dissenting). Thus, the general rule is that if a person desires not to incriminate himself or herself, he or she must invoke the protection of the Fifth Amendment privilege against self-incrimination rather than answer. State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172 (1992)

(citing Garner v. United States, 424 U.S. 648, 654 n.9, 47 L. Ed. 2d 370, 96 S. Ct. 1178 (1976)) (emphasis added); see also State v. Warner, 125 Wn.2d 876, 884, 889 P.2d 479 (1995) (a person must invoke the Fifth Amendment protections in order for them to apply). Generally, the right is not self-executing. State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

An exception to the general rule applies when the State is engaged in “custodial interrogation.” Minnesota v. Murphy, 465 U.S. 420, 429-430, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984). If a witness is in custody and being interrogated, the State must give Miranda warnings prior to any questioning. Id. at 430; see also Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). If Miranda warnings are given in such a situation, the court will hold that the witness knowingly waived his or her right against self-incrimination. Warner, 125 Wn.2d at 884; State v. Walton, 64 Wn. App. 410, 413, 824 P.2d 533 (1992).

At trial, a nondefendant witness need not be given Miranda warnings before testifying in open court. See Dictado, 102 Wn.2d at 292-93 (where the court held that the prosecutor did not need to give Miranda warnings to the witness in a material witness hearing); see also United States v. Mandujano, 425 U.S. 564, 96 S. Ct. 1768,

48 L. Ed. 2d 212 (1976) (where the court held that a grand jury witness was not entitled to Miranda warnings because he was not a suspect in police custody); Robinson v. United States, 401 F.2d 248, 251 (9<sup>th</sup> Cir. 1968) (holding no Miranda warnings were required because a witness in court pursuant to a subpoena is not held under a similar compulsion as a suspect in police custody); Labbe v. Berman, 621 F.2d 26 (1st Cir. 1980);(where no Miranda warnings were required to be given to a witness at an inquest); United States v. Armstrong, 476 F.2d 313, 315 (5<sup>th</sup> Cir. 1973) (holding that Miranda warnings are not required when a witness is questioned in open court).

This is because judicial inquiries are not the equivalent of custodial interrogations. Mandujano, 425 U.S. at 579. The Miranda decision was “aimed at the evils seen by the Court as endemic to police interrogation of a person in custody.” Id. (emphasis added). “Miranda addressed extrajudicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards,” and the warnings prescribed were “to negate the ‘compulsion’ thought to be inherent in police station interrogation.” Id.

The Court thus recognized that many official investigations take place in a setting wholly different from custodial police interrogation. Id. at 579-80. Indeed, the Court's opinion in Miranda reveals a focus on what was seen by the Court as police "coercion" derived from "factual studies [relating to] police violence and the 'third degree'... physical brutality - beating, hanging, whipping - and to sustained and protracted questioning incommunicado in order to extort confessions...." Id. at 580 (quoting Miranda, 384 U.S. at 445-46). "To extend these concepts to questioning before a . . . jury inquiring into criminal activity under the guidance of a judge is an extravagant expansion never remotely contemplated by this Court in Miranda. . . ." Id. at 580.

Extending the concepts of Miranda, would require that the witness be told that there was an absolute right to silence, and obviously any such warning would be incorrect, for there is no such right before a jury. Id. at 580-81. Under Miranda, a person in police custody has, of course, an absolute right to decline to answer any question, incriminating or innocuous, see Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), whereas a witness, on the contrary, has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim. Id. at

581. However, even when the witness asserts the privilege, questioning need not cease, except as to the particular subject to which the privilege has been addressed. Id.; see also State v. Levy, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006). Other lines of inquiry may properly be pursued. Mandujano, 425 U.S. at 581; Levy, 156 Wn.2d at 732.

Here, Milleson alleged that Deen's vehicle was parked at the College Street residence because she used the vehicle to drive to work; not because Deen actually lived there. (RP Vol. I 167) The State believed this to be untrue. In order to show that the vehicle was parked at the College Street address because Deen actually lived there and was the driver of the vehicle, the State asked Milleson if her license was suspended. (RP Vol. I 25-27) Milleson admitted her license was suspended, but reiterated that she alone drove the vehicle, even while her license was suspended. (RP Vol. II 25-27)

It is not prosecutorial misconduct to ask criminative questions. Mandujano, 425 U.S. at 574 (citing Monia, 317 U.S. at 433 (Frankfurter, J., dissenting)). It was Milleson's duty to invoke her Fifth Amendment right against self-incrimination when the prosecutor asked her if her license was suspended and whether

she continued to drive. See Sargent, 111 Wn.2d 641. Since Milleson failed to invoke her Fifth Amendment right, the right was waived. Post, 118 Wn.2d at 605. The prosecutor had no legal obligation to *Mirandize* Milleson prior to her answering the question. See Dictado, 102 Wn.2d at 292-93. The examination of Milleson as a witness in a court of law is not “custodial interrogation.” See Mandujano, 425 U.S. at 579-580. Neither the terms of the *Miranda* decision nor its rationale extends to the judicial setting of the sort involved here. See id.

Further, the prosecutor had no reason to *Mirandize* Milleson because there was no reason to believe that Milleson would make self-incriminating statements. When the prosecutor asked Milleson if she drove on a suspended license, the State presumed Milleson would testify that she was a law abiding citizen who would not drive on a suspended license. The prosecutor asked Milleson the question in good faith and assumed Milleson would admit that she does not drive on a suspended license, thus proving Deen was the actual driver of his vehicle and providing further evidence that Deen did in fact live at the College Street apartment.

As such, the State did not commit misconduct in failing to provide *Miranda* warnings to Milleson before she admitted that she

drove a vehicle while her license was suspended. Further, even if this court finds prosecutorial misconduct occurred, Deen cannot show that such misconduct actually prejudiced him.

Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury's verdict.” Dhaliwal, 150 Wn.2d at 578 (quoting Pirtle, 127 Wn.2d at 672). Here, Deen cannot show that failing to advise Milleson of her Fifth Amendment rights affected the jury's verdict in any way. The fact that Milleson made incriminating statements that may subject her to future criminal charges is wholly unrelated and irrelevant to Deen's trial.

- d) The State did not commit prosecutorial misconduct when the State argued in closing that Milleson's taped statement to Detective Frawley was substantive evidence.

A defendant may not assign error to a prosecutor's argument unless he objected to the improper remarks and requested a curative instruction. State v. Monk, 42 Wn. App. 320, 324-25, 711 P.2d 365 (1985); State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). Here, the defense neither objected to the State's closing argument nor requested a curative instruction. (RP Vol. II 158-59)

An exception to this rule is warranted, however, when the misconduct is so flagrant and ill intentioned that no instruction could obviate the prejudice engendered by it. Monk, 42 Wn. App. at 325; Ziegler, 114 Wn.2d at 540. Here, the prosecutor's closing argument was not ill intentioned and no misconduct occurred.

Deen argues that the State committed misconduct by improperly arguing in closing that Milleson's taped statement was substantive evidence of Deen's guilt. (Appellant' Brief 23) In the State's closing statements, the prosecutor said:

What's the best evidence we have that [Deen]'s actually living there? We have Erin [Milleson]. . . We know at the time that she was locked into a story, and that is her taped statement, and she recounts very reluctantly. . . [S]he says [Deen] didn't come down between two and three months after he moved out . . . and then . . . he starts coming down maybe once or twice a week. . . and July rolls around, and he just ends up staying all the time. . . .And, from the State's perspective, I think [this statement] is the only truthful one we have.

(RP Vol. II 159)

Under ER 613, prior inconsistent statements are admissible for the limited purpose of attacking the credibility of a witness. 5A K. Tegland, Evidence, Washington Practice § 613.3 (1999). However, if no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider

the prior statements as substantive evidence. See Myers, 133 Wn.2d at 36 (evidence admitted as relevant for one purpose is deemed relevant for others" in the absence of an objection or limiting instruction); see also Carraway, 63 Wn.2d at 214 (hearsay statements that are generally only admissible for impeachment purposes can properly be considered by the jury and the court of appeals, if admitted into evidence without objection).

Here, Milleson's own statements to Detective Frawley were used for impeachment purposes. However, such evidence became substantive evidence when defense counsel failed to object to its introduction into evidence and failed to request a limiting instruction. (RP Vol. I 169) Thus, the jury could properly consider the evidence in determining Deen's guilt and the prosecutor was entitled to present the testimony as substantive evidence to the jury. As such, the prosecutor's closing statements were entirely appropriate and no misconduct occurred.

#### D. CONCLUSION.

The charging information was sufficient because it alleged all the essential elements of the crime and the defendant was not prejudiced by the language of the document. Further defense counsel was not ineffective for failing to request a limiting

instruction regarding Milleson's taped statement because the decision was a tactical measure used to present the witness as credible. Sufficient evidence exists to convict Deen of failure to register as a sex offender, even if Milleson's taped statement is not considered substantive evidence of Deen's guilt. Additionally, the term "residence" is not ambiguous, thus the rule of lenity does not apply. Lastly, the State did not commit any of the four alleged counts of prosecutorial misconduct. For the foregoing reasons the State respectfully requests this Court affirm Deen's conviction for failure to register as a sex offender.

Respectfully submitted this 3<sup>d</sup> day of December, 2009.

  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

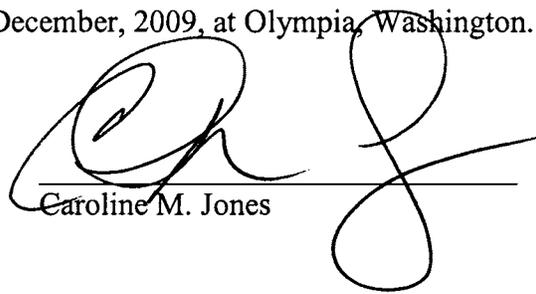
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of December, 2009, at Olympia, Washington.

  
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Caroline M. Jones