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Court of Appeals No. 40241-6-II
Clark County No. 09-1-01347-1

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STATE OF WASHINGTON,

Respondent,

vs.

DOUGLAS BUSH, II.

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
Attorney for Appellant

P. O. Box 1670
Kalama, WA 98625
360 - 673-4941

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A. ASSIGNMENT OF ERROR

I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. THE EVIDENCE IS INSUFFICIENT TO PROVE EACH OF THE FOUR ACTS IT USED TO PROVE THAT MR. BUSH FAILED TO REGISTER AS A SEX OFFENDER.

C. STATEMENT OF THE CASE

Appellant Douglas Bush was required to register as a sex offender. RP I, p. 46. On June 19th, 2009 his address was reported to be 76th Street in Vancouver. RP I, p. 79. On July 30th, 2009 Mr. Bush registered his address as 501 S.E. 123rd Avenue, Apt. I59.¹ RP I, 80. Detective Patrick Kennedy began an investigation on Mr. Bush address and discovered, on August 6th, 2009, that Mr. Bush had inadvertently noted the apartment number as I59 when it was actually I57. RP I, p. 80-82. At that apartment Detective Kennedy spoke to Jeanie Alo who told him that Mr. Bush was not living there at that time. RP I, p. 82. Detective Kennedy did not ask Ms. Alo when the last date was that Mr. Bush stayed at her apartment. Id. Detective Kennedy interviewed Mr. Bush and claimed that Mr. Bush said

¹ The apartment in question, where Mr. Bush stayed for a disputed period of time, was actually numbered I57. The State did not focus on this discrepancy in its claim that Mr. Bush failed to register his address. All parties seemed to agree that the I59/I57 mix-up was an honest mistake. RP I, p. 81-82.

the last day he stayed at Ms. Alo's apartment was a couple of days before he registered the address. RP I, p. 86.

Ms. Alo was contacted by a friend who told her that Douglas Bush needed a place to stay. RP I, p. 112. She knew he was a registered sex offender and wanted to help him out. RP I, p. 112. They had an agreement that Mr. Bush would either procure his own groceries or give his food stamps to Ms. Alo so that she could purchase food. RP I, p. 113. Mr. Bush slept on the couch while he was there. RP I, p. 113.

The State charged Mr. Bush with failure to register as a sex offender between July 30, 2009 and August 6, 2009. CP 5. The prosecutor argued during closing argument that Mr. Bush failed to register in four ways: First, that he failed to register by not registering a new address within either 48 or 72 hours of having never lived at the 76th Street address that he registered on June 16th, 2009. RP I, p. 217. Second, that he failed to register by registering the 123rd Street address at which, the State contended, he never lived despite the agreement testified to by Ms. Alo. RP I, p. 218. Third, that he lacked a fixed residence between June 16th, 2009 and July 30th, 2009. RP I, p. 219. And fourth, that he left the 123rd Street address on or before July 30th, 2009, and failed to report it within 48 or 72 hours. RP I, p. 219.

The court instructed the jury that “In any case where the offense is alleged to have occurred more than once over a period of time, all twelve of you must agree that the same criminal act has been proved beyond a reasonable doubt.” CP 20. The court further instructed the jury as follows:

To convict the defendant of the crime of failure to register as a sex offender, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on about or between July 30, 2009, and August 6, 2009, the defendant was required to register as a sex offender; and
- (2) That on about or between July 30, 2009, and August 6, 2009, the defendant knowingly failed to comply with a requirement of sex offender registration; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 21.

The jury convicted Mr. Bush. CP 26. He was given a standard range sentence. CP 30. This timely appeal followed. CP 43.

D. ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO PROVE EACH OF THE FOUR ACTS IT USED TO PROVE THAT MR. BUSH FAILED TO REGISTER AS A SEX OFFENDER.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980).

When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

A jury must unanimously conclude that the defendant committed a charged criminal act. *State v. Petrich*, 101 Wn.2d 566, 569, 693 P.2d 173 (1984), modified, *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). When the State charges one count of criminal conduct but introduces evidence of multiple distinct acts, (1) the State must specify the

particular act on which it relies for each conviction, or (2) the trial court must instruct the jury that it can convict only if it unanimously agrees on at least one criminal act. *Petrich*, 101 Wn.2d at 572. This requirement guards against the State's using multiple acts to prove one count, thus obscuring whether the jury unanimously based its conviction on the same act. *Petrich*, 101 Wn.2d at 572; *Kitchen*, 110 Wn.2d at 411. Nevertheless, a unanimity error may be harmless as long as the nature of the verdict indicates that all jurors relied on the same incident for conviction. See *State v. Holland*, 77 Wn.App. 420, 425, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995); *Kitchen*, 110 Wn.2d at 405-06.

In this case, the State was required to prove that Mr. Bush's act of failing to register occurred on about or between July 30th, 2009 and August 6th, 2009. However, the State relied on conduct which occurred long before that time period to prove Mr. Bush's guilt.

Here, the State alleged that Mr. Bush failed to register as a sex offender by failing to register a new address within either 48 or 72 hours after June 16th, 2009 (the date he registered the 76th Street address). Irrespective of whether he was required to register 48 or 72 hours after that August 6th, 2009, the crime occurred no later than June 18th or June 19th, 2009. The crime does not occur when a person registers a new address in an effort to be in compliance; rather, it occurs when the relevant

time expiration is triggered, i.e. 48 or 72 hours after changing one's address.

Under the law of the case doctrine, because of the language used in the "to convict" instruction, the State assumed the burden of proving that he knowingly failed to register on or between July 30th, 2009 and August 6th, 2009. The law of the case doctrine is an established doctrine dating to the earliest days of statehood which holds that jury instructions not objected to become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (citing *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P.743 (1986), and *Peters v. Union Gap Irr. District*, 98 Wash. 412, 413, 167 P. 1085 (1917)). In the criminal context, the doctrine holds the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction. *Hickman* at 102 (citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995); see also *State v. Barringer*, 32 Wn.App. 882, 887-88, 650 P. 2d 1129 (1982) (where "to convict" instruction required jury to find valium was a "controlled substance," this became the law of the case and an added element the State had to prove), *overruled* in part on other grounds by *State v. Monson*, 113 Wn.2d 833, 849-50, 784 P.2d 485 (1989).

Where the State has assumed the burden of proving surplusage by including “elements” in the “to convict” instruction, a defendant may assign error to such added “elements” and the court may consider whether the State has met its burden of proving them. *Hickman* at 102. “There is but one question...that is, [i]s there sufficient evidence to sustain the verdict *under the instructions of the court?*” *Schatz v. Heimbigner*, 82 Wash. 589, 590, 144 P. 901 (1914) (emphasis added). As noted above, in determining whether there is sufficient evidence to prove the added element, the reviewing court assesses whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could find that all the essential elements of the crime charged were proven beyond a reasonable doubt. *Hickman* at 103.

In *Hickman*, the State included venue as an element of the “to convict” instruction in an insurance fraud prosecution by indicating the crime had occurred in Snohomish County, although venue was not an element of the charged offense. Reversing, the Court found the State had failed to prove the crime occurred in Snohomish County and, consistent with double jeopardy prohibitions, barred the State from seeking a retrial. *Hickman* at 105-06. Courts have reached a similar result where the State’s burden was increased by an apparent scrivener’s error. See *State v. Nam*, 136 Wn.App. 698, 150 P.3d 617 (2007).

This Court has held that the State's inclusion of a particular charging period in the "to convict" instruction makes that charging period the law of the case. *State v. Jensen*, 125 Wn.App. 319, 104 P.3d 717 (2005), *rev. denied*, 154 Wn.2d 1011 (2005). In *Jensen*, a child molestation case, the defendant argued the State assumed the burden of proving the alleged molestation occurred during the charging period contained in the "to convict" instruction. *Jensen* at 325-26. This Court agreed, but affirmed on factual grounds, finding that sufficient evidence had been presented that the charged acts occurred during the charging period. *Jensen* at 326.

Here, two of the four bases on which the State urged the jury to find Mr. Bush failed to register occurred before the charging period. Because failure to register is a status offense in which the crime is defined largely by failing to do certain acts within a certain time period (i.e. failing to report a change of address within 72 hours, failing to report transient status within 48 hours, failing to report in person every 90 days as a level II or III sex offender under former RCW 9A.44.130 (7), etc.), time is an essential element of this offense. Because the State relied on multiple acts which would prove the offense, and the jury was not required to elect which act it was relying upon, the State was required to present sufficient evidence of *each act*. With regard to the 76th Street address, the State

failed to prove that Mr. Bush's failure to report that he left that address, or that he never lived there in the first place, occurred on or between July 30th, 2009 and August 6th, 2009. It is baffling that the State didn't simply charge, and ask the court to instruct, that the offense period began on June 16th, 2009. They didn't, however, and this Court cannot correct that failing.

The State presented insufficient evidence of each act it alleged constituted the offense of failing to register as a sex offender and Mr. Bush's conviction should be reversed and dismissed with prejudice.

E. CONCLUSION

Mr. Bush's conviction should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 27th day of August, 2010.


ANNE M. CRUSER, WSBA No. 27944
Attorney for Mr. Bush

CERTIFICATE OF MAILING

I, Anne M. Cruser, certify that I placed a copy of this document in the mails of the United States addressed to: (1) David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; (2) Michael C. Kinnie, Deputy Prosecuting Attorney, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA 98666; (3) Douglas Bush, II, DOC No. 871897, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.