

NO. 40877-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

TERRY PETERSON,

Appellant.

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STATE OF WASHINGTON  
BY WJ  
COURT OF APPEALS  
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 10-1-00233-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED March 29, 2011, Port Orchard, WA                       
**Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether Peterson's claim that the second amended information was deficient must fail when the information contained the essential elements of the crime of failure to register as a sex offender?

2. Whether Peterson's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found the State proved the essential elements of the crime of Witness tampering beyond a reasonable doubt?

3. The State concedes that the term "pornography" is vague and should be stricken from the community custody conditions listed in the judgment and sentence?

4. Whether the trial court abused its discretion in imposing a substance abuse evaluation as a condition of Peterson's community custody when Peterson admitted at sentencing that his crimes were caused by a substance abuse problem?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Terry Peterson was charged by a second amended information filed in Kitsap County Superior Court with one count of failure to register as a sex offender and one count of tampering with a witness. CP 9. Following a jury

trial, Peterson was found guilty of the charged offenses. CP 57. The trial court then imposed a standard range sentence. CP 60. This appeal followed.

**B. FACTS**

Peterson stipulated below that he had a prior conviction for a felony sex offense that required him to register as a sex offender and that he was aware of this registration requirement. RP 146, CP 17. The charged offenses were based on the State's allegations that: (1) soon after DOC had issued a warrant for his arrest, Peterson stopped living at the residence of Elsie Clotfelter (which was his registered address) and failed to notify the Sheriff of this fact; and that (2) after his arrest Peterson made several phone calls including calls to Ms. Clotfelter and to his mother in an attempt to induce Ms. Clotfelter to testify falsely.

At trial, Detective Michael Rodrigue of the Kitsap County Sheriff's Office explained that on November 2, 2009 Peterson registered as a sex offender using the address of 19630 Ashcrest Loop NE, in Poulsbo Washington. RP 91, 96.

David Payne of the Department of Corrections was the CCO assigned to supervise Peterson in late 2009. RP 73. Officer Payne went to the Ashcroft residence in November of 2009 and spoke with Elsie Clotfelter who confirmed that Peterson was living there with her, and officer Payne was satisfied at that point that Peterson was living at the Ashcrest Loop residence.

RP 88-89. On December 11, 2009, however, Officer Payne issued an arrest warrant<sup>1</sup> for Peterson, and Officer Payne explained that Peterson would have known about that warrant. RP 73. Later statements made by Peterson in recorded jail phone calls demonstrated that Peterson was in fact aware that officers were looking for him. *See*, Exhibits 7A, 8A, 9A (discussed in more detail below).

In January of 2010, Detective David Gessell of the Poulsbo Police Department sent out an annual address verification form to Peterson at the Ashcrest loop address. 121-23, 125-26. The letter, however, was returned unopened after several attempts for delivery were made. RP 124. On the 25<sup>th</sup> of January Detective Gessell went to Peterson's registered address and spoke with Ms. Clotfelter, who said that Peterson had not lived there for at least a month. RP 124-25.

Later, in March of 2010, officer John Halsted of the Poulsbo Police Department began to check several locations looking for Peterson. RP 66. Officer Halsted explained that he would check "once a shift or so" looking for Peterson, and that he checked the Ashcrest Loop residence but did not find Peterson. RP 67. Eventually, on March 5, Officer Halsted found Peterson at Peterson's mother's residence on Noll Road. RP 67-68. Peterson

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<sup>1</sup> The jury was not told about the exact nature of the warrant. RP 73,

was arrested at that time. RP 68-69.

After his arrest, Peterson made several phone calls from the jail that were recorded by the jail's phone system. RP 61-64, 75. Several CD's of the recorded phone calls were admitted as evidence and played for the jury.

The first, Exhibit 7A, included calls made on March 8 and May 23 from Peterson to his mother, Margaret Crist. RP 76-77, 84-85. In the March 8 call, Peterson can be heard talking to Ms. Crist and instructing her to tell Ms. Clotfelter that people will be talking to her and that she should tell them that he was living with her. Exhibit 7A. Specifically, Peterson instructs Ms. Crist as follows:

Peterson: Tell Elsie that I'm going to put that in as my address.

Ms. Crist: Just want her to hang onto your mail.

Peterson: Yes, tell her to hang on – but I'm gonna put that – they're gonna be contacting her to see if I was living there – she's got to –

Ms. Crist: Is she supposed to say yes?

Peterson: Yes. That's what we talked about and agreed upon.

...

Peterson: Tell he I'll write her a letter but tell her when they call her to tell them yes I was living there.

Exhibit 7A. In the May 23 call to Ms. Crist Peterson makes the following statement,

Peterson: That's where I was living, I mean, technically speaking that's where I was living, you know what I mean, and because Elsie never kicked me out, I just hadn't been there because they were looking for me there.

Exhibit 7A.

Exhibit 8A included an April 18 phone call from Peterson to Elsie Clotfelter. RP 85. In that call Peterson instructs Ms. Clotfelter as follows:

Peterson: They're going to ask you if I lived there the whole time and just tell them yes. You know, they're gonna ask if I lived there since November and just say yes he has, you know, just say that, you know, that you're not my keeper and I had a girlfriend and I was gone quite a bit but I did live there.

Exhibit 8A. Finally, Exhibit 9A contained a May 19 phone call in which Peterson states, "I quit going there, I still lived there, but I quit going there because the cops were looking for me there." RP 86, Exhibit 9A.

Elsie Clotfelter testified at trial, and was asked whether Peterson stopped living with her sometime in January. RP 106. Ms. Clotfelter responded: "Well, he would come and go and call me. I mean, he wasn't there as regularly." RP 106. The State then asked Ms. Clotfelter if she recalled telling a police officer on January 25<sup>th</sup> that she hadn't seen Peterson in about a month, and Ms. Clotfelter replied, "I don't remember that, no, exactly. I might have said that I hadn't seen him for awhile. But I – I heard from him occasionally." RP 107. Ms. Clotfelter went on to state that in

February Peterson stayed at her residence on two occasions: once on the weekend of February 2 and then later in the month, around February 24<sup>th</sup> or 25<sup>th</sup>, when she wrote him a check because he needed some money. RP 108-09. Ms. Clotfelter did not recall seeing Peterson after that date, and the next thing she heard was that Peterson had been arrested. RP 108.

### III. ARGUMENT

#### A. PETERSON'S CLAIM THAT THE SECOND AMENDED INFORMATION WAS DEFICIENT MUST FAIL BECAUSE THE INFORMATION CONTAINED THE ESSENTIAL ELEMENTS OF THE CRIME OF FAILURE TO REGISTER AS A SEX OFFENDER.

Peterson argues that the second amended information failed to include all of the essential elements of the crime of failure to register. App.'s Br. at 8. This claim is without merit because the information contained the essential elements of the crime of failure to registered as required. In addition, as Peterson did not challenge the information below the information is to be liberally construed in favor of its validity and a reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document.

All essential elements of a crime must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86

(1991). When a defendant, however, challenges the sufficiency of the charging information for the first time on appeal, the appellate court is to liberally construe the document in favor of its validity. *Kjorsvik*, 117 Wn.2d at 105-06.<sup>2</sup> The appellate court then considers (1) whether the necessary elements appear in any form, or can be found by fair construction, in the charging document; and, if so, (2) whether the defendant nonetheless suffered actual prejudice as a result of the inartful, vague, or ambiguous charging language. *Kjorsvik*, 117 Wn.2d at 105-06. Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document. *Kjorsvik*, 117 Wn.2d at 104. “Thus, when an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document.” *Id* at 104. Finally, the appellate court is to read words in a charging document as a whole, construing them according to common sense and as including facts that are

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<sup>2</sup> The standards are different if a defendant fails to challenge an information below because, as our Supreme Court has noted,

The orderly administration of criminal justice demands that a defendant who is dissatisfied with the form or substance of an indictment or information filed against him shall make that known to the trial court at or before the time when sentence is imposed, ... It would create an intolerable situation if defendants, after conviction, could defer their attacks upon indictments or informations until witnesses had disappeared, statutes of limitation had run, and those charged with the duty of prosecution had died, been replaced, or had lost interest in the cases.

*Kjorsvik*, 117 Wn.2d at 105, citing, *State v. Majors*, 94 Wn.2d 354, 358-59, 616 P.2d 1237 (1980) (quoting *Keto v. United States*, 189 F.2d 247, 251 (8th Cir.1951)).

necessarily implied. *Kjorsvik*, 117 Wn.2d at 109.

Division One recently addressed an argument similar to the one raised by Peterson in the present case and held that RCW 9A.44.130(11)(a) created the only crime under the sex offender registration statutes, whose elements consisted of (1) knowingly (2) failing to register. *State v. Peterson*, 145 Wn. App. 672, 677-78, 186 P. 3d 1179 (2008). The court there specifically held that subsections that set forth the definition of registration and procedure for registration “merely articulate the definition of continuing compliance” and “do not define the elements or create alternative means of committing the crime of failure to register as a sex offender.” *Peterson*, 145 Wn. App. at 678.

In the present appeal Peterson argues that *State v. Peterson* is of “limited persuasive authority” because the “Supreme Court has granted review of the case.” App.’s Br. at 10. This argument, however, is without merit because the Supreme Court upheld the *Peterson* decision in its written opinion of May 6, 2010. *State v. Peterson*, 168 Wn.2d 763, 771-74, 230 P.3d 588 (2010)(agreeing with Court of Appeals that deadlines and residential scenarios are not alternative means or elements of the crime of failure to register).

In the present case the second amended information, which was not challenged below, alleged that,

On or between December 6, 2009 and March 5, 2010, in the County of Kitsap, State of Washington, the above-named Defendant, having been convicted of a felony sex offense or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense, (1) did knowingly fail to register with or notify the county sheriff; or (2) did knowingly change his or her name without notifying the county sheriff and the state patrol as required by RCW 9A.44.130; contrary to Revised Code of Washington 9A.44.130(11).

CP 9.<sup>3</sup> At the time of Peterson's crime, RCW 9A.44.130(11) simply provided that a person who "knowingly fails to comply with any of the requirements of this section is guilty of a class C felony."<sup>4</sup> Former RCW 9A.44.130(11)(2009). The charging language in the present case, therefore, contained the elements of the crime as it alleged that Peterson "did knowingly fail to register with or notify the county sheriff" contrary to RCW 9A.44.130. CP 9. Pursuant to *Peterson*, this language is sufficient.

Furthermore, in examining the charging document in the present case, the relevant question is (1) whether the necessary elements appear in any

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<sup>3</sup> For crimes of failure to register committed after June 10, 2010, the crime of failure to register has been moved to a new statute, RCW 9A.44.132. The statute defining the crime of failure to register (9A.44.132) is thus now completely separated from the sections outlining the definitions and procedures relating to registration (9A.44.130).

<sup>4</sup> Thus the statute in effect at the time of Peterson's crime in the present case actually contained even less specific language than the statute discussed by the Court of Appeals and Supreme Court in *State v. Peterson*, which dealt with the statute that was in effect in late 2005. See, *Peterson*, 145 Wn. App. at 675, 677-78; See also, Laws 2006, ch. 126, § 2, which substituted "A person who knowingly fails to comply with any of the requirements of this section" for "A person who knowingly fails to register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section."

form, or can be found by fair construction, in the charging document; and, if so, (2) whether the defendant nonetheless suffered actual prejudice as a result of the inartful, vague, or ambiguous charging language. *Kjorsvik*, 117 Wn.2d at 105-06, 812 P.2d 86. The charging language in the present case clearly satisfied this test as it outlined the necessary elements: namely, that Peterson knowingly failed to register contrary to RCW 9A.44.130. In addition, Peterson has failed to demonstrate any actual prejudice.

Thus, Peterson's claim that the charging document was fatally flawed is without merit, especially given the fact that since the charging document was not challenged below this court is to liberally construe the document in favor of its validity and to read words in a charging document as a whole, construing them according to common sense and as including facts which are necessarily implied. *Kjorsvik*, 117 Wn.2d at 105-06, 109. Finally, even if there was an "apparently missing element," it may be able to be fairly implied from language within the charging document in the present case which informed Peterson that he was being charged with failing to register with or notify the sheriff contrary to RCW 9A.44.130. *See Kjorsvik*, 117 Wn.2d at 104.

As the failure to register charge in the present case was sufficient to give the defendant reasonable notice of the elements of the charge against him, and because Peterson suffered no prejudice from the manner in which

the crime was charged, there is no reversible error.

**B. PETERSON'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CRIME OF WITNESS TAMPERING BEYOND A REASONABLE DOUBT.**

Peterson next claims that there was insufficient evidence to support the jury's finding of guilt on the tampering with a witness charge. App.'s Br. at 11. This claim is without merit because viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crime of witness tampering beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618

P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), *citing State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

As set forth in the instructions given by the trial court, the jury was required to find the following elements in order to convict Peterson of witness tampering:

- (1) That on or about March 8, 2010 through May 19, 2010, the Defendant attempted to induce a person to testify falsely; and
- (2) That other person was (a) a witness or (b) a person the defendant had reason to believe was about to be called as a witness in any official proceedings; and
- (3) That the acts occurred in the State of Washington.

CP 89; *See also*, RCW 9A.72.120.

The evidence at trial showed that in November, 2009 Peterson was living at the Ashcrest residence with Ms. Clotfelter and that Peterson registered using this address. RP 88-89, 91, 96. In December, however, Peterson's CCO issued an arrest warrant. RP 73. Peterson's own statements show that he was aware that the police were looking for him and that he stopped coming to the Ashcrest residence because he knew the police would be looking for him there. Exhibit 7A, 9A. Furthermore, when Detective Gessell spoke to Ms. Clotfelter on January 25, she informed him that Peterson had not lived there for at least a month. RP 124-25.

After his arrest, Peterson made several phone calls from the jail, and a rational finder of fact could find that those calls were an attempt to get Ms. Clotfelter to testify falsely. Specifically, Peterson's statements on those calls could be found to be an attempt to induce Ms. Clotfelter to falsely state that he had been living at the Ashcrest residence when he, in fact, had been avoiding the residence because he knew that the police would be looking for him there. See Exhibit 8A, 9A. For instance, in his April 18 phone call with Ms. Clotfelter, Peterson specifically told Ms. Clotfelter that, "They're going to ask you if I lived there the *whole time* and just tell them yes." Exhibit 8A (emphasis added). A rational trier of fact could have found that this was an attempt to induce Ms. Clotfelter to testify falsely because Peterson had not, in fact, "lived there the whole time."

Peterson argues in the present appeal that there was insufficient evidence that Peterson attempted to get Ms. Clotfelter to say anything that wasn't true and that the evidence only showed that he asked her to say he was "living" with her and that this was not false. App.'s Br. at 14.

The record, however, shows that Peterson's actual statements went further than this. As outlined above, Peterson told Ms. Clotfelter to say that he "lived there the whole time," and a rational jury could find that such a statement would be false given Peterson's statements to the contrary and Ms. Clotfelter's statements to the contrary.

Given all of these facts and viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that Peterson committed the crime of witness tampering by attempting to induce Ms. Clotfelter to testify falsely knowing that she was (or was likely to be) called as a witness. Peterson's sufficiency of the evidence challenge, therefore, must fail.

**C. THE STATE CONCEDES THAT THE TERM "PORNOGRAPHY" IS VAGUE AND SHOULD BE STRICKEN FROM THE COMMUNITY CUSTODY CONDITIONS LISTED IN THE JUDGMENT AND SENTENCE.**

Peterson next claims that the trial court erred in imposing a blanket prohibition on "pornography" as a condition of his community custody.

App.'s Br. at 1, 15. This State concedes that the term "pornography" is vague and should be stricken.

The State acknowledges that the Washington Supreme Court has previously found that the term "pornography" as used in a community custody condition was unconstitutionally vague. *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). The State therefore concedes that the term "pornography" should be stricken from the community custody conditions listed in Peterson's judgment and sentence.<sup>5</sup>

**D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A SUBSTANCE ABUSE EVALUATION AS A CONDITION OF PETERSON'S COMMUNITY CUSTODY BECAUSE PETERSON ADMITTED AT SENTENCING THAT HIS CRIMES WERE CAUSED BY A SUBSTANCE ABUSE PROBLEM.**

Peterson next claims that the community custody condition that he obtain a substance abuse evaluation was unlawful. App.'s Br. at 15. This claim is without merit because the trial was allowed to order a substance abuse evaluation as long as it reasonably related to the circumstances of the offense and because Peterson admitted at sentencing that his crimes were caused by a substance abuse problem.

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<sup>5</sup> Peterson has not assigned error to any of the other terms or conditions listed in his judgment and sentence, and the State, therefore, does not concede that Peterson is entitled to any relief

An appellate court reviews the imposition of community custody conditions for abuse of discretion and will reverse only if the trial court's decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

RCW 9.94A.703(3)(c)(2009)(effective Aug 1, 2009) gives the trial court authority to impose a condition that an offender “participate in crime-related treatment or counseling services.” And under RCW 9.94A.703(3)(d)(2009)(effective Aug 1, 2009), the court may also order the offender to participate in “rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” When a court orders an evaluation and treatment under these provisions, however, the evaluation and treatment must address an issue that contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). But, in general, “[n]o causal link need be established between the imposed condition and the crime committed, so long as the condition relates to the circumstances of the crime.” *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

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other than having the specific term “pornography” stricken from the judgment and sentence.

Furthermore, RCW 9.94A.530(2) provides that in imposing a sentence a trial court may, among other things, rely on information that is admitted or acknowledged at the time of sentencing, as well as information proved at trial.

In the present case the evidence showed that the defendant stopped going to his registered address because he knew that law enforcement would be looking for him there. In addition, at sentencing Peterson addressed the court and stated that,

I just – I would ask you for mercy, I guess. And I was hoping – I was actually – wanted to say that this all stemmed from a dirty urinalysis from my probation. And then I started to go running from my probation. That’s what it all came down to. I never moved. But I – you know, something 20 years old is holding me from, like, a DOSA program, which would be more beneficial for everybody concerned to deal with the problem at the source is what I would think. Other than that, that’s all I’ve got.

RP 201.

Given Peterson’s admission or acknowledgment at sentencing, as well as the facts of the offense, the trial court did not abuse its discretion in imposing the substance abuse evaluation as a condition of community custody since Peterson admitted that his crimes stemmed from a dirty urinalysis (that lead him to run from probation) and acknowledged that he had a problem which could have been addressed in a program such as the drug offender sentencing alternative.

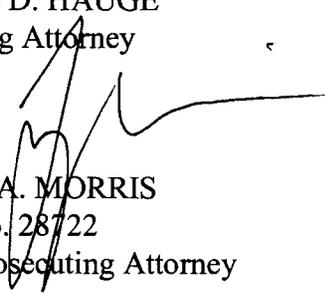
**IV. CONCLUSION**

For the foregoing reasons, Peterson's conviction and sentence should be affirmed.

DATED March 29, 2011.

Respectfully submitted,

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