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Court of Appeals  
Division II  
State of Washington  
9/28/2018 1:37 PM  
No. 50691-2-II

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

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STATE OF WASHINGTON, Respondent

v.

JOHN MILAM, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF GRAYS HARBOR COUNTY THE HONORABLE JUDGE  
THOMAS A. COPLAND

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REPLY/SUPPLEMENTAL BRIEF OF APPELLANT

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I. SUPPLEMENTAL ASSIGNMENTS OF ERROR

A. The trial court erred when it entered Finding of Fact 1:

“There is sufficient evidence in the record, particularly in the documents related to Mr. Milam’s sex offense conviction in Oregon, which were admitted during the trial, to identify the Defendant as John Clark Milam. Supp.CP 4.

B. The trial court erred when it entered Conclusion of Law 2:

“The evidence was sufficient to prove that the Defendant was John Clark Milam, who was convicted of a qualifying sex offense out of Oregon and required to register as a sex offender in Washington.” Supp. CP 5.

C. The trial court erred when it found Mr. Milam guilty of failure to register as a sex offender. Supp. CP 6.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Under the *Harkness* rule, did the State fail to present

sufficient evidence to establish that the defendant was the same individual named in a 1989 Oregon conviction?

B. Where the State has not presented sufficient evidence to establish that the defendant was the same individual who was required to register as a sex offender, must the conviction be reversed?

## II. STATEMENT OF FACTS

Mr. Milam relies on the statement of facts presented in the opening appellate brief. As the prevailing party, this Court ordered the State to provide written findings of fact and conclusions of law as required under CrR 6.3 within 30 days of the ruling. (See ruling of June 13, 2018). This Reply Brief assigns error to the findings and conclusions and addresses arguments in reply to the State's response brief.

## III. ARGUMENT

Mr. Williams relies on the arguments he raised in his opening brief. He adds the following, to sufficiently address the late entered finding of fact and conclusion of law that the State presented sufficient evidence of identity.

A. The Trial Court Erred When It Found The The State Presented Sufficient Evidence That The Defendant, Mr. Milam, Was The Individual Named In The Oregon Judgment and Sentence And The Conviction Must Be Dismissed With Prejudice.

A person does not have to register as a sex offender unless he has been convicted of a sexual offense. RCW 9A.44.130. Under the *Harkness* rule, where a prior conviction is an element of a crime, the State must prove the prior conviction beyond a reasonable doubt. An identity by name alone is insufficient to meet this burden. *State v. Harkness*, 1 Wn.2d 530, 543, 96 P.2d 460 (1939). It must be shown by *independent* evidence that the person whose former conviction is proved is the defendant in the current action. *State v. Hunter*, 29 Wn.App. 218, 221, 627 P.2d 1339 (1981). The State bears the burden of producing evidence to prove identity. *Harkness*, 1 Wn.2d at 543.

In *State v. Huber*, 129 Wn.App. 499, 119 P.3d 388 (2005), the state charged Wayne Alan Huber with bail jumping. The sole issue on this appeal was whether the evidence was sufficient to show that the Wayne Alan Huber on trial was the same Wayne Alan Huber who had failed to appear in court and been charged with the bail jumping. In its case in chief, the state introduced copies of an information charging Huber with violation of a protection order and witness tampering; an order directing Mr. Huber to appear in court on a certain date; clerk's minutes indicating Mr. Huber's failure to appear on that date; and a bench

warrant authorizing Mr. Huber's arrest. *Id.* at 500-501. The state did not call any witnesses or otherwise try to show the exhibits related to the same Wayne Alan Huber who was before the court. *Id.* at 501.

In its ruling, the *Huber* Court quoted our Supreme Court in *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974):

It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.

*Huber*, 129 Wn.App. at 502.

The Court went on to detail ways the state could meet its burden of proving identity. The Court suggested production of admissible booking photographs, booking fingerprints, eyewitness identification or distinctive personal information. *Id.* at 503. The Court concluded that the evidence was insufficient to support a finding that the person on trial was the person named in the state's exhibits. The Court reversed and remanded with instructions to dismiss the charge with prejudice.

Here, the State produced Exhibit I, which consisted of documents from a 1989 Oregon conviction which bore the name “John Clark Milam”. Aside from a name there was *no* identifying evidence on any of the documents, such as a date of birth, fingerprints, or photograph. Neither did the state produce an eyewitness who could credibly identify the John Clark Milam named in the documents was the same John Clark Milam before the trial court.

In its response brief, the state claims that “multiple pieces of evidence” were admitted to show identity. (Br. Of Respondent at 14). It relies on an rental agreement, which was signed in the name of John Barber. It relies on identification of the defendant by the landlord, who knew him as John Barber; and “officers who testified at trial.” (Br. Of Respondent at 14).

The state’s argument is without merit on the issue of identity. The rental agreement does nothing to establish Mr. Milam as the Mr. Milam named in the Oregon documents as it wa signed in the name of John Barber. The identification by the landlord, who only knew him as John Barber does nothing to establish Mr. Milam as the Mr. Milam named in the Oregon documents.

Lastly, out of court statements made to a police officer may be admitted to demonstrate the officer or declarant's state of mind **only** if their state of mind is relevant to a material issue in the case; otherwise, such declarations are inadmissible hearsay. *State v. Hudlow*, 182 Wn.App. 266, 278, 331 P.3d 90 (2014). Here, the officer's and declarant's state of mind was not at issue, and was inadmissible for the purpose of establishing identity. Moreover, the officer did not have first hand knowledge whether the individual named in the Oregon documents was the same person as the defendant.

As in the cases of Wayne Alan Huber, and Lyle Harkness, the insufficient proof of identity requires the conviction to be reversed and dismissed with prejudice. *Huber*, 129 Wn.App. at 504; *Harkness*, 1 Wn.2d at 544.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Milam respectfully asks this Court to reverse and vacate his conviction with prejudice.

Respectfully submitted this 28<sup>th</sup> day of September, 2018.

*Marie Trombley*

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## APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JOHN CLARK MILAM,

Defendant.

No.: **17-1-113-1**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
RE: FINDING OF GUILT FOLLOWING  
A BENCH TRIAL**

THIS MATTER having come on before the undersigned judge of the above-entitled court on May 2, 2017 for a bench trial, the defendant appearing in person and with his attorney, Christopher Baum, the State appearing through Erin C. Riley [Jany], deputy Grays Harbor County prosecuting attorney, and the Court having considered the evidence presented enters the following:

**UNDISPUTED FACTS**

**1.**

A John Clark Milam was convicted in Union County, Oregon under cause number 88-10-32235, of Sexual Abuse in the First Degree.

**2.**

Due to that conviction, that John Clark Milam was required to register as a sex offender.

**3.**

That John Clark Milam never registered as a sex offender in Grays Harbor County.

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4.

In August of 2016, the Defendant and Tonni Barber rented a home located at 505 Polk Street in Hoquiam, Washington from Danny "Bud" Sutherland. The Defendant gave his name as John Barber when he completed the rental application and contract. The Defendant did not inform Mr. Sutherland that he was a registered sex offender when he applied to rent the home and signed the rental contract. Mr. Sutherland identified the Defendant in court as the person who signed the lease on his home with Ms. Barber.

5.

On January 5, 2017, a welfare check was requested by family members on Ms. Barber at 505 Polk Street in Hoquiam. Ms. Barber is disabled and wheel-chair bound. Contact was made with Ms. Barber and John Clark Milam by Hoquiam police and it was determined that there was no welfare issue at that time. Mr. Milam was not checked for wants and warrants at that time.

6.

On January 13, 2017, Hoquiam police, including Officer Spaur and Sergeant Salstrom, were dispatched to a male subject who seemed confused at Swanson's Grocery. The male subject was identified as John Clark Milam and Mr. Milam advised that he lived at 505 Polk Street in Hoquiam. Mr. Milam stated that he lived there with his wife and they had moved there from Oregon. Mr. Milam was not checked for wants and warrants at that time. Both Officer Spaur and Sergeant Salstrom identified the Defendant in court as the person identified as Mr. Milam during that call.

7.

On February 1, 2017, Sergeant Salstrom was asked to do a second welfare check on Ms. Barber. The request was made by Ms. Barber's sister, Roxie Wood, who had concerns that John

1 Clark Milam was controlling of her sister and was not allowing Ms. Barber to call or speak with her  
2 family. Ms. Wood also informed Sergeant Salstrom that John Clark Milam is a registered sex  
3 offender in Oregon and is considered to be a dangerous offender. After speaking with Ms. Wood,  
4 Sergeant Salstrom made contact with the Multnomah County Sheriff's Office. The records specialist  
5 advised that Mr. Milam was registered as living at a residence in Troutdale, Oregon. There was no  
6 record of Mr. Milam moving to Washington State or otherwise registering a new address.  
7

8 **8.**

9 At the request of Sergeant Salstrom, Leanna Ristow of the Grays Harbor County Sheriff's  
10 Office, who is the record's custodian for sex offenders registered in the county, ordered records  
11 related to Mr. Milam's sex offense conviction in Oregon. Those records, which were admitted into  
12 evidence during the trial, showed that Mr. Milam had a qualifying sex offense that would require him  
13 to register in Washington State and with the county if he was living in Grays Harbor. Ms. Ristow  
14 also verified that Mr. Milam had not registered in Grays Harbor County.  
15

16  
17 **DISPUTED FACTS**

18 **1.**

19 It was disputed whether the State had proven that the Defendant, who was the person before  
20 the Court, was the John Clark Milam, identified in the Oregon paperwork as a registered sex  
21 offender.  
22

23 **2.**

24 It was further disputed whether or not the Defendant had knowledge that he had a duty to  
25 register.  
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3.

It was also disputed whether the charging language gave the Defendant sufficient notice of the charges against him.

### FINDINGS OF THE COURT

1.

There is sufficient evidence in the record, particularly in the documents related to Mr. Milam's sex offense conviction in Oregon, which were admitted during the trial, to identify the Defendant as John Clark Milam.

2.

The evidence is clear that the Defendant had been in Grays Harbor County in Hoquiam, Washington since at least August of 2016.

3.

The Defendant was identified by Mr. Sutherland as the man who signed the lease.

4.

Mr. Sutherland knew the Defendant as John Barber.

5.

The Defendant gave Mr. Sutherland a false name instead of his true name.

6.

With regard to knowledge, the Court finds, based on the evidence presented, that there is no other reason for the Defendant to have signed a lease under a false name except to hide from something, which the Court believes to have been his duty to register.

1 7.

2 With regard to the charging document, the Court finds that the language is sufficient.

3 8.

4 The Information clearly charges that the Defendant did knowingly fail to wit the requirement  
5 that sex offenders who move to Washington must register within three business days of establishing  
6 residence, which is the core of the case.  
7

8 9.

9 While there may be some surplusage in the Information, the additional language does not  
10 detract from the charge at hand.

11 Based upon the foregoing findings of fact, the court enters the following:

12  
13 **CONCLUSIONS OF LAW**

14 1.

15 The court has jurisdiction over the parties and subject matter herein.  
16

17 2.

18 The evidence was sufficient to prove that the Defendant was John Clark Milam, who was  
19 convicted of a qualifying sex offense out of Oregon and required to register as a sex offender in  
20 Washington.  
21

22 3.

23 The evidence was sufficient to show that the Defendant had knowledge of his duty to register.  
24

25 4.

26 The Information was sufficient to give the Defendant notice of the charges against him.  
27

ORDER

IT IS THEREFORE ORDERED that the Defendant is hereby found guilty of Failure to Register as a Sex Offender.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2018.

JUDGE

Presented by:

*Erin C. Riley*  
ERIN C. RILEY  
Deputy Prosecuting Attorney  
WSBA #43071

Approved (for entry) (as to form):

*Christopher Baum*  
CHRISTOPHER BAUM  
Attorney for Defendant  
WSBA #32279

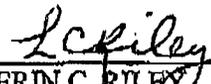
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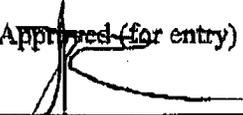
**ORDER**

IT IS THEREFORE ORDERED that the Defendant is hereby found guilty of Failure to Register as a Sex Offender.

DATED this 11 day of July, 2018.

  
JUDGE *pro Tem*

Presented by:  
  
ERIN C. RILEY  
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Approved (for entry) (as to form):  
  
CHRISTOPHER BAUM  
Attorney for Defendant  
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FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 6

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for John Milam, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on September 28, 2018 to:

John Milam  
223 SE 34th Circle  
Troutdale, OR 97030

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Grays Harbor County Prosecuting Attorney (at [appeals@co.grays-harbor.wa.us](mailto:appeals@co.grays-harbor.wa.us)).

/s/ Marie Trombley, WSBA 41410  
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**MARIE TROMBLEY**

**September 28, 2018 - 1:37 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
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**Appellate Court Case Title:** State of Washington, Respondent v John Milam, Appellant  
**Superior Court Case Number:** 17-1-00113-1

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