

FILED
Court of Appeals
Division II
State of Washington

NO. 50733-1-11
4/2/2018 4:59 PM

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL A. McDONALD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00210-0

BRIEF OF RESPONDENT

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-301

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....14

A. EVIDENCE OF MCDONALD’S PRIOR FAILURE TO REPORT WAS PROPERLY ADMITTED BECAUSE IT WAS RELEVANT TO SHOW KNOWLEDGE AND IT WAS NOT UNFAIRLY PREJUDICIAL.14

1. The court properly admitted evidence of the September 13 failure to report to the Sheriff’s office because it was relevant to prove the element of knowledge and it was not unfairly prejudicial.15

2. Failure to conduct a proper analysis on the record was harmless because the record is sufficient for effective review of the trial court’s decision to admit evidence of the September 13 no show.....23

3. Evidence of the Sept. 13, 2016 prior no show was not prejudicial and not reversible error because the record shows overwhelming evidence of guilt.....24

B. THE COURT PROPERLY ADMITTED THE JUDGMENT AND SENTENCE FOR THEFT IN THE THIRD DEGREE AND JAIL SENTENCE.....26

C. UNDER *STATE V. CONDON*, TESTIMONY THAT MCDONALD WAS IN JAIL WAS HARMLESS BECAUSE THE STATEMENT WAS VAGUE AND THE COURT’S INSTRUCTION TO DISREGARD WAS SUFFICIENT TO SAFEGUARD AGAINST POTENTIAL PREJUDICE.....31

D.	THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION.....	37
E.	MCDONALD FAILS TO ESTALBISH THAT THE STATE’S ARGUMENT WAS IMPROPER AND PREJUDICIAL.....	41
	1. The prosecutor’s statement was not an improper statement of the law and did not diminish the State’s burden of proof.....	44
	2. The prosecutor’s explanation of what he had to prove in regards to knowledge was not prejudicial.....	45
F.	MCDONALD FAILS TO ESTABLISH CUMULATIVE ERROR AND ANY PREJUDICE BECAUSE THERE WAS OVERWHELMING AND UNCONTROVERTED EVIDENCE OF GUILT.....	48
IV.	CONCLUSION.....	48
	CERTIFICATE OF DELIVERY	51

TABLE OF AUTHORITIES

Cases

<i>State v. Beard</i> , 74 Wn.2d 335, 338–39, 444 P.2d 651 (1968)	29
<i>State v. Bradford</i> , 56 Wn. App. 464, 783 P.2d 1133 (1989), <i>abrogated on other grounds by State v. Lough</i> , 125 Wn.2d 847, 861, 889 P.2d 487 (1995).....	23
<i>State v. Brown</i> , 113 Wn.2d 520, 533, 782 P.2d 1013 (1989)	28
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997)	44, 46
<i>State v. Carver</i> , 122 Wn. App. 300, 306, 93 P.3d 947 (2004).....	43
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	22, 27, 28
<i>State v. Coles</i> , 28 Wn. App. 563, 572, 625 P.2d 713 (1981)	27
<i>State v. Condon</i> , 72 Wn. App. 638, 865 P.2d 521 (1993).....	31, 32
<i>State v. Dejarlais</i> , 88 Wn. App. 297, 305, 944 P.2d 1110 (1997), <i>aff'd</i> , 136 Wn.2d 939, 969 P.2d 90 (1998).....	38
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	22
<i>State v. Drake</i> , 149 Wn. App. 88, 92, 201 P.3d 1093 (2009)	40
<i>State v. Emery</i> , 174 Wn.2d 741, 766, 278 P.3d 653 (2012).....	48
<i>State v. Escalona</i> , 49 Wn. App. 251, 742 P.2d 190 (1987)	33, 34
<i>State v. Gibson</i> , 32 Wn. App. 217, 221, 646 P.2d 786 (1982).....	26
<i>State v. Gogolin</i> , 45 Wn. App. 640, 645, 727 P.2d 683 (1986)	23
<i>State v. Grisby</i> , 97 Wn.2d 493, 499, 647 P.2d 6 (1982)	46
<i>State v. Huelett</i> , 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)	14
<i>State v. J.P.</i> , 130 Wn. App. 887, 891–92, 125 P.3d 215 (2005).....	38
<i>State v. Johnson</i> , 124 Wn.2d 57, 77, 873 P.2d 514 (1994).....	33
<i>State v. Kintz</i> , 169 Wn.2d 537, 551, 238 P.3d 470 (2010).....	37
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	14, 15, 17, 22
<i>State v. McBride</i> , 192 Wn. App. 859, 867, 370 P.3d 982 (2016)	27

<i>State v. Miles</i> , 73 Wn.2d 67, 436 P.2d 198 (1968)	35
<i>State v. Perrett</i> , 86 Wn. App. 312, 321, 936 P.2d 426 (1997).....	29
<i>State v. Post</i> , 118 Wn.2d 596, 620, 826 P.2d 172 (1992).....	31
<i>State v. Powell</i> , 126 Wn.2d 244, 264, 893 P.2d 615 (1995).....	14, 20
<i>State v. Ray</i> , 116 Wn.2d 531, 545, 806 P.2d 1220 (1991).....	28, 30
<i>State v. Rich</i> , 184 Wn.2d 897, 903, 365 P.3d 746 (2016).....	37
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 359, 655 P.2d 697 (1982).....	21, 22
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 623, 290 P.3d 942 (2012).....	14
<i>State v. Suleski</i> , 67 Wn.2d 45, 406 P.2d 613 (1965).....	35, 36
<i>State v. Thomas</i> , 35 Wn. App. 598, 609, 668 P.2d 1294 (1983).....	24, 25
<i>State v. Yates</i> , 161 Wn.2d 714, 776, 168 P.3d 359 (2007)	47
 Rules	
ER 404(b).....	15
ER 609(a)(2)	26

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the court abused its discretion by admitting evidence of McDonald's prior non-compliance with his sex offender registration requirements when it was relevant to show knowledge?
2. Whether the court abused its discretion by admitting the record of McDonald's theft conviction in evidence on cross-examination for impeachment purposes?
3. Whether the court abused its discretion by not granting a mistrial after defense objected to Deputy Zellar's inadvertent remark that McDonald was in jail at some point?
4. Whether there was sufficient evidence to support the conviction when considering all the evidence in a light most favorable to the State?
5. Whether the prosecutor committed flagrant intentional misconduct when he accurately summarized what he was required to prove beyond a reasonable doubt?
6. Whether there was cumulative error when there was overwhelming and uncontroverted evidence that McDonald knowingly failed to comply with a requirement of sex offender registration?

II. STATEMENT OF THE CASE

The State was required to prove the following elements beyond a reasonable doubt in order to convict the defendant of the crime of Failure to

Register as a Sex Offender:

- (1) Prior to June 6th, 2017, the defendant was convicted of a felony sex offense;
- (2) That due to that conviction, the defendant was required to register in the County of Clallam, State of Washington, as a sex offender on June 6th, 2017; and
- (3) That on June 6th, the defendant knowingly failed to comply with the requirement of sex offender registration.

CP 71.

At trial, Clallam County Sheriff's Civil Deputy, Kaylene Zellar testified that she is in charge of the sex offender registration program within Clallam County. RP 170. Zellar's testimony outlined the registration requirements for transients and when and where they are required to report to the Clallam County Sheriff's Office (CCSO) between 8:30 a.m. and 4:30 p.m. RP 171. Deputy Zellar testified that the normal business hours for the CCSO are 8:30 a.m. to 4:30 p.m. and that that the doors to the CCSO automatically lock at 4:30 p.m. for security purposes. RP 171.

Zellar testified regarding the notice given to offenders for the sex offender registration requirements and that the notices are signed by the offenders. RP 171. Zellar then testified as to the procedure when a person lacking a physical address does not show up to report as required. RP 172. Zellar testified that for the very first offense or time when an offender does not show up, Zellar provides a verbal and written warning outlining that it was non-compliance for their transient registration and that any subsequent

non-compliances will result in jail. RP 172.

Zellar testified that McDonald was informed of his duty to register due to his sex offense conviction and has been required to register as a sex offender since the late 1990's. RP 174. McDonald re-registered on May 22, 2015 because his residential status changed and he lacked a fixed address. RP 179-80.

McDonald was informed of his duty to report weekly as a transient person and was informed when and where to report. RP 171, 181. McDonald was informed that he would have to report between 8:30 a.m. and 4:30 p.m. at the CCSO and he signed a document acknowledging this. RP 171, 181; State's Ex. 3, 4. The documents admitted as State's Exhibit no. 4 and no. 6, signed by McDonald on May 22, 2015, states that McDonald was required to show up to register at the CCSO on Tuesdays, between 8:30 a.m. and 4:30 p.m. RP 181. McDonald, lacking a fixed address, was also told that the door to the CCSO would be locked at 4:30 p.m. RP 172.

Evidence of Prior No Show

The State then offered evidence of an occasion on Sept. 13, 2016, where McDonald failed to report as required. RP 183; State's Ex. 5.

Defense counsel objected to the admission of the evidence of McDonald's failure to report to the CCSO on Tuesday, Sept. 13, 2016 as a sex offender registration requirement. RP 183-84. The State made an offer of

proof and then the court heard the defense counsel argue on the admissibility of the no show. RP 185.

The court expressed that Deputy Zellar already testified regarding her procedures in managing non-compliance with sex offender reporting requirements and how the first instance of non-compliance results in a verbal warning. RP 187–88. The court stated that the testimony already established that the first time it happens the CCSO has a policy of first time no foul, the second time there will be charges, and that the incident was evidence that the CCSO gave McDonald an opportunity. RP 187–88. The court opined that it didn't see that the evidence was ER 404(b) evidence but was simply evidence that McDonald was verbally warned about his non-compliance. RP 188.

The State requested the court to make findings for the record that the no show on Sept. 13 and subsequent warning the next day was established by a preponderance of the evidence, and that it was offered for the purpose of proving the essential element of knowledge, and that the evidence was far more probative than prejudicial as Deputy Zellar already testified regarding her procedures and the first failure to comply results in a warning first. RP 188–89. The court granted the State's request and adopted those findings as its own when it stated, "Okay, and that's basically what I'm finding." RP 189.

Testimony recommenced

On Sept, 13, 2016, McDonald failed to report to the CCSO as

required. RP 190–192; State’s Ex. 5. The failure to show up to report as required on Sept. 13, 2016 was the first time that McDonald did not report as required on a homeless check in day. RP 193. McDonald attempted to report late the very next day on Sept. 14. RP 193. State’s Exhibit no. 5 is a document from the CCSO memorializing McDonald’s failure to check in on Sept. 13. It was signed by the registering deputy at 1631 hours.

On Sept. 14, 2016, McDonald was provided with a verbal and written warning for the first no show was informed in writing that “any further non-compliance will result in arrest, *no exceptions*.” RP 193–94; State’s Ex. 6. (emphasis added). McDonald signed the document which informed him that any further non-compliance with the duty to register would result in an arrest. RP 194–95.

Zellar then testified that McDonald failed to check in with CCSO as required again on Tuesday, June 6, 2017. RP 195. State’s Exhibit no. 8 memorialized the no show with a handwritten “No Show” across the page. The document was signed by the registering deputy at 1635 hours. State’s Ex. 8. Zellar testified that McDonald had not changed his status as someone without a fixed address and that he had just registered properly on Tuesday, May 30, 2017 as reflected in State’s Exhibit no. 7.

Zellar testified that McDonald was brought into the lobby of the CCSO by Deputy Wagner and she saw McDonald about 4:50 p.m. RP 199.

The CCSO was closed at the time and the courthouse was closed. RP 199. The door to the CCSO was locked. RP 200. Zellar, not knowing where McDonald was, instructed Deputy Wagner at 4:37 p.m. that McDonald was to be taken into custody. RP 200-01.

On cross examination, Zellar testified that she was informed at 4:45 p.m. by Deputy Wagner that McDonald was at the courthouse. RP 201.

Reference to jail

On cross examination, defense counsel asked Deputy Zellar the following:

So, between May 22nd, 2015 and June 6th, 2017, there were only two instances where Mr. McDonald did not fully comply with your department's requirements for registration?

RP 201.

Deputy Zellar asked for clarification regarding defense counsel's question. RP 202. The court did not understand what was confusing and inquired what clarification Deputy Zellar was requesting. RP 202. Deputy Zellar responded: "Well, he's gone to jail in those -- in that time period. So, on two occasions, we . . ." and defense counsel interrupted and asked that the jury be excused from the room. RP 202.

The court and defense counsel spoke about what the actual question was:

THE COURT: Well, I want to be sure what the question was.

MR. STALKER: Right.

THE COURT: The question was –

MR. STALKER: Did Mr. McDonald –

THE COURT: Are those the only two instances that he didn't check in.

MR. STALKER: That he failed to comply with your office's registration requirements.

THE COURT: Well, I don't know if you used those -- that language.

MR. STALKER: I think I said your department, but that's what I said.

RP 203.

Defense counsel moved for a mistrial:

Under (i), offenders in custody, they're required to register when they release -- when they are released. So, I mean, the correct and truthful answer to that question would be that yes, he -- those are the only instances when he failed to comply. He doesn't need to come in and register on a Tuesday when he's in custody, and the statute reflects that. So, I'm going to ask for a mistrial at this point, Your Honor.

RP 204.

The State argued that Deputy Zellar did not understand the question and asked for clarification and did not receive it. RP 207. The State requested that the court instruct the jury to disregard the remark and to deny the motion for a mistrial. RP 207. The State argued that there was very little prejudice because the jury already knew from the stipulation of the parties that

McDonald was a convicted sex offender which was far more prejudicial, that the jury did not know what McDonald was in jail for, and that the adversarial process was not undermined to the point as to drive McDonald of a fair trial. RP 208.

The court pointed out that the statement was not a non-responsive answer to defense counsel's question but was a responsive answer to the court's question asking why Deputy Zellar needed clarification. RP 208–09. The court determined that it would instruct the jury to disregard the comment and invited the defense to consider a curative instruction. RP 209–10. The court declined to declare a mistrial. RP 210.

After bringing the jury back in, the court instructed the jury as follows:

Okay, so at this time, I'm directing the jury to -- that any responses that were made to this last question are stricken, and that you are to disregard any response that was made either to the question originally asked by the Defense counsel, or my question to the witness. So those matters are to be disregarded and that we will proceed with the cross examination with a new form of question by the Defense.

RP 212.

McDonald's Testimony

McDonald testified that his friend Gypsy's roommate Gabe had agreed to drive McDonald to Port Angeles from Sequim on Tues., June 6, 2017, so that McDonald could check in at the CCSO. RP 232–33. On June 6,

in the afternoon before 1:00 p.m., McDonald was informed that Gabe sent a text message to Gypsy to say he could not give McDonald a ride. RP 233. McDonald headed to the bus stop with his belongings and dog to catch a bus to Port Angeles. RP 234. McDonald got to the bus stop about 2:00 p.m. but could not get on the bus with his dog. RP 235. McDonald asked the next bus driver to allow him on with his dog and the bus driver let McDonald on the bus. RP 235. McDonald was kicked off the bus by the Port Angeles Walmart after the dog started to bark. RP 237. McDonald walked and jogged toward the courthouse. RP 237.

McDonald ran into his friend Angel by Jim's Pharmacy and she said she would watch the dog at the courthouse. RP 238. McDonald and Angel walked to the court house and McDonald left Angel with his dog at the bus stop by the courthouse and went to the door to the Sheriff's Office. RP 238.

McDonald testified that the door opened as he reached for the handle and a couple of deputies were at the door. RP 238. McDonald testified that the time was 4:20 p.m. when he last checked his phone as he was still walking. RP 239. McDonald testified that he told the deputies he was there to register and the deputy said "Come with me," and they went into the Sheriff's lobby. RP 239. McDonald testified that he tried to register and asked if he could register but that he was told he was going to be arrested. RP 239-40. McDonald testified that he asked a deputy to inform his friend Angel had he

was arrested. RP 240. McDonald then admitted he had been convicted of theft in the third degree. RP 241.

Theft in the Third Degree Conviction Admitted

On cross examination, the State immediately moved to admit State's Exhibit 10 which was a court certified judgment and sentence for Theft in the Third Degree. RP 241; State's Ex. 10. The prosecutor asked McDonald whether he had been convicted of Theft in the Third Degree in the year prior in Clallam County District Court. RP 242. McDonald admitted that he had. RP 341-42. The State again moved to admit State's Exhibit no. 10. RP 242.

The trial court admitted the exhibit over the defense objection that the judgment and sentence was not relevant because McDonald already testified about it. RP 242. After McDonald's testimony the court requested Exhibit no. 10 to take a look at it. RP 246. The court pointed out as follows:

All right, I'm just going to note that in regards to Exhibit number 10, that it is a judgment and sentence where there was jail time imposed with regard to Mr. McDonald in this intervening time during the registration time. So, just to note that on record, because there was an objection with regard to the possible mistrial. So, I think this -- all I'm saying is I think that sort of reinforces that I don't think it would lead to a mistrial because they actually are going to have evidence in the jury room that he was incarcerated during that period of time. Just noting that.

RP 247.

The judgment shows that McDonald was sentenced to 35 days of jail on July 5, 2016 for Theft in the Third Degree. State's Ex. 10.

Deputy Wagner's testimony

Deputy Wagner testified that he ran into McDonald at the door to the CCSO after 4:30 p.m. "a quarter to 5:00ish." RP 248. Wagner had already been advised that McDonald had failed to show up on time. RP 249.

On cross examination, Wagner testified that he told McDonald that the CCSO was closed and that all the lights were off inside the office. RP 251.

Closing argument

During closing argument, the prosecutor (Mr. Kennedy) argued how the evidence paired with the knowingly element in jury instruction no. 11:

[MR. KENNEDY:] All right, instruction number 11, knowingly. So, this is one of the more confusing jury instructions that is probably in your packet. (Inaudible), so I'll try to condense this in a way that maybe makes some more sense. One of the requirements is that Mr. McDonald acted knowingly. That's on the elements, that he knowingly failed to comply. So, what does knowingly mean? For the purposes of this case, knowingly is that Mr. McDonald knew he had to show up June 6th. He knew he had to show up between 8:30 and 4:30. And he knew that if he didn't there would be consequences for it. That's knowingly for the purposes of this case. So, the fact that he actually did show up –

MR. STALKER: Objection, counsel is stating the law.

THE COURT: Okay, you must disregard any remarks, statement or argument that is not supported by the law in my instructions. So, refer to your instructions in regard to what the law is.

RP 283–84.

The prosecutor continued with argument:

And remember from the first instruction, these instructions are meant to be taken as a whole.

All right, then on June 6th, *the Defendant knowingly failed to comply with the requirement of sex offender registration*. He didn't show up. The office was closed when he showed up. The door to the Sheriff's Office was locked. Deputy Wagner said that the lights were out. He had a whole day to get there. He didn't get there, he missed it. He failed to meet the compliant -- or the requirements of the sex offender registration on that day.

So, going through the elements, the State has proven to you beyond a reasonable doubt that on June 6th (sic), the Defendant was convicted of a felony sex offense. That due to that conviction, that the Defendant was required to register in the County of Clallam, State of Washington on June 6th, and that he knowingly failed to do so.

RP 285-86 (emphasis added).

During closing, Defense counsel argued, in regards to the knowingly element in instruction no. 11 that the prosecutor was trying to pull a fast one on the jury:

Now, the second problem, I -- it seems like counsel's trying to pull a bit of a fast one on you here. I actually think this is the bigger problem, that Mr. McDonald has to knowingly fail to register. So, what does knowingly mean? Well, that is instruction number 11, one back from the elements instructions.

RP 290.

Defense counsel then described what knowingly meant:

The knowingly comes to making a decision, a knowing what the results or suspecting what the results may be. It doesn't come to knowing about the requirement. If it was knowing about the requirement, they would have written that elements instruction differently. It would have said knowing or your requirements to register does fail to register. Instead it says knowingly failed to comply with the requirements to register. I know it seems like I'm

parsing words here, because that's what this is.

RP 292.

So, the question is, knowing that's what's going to happen, did he *intentionally or knowingly* put himself in a position where he wasn't going to be able to comply? He knows what the consequences are, he's been warned, he got told no exceptions. And yet, the Prosecutor has to prove to you beyond a reasonable doubt, knowing all that, he still put himself willingly in a position where he wouldn't be able to comply with it.

RP 294 (emphasis added).

On rebuttal, the prosecutor addressed the knowingly element again:

[MR. KENNEDY:] Now, with respect to knowingly, take a look at that instruction. It is somewhat awkwardly worded. But you don't need Latin to figure that out. It's jury instruction number 11, so a person acts knowingly or with knowledge with respect to a circumstance or result, when he or she is aware of that circumstance or result.

Okay, so here's how I'm going to paraphrase that. Mr. McDonald knew he had to check in on Tuesday, June 6th, between 8:30 and 4:30, and if he didn't, he'd be arrested there. That's jury instruction number 11, that's no –

MR. STALKER: Objection, counsel's misstating the law.

THE COURT: Again, the lawyers remarks, statements and arguments, they're not evidence. The law is in the instructions. You may resume.

RP 300.

//

III. ARGUMENT

A. EVIDENCE OF MCDONALD'S PRIOR FAILURE TO REPORT WAS PROPERLY ADMITTED BECAUSE IT WAS RELEVANT TO SHOW KNOWLEDGE AND IT WAS NOT UNFAIRLY PREJUDICIAL.

A trial court's decision to admit or exclude prior bad acts evidence is reviewed for abuse of discretion. *State v. Lough*, 125 Wn.2d 847, 864–65, 889 P.2d 487 (1995). Judicial discretion is abused “only if no reasonable person would take the view adopted by the trial court.” *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979) (citing *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)); see also *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

“[P]roper evidence will not be excluded because it may also tend to show that the defendant committed another crime unrelated to the one charged.” *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995) (citing *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); *State v. Boggs*, 80 Wn.2d 427, 433, 495 P.2d 321 (1972)).

“We will uphold a trial court's decision to admit evidence of prior misconduct under ER 404(b) if one of its cited bases is justified.” *Powell*, 126 Wn.2d at 264 (citing *Dennison*, 115 Wn.2d at 628) (upholding the trial court's admission of ER 404(b) evidence because its cited basis was justified)).

1. **The court properly admitted evidence of the September 13 failure to report to the Sheriff's office because it was relevant to prove the element of knowledge and it was not unfairly prejudicial.**

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of . . . knowledge . . .” ER 404(b).

“To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. Additionally, the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred.” *Lough*, 125 Wn.2d at 853.

Here, there was no abuse of discretion by the trial court because a reasonable person could determine that the prior failure to report to the Clallam County Sheriff's Office was offered for the purpose of proving knowledge of reporting requirements, the no show was highly relevant evidence of knowledge, and the probative value of the evidence outweighed any risk of any unfair prejudice.

In order to convict the defendant of the crime of Failure to Register as

a Sex Offender, the State was required to prove beyond a reasonable doubt “[t]hat on June 6th, the defendant *knowingly* failed to comply with the requirement of sex offender registration.” CP 71 (emphasis added).

Defense counsel objected to the State’s offer of the evidence of McDonald’s failure to report to the Sheriff’s Office on Tuesday, Sept. 13, 2016 as a sex offender registration requirement. RP 183–84. The State made an offer of proof and then the court heard the defense counsel argue on the admissibility of the no show. RP 185.

The court expressed that Deputy Zellar already testified regarding her procedures in managing non-compliance with sex offender reporting requirements and how the first instance of non-compliance results in a verbal warning. RP 187–88. The court stated that the testimony already established that the first time it happens the Sheriff’s Office has a policy of first time no foul, the second time there will be charges, and that the incident was evidence that the Sheriff’s Office gave McDonald an opportunity. RP 187-88. The court opined that it didn’t see that the evidence was ER 404(b) evidence but was simply evidence that McDonald was verbally warned about his non-compliance. RP 188.

The State requested the court to make findings for the record that the no show on Sept. 13 and subsequent warning the next day was established by a preponderance of the evidence, and that it was offered for the purpose of

proving the essential element of knowledge, and that the evidence was far more probative than prejudicial as Deputy Zellar already testified regarding her procedures and the first failure to comply results in a warning only. RP 188–89. The court granted the State’s request and adopted those findings as its own when it stated, “Okay, and that’s basically what I’m finding.” RP 189.

Therefore, the court made the proper findings in compliance with the procedure for admitting evidence under ER 404(b) and the admission was not an abuse of discretion because a reasonable person could agree with the court that the evidence was relevant to prove the element of knowledge of reporting requirements and the probative value of the no show was not outweighed by any risk of unfair prejudice under the circumstances. The jury could infer that McDonald had a prior no show already because the first non-compliance results in a warning and he was now facing trial for non-compliance.

Relevance

McDonald argues that the evidence of the Sept. 13 no show was not relevant to show knowledge. *See* Br. of Appellant at 15.

“The issue of relevance generally is to be determined by the trial court, with review limited to whether the trial court abused its discretion.” *Lough*, 125 Wn.2d at 861 (citing *State v. Lane*, 125 Wn.2d 825, 834–835, 889 P.2d 929 (1995)).

“‘Relevant evidence’ means evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.* 861–62.

McDonald’s first time no show on Sept. 13 is highly relevant to establish the element of knowledge of duty to register because it shows the jury that the importance of this event was particularly heightened and would be impressed upon the mind of McDonald because he was *relieved of a criminal charge* and also, he was specifically warned that next time would result in an arrest with no exceptions. State’s Ex. 6.

The testimony regarding the Sept. 13, 2016 prior no show revealed a number of important details that complete the picture of McDonald’s acute knowledge of his reporting requirement. First, McDonald was informed of his duty to register due to his sex offense conviction and has been required to register as a sex offender since the late 1990’s. RP 174. McDonald re-registered on May 22, 2015 because his residential status changed and he lacked a fixed address. RP 179–80. This shows that McDonald has been registering as required for well over a decade and that he understood what he had to do in the event his address was not fixed.

McDonald was informed of his duty to report weekly as a transient person and was informed when and where to report. RP 171, 181. McDonald was informed that he would have to report between 8:30 a.m. and 4:30 p.m.

at the CCSO and he signed multiple documents acknowledging this. RP 171, 181; State's Ex. 3, 4, 6. McDonald, lacking a fixed address, was also told that the door to the CCSO would be locked at 4:30 p.m. RP 172.

The failure to show up to report on Sept. 13, 2016 was the *first time* that McDonald did not report as required on a homeless check in day. RP 193. McDonald attempted to report late *the very next day*. RP 193.

Deputy Zellar, as is her practice, provided a written and verbal warning for McDonald's no show. State's Ex. 6. On April 14, 2017, McDonald was essentially informed that he was being warned for the first no show but that next time would be different. McDonald signed a document which informed him that any further non-compliance with the duty to register would result in an arrest with no exceptions. State's Ex.6.

Thus, the Sept. 13 event which ended resulted in a warning, acknowledged with McDonald's signature, was highly relevant to show knowledge of the reporting requirement.

McDonald argues that the State's assertion that it offered the evidence of the Sept. 13 no show for the purpose of proving knowledge does not pass muster because McDonald testified that he knew he had to register and that he actually came to the courthouse to register. *See* Appellant's Br. at 16.

This argument fails because McDonald's testimony after the State rested did not relieve the State from its burden to prove the element of

knowledge beyond a reasonable doubt during its case-in-chief.

Therefore, a reasonable person could find that the no show was highly relevant evidence showing McDonald's acute awareness of his duty to report by 4:30 p.m. when he failed to do so on June 6, 2017.

No unfair prejudice

The evidence of the prior no show was relevant to proving knowledge, an essential element, and the probative value was not outweighed in any amount by a risk of unfair prejudice.

The fact that McDonald failed to report to CCSO as required on Sept. 13, 2016, was not likely to stimulate any emotional response from the jury other than a rational one because the testimony showed that McDonald checked in at the CCSO the very next day, as opposed to hiding from law enforcement to avoid reporting his whereabouts. *See Powell*, 126 Wn.2d at 264 (citing *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) ("When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.")).

Additionally, the Sheriff's office did not hold that tardiness against McDonald except to warn him. The testimony before the jury also showed that, other than Sept. 13, McDonald had been in compliance with his reporting requirements since the late 1990's. Under these circumstances, it was highly unlikely that a jury was going to give more importance to the

event than the Sheriff's office did.

Moreover, the admission of the prior no show testimony was less likely to be unfairly prejudicial than evidence that McDonald had committed a sex offense which required him to register in the first place. The evidence of the prior sex offense was stipulated to and was before the jury.

Finally, the trial court itself stated that it did not even consider the evidence of the prior no show to be conformity or propensity evidence or even evidence of ER 404(b) prior misconduct, wrongs or acts. RP 187. It is evident from the record that the evidence at issue appeared to the trial court to be, purely and simply, evidence that the CCSO cut McDonald a break by issuing a warning of non-compliance. RP 188. The court did not find it objectionable. RP 188. This shows that the testimony was not offensive enough to evoke an emotional response from the jury rather than a rational one. Thus, based on the above, evidence of the Sept. 13 no show was highly unlikely to create any risk of or unfair prejudice to the defendant at all.

McDonald refers to the admission of the prior no show as admission of a *sex offense* and cites to cases such as *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982) which point out that prejudice is at its highest in sex cases. Br. of Appellant at 13–14.

McDonald's argument is more relevant when dealing with sex cases in which the "the accused has been characterized as a person of abnormal

bent, driven by biological inclination.” *State v. Coe*, 101 Wn.2d 772, 781, 684 P.2d 668 (1984) (quoting Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L.Rev. 325, 333–34 (1956)).

For instance, the prior misconduct held to be improperly admitted in *Saltarelli* was a prior attempted rape committed over four years before the rape *Saltarelli* was standing trial for. *State v. Saltarelli*, 98 Wn.2d 358, 359, 655 P.2d 697 (1982). In *Coe*, it was the examination of Coe's “sexually oriented writings” which were at issue and which were improperly delved into with detail to prove lustful disposition in a first degree rape trial where the issue was lack of consent rather than the fact of intercourse. *See Coe*, 101 Wn.2d at 780. This type of conduct is far more likely to stimulate an emotional response than a failure to report as required in a timely manner.

Moreover, there are cases where prior sex offenses have been held properly admitted despite the higher risk of unfair prejudice. For instance, in *State v. Lough*, the Court of Appeals, Division I, held that evidence of the defendant's previous sexual assaults on women were admissible to prove a common scheme and plan to drug and rape women as they were relevant to the charges of indecent liberties and attempted rape. *Lough*, 70 Wn. App. at 333; *see also State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003) (“[E]vidence of defendant's prior molestation of another child was admissible in order to show a common scheme or plan.”).

Here, the prior incidents of sexual misconduct or crimes of a sexual nature are not at issue, and therefore, the concerns of unfair prejudice inherent in such cases are not present.

For all the foregoing reasons, this Court should find that the trial court did not abuse its discretion, and thus, did not err in its decision to admit the State's evidence of McDonald's Sept. 13 no show because it is relevant to prove the element of knowledge and it was not unfairly prejudicial.

2. Failure to conduct a proper analysis on the record was harmless because the record is sufficient for effective review of the trial court's decision to admit evidence of the September 13 no show.

A trial court's error of admitting ER 404(b) evidence without balancing the necessity for admission against possible prejudice on the record is harmless error if the record as a whole is sufficient to allow effective appellate court review of the trial court's decision. *State v. Bradford*, 56 Wn. App. 464, 783 P.2d 1133 (1989), *abrogated on other grounds by State v. Lough*, 125 Wn.2d 847, 861, 889 P.2d 487 (1995); *see also State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986).

Here, the record is sufficient to demonstrate that the Sept. 13 no show testimony was logically relevant to prove the essential element of knowledge, as argued above. The testimony reveals circumstances demonstrating that McDonald was acutely aware of his reporting requirements as he could have been charged for the Sept. 13 incident but

instead was let off with a warning that the next time would result in an arrest, with no exceptions.

The record also demonstrates that the Sept. 13 no show testimony was legally relevant because it was highly probative evidence of knowledge but was just not very prejudicial as it simply resulted in warning from the Sheriff's office and there was nothing about the tardiness to suggest some sort of offensive sexual misconduct to the jury.

Therefore, the record was sufficient for appellate review and demonstrates that the evidence of the Sept. 13 no show was properly admitted and there was no abuse of discretion.

3. Evidence of the Sept. 13, 2016 prior no show was not prejudicial and not reversible error because the record shows overwhelming evidence of guilt.

Assuming for argument that the admission of the Sept. 13 no show was error, the alleged error is not reversible because there was clear and uncontroverted evidence of guilt.

“The test for whether an improper evidentiary ruling constitutes reversible error was stated in *State v. Tharp*, . . . :

[W]e apply the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.”

State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983) (quoting *State*

v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980))).

In *Thomas*, the defendant lost custody of his child. Custody of the child was given to the child's maternal grandmother. A restraining order prohibited the defendant from contacting the child and the child's mother, Tina Moore. Subsequently, the defendant took his child from the arms of his mother when she refused to talk with him.

At trial the trial court admitted evidence that the defendant had assaulted the child's mother Tina, Tina's father, and Tina's brother. The Court of Appeals held that ER 404(b) evidence was improperly admitted because the probative effect was outweighed by its prejudicial effect.

However, the *Thomas* Court held further that the admission of the prior assault evidence was not reversible error because it was not reasonably likely that the evidence materially affected the outcome of the trial. *Id.* at 609. The *Thomas* Court reasoned that the elements of the crime were clearly established by the uncontroverted testimony of the child's mother. *Id.* There was no evidence offered to negate any element of the offense. *Id.*

Here, as in *Thomas*, even without the Sept. 13 incident, the elements of the crime were clearly established that the defendant was convicted of a felony sex offense, that he was required to register as a sex offender in Clallam County, and that he did not comply with the requirement of sex

offender registration on June 6, 2017. McDonald's testimony did not negate any element of the offense.

Therefore, as in *Thomas*, the alleged error is not reversible because it was not reasonably probable that the admission of the Sept. 13 prior no show materially affected the outcome of the trial. This Court should affirm.

B. THE COURT PROPERLY ADMITTED THE JUDGMENT AND SENTENCE FOR THEFT IN THE THIRD DEGREE AND JAIL SENTENCE.

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment.

ER 609(a)(2).

McDonald argues that the judgment and sentence for his theft conviction was improperly admitted because it included extra information beyond the conviction, in particular that McDonald was sentenced to jail.

This argument fails under well settled case law. *See State v. Gibson*, 32 Wn. App. 217, 221, 646 P.2d 786 (1982). In *Gibson*, the Court of Appeals held that when evidence of a prior conviction is admissible under ER 609(a), the punishment imposed for the conviction, including any enhancement based on a habitual criminal finding, is also admissible so long as the punishment is shown on the judgment and sentence. *Id.* "Cross examination on prior convictions under ER 609(a) is limited to facts contained in the record of the

prior conviction: the fact of conviction, the type of crime, and the punishment imposed.” *Coe*, 101 Wn.2d at 776 (citing *State v. Coles*, 28 Wn. App. 563, 625 P.2d 713 (1981); *State v. Brewster*, 75 Wn.2d 137, 449 P.2d 685 (1968); *State v. Lindsey*, 27 Wn.2d 186, 177 P.2d 387 (1947)). “Cross examination exceeding these bounds is irrelevant and likely to be unduly prejudicial, hence inadmissible.” *Id.* (citing *Coles*, 28 Wn. App. at 572–73).

McDonald cites to *State v. McBride* in support of his argument. *State v. McBride*, 192 Wn. App. 859, 867, 370 P.3d 982 (2016) (quoting *State v. Coles*, 28 Wn. App. at 573). McDonald’s reliance upon *McBride/Coles* is misplaced because *McBride/Coles* only bars admission of the *acts* leading to the conviction rather than details appearing on the judgment and sentence.

“The former convictions may be shown by admission of the ‘record of the conviction,’ defined as an authenticated copy of the judgment of conviction, or other competent evidence, *including* direct questioning of the witness, of facts that would be contained in this record.” *Coles*, 28 Wn. App. at 572 (citations omitted) (emphasis added).

Thus, the details which the *Coles* Court deemed inadmissible were not the details which the record of conviction would show, but rather the details of the *acts* which led to the conviction. *Id.* at 573.

McDonald also argues that the court abused its discretion in admitting the judgment and sentence because McDonald admitted to his conviction on

direct and on cross examination and the court still admitted the judgment without analysis. Br. of Appellant at 19–20.

First, the court was required to admit the theft conviction without engaging in balancing of probative value versus prejudicial effect because theft is a crime of dishonesty. *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991) (“[C]rimes of theft, per se, involve dishonesty”); *State v. Brown*, 113 Wn.2d 520, 533, 782 P.2d 1013 (1989) (“[P]rior convictions for crimes involving dishonesty or false statement are automatically admissible under ER 609(a)(2) and the trial court does not engage in balancing probative value against prejudicial effect in ruling on admissibility.”).

McDonald supports his argument with *State v. Coe*, 101 Wn.2d at 775 which does not in any way hold that a judgment and sentence is inadmissible if the defendant admits to the conviction on direct or cross examination. Rather, *Coe* holds that the record of conviction including the punishment is admissible for impeachment on cross-examination. *Coe*, 101 Wn.2d at 776.

McDonald’s argument also fails because it incorrectly assumes that McDonald already admitted to everything on direct examination. Although McDonald testified on direct that he was convicted of Theft in the Third Degree, he did not testify that he was sentenced to jail for 35 days.

Furthermore, there are other good reasons for the State to move to admit the record of conviction and certainly to have it on hand, even if the

defendant admits to having been convicted on direct examination.

First, a party is entitled to impeach a witness under ER 609 so it does not matter if the defendant admits to it first on direct examination. When the defendant offers his own crime of dishonesty on direct examination, it is not for the purpose of impeachment, but rather to show honesty about his prior crime. Therefore, State may still attack the credibility of the defendant.

Additionally, admitting the record of conviction into evidence removes any risk that the defendant was mistaken or confused about his own criminal history.

Finally, the history of the cases show that a plain reading of ER 609 means that the defendant must admit to the conviction or else the conviction *must* be established by public record before the evidence of the impeachment conviction is admitted in order to protect against error. *See State v. Perrett*, 86 Wn. App. 312, 321, 936 P.2d 426 (1997) (citing *State v. Martz*, 8 Wn. App. 192, 196, 504 P.2d 1174 (1973) (“It is only when the prosecutor is unable or unwilling to substantiate his accusations in the face of defendant's sworn denial that error is committed.”)); *see also State v. Beard*, 74 Wn.2d 335, 338–39, 444 P.2d 651 (1968); *State v. Goodwin*, 29 Wn.2d 276, 186 P.2d 935 (1947)) (“The examination of a witness by the state with regard to prior convictions, when the prosecutor is either unwilling or unable to prove the alleged convictions upon the witness's denial has been condemned in

prior cases.”).

Therefore admission of the judgment and sentence after McDonald admitted to his Theft conviction was not error.

Furthermore, the admission of the record of conviction was not reversible error because it is not reasonably probable that there was any resulting prejudice.

“A ruling under ER 609 is not reversible error ‘... unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Here, the admission of the judgment and sentence which revealed the jail sentence was not likely to materially affect the outcome of the trial because a jury would likely infer that McDonald was punished for the conviction with jail anyway.

Therefore, the court did not abuse its discretion by admitting the judgment and sentence for Theft in the Third Degree.

C. UNDER *STATE V. CONDON*, TESTIMONY THAT MCDONALD WAS IN JAIL WAS HARMLESS BECAUSE THE STATEMENT WAS VAGUE AND THE COURT'S INSTRUCTION TO DISREGARD WAS SUFFICIENT TO SAFEGUARD AGAINST POTENTIAL PREJUDICE.

“The trial court has wide discretion to cure trial irregularities, *State v. Gilchrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979), and the standard of review is an abuse of discretion, *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).” *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

“In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction.” *Id.* (citing *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987)).

“The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that [the defendant] did not receive a fair trial.” *Id.* (citing *Weber*, 99 Wn.2d at 164).

State v. Condon is instructive. In *Condon*, the defendant argued that “the trial court erred in denying his motion for a mistrial based on a witness's references to the fact that Condon had been in jail.” *See State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). A witness made three separate remarks stating or suggesting that the defendant had been in jail. *Id.* at 648.

The trial court instructed the jury to disregard the remarks. *Id.*

The *Condon* Court affirmed the trial court's denial of a motion for a mistrial concluding that the remarks were ambiguous and did not indicate the defendant had a propensity to commit the charged crime or that he had even been convicted of a crime. *Id.* at 649. "Thus, although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the court's instructions to disregard the statements were sufficient to alleviate any prejudice that may have resulted." *Id.* at 649–50.

Here, Deputy Zellar's single reference to jail was more innocuous than the repeated references to jail in *Conlon*. Zellar' remark was also ambiguous as it did not suggest that McDonald had a propensity to commit the charged crime and there was no indication why McDonald was in jail or for how long or even if he was convicted or charged with a crime at all.

The trial court also pointed out on the record that the Theft in the Third Degree Judgment and Sentence resulted in a jail sentence during the time frame at issue from which the jury could infer was the period of jail referred to by Deputy Zellar. RP 247; State's Ex. 10.

Finally, the instant case was not a close case. *See Condon*, 72 Wn. App. at 650 n.2. There was no real dispute that McDonald did not report to the Sheriff's Office on June 6, 2017 before 4:30 p.m. Rather, McDonald's testimony focused on events leading up to his failure to report to the Clallam

County Sheriff's Office on time. RP 232–238.

Thus, as in *Condon*, Deputy Zellar's remark referring to jail was not so serious as to warrant a mistrial and the court's instruction the jury to disregard the statement was sufficient to alleviate any potential prejudice. A jury is presumed to have followed the court's instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Therefore, the trial court did not abuse its discretion by not granting a mistrial.

McDonald relies upon *State v. Escolana* to support his argument that Zellar's inadvertent reference to a period of time when McDonald was in jail was so overly irregular and prejudicial that it could not be cured by an instruction by the court to disregard and thus a mistrial should have been granted. *State v. Escalona*, 49 Wn. App. 251, 253, 742 P.2d 190 (1987). McDonald's reliance upon *Escolana* is misplaced because the facts of that case are highly distinguishable from the facts in this case.

In *Escolana*, the victim was asked whether he had been stabbed on a prior incident unrelated to Escolana's case. *Id.* Then the victim was asked if he was nervous the particular day in question and the victim responded, "This is not the problem. Alberto [Escalona] already has a record and had stabbed someone." *Id.*

The Court of Appeals held that the trial court abused its discretion in

denying defendant a mistrial based on an unsolicited statement that the defendant already had a record and had stabbed someone. *Escalona*, at 256. The *Escalona* Court characterized the statement as extremely serious considering that the statement consisted of the admission of evidence of a prior crime in a case with a “paucity of credible evidence against Escalona.” *Id.* at 255. Additionally, the evidence was not merely cumulative to other evidence and the trial judge had already ruled in limine that the prior conviction could not be admitted. *Id.*

Finally, the court found that Escalona’s prior conviction for having stabbed someone was inherently prejudicial and the jury would undoubtedly “conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.” *Id.* at 256.

Here, the prior activity at issue, rather than a prior conviction for stabbing somebody, is a failure to check in on time at the Sheriff’s office which resulted in a warning only. This conduct is not on par with the stabbing in *Escolana* which constituted a serious irregularity which could not be cured by an in instruction. Deputy’s Zellar’s comment in this case was not even as serious as *Condon* where the *repeated* references to jail in *Condon* were held to not constitute a serious irregularity and that the court’s curative warnings were sufficient to alleviate any potential prejudice.

McDonald also relies upon *State v. Miles*, 73 Wn.2d 67, 436 P.2d 198

(1968). *Miles* is also distinguishable from the facts of the instant case. In *Miles*, a police officer testified regarding the defendants' "alleged plan to perpetrate a robbery like the one with the commission of which the defendants were charged." *Id.* at 71. Such evidence suggested that the defendants had a propensity to commit crimes of the same nature as those for which they were currently standing trial and therefore it was highly prejudicial such that a curative instruction to disregard the testimony would not have been effective. *Id.*

Here, unlike the statement in *Miles*, Zellar's reference to jail does not serve as propensity evidence. The reference to jail did not suggest that McDonald had a propensity to commit any particular type of crime. In fact, the evidence before the jury in the first phase of the trial was that McDonald had continually been in compliance with his reporting requirements except on Sept. 13, 2016 and June 6, 2017. Therefore, *Miles* is distinguishable and does not apply.

In *State v. Suleski*, also distinguishable, the defendant was charged with attempt to obtain a narcotic with a fraudulent prescription. *State v. Suleski*, 67 Wn.2d 45, 49, 406 P.2d 613 (1965). The irregularities at issue were *numerous*. These included testimony that the doctor that wrote the prescription feared violence by the defendant based on suspicion the defendant was a drug addict. A dismantled .38 caliber Luger pistol and

burglary tools were also admitted in evidence. Also admitted was the defendant's automobile (which was viewed by the jury), defendant's fingerprint card, reference that the fingerprint card was sent to the FBI to check the defendant's criminal record, reference to a criminal investigation by the U.S. Treasury Dept., testimony that the investigator interviewed the defendant in custody about the firearm for a possible violation of the Federal Firearms Act were admitted in evidence. *Id.* Finally, "a four or five-page document was, in the presence of the jury, identified as 'a report which we received from the Federal Bureau of Investigation.' It was offered in evidence and rejected." *Suleski*, 67 Wn.2d at 49.

The *Suleski* Court found as follows:

In the instant case, the bells of the dismissed burglary tools charge, prior burglary convictions, a four or five-page F.B.I. record, a possible violation of the Federal Firearms Act, and the fruits of the various searches, were so conclusively rung as to effectively preclude their 'unringing.' The adroitly drawn picture of the defendant's criminal proclivities, sketched upon the backdrop of the medical witness's fear of violence and suspicion of drug addiction, literally dissolved any legalistic curtain based upon the theory that the court's instructions could remove all undue impressions from the jurors' minds. The defendant was irretrievably prejudiced.

Id. at 51.

In the instant case, McDonald claims comparable prejudice from Zellar's single inadvertent remark that McDonald was in jail. McDonald's reliance upon *Suleski* is misplaced because Zellar's remark is not comparable

to the extensive breadth of inadmissible and prejudicial material used to convict the defendant in *Suleski*.

Under *State v. Condon*, Zellar's single reference to time in jail was not a serious irregularity and the court's instruction to the jury to disregard it was sufficient to alleviate any potential prejudice.

Therefore, the Court should affirm the conviction.

D. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION.

"Sufficiency of the evidence is a question of law that we review de novo." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Kintz*, at 551 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* "Circumstantial

evidence and direct evidence are equally reliable' in determining the sufficiency of the evidence." *Id.* (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). "In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." *State v. Dejarlais*, 88 Wn. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wn.2d 939, 969 P.2d 90 (1998).

Additionally, this Court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. J.P.*, 130 Wn. App. 887, 891–92, 125 P.3d 215 (2005).

In order for a jury to find McDonald guilty of Failure to Register as a Sex Offender, the State was required to prove the following elements beyond a reasonable doubt:

- (1) Prior to June 6th, 2017, the defendant was convicted of a felony sex offense;
- (2) That due to that conviction, the defendant was required to register in the County of Clallam, State of Washington, as a sex offender on June 6th, 2017; and
- (3) That on June 6th, the defendant knowingly failed to comply with the requirement of sex offender registration.

CP 71.

Here, the defense conceded to the jury that the State established the first two elements. RP 284–85. McDonald seems to argue that there was no evidence of what normal business hours were. This argument ignores Deputy

Zellar's testimony that 8:30 a.m. to 4:30 p.m. are the normal business hours. RP 171. Zellar also testified that the doors automatically lock at 4:30 p.m. RP 171-72. Furthermore, the documents labeled State's Exhibits 3, 4, and 6, all signed by McDonald, state that McDonald was required to check in between 8:30 a.m. and 4:30 p.m. Finally, Deputy Wagner testified that the lights were out and the doors were locked when McDonald showed up.

McDonald also argues that there was no evidence that McDonald knew what time it was. McDonald testified that it was 4:20 p.m. when he was still walking to the courthouse. RP 239. There was no evidence that he completely lost track of time within the next 10 minutes. The fact that McDonald was speed walking shows he was aware of the time. RP 237. McDonald also testified that the only thing his phone could do was show the time because he had run out of minutes. RP 234. This is circumstantial evidence that McDonald knew what time it was when he was about to open the door at the courthouse.

Furthermore, the State was not required to prove that McDonald knew what time it was. Rather the State was required to prove that McDonald knowingly failed to comply with the requirement of sex offender registration. This means that once it was established that McDonald had knowledge of the requirements of sex offender registration, i.e., to report between 8:30 a.m. and 4:30 p.m., the responsibility is imputed to McDonald to know what time

it is. It could be said that failure to check the time and thus register on time is a failure to comply with the sex offender registration requirement.

McDonald relies upon *State v. Drake*, 149 Wn. App. 88, 92, 201 P.3d 1093 (2009) to support his argument that the State must prove he knew what time it was. *Drake* does not support such an argument as the facts are markedly different.

“Mr. Drake was charged with knowingly failing to register between May 6 and 20, 2007, by changing his residence address and failing to notify the sheriff's office within 72 hours of moving or within 48 hours of ceasing to have a fixed address and/or failing to report in person on a weekly basis.” *Drake*, 149 Wn. App. at 92.

The problem in *Drake* was that there was no evidence that Drake had knowledge of his *requirement* to re-register. This is because the State presented no evidence that Drake knew he was evicted on May 7 which triggered the requirement to re-register shortly after he had just registered on May 4. In essence, there was no evidence that Drake knew he had to re-register because there was no evidence that he knew he was evicted. There was no evidence of where Drake was or that he was living homeless or in another residence. There was no evidence that Drake knowingly changed his residence and thus had knowledge of his sex offender registration *requirement* to re-register.

Here, *Drake* has no application because the evidence shows that McDonald had complete knowledge of his requirements.

State's Exhibit 3, 4, and 6 show that McDonald was required to report to the Clallam County Sheriff's Office every Tuesday between the hours of 8:30 AM and 4:30 PM. State's Exhibit 6, dated 9-14-16, states in handwriting along the side of the document, "*Any further non compliances will result in arrest, no exceptions.*" These show that McDonald knew what days, where, and what time he was required to report to the CCSO.

McDonald was clearly told to report by 4:30 p.m. weekly on Tuesdays. McDonald signed off on documents instructing the same. McDonald was in compliance for all but one occasion prior to June 6, 2017 and he was warned that the next time would result in arrest. Therefore, McDonald was acutely aware of his reporting requirements.

For all the forgoing reasons, this Court should find that there is sufficient evidence to support the conviction and should affirm.

**E. MCDONALD FAILS TO ESTALBISH THAT
THE STATE'S ARGUMENT WAS IMPROPER
AND PREJUDICIAL.**

The State was required to prove the following element beyond a reasonable doubt:

That on June 6th, the defendant knowingly failed to comply with the requirement of sex offender registration.

CP 71.

A person who is required to register as a sex offender must comply with certain requirements of registration, including the following:

(1) The requirement that the defendant register with the county sheriff for the defendant's county of residence, and

(2) The requirement that the defendant, lacking a fixed residence, report weekly on a day specified by the county sheriff's office and during normal business hours, in person, to the sheriff of the county where the defendant is registered.

CP 65.

A person knows or acts knowingly or with knowledge with respect to a circumstance or result when he or she is aware of that circumstance or result. It is not necessary that the person know that the circumstance or result is defined by law as being unlawful or an element of the crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 70 (Instruction No. 11).

In closing argument the prosecutor stated the following:

All right, instruction number 11, knowingly. So, this is one of the more confusing jury instructions that is probably in your packet. (Inaudible), so I'll try to condense this in a way that maybe makes some more sense. One of the requirements is that Mr. McDonald acted knowingly. That's on the elements, that he knowingly failed to comply. So, what does knowingly mean? For the purposes of this case, knowingly is that Mr. McDonald knew he had to show up June 6th. He knew he had to show up between 8:30 and 4:30. And he knew that if he didn't there would be consequences for it. That's knowingly for the purposes of this case.

RP 283-84.

Defense counsel objected, "Objection, counsel is stating the law." RP 284.

The court without sustaining the objection reminded the jury as follows: "Okay, you must disregard any remarks, statement or argument that is not supported by the law in my instructions. So, refer to your instructions in regard to what the law is." RP 284.

The prosecutor continued without objection:

So, for knowingly, that is supported by the fact that, well, he did show up, albeit late, so he did know that he had to be there. And based on the prior warnings that he was given back in September, he knew what the consequences were going to be.

RP 284.

McDonald argues that the prosecutor repeatedly misstated the law to the jury and that the State's argument was flagrant and ill-intentioned and incurable by the trial court's instruction, and that the argument was a gross simplification of its burden and effectively mischaracterized the offense. *See* Appellant's Br. at 40-42.

"In order to establish prosecutorial misconduct, Carver must prove that the prosecutor's conduct was improper and prejudiced his right to a fair trial." *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). "Prejudice is established only where 'there is a substantial likelihood the instances of

misconduct affected the jury's verdict.” *Carver*, 122 Wn. App. at 306 (quoting *Dhaliwal*, 150 Wn.2d at 578). “We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.” *Id.* (citing *Dhaliwal*, 150 Wn.2d at 578); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998)).

1. The prosecutor's statement was not an improper statement of the law and did not diminish the State's burden of proof.

The prosecutor's statement regarding the element of knowledge was not improper because the State did need to prove exactly what the prosecutor said, that “Mr. McDonald knew he had to show up June 6th. He knew he had to show up between 8:30 and 4:30.” RP 283–84.

In regards to “knowingly” the State was required to prove the following element:

That on June 6th, the defendant knowingly failed to comply with a requirement of sex offender registration.

CP 71 (Instruction no. 12)

A person who is required to register as a sex offender must comply with certain *requirements* of registration, including the following: . . .

(2) The requirement that the defendant, lacking a fixed residence, *report weekly on a day specified by the county sheriff's office and during normal business hours*, in person, to the sheriff of the county where the defendant is registered.

CP 65 (Instruction no. 6) (emphasis added).

State's Exhibit 3 lays out those requirements in detail:

If you lack a fixed residence, you must report in person on a weekly basis to the County Sheriff's Office where you last registered. The report date for the Clallam County Sheriff's Office is *every Tuesday, 8:30 AM to 4:30 PM*, excluding holidays, when the report date will be the following business day.

Thus, McDonald's sex offender registration requirements included showing up at the CCSO to check in weekly on Tuesdays between 8:30 a.m. and 4:30 p.m. Failing to show up at CCSO between 8:30 a.m. and 4:30 p.m. to check in on Tuesday June 6, 2017, is *the* sex offender registration requirement that McDonald was alleged to have knowingly failed to comply with.

Therefore, the State was required to prove beyond a reasonable doubt that McDonald knew of these requirements. It was not improper to point this out to the jury on closing argument.

Therefore, this Court should affirm the conviction.

2. The prosecutor's explanation of what he had to prove in regards to knowledge was not prejudicial.

The trial court instructed the jury to refer to their instructions and the prosecutor's comment was accurate as to what the State had to prove in order to prove McDonald knowingly failed to comply with a sex offender registration requirement.

“The jury is presumed to follow the instructions of the court.” *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) (citing *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976)). “To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (citing *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).

The burden of proof was clearly laid out for the jury in instruction no. 3. CP 62. The elements were clearly laid out for the jury in instruction no. 12 and no. 6. CP 65, 71. Additionally, the jury was specifically reminded by judge to “disregard any remarks, statement or argument that is not supported by the law in my instructions. So, refer to your instructions in regard to what the law is.” RP 284. However, defense counsel was permitted to comment on the prosecutor’s credibility without any instruction from the court to disregard when defense counsel stated “it seems like counsel's trying to pull a bit of a fast one on you here.” RP 290. “So, here's where the fast one comes. The Prosecutor says Mr. McDonald knew about the requirement to register. That's absolutely true, he totally did.” RP 291. Defense counsel then suggested the mens rea of *intentionally* was interchangeable with *knowingly* when he stated: “So, the question is, knowing that's what's going to happen, did *he intentionally or knowingly* put himself in a position where he wasn't going to

be able to comply?” RP 294. This was not an accurate statement of what the State had to prove: “That on June 6th, the defendant knowingly failed to comply with a requirement of sex offender registration.” CP 71 (Instruction no. 12).

Finally, the prosecutor correctly stated the element at issue when arguing the evidence: “All right, then on June 6th, the Defendant knowingly failed to comply with the requirement of sex offender registration.” RP 285.

Considering the prosecutor’s statement at issue in context of the evidence, the whole arguments, and the immediate curative instruction on two occasions in regards to the prosecutor’s statement, and what defense counsel argued before the jury, McDonald fails to rebut the presumption that the jury followed the court’s instruction to follow the law as presented by the court. RP 284, 300.

Further, there was no likelihood the alleged misconduct affected the jury’s verdict because there was substantial evidence for every element of the crime. McDonald fails to establish any prejudice. *See State v. Yates*, 161 Wn.2d 714, 776, 168 P.3d 359 (2007) (finding no prejudice from an improper comment when there was overwhelming evidence in the case).

Therefore, the Court should affirm the conviction.

F. MCDONALD FAILS TO ESTABLISH CUMULATIVE ERROR AND ANY PREJUDICE BECAUSE THERE WAS OVERWHELMING AND UNCONTROVERTED EVIDENCE OF GUILT.

“Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair.” *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012) (citing *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994))(holding there was no cumulative error warranting dismissal where there was only one error and no resulting prejudice).

Here, because the evidence of guilt was overwhelming and uncontroverted, it follows that there was no prejudice resulting from any of the alleged errors.

Furthermore, the court did not abuse its discretion by admitting the prior no show from Sept. 13 and the record of McDonald’s Theft in the Third Degree conviction which was automatically admissible for impeachment purposes. Therefore, McDonald did not receive a trial that was fundamentally unfair and reversal is not warranted under the cumulative error doctrine. This Court should affirm.

IV. CONCLUSION

The court properly admitted evidence of the Sept. 13 prior no show because it was relevant to show knowledge and it was not unfairly

prejudicial. The court properly admitted the defendant's record of conviction for Theft in the Third Degree under ER 609 because well-established case law holds that the jail sentence, a fact which McDonald never admitted to, is also admissible if it is on the record of conviction.

Under *State v. Condon*, Deputy Zellar's single reference to jail was not serious as to warrant a mistrial and the court's instruction to the jury to disregard the statement was sufficient to alleviate any potential prejudice.

The evidence that McDonald failed to show up at CCSO on Tuesday, June 6, 2017 between 8:30 a.m. and 4:30 p.m. and that he had actual knowledge of this requirement was overwhelming and uncontroverted. Therefore, because the Court weights the evidence and all reasonable inferences in the light most favorable to the State and defers to the fact finder on the persuasiveness of the evidence, this Court should find that the conviction was supported by sufficient evidence.

Further, the prosecutor accurately stated what he had to prove in order to prove that McDonald knowingly failed to comply with a sex offender registration requirement. Therefore it was neither improper nor prejudicial.

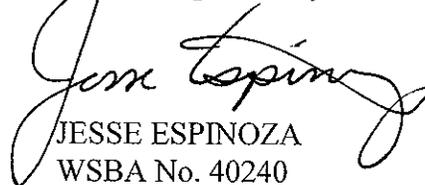
Finally, because the court did not abuse its discretion by admitting evidence and declining to grant a mistrial, and the evidence was substantial such that there was no prejudice from any alleged error, there was no cumulative error.

For the foregoing reasons, the Court should affirm the conviction.

Respectfully submitted this 2nd day of April, 2018.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

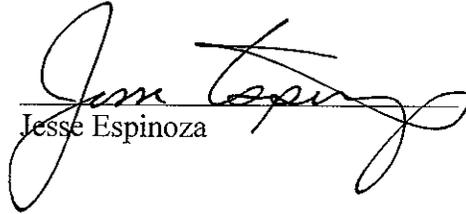
A handwritten signature in black ink, appearing to read "Jesse Espinoza", written in a cursive style.

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to John Austin and Mary K. High on April 2, 2018.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

April 02, 2018 - 4:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50733-1
Appellate Court Case Title: State of Washington, Respondent v. Paul McDonald, Jr, Appellant
Superior Court Case Number: 17-1-00210-0

The following documents have been uploaded:

- 507331_Briefs_20180402165209D2451310_6362.pdf
This File Contains:
Briefs - Respondents
The Original File Name was McDonald - 50733-1-II - Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- JAUSTIN@co.pierce.wa.us
- mhigh@co.pierce.wa.us

Comments:

Sender Name: Jesse Espinoza - Email: jespinoza@co.clallam.wa.us

Address:

223 E 4TH ST STE 11

PORT ANGELES, WA, 98362-3000

Phone: 360-417-2301

Note: The Filing Id is 20180402165209D2451310