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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

MICHAEL JAY STEWART

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BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The Information does not contain all the essential elements for the offense of failure to register.
2. The jury verdict was not supported by the unanimous decision of the jurors.
  - a. The jury was not instructed on the need for factual unanimity.
  - b. The Supreme Court's conclusion that RCW 9A.44.130 is an alternative means statute is incorrect and harmful and should be overruled.
  - c. In the alternative, the alternative means listed in Jury Instruction #8 are not supported by substantial evidence.

Issues Pertaining to Assignments of Error

1. Does the Information, which fails to identify which provision of RCW 9A.44.130 Mr. Stewart is alleged to have violated, fail to state all the essential elements for the offense of failure to register.
2. Was Mr. Stewart's constitutional right to a unanimous jury verdict violated when:

- a. The jury was not instructed on the need for factual unanimity after the State present evidence of multiple factual allegations?
- b. The jury was not instructed on the need for legal unanimity as to the alternative crimes committed by Mr. Stewart, an argument that necessitates this Court overturn State v. Peterson as incorrect and harmful and should be overruled?
- c. In the alternative, the jury was instructed on alternative means for violating the statute that were not supported by substantial evidence.

#### B. Statement of Facts

Michael Stewart was charged with failure to register between May 9, 2018 and June 5, 2018. CP, 3. (All dates listed are in 2018 unless otherwise noted.)

Michael Stewart is required to register as a sex offender due to a 1991 sex offense conviction. RP, 182. He has been convicted at least twice prior of failure to register as a sex offender. RP, 182.

The State admitted without objection seven redacted registration packets. RP, 9, Exhibits, 12A, 13A, 14A, 15A, 16A, 17A, 18A. Each of

these packets is materially identical and reflects the information provided to Mr. Stewart when he registered on March 20, 2018, February 24, 2014, February 13, 2014, August 23, 2013, August 15, 2013, July 17, 2012, and February 16, 2012, respectively. CP, 39. Pages 6 through 8 contain three pages of single-spaced, tiny font information of the registration requirements of RCW 9A.44.128 through 9A.44.145. Exhibit 12A.

On March 20, Mr. Stewart registered that he was living at 3021 Pacific Highway East, number 162, in Fife, Pierce County, Washington. RP, 139, Exhibit 12A. 3021 Pacific Highway East is the physical address of the Guesthouse Motel in Fife (hereinafter “Guesthouse Motel.”) RP, 59. Relevant to this appeal, the Guesthouse Motel was his last registered address. RP, 168.

In 2018, Rosemary Stewart, Mr. Stewart’s mother, was living at the Guesthouse Motel. RP, 68. She lived there with her longtime domestic partner, Jackie Robinson, who was in very poor health from liver disease during this period. RP, 72, 187. Mr. Stewart was extremely close to Mr. Robinson, his stepfather for over thirty years. RP, 186. The record does not reflect when she started living there, but Ms. Stewart moved out on or before May 1. RP, 68. Mr. Stewart was never a registered guest of the motel, but he was observed visiting frequently by motel staff. RP, 67.

Mr. Stewart is on active community custody and supervised by the Department of Corrections (DOC). RP, 39-40. He was also on GPS monitoring with the Department. RP, 94. On March 15, Mr. Stewart contacted his community corrections officer (CCO), Manuel Vilela, about possibly moving to the Guesthouse Motel. RP, 41. As part of his community custody, he is required to live in a DOC approved address. RP, 81. On March 19, 2018, CCO Vilela conducted an in-state transfer request (ITR) visit of the Guesthouse Motel. RP, 40-41. Mr. Stewart was allowed to stay at the Guesthouse Motel while the address was pending approval. RP, 86. On March 21, the ITR address was denied as unsuitable. RP, 46-47. Mr. Stewart was not told of the denial until April 6, however. RP, 86.

Mr. Stewart's primary CCO was Andrew Liebl starting in March of 2018. RP, 80. After the address was denied, CCO Liebl instructed Mr. Stewart that he could continue to visit his mother at the address, but could not stay there overnight. RP, 86. CCO Liebl instructed Mr. Stewart to report daily until he could locate another address, which he started doing. RP, 87-92. On April 15, Mr. Stewart left CCO Liebl a voicemail saying he had to stay at the Guesthouse Motel overnight. RP, 92. He later explained on the witness stand that Mr. Robinson's health had taken a severe turn for the worse and he needed to be with him. RP, 187. CCO

Liebl returned the voicemail on April 16 and Mr. Stewart said, "I know I got to go to jail for staying at mom's." RP, 93. The GPS monitoring confirmed that Mr. Stewart was staying at the Guesthouse Motel from April 15 through April 18. RP, 95. On April 17, Mr. Robinson "passed away in [Mr. Stewart's] arms." RP, 188. Mr. Stewart was arrested on April 18 for the DOC violation and held at the SCORE correctional facility. RP, 95.

Mr. Stewart was released from custody on May 1 and reported to CCO Liebl the same date. RP, 97-98. He said he was going to be staying with his fiancé Helen Schultz in Auburn. RP, 98. Ms. Schultz' address was also not an approved address. RP, 103.

On May 7, Mr. Stewart failed to appear for a scheduled meeting with CCO Liebl. RP, 100. CCO Liebl tried to contact Mr. Stewart by "pinging" his GPS monitoring system. RP, 100. Mr. Stewart removed the GPS bracelet, activating its tamper alert system. RP, 100. CCO Liebl obtained a DOC secretary's warrant that same date. RP, 100. Mr. Stewart was arrested on June 6. RP, 106, 212.

On May 17, Fife Police Officer Randall Fleming went to the Guesthouse Motel to attempt contact with Mr. Stewart. RP, 113. Mr. Stewart was not there when he visited. RP, 115.

Mr. Stewart's defense at trial was that during the charging period, he was registered at Ms. Schultz' residence in King County." RP, 203. The defendant, testifying on his own behalf, testified that prior to March of 2018 he was registered at Ms. Schultz' residence, 34602 53<sup>rd</sup> Avenue in Auburn. RP, 186. When his father got ill, he felt the need to be close to him, so he moved to the Guesthouse Motel in Fife. RP, 187. But then DOC denied the Fife address, so he returned to Ms. Schultz' Auburn address. RP, 188. He admitted spending a couple of nights at the Guesthouse Motel while his father literally died in his arms. RP, 188-89. He was arrested for DOC violations the day after his father's death. RP, 189. After he got out of jail, he returned to staying with Ms. Schultz in Auburn. RP, 198.

Mr. Stewart testified on direct examination that after he was released from jail, he went "downtown" to see if he had to register. RP, 189. Mr. Stewart's attempt to explain what "the lady" downtown told him was stymied by a hearsay objection from the prosecutor. RP, 189. But on cross-examination from the prosecutor, Mr. Stewart was repeatedly challenged over objection with the fact that he had no "proof" of contacting the King County sheriff. RP, 196-97. This section of the cross-examination concludes with the following question, "You don't have anyone coming here to testify on your behalf, do you?" RP, 197. Later,

when Mr. Stewart stated unequivocally, “I was registered in King County; I was,” the prosecutor responded, “But there’s no proof of that at all.” RP, 203.

On cross-examination, multiple times the prosecutor conflated his community custody requirements and his registration requirements. For instance, she elicited an admission by him that staying at the Guesthouse Motel was “against the rules imposed by your corrections officer.” RP, 202. After his mother’s address was denied, he told CCO Liebl he “was going to stay there anyway.” RP, 197. He was supposed to meet with CCO Liebl on May 7, but he “didn’t go” and instead “cut off [his] GPS.” When he was staying at Ms. Schultz’ residence after May 7, he was “not reporting to [his] CCO any longer.” RP, 212.

Jury instruction #11, the “to convict” jury instruction in this case, instructed the jury that they were required to find that “during that time period, the defendant knowingly failed to comply with the requirement of sex offender registration.” CP, 54. Jury instruction # 8 defines what it means to register as a sex offender.

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.

2. the requirement that the defendant provide the following information when registering: name; any aliases used; complete and accurate residential address, or if the defendant lacks a fixed residence, where the defendant plans to stay; date and place of birth; place of employment; crime for which convicted; date and place of conviction; social security number; photograph; and fingerprints.

3. the requirement that, in conjunction with an address verification by the county sheriff, the defendant update the following information: name; any aliases used; residential address, or if the defendant lacks a fixed residence, where the defendant plans to stay; date and place of birth; place of employment; crime for which convicted; date and place of conviction; social security number; photograph; and fingerprints.

4. the requirement that the defendant, moving to a new county, register within three business days of moving with the county sheriff of the new county of residence.

5. the requirement that the defendant, upon moving to a new county, provide in person or by certified mail with return receipt requested, signed written notice within three business days of the

change of address to the county sheriff with whom the defendant last registered.

6. the requirement that the defendant provide, in person or by certified mail with return receipt requested, signed written notice of a change of address to the county sheriff within three business days of moving to a new residence within the same county.

7. the requirement that the defendant, upon moving to a new county, provide in person or by certified mail with return receipt requested, signed written notice within three business days of the change of address to the county sheriff with whom the defendant last registered.

8. the requirement that the defendant, who had a fixed residence but later lacked one, provide signed written notice to the sheriff of the county where the defendant last registered within three business days after ceasing to have a fixed residence.

9. 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.

10. the requirement that the defendant, lacking a fixed residence, comply with a request from the county sheriff of an accurate accounting of where the defendant stayed during the week.

11. the requirement that the defendant, lacking a fixed residence and under the supervision of the department of corrections, register with the county sheriff of the county of the defendant's supervision.

12. the requirement that the defendant provide signed written notice of his change of address to the county sheriff within three business days of moving from the registered address.

CP, 50-51.

### C. Argument

1. The Information does not contain all the essential elements for the offense of failure to register.

It is black letter law in Washington that a charging document must contain the essential elements of the offense. *State v. Kjorsvic*, 117 Wn.2d 93, 812 P.2d 86 (1991). A charging document that fails to state all the essential elements must be dismissed without prejudice. *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995). The charging document in this case simply alleges Mr. Stewart “did knowingly fail to

comply with the registration requirements of RCW 9A.44.130 when required to do so.” CP, 3. The Information does not specify which provision of RCW 9A.44.130 he was alleged to have violated. As will be argued in more detail below, this Court should interpret RCW 9A.44.130 as an alternative crimes statute and dismiss the case. *State v. Mason*, 170 Wn.App. 375, 285 P.3d 154 (2012).

2. The jury verdict was not supported by the unanimous decision of the jurors.

The Washington Constitution requires unanimous verdicts in criminal cases. *State v. Stephens*, 93 Wn.2d 186, 607 P.2d 304 (1980). In applying this principle, Washington has developed two separate lines of cases to address two separate situations: factual unanimity and legal unanimity. *State v. Petrich*, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984), *overruled on other grounds*, *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). Factual unanimity is required when the State files a single criminal offense when multiple criminal acts are alleged. This was the situation in *Petrich*, where the defendant was charged with a single count of indecent liberties after the victim described multiple incidents of sexual contact. In that situation, the Court held that a jury instruction was required. The *Petrich* case resulted in the now-familiar WPIC 4.25.

Legal unanimity is implicated when a single criminal offense can be committed in multiple ways. In this situation, Washington courts have distinguished between alternative crimes and alternative means statutes. An alternative means statute need not be unanimous as long as each of the alternative means is supported by substantial evidence<sup>1</sup>. *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017); *State v. Whitley*, 108 Wn.2d 506, 739 P.2d 1150 (1987); *State v. Arndt*, 87 Wash.2d 374, 553 P.2d 1328 (1976). Sufficient evidence is that which justifies a rational trier of fact finding guilt beyond a reasonable doubt. *Armstrong* at 341. As the discussion in *Armstrong* suggests, it is not always easy to distinguish between alternative crime statutes and alternative means statutes. See *Armstrong* at 347 (Justice McCloud, dissenting).

Mr. Stewart's case implicates both factual and legal unanimity. Factually, the prosecutor alleged multiple incidents of failing to register, but the jury was not instructed on the need for unanimity pursuant to WPIC 4.25. Legally, the jury was instructed on multiple means to commit the offense of failure to register without being instructed on the need to be unanimous as to the means. In the alternative, many of the means that the jury was instructed on are not supported by substantial evidence. The issue of whether the verdict violates the unanimity requirement is one of

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<sup>1</sup> The *Armstrong* case appears to use the terms "substantial evidence" and "sufficient evidence" interchangeably.

constitutional magnitude that may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Fiallo-Lopez*, 78 Wn.App. 717, 899 P.2d 1294 (1995).

a. The jury was not instructed on the need for factual unanimity.

The difficulty in evaluating the factual disputes in this case is the jury heard a significant amount of prejudicial evidence that has no significance to whether Mr. Stewart properly registered. The jury heard evidence that one day after he registered at the Guesthouse Motel, DOC denied it as an approved address. The jury heard evidence that, after he was advised the Motel was not an approved address, he continued to spend nights at the Motel, in violation of his DOC conditions but consistent with his registration address. The jury heard evidence that he was arrested on April 18 and spent twelve days in jail for a community custody violation. The jury heard evidence that after his release from jail, he moved into a second residence that was not preapproved by the Department. The jury heard evidence that Mr. Stewart did not report as required to his CCO on May 8. Finally, the jury heard evidence that on May 8, Mr. Stewart cut off his GPS monitoring system in violation of his community custody conditions. None of this evidence was relevant to whether Mr. Stewart was properly registered. Given the amount of irrelevant evidence, it was essential the jury be instructed on factual unanimity.

The jury also heard evidence, viewed in the light most favorable to the State, that Mr. Stewart factually committed multiple acts of failure to register. Viewed in the light most favorable to the State, the jury could have concluded Mr. Stewart lived the majority of the time at his fiancé's address between April 6 and April 18 without registering her address. The jury could have concluded Mr. Stewart failed to register his address within three business days of being released from custody on May 1. The jury could have concluded Mr. Stewart lived the majority of the time at his fiancé's residence between May 1 and June 6 without registering her address. Each of these factual scenarios represents a different factual basis for the single offense to failure to register and the jury should have been instructed on the need to be unanimous. The failure to provide the jury with a *Petrich* instruction, such as WPIC 4.25, violated his right to factual unanimity.

- b. RCW 9A.44.130 is an alternative crimes statute requiring jury unanimity and the Supreme Court's conclusion that RCW 9A.44.130 is an alternative means statute is incorrect and harmful and should be overruled.

The Washington Supreme Court interpreted RCW 9A.44.130, the failure to register statute, in 2010 and ruled the statute is not an alternative means statute. *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010).

According to the *Peterson* court, although there are a variety of requirements and deadlines that must be complied with, the nature of the criminal act remains the same: the offender moves without registering. *Peterson* at 770. Having concluded RCW 9A.44.130 is not an alternative means statute, the Court further concluded the jury need not be unanimous as to which requirement the defendant violated. Mr. Stewart raises two assignments of error relevant to the *Peterson* case. First, he argues that *Peterson* was incorrectly decided and should be overruled. In the alternative, he argues that substantial evidence does support each of the alternative means.

The holding of *Peterson* should be overruled because it is incorrect and harmful. The standard in Washington for overruling established precedent is that there be a “clear showing that the rule it announced is incorrect and harmful.” *State v. W.R.*, 181 Wn.2d 757336 P.3d 1134 (2014). The *Peterson* case is both incorrect and harmful and should be overruled.

That the *Peterson* case is incorrect is easily demonstrated, as this Court recognized in *State v. Mason*, 170 Wn.App. 375, 285 P.3d 154 (2012). Contrary to the Supreme Court’s assertion, RCW 9A.44.130 is not just a moving without registering statute. Depending upon how one counts the requirements in the statute, there are scores of ways to violate

the failure to register statute, many of which have nothing to do with moving, including:

- (1) Failure to submit a photograph or fingerprints. RCW 9A.44.130(2)(a); *State v. Croften*, 110 Wn.App. 1054 (2002) (unpublished) (affirming conviction of defendant who refused to sit for an updated photograph )
- (2) Failure to re-register after being released from a county jail or state prison. RCW 9A.44.130(1)(1); *State v. Tash*, 3 Wash.App.2d 74, 413 P.3d 1069 (2018).
- (3) Failure to register prior to arriving at a school to attend classes. RCW 9A.44.130(1)(b)(i).
- (4) Failure to register upon termination from employment. RCW 9A.44.130(1)(b)(iii).
- (5) Failure to register a name change. RCW 9A.44.130(7).
- (6) Failure to register one's intent to travel outside the United States. RCW 9A.44.130(3).
- (7) Failure to register within three business days of receiving actual notice of the duty to register. RCW 9A.44.130(4)(c).

As this Court held in *Mason*, the *Peterson* case should be limited to the narrow circumstances of its facts. This Court issued the following caution: “We caution, however, that applying our Supreme Court's

reasoning in *Peterson* that focused solely on Peterson's narrow factual circumstances to other factual circumstances leads to results contrary to the statutory language. The statutory language clearly and expressly establishes multiple circumstances that trigger the registration requirement that do not involve moving from one residence to another (or to none) without notice.” *Mason* at 381.

The plethora of ways an offender may violate the registration statute, some requiring a person to reregister after moving and some not, is echoed in Exhibit 12A and the other registration packets admitted by the State at trial. Exhibit 12A, the packet signed by Mr. Stewart on March 20, contains a detailed, small font, single spaced recitation of the registration requirements that largely mirrors the statute. The jury was allowed to rely on Exhibit 12A as evidence of the registration requirements. *See State v. Taylor*, \_\_ Wn.2d \_\_ (96325-8, decided July 18, 2019) (holding that a no contact order was admissible as an exhibit because it “provides the specific restrictions imposed on a defendant, is closely related to a felony violation of a no-contact order charge, and is evidence of multiple elements of that offense”). The jury was advised of these various requirements and was free to apply them as they wished. The *Peterson* case is incorrect.

The *Peterson* case is also harmful. In the *Armstrong* case, Justice McCloud reviewed the various cases and summed up their holdings with the following rule:

Acts listed in a single statute may be treated as alternative means on which the jury need not be unanimous (as opposed to alternative crimes on which the jury must be unanimous) only where a juror can logically determine beyond a reasonable doubt that the defendant committed the general crime charged, without also determining which of several acts he or she did to commit that general crime. In other words, the constitution does not demand jury unanimity as to means when those means differ as to preliminary factual issues but do not differ as to the bottom line definition of the crime. On the other hand, where those alternatives really describe different bottom line crimes—where a juror cannot determine that the defendant in *fact* committed the crime charged without also determining *how* he or she committed it—the constitution requires unanimity as to this “how.”

*Armstrong* at 352-53 (Justice McCloud, dissenting).

As Justice McCloud recently pointed out, the risk of treating an alternative crimes statute as an alternative means statute is that “the jury would convict not because it agreed that [the defendant] committed a particular criminal act, but instead because it agreed that he must be guilty of something—‘that where there is smoke there must be fire.’” *Armstrong* at 355 (Justice McCloud, dissenting).

Mr. Stewart’s case amply demonstrates the harm that comes from a lack of jury unanimity as to the alternative means. The State presented

evidence that Mr. Stewart was released from jail on May 1 and did not return to the Guesthouse Motel, his last registration address. This fact pattern lends itself to two separate legal theories for failing to register: moving without registering and failing to register upon release from custody. This latter theory became a source of tension during Mr. Stewart's testimony. The prosecutor and Mr. Stewart got into a disagreement over whether Mr. Stewart was required to register upon his release from jail on May 1.

Q. Okay. So assuming that you were verbally advised and the registration packets go over the law, then you are aware that you have three business days to register from the time you move from your last registered address, right?

A. I was not told I had three business days by anybody, ma'am.

Q. Okay. So under -- because you know that then, then what did you believe your requirement was?

A. If I'm getting out of jail, I went downtown just to make sure and talk to the lady.

Q. I'm asking, what do you believe your requirement was?

A. I'm trying to tell you, ma'am. What your --

Q. I'm asking, how many days did you believe you had to go and register, business days? That's my question.

A. When you're released from prison, you have three days. If you go to jail on a DOC violation or any, you know, upon your release, if your address hasn't changed, you don't need to re-register. But if your address changes, you need to re-register, okay?

Q. Okay.

A. My address never changed. I've been registered at Helen's.

RP, 206-08. Later, during recross-examination:

Q. When did you get released?

A. May 1st, I believe.

Q. Okay. And it's your testimony that -- you did just testify to this on cross -- that once you were released from custody, you were required to register within three business days?

A. If you're released from prison, not jail.

Q. That's your understanding, correct?

A. Not for a DOC violation.

Q. Okay. Is that what your understanding of the law is?

A. That's what I was told.

RP, 213.

Washington case law makes clear that Mr. Stewart's understanding of the law is incorrect: the requirement to register within three days of release from custody applies regardless of whether the offender's registration address has changed. *State v. Tash*, 3 Wash.App.2d 74, 413 P.3d 1069 (2018). Although the trial court did not explicitly instruct the jury on this requirement, it is addressed in Exhibit 12A, which reads, in part, "If you are in custody or are transferred to partial confinement (such as work release), you must register within three business days from the time of release from custody or at the time of

transfer to partial confinement, with the official designated by the agency that has jurisdiction over you.” Exhibit 12A, page 6. The prosecutor even referenced the “registration packets” in challenging Mr. Stewart about his understanding of the registration requirements.

Another example of a possible violation gleaned from both Jury Instruction #8 and Exhibit 12A is the requirement that offenders be subject to random residence checks. Jury Instruction #8, paragraph 3, reads: “[T]he requirement that, in conjunction with an address verification by the county sheriff, the defendant update the following information: name; any aliases used; residential address, or if the defendant lacks a fixed residence, where the defendant plans to stay; date and place of birth; place of employment; crime for which convicted; date and place of conviction; social security number; photograph; and fingerprints.” Exhibit 12A, page 6, reads, “Sheriff’s deputies or police officers may come to your home to verify your address. You may be required to verify and update your registration information at that time in conjunction with the address verification.” In this case, the jury heard testimony from Fife Police Officer Randall Fleming, who went to the Guesthouse Motel and Mr. Stewart was not present and did not verify any of his data. The jury could have interpreted Exhibit 12A as requiring Mr. Stewart to be present and

ready to verify his address at the time of the visit and his failure to do so constituted a violation of the statute.

The jury instructions did nothing to clear up this confusion. The “to convict” instruction required to the jury to find that “during the time period, the defendant knowingly failed to comply with the requirement of sex offender registration” without defining what those requirements were. CP, 54. Jury instruction # 8 lists twelve different ways the registration statute can be violated, but many of those methods are repetitive, irrelevant to Mr. Stewart’s case, or ambiguous. The first paints the registration requirements with a very broad brush when it states that an offender must comply with “the requirement that the defendant register with the county sheriff for the defendant’s county of residence.” This ambiguous instruction, coupled with the detailed information contained in Exhibit 12A, leaves the jury guessing as to the State’s theory and creates a very real possibility that the jury convicted without being unanimous as to the law violation.

RCW 9A.44.130 is not an alternative means statute, the conclusion of the Supreme Court in *Peterson* notwithstanding. *Peterson* is incorrect and harmful and should be overruled.

- c. In the alternative, the alternative means listed in Jury Instruction #8 are not supported by substantial evidence.

In the event this Court declines to overrule *Peterson*, reversal of Mr. Stewart's case is still required. Jury instruction #8 lists twelve different means by which Mr. Stewart could have violated the failure to register statute. Of these means, fully half of them are not supported by substantial evidence. The jury did not hear any evidence of the following possible violations, indicated by strikethroughs.

1. the requirement that the defendant register with the county sheriff for the defendant's county of residence.
2. ~~the requirement that the defendant provide the following information when registering: name; any aliases used; complete and accurate residential address, or if the defendant lacks a fixed residence, where the defendant plans to stay; date and place of birth; place of employment; crime for which convicted; date and place of conviction; social security number; photograph; and fingerprints.~~
3. the requirement that, in conjunction with an address verification by the county sheriff, the defendant update the following information: name; any aliases used; residential address, or if the defendant lacks a fixed residence, where the

defendant plans to stay; date and place of birth; place of employment; crime for which convicted; date and place of conviction; social security number; photograph; and fingerprints.

4. the requirement that the defendant, moving to a new county, register within three business days of moving with the county sheriff of the new county of residence.
5. the requirement that the defendant, upon moving to a new county, provide in person or by certified mail with return receipt requested, signed written notice within three business days of the change of address to the county sheriff with whom the defendant last registered.
6. ~~the requirement that the defendant provide, in person or by certified mail with return receipt requested, signed written notice of a change of address to the county sheriff within three business days of moving to a new residence within the same county.~~
7. the requirement that the defendant, upon moving to a new county, provide in person or by certified mail with return receipt requested, signed written notice within three business

days of the change of address to the county sheriff with whom the defendant last registered.

8. ~~the requirement that the defendant, who had a fixed residence but later lacked one, provide signed written notice to the sheriff of the county where the defendant last registered within three business days after ceasing to have a fixed residence.~~
9. ~~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.~~
10. the requirement that the defendant, lacking a fixed residence, comply with a request from the county sheriff of an accurate accounting of where the defendant stayed during the week.
11. ~~the requirement that the defendant, lacking a fixed residence and under the supervision of the department of corrections, register with the county sheriff of the county of the defendant's supervision.~~
12. the requirement that the defendant provide signed written notice of his change of address to the county sheriff within three business days of moving from the registered address.

Essentially, Jury Instruction #8 is a laundry list of different ways the registration can be violated. Because half of the means listed in Jury Instruction #8 have no applicability to Mr. Stewart's case, this Court must still reverse.

It is worthwhile to juxtapose the "to convict" instruction from Mr. Stewart's case to that of *State v. Batson*, 194 Wn.App. 326, 377 P.3d 238 (2016). The "to convict" instruction in Mr. Stewart's case simply states, "That during that time period, the defendant knowingly failed to comply with the requirement of sex offender registration." In contrast, the jury instruction in *Batson* states, "That during that time period, the defendant knowingly failed to comply with a requirement of sex offender registration: A requirement of sex offender registration is that a person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered." As can be seen, the two jury instructions begin with the exact same language, but *Batson* has additional language setting forth the precise violation of RCW 9A.44.130 alleged. This additional language is not surplusage. It is designed to ensure that the jury only convicts on a theory for which there is substantial evidence.

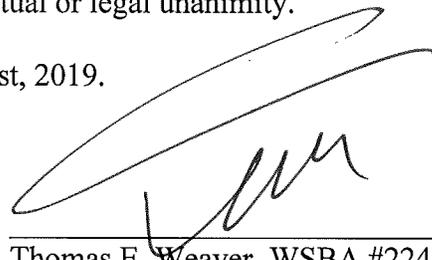
The trial court instructed the jury on six alternative means for violating RCW 9A.44.130 for which there was not substantial evidence. Assuming that RCW 9A.44.130 is an alternative means statute, each of the

alternative means must still be supported by substantial evidence.  
Reversal is required.

D. Conclusion

This case should be dismissed without prejudice for a defective Information. In the alternative, a new trial should be ordered because the verdict is not supported by either factual or legal unanimity.

DATED this 7<sup>th</sup> day of August, 2019.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant/Appellant

**THE LAW OFFICE OF THOMAS E. WEAVER**

**August 07, 2019 - 2:43 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
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**Appellate Court Case Title:** State of Washington, Respondent v. Michael Jay Stewart, Appellant  
**Superior Court Case Number:** 18-1-02450-3

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

STATE OF WASHINGTON, ) Court of Appeals No.: 53284-1-II  
 )  
Plaintiff/Respondent, )  
 )  
vs. ) DECLARATION OF SERVICE OF  
 ) SUPPLEMENTAL DESIGNATION OF  
 ) CLERK'S PAPERS AND BRIEF OF  
 ) APPELLANT  
MICHAEL JAY STEWART, )  
 )  
Defendant/Appellant. )

STATE OF WASHINGTON )  
 )  
COUNTY OF KITSAP )

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On August 7, 2019, I e-filed the Supplemental Designation of Clerk's Papers and the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated copies of said documents to be sent to Michelle Hyer of the Pierce County Prosecuting Attorney's Office via email to: [PCpatcecf@co.pierce.wa.us](mailto:PCpatcecf@co.pierce.wa.us) through the Court of Appeals transmittal system.

On August 7, 2019, I e-filed the Supplemental Designation of Clerk's Papers with Pierce County Superior Court through the LINX electronic filing system.

On August 7, 2019, I deposited into the U.S. Mail, first class, postage prepaid, true and correct copies of the Supplemental Designation of Clerk's Papers and the Brief of Appellant to the defendant:

////

////

1 Michael Jay Stewart, DOC #944400  
2 Coyote Ridge Corrections Center  
3 PO Box 769  
Connell, WA 99326

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

6 DATED: August 7, 2019, at Bremerton, Washington.

7   
8 \_\_\_\_\_  
Alisha Freeman

**THE LAW OFFICE OF THOMAS E. WEAVER**

**August 07, 2019 - 2:43 PM**

**Transmittal Information**

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