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NO. 53284-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JAY STEWART,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge van Doorninck

No. 18-1-02450-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

The defendant Michael Stewart has a lifetime duty to register as a sex offender. He registered on March 20, 2018, at a motel in Pierce County. He stopped living at this address on April 6, 2018, and did not subsequently register at a new address or as transient. During the charging period of May 9, 2018, to June 5, 2018, he did not notify law enforcement of his location.

At trial, the jury was provided twelve provisions of RCW 9A.44.130 to determine if Stewart failed to comply with his registration requirements. Ten of these provisions described requirements of registration depending on Stewart's living status, and two described information he was required to provide law enforcement. These provisions were not alternative means because they related to Stewart's single and continuous criminal act of failing to notify law enforcement of his location. Because they were not alternative means, substantial evidence was not required for each provision.

The Washington Supreme Court case supporting the State's position that failure to register is not an alternative means crime on these facts was correctly decided and is binding precedent for this Court. This Court should decline to consider Stewart's improperly developed argument the information in his case did not contain the essential elements of the crime. This Court should deny Stewart's claims and affirm his conviction.

II. RESTATEMENT OF THE ISSUES

- A. The multiple provisions of the registration statute provided to the jury in Stewart's case related to the single and continuous criminal act of a registered sex offender failing to notify law enforcement of his location and did not constitute alternative means.
- B. This Court is bound by the Washington Supreme Court's decision in *Peterson*, precedent that is neither incorrect nor harmful.
- C. This Court should decline to consider Stewart's undeveloped argument the information in his case did not contain the essential elements of failure to register.

III. STATEMENT OF THE CASE

A. Facts

The defendant, Michael Stewart, was convicted of rape in the first degree in 1988, and failure to register as a sex offender in 2013 and 2014. CP 79-80. He has a lifetime duty to register as a sex offender. CP 35, 55. Stewart has previously registered in different counties and understands he must register in the county in which he is living. RP 139, 203. Stewart's ongoing duty to register included the period between May 9, 2018, through June 5, 2018. CP 36, 55.

In early March 2018, Stewart lived in King County, where he was registered as a sex offender and supervised by the Department of Corrections (DOC). RP 79, 101-02, 137-39, 185-86. On March 14, 2018, Stewart sought DOC's approval to move to his mother's address in Pierce County. RP 40, 84. His mother lived in room 162 of the Guesthouse Motel

at 3021 Pacific Highway South in Fife, Washington. RP 84. Stewart was granted permission to live at the location while DOC investigated its suitability as a residence. RP 84, 86.

Stewart registered as a sex offender at the Pierce County Sheriff's Department on March 20, 2018, listing the Fife Guesthouse Motel as his residence. RP 45-46, 84, 137, 139; Ex 12A. Stewart reported his previous location was "homeless in King County." RP 139. He lived at the motel until April 6, 2018, when his community corrections officer (cco) informed him the address had not been approved by DOC and he needed to return to King County. RP 86-87, 93.

Stewart subsequently stayed at a few different addresses in Auburn and Federal Way. RP 91-92, 94. DOC allowed him to visit his mother in Fife during the day but prohibited him from staying overnight. RP 91. Stewart stayed overnight at the Guesthouse Motel from April 15, 2018, to April 18, 2018. RP 93-95. He was arrested on April 18, 2018, for violations of his community custody and incarcerated until May 1, 2018. RP 95.

Stewart met with his cco upon his release from custody on May 1, 2018. RP 98-99. On the same day, his mother moved out of the Guesthouse Motel in Fife. RP 68; Ex 3. His cco told him to register as a sex offender in King County. RP 98-99. Stewart told his cco he planned to temporarily stay at his fiancé's house in Auburn, another address that wasn't approved by

DOC as a permanent residence. RP 98-101, 103. GPS showed him at that location from May 1, 2018, to May 3, 2018, and at two additional locations from May 4, 2018, to May 6, 2018. RP 107-08. Stewart failed to appear to his scheduled DOC meeting on May 7, 2018, and cut off his GPS bracelet. RP 100. He had no further contact with his cco. RP 100-01.

The Fife Police Department performed a sex offender address verification check at Stewart's last registered address, room 162 at the Fife Guesthouse Motel, on May 17, 2018. RP 113-14. Stewart was not living at the hotel at the time. RP 68, 114-15. Offender Watch, a national database used in Washington State to monitor registered sex offenders, showed that Stewart had not registered in Pierce County or in King County subsequent to his March 20, 2018, registration at the Guesthouse Motel. RP 144-45, 168-70.

Stewart testified at trial. RP 184-213. He said that after his release from custody in King County on May 1, 2018, he went downtown to see if he had to register. RP 207. He also claimed he didn't believe he had to register in King County, despite his March 20, 2018, registration in Pierce County, because he had at some point previously registered at his fiancé's King County residence in Auburn. RP 101-02, 139, 209. He admitted to cutting off his GPS bracelet and absconding from DOC supervision in May

2018, but claimed he was living at his fiancé's residence at that time. RP 210-12.

B. Procedural History

Stewart was charged with violating RCW 9A.44.132 by failing to comply with the registration requirements of RCW 9A.44.130 between May 9, 2018, and June 5, 2018. CP 3. The State also alleged Stewart had previously been convicted of failure to register as a sex offender on two or more prior occasions. CP 3. Stewart asserted a defense of general denial. CP 103.

Trial took place from January 15, 2019, to January 16, 2019. RP 1-240. Stewart stipulated to the following: he had previously been convicted of a Class A felony sex offense, he had more than one conviction for a sex offense, he was required to register as a sex offender for life, his duty to register included the charging period, and he had two or more prior convictions for failure to register. CP 35-37, 55. The jury was instructed that to find Stewart guilty they had to find he knowingly failed to comply with a requirement of sex offender registration. CP 54. The applicable requirements of registration were defined in Jury Instruction #8. CP 50-51. Stewart did not object to any of the jury instructions. RP 215.

The jury found Stewart guilty on January 17, 2019. RP 242. The jury also found that he had been convicted of failure to register on two or more

prior occasions. RP 242. Sentencing took place on March 8, 2019. RP 248. The court sentenced Stewart to 57 months incarceration, the high end of the standard sentencing range. RP 256. The court found this sentence was appropriate given his extensive criminal history and the fact of his supervision by DOC at the time of the crime. RP 256. Stewart timely appealed. CP 95.

IV. ARGUMENT

- A. The multiple provisions of the registration statute provided to the jury in Stewart's case related to the single and continuous criminal act of a registered sex offender failing to notify law enforcement of his location and did not constitute alternative means.**

Failure to register as a sex offender is not an alternative means crime when the offense is based upon a single criminal act or continuous course of conduct that violates multiple provisions of the statute, as occurred in Stewart's case. A person charged with a crime in Washington State has the right to a unanimous jury verdict. *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015) (citing Wash. Const. art I. § 21). A crime is an alternative means crime when the offense can be committed in multiple ways. *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (citing *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007)). In these cases, a jury need not be unanimous as to the particular means of committing the crime so long as substantial evidence supports all the alternatives submitted

to the jury. *State v. Armstrong*, 188 Wn.2d 333, 340, 344, 394 P.3d 373 (2017).

Whether an offense is an alternative means crime is judicially determined through statutory analysis. *Peterson*, 168 Wn.2d at 769. Questions related to statutory interpretation are reviewed de novo. *State v. Butler*, 194 Wn. App. 525, 528, 374 P.3d 1232 (2016). In determining whether an offense is an alternative means crime, the court examines whether each means of committing the crime constitutes a distinct criminal act. *Sandholm*, 184 Wn.2d at 734. “The more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.” *Id.*

The Washington State Supreme Court recently conducted an alternative means analysis for two crimes in *State v. Barboza-Cortes*. *State v. Barboza-Cortes*, No. 96397-5, 451 P.3d 707 (2019). The Court held that unlawful possession of a firearm in the second degree and identity theft in the second degree are not alternative means crimes because the multiple ways each crime can be committed constitute variances of the same criminal act. *Id.*, at 710-11 (2019). Regarding unlawful possession of a firearm, the Court noted that although there are “subtle distinctions in aspects of ownership, possession, and control,” all describe nuances of the same

criminal act of accessing guns when prohibited. *Id.* Similarly, the Court found that although the identity theft statute distinguishes “means of identification” and “financial information,” the specific criminal act of using another’s information to commit a crime is what is prohibited by the offense. *Id.* The different descriptions in each statute depict variations of the same criminal conduct.

It is possible for a single criminal statute to contain both alternative means as well as provisions describing nuances of the same criminal act. In *State v. Owens*, the Washington Supreme Court found that the first degree trafficking in stolen property statute includes two alternative means within a list of eight methods of committing the crime. *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014); RCW 9A.82.050. The Court found that the first seven methods essentially described the same criminal conduct given how closely related the terms are, where the last describes a different criminal act, an alternative means. *Id.*

A person is guilty of failing to register if he or she is required to register and knowingly fails to comply with any of the requirements listed in RCW 9A.44.130. RCW 9A.44.132. Many of these requirements involve notifying law enforcement of where one is living. Registration is required when moving from one residence to another, when moving from one county to another, when ceasing to have a fixed residence, when registering as

transient, after release from custody, and when moving to a new state. RCW 9A.44.130(4)(a)(i), (vi), (vii), and (viii), (5)(a) and (b), and (6)(a) and (b). Other provisions require offenders to register for certain activities, such as attending school, working in an institution of higher education, or traveling outside the United States. RCW 9A.44.130(1)(b)(i) and (3). Two provisions of the statute outline what information an offender must provide at registration or when contacted by law enforcement for an address verification check. RCW 9A.44.130(2)(a) and (b).

In *State v. Peterson*, the Washington Supreme Court held that failure to register as a sex offender is not an alternative means crime for provisions describing variations of the single criminal act of moving “without alerting the appropriate authority.” *Peterson*, 168 Wn.2d at 770. This rule is consistent with case law holding that the important consideration for whether a crime includes alternative means is whether separate provisions criminalize substantially similar conduct or significantly varying criminal acts. See *Sandholm*, 184 Wn.2d at 734; *Barboza-Cortes*, 451 P.3d at 710-11; *Owens*, 180 Wn.2d at 99. *Peterson* recognizes that the failure to register statute contains many provisions describing nuances of the same criminal act of failing to notify law enforcement of one’s location, and that multiple provisions may be violated by the same criminal conduct.

The *Peterson* decision is also consistent with this Court's holding in *Green* that failure to register is an ongoing course of conduct. *State v. Green*, 156 Wn. App. 96, 96, 230 P.3d 654 (2010). This means that when there is a span of time a person remains unregistered, many different provisions of RCW 9A.44.130 relating to residence may be violated if the offender changes location during this time, although the criminal conduct of failing to notify law enforcement remains the same. *Id.*, at 101. For example, during an uninterrupted time period, an offender may move out of a residence, become transient, and move to a different county, all variations of the same unceasing criminal act of failing to alert authorities of one's location. RCW 9A.44.130(4)(vi), (5)(b), (6)(a), (6)(b).

The holding in *Peterson* is also correct because it may be impossible to prove which specific provisions an offender has violated during a period of time he or she is unregistered. The failure to register statute criminalizes the failure to do an act that is statutorily required. RCW 9A.44.132. The specifics of the required act may differ depending on the offender's residential status. RCW 9A.44.130. As the court noted in *Peterson*, requiring the State to prove which specific provision was violated means that "an offender who successfully hides his whereabouts after moving cannot be convicted of failure to register despite clear evidence that he

failed to register within any statutorily prescribed deadline.”¹ *Peterson*, 168 Wn.2d at 774. Holding that the failure to register statute is an alternative means crime requiring substantial evidence for each means submitted to the jury would render the charge impossible to prove when there is no information about whether an offender was transient, in a new residence, or in a new county. *Id.*

This Court has previously noted that not all means of violating RCW 9A.44.130 arise from the criminal act of failing to alert authorities of one’s whereabouts. *State v. Mason*, 170 Wn. App. 375, 382, 285 P.3d 154 (2012). Whether the provisions of RCW 9A.44.130 requiring registration upon enrollment in higher education, accepting employment in higher education, or traveling outside the United States are alternative means to the provisions requiring notice of one’s location is a question yet unanswered by our courts. *Id.*, at 381. Given the factual scenario in the present case, however, it is not a question that need be answered here, despite Stewart’s argument to the contrary. Br. of Appellant at 15-17.

Like the defendant in *Peterson*, Stewart was convicted of failure to register because he committed a single continuous criminal act: failing to notify law enforcement of his whereabouts. In Stewart’s case, this act was

¹ This quotation is taken from the portion of *Peterson* discussing the essential elements of failure to register, not alternative means, but the point is applicable to the present analysis. *Peterson*, 168 Wn.2d at 774.

continuous and unchanging during the charging period of May 9, 2018, to June 5, 2018. Stewart stopped living at his last registered address, room 162 at the Fife Guesthouse Motel, on April 6, 2018, and was required thereafter to apprise law enforcement of his updated location within prescribed time periods. There was no evidence he did so, before or during the charging time period.

All of the “requirements of registration” the jury was provided to determine whether Stewart violated the statute were related to his failure to notify law enforcement of his location. CP 50-51. Jury Instruction #8 listed the different registration requirements depending on Stewart’s living situation, whether a fixed residence, transient, or residency in a new county. CP 50-51 (1, 4, 5, 6, 7, 8, 9, 10, 11, 12).² The instruction also included the provisions requiring him to provide or update certain information at registration or during an address verification check. CP 50-51 (2, 3). Stewart violated or potentially violated one or more of these requirements through his single continuing act of failing to notify law enforcement of his whereabouts. Although two involve what information is required to be provided to law enforcement, these provisions are also violated when a person does not register or live at an address when there is an address

² Requirement #7 is a duplicate of requirement #5.

verification check. These requirements were not independent of Stewart's duty to provide his residency information to law enforcement, and were violated when he failed to do so. The provisions in Jury Instruction #8 were facets of the same criminal conduct, not distinct acts. See *Sandholm*, 184 Wn.2d at 734.

Because Stewart's location was unknown during the charging period, the State could not specify exactly which or how many of the provisions he violated. But there was no confusion about his alleged criminal conduct or a suggestion he committed different criminal acts. The provisions the jury considered were variances of or related to the same criminal conduct, failing to notify law enforcement of location, and they consequently did not constitute alternative means under *Peterson*. *Peterson*, 168 Wn.2d at 770.

Even if one of the registration requirements provided to the jury was inapplicable, the error is harmless if it did not affect the verdict. *State v. A.M.*, 194 Wn.2d 33, 41, 448 P.3d 35 (2019) (citing *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)) (an erroneous jury instruction is subject to harmless error analysis). Given that Stewart's criminal conduct was unquestionably based on having disappeared from law enforcement's view for a continuous period of time, it is implausible the inclusion of an irrelevant registration requirement affected the verdict. There was no

requirement, as Stewart argues, that substantial evidence support each of the provisions provided to the jury because the jury was not choosing between alternative means. *Armstrong*, 188 Wn.2d at 340; Br. of Appellant at 15. Even if this Court finds there was an alternative means erroneously submitted to the jury, the verdict may be affirmed if there is no danger it was based on that means. *State v. Lobe*, 140 Wn. App. 897, 907, 167 P.3d 627 (2007).

Stewart's argument his conviction must be reversed because the jury had access to the text of the registration statute in the admitted registration paperwork also fails. Br. of Appellant at 17. The jury is presumed to follow the court's proper instructions. *State v. Anderson*, 153 Wn. App. 417, 428-29, 220 P.3d 1273 (2009). The jury presumably did not base its verdict on provisions of the statute that weren't provided in the jury instructions. *Id.* The jury also presumably did not base its verdict on any discussion during trial of requirements not included in the instructions. Br. of Appellant at 20. Stewart's reliance on *Taylor* is misplaced, as in that case the no contact order was factually probative, not legally instructive. *State v. Taylor*, 193 Wn.2d 691, 702-03, 444 P.3d 1194 (2019). Admission of the registration documents in this case was similarly based on factual relevance, not as a legal reference for the jury.

Peterson correctly concluded that failure to register as a sex offender is not an alternative means crime where the provisions provided to the jury relate to the single criminal act of moving without alerting the appropriate authority. This case falls within *Peterson's* framework given Stewart's unchanging conduct of failing to notify law enforcement of his location during the charging period. This Court should reject Stewart's claim that the provisions of 9A.44.130 provided to the jury are alternative means.

B. The Washington Supreme Court correctly decided *Peterson* and the case is binding precedent for this Court.

The facts of Stewart's case fall under the binding precedent of *Peterson* given that the provisions submitted to the jury related to Stewart's single continuous criminal act of failing to notify law enforcement of his whereabouts. This Court is required to abide by a decision of the Washington Supreme Court and cannot overrule its precedent. *State v. Jussila*, 197 Wn. App. 908, 931, 392 P.3d 1108 (2017) (citing *State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997)). Furthermore, *Peterson* is neither incorrect nor harmful and should not be reversed.

The principle of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (quoting *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997)).

To maintain stability in the legal system, stare decisis discourages overruling of precedent except in narrow circumstances. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). A prior decision will only be set aside if “so problematic it *must* be rejected, despite the many benefits of adhering to precedent...” *Id.* (quoting *Edie*, 131 Wn.2d at 831 (1997)) (internal quotations omitted) (emphasis in original).

There must be a clear showing a prior rule is *both* incorrect and harmful before it is set aside. *Barber*, 170 Wn.2d at 864. Incorrect may mean conflicting with preceding case law, incompatible with the state constitution or a statute, or inconsistent with public policy. *Id.* Harmful generally means “detrimental to the public interest.” *Id.*, at 865.

Stewart cannot show that *Peterson* is incorrect *and* harmful. First, it is not incorrect. As this Court explained in *Mason*, *Peterson* is limited to its specific facts relating to a single criminal act. *Mason*, 170 Wn. App. at 382. This clarification addresses the concerns Stewart raises. Br. of Appellant at 15-16. Second, Stewart has not shown that *Peterson* is harmful. Rather, reversing *Peterson* would be harmful. To treat failure to register as an alternative means crime, rendering it impossible to prove when an offender “successfully hides his whereabouts,” would defeat the statute’s purpose in “aid[ing] law enforcement in keeping communities safe by requiring offenders to divulge their presence in a particular jurisdiction.” *Peterson*,

168 Wn.2d at 773-74. This Court should abide by the binding Washington Supreme Court precedent in *Peterson*.

C. This Court should decline to consider Stewart's improperly developed claim the information in his case fails to state the essential elements of the crime of failure to register.

Stewart's claim the information does not contain all the essential elements of failure to register should be summarily rejected for lack of meaningful analysis or citation to authority. Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant)); RAP 10.3(a). See also *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), *reversed by State v. Stubbs*, 170 Wn.2d 117, 240 P.3d 143 (2010) (“[p]assing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review.”)

Stewart alleges the information in his case failed to include all the essential elements of failure to register because it did not include the specific provision or provisions he was accused of violating. Br. of

Appellant at 1, 10. Stewart cites authority only for the rule that an information must contain the essential elements of the offense or it must be dismissed with prejudice. Br. of Appellant at 10. He then argues that the information in his case should have listed the provision or provisions he was accused of violating but includes no analysis or further citation supporting this argument. Br. of Appellant at 11. He ends by referencing his alternative means argument elsewhere in briefing. Br. of Appellant at 11.

Stewart's claim is unsupported. This Court rejected a similarly unsupported claim in *Mason*. *Mason*, 170 Wn. App. at 383-85. In *Mason*, the defendant argued the requirement to register in the county of one's residence was an essential element. *Id.*, at 384. This conclusory argument was rejected for lack of any citation to authority. *Id.* This Court also emphasized that the essential elements analysis is separate from an alternative means analysis and the two cannot be conflated. *Id.*, at 383.

Stewart's conclusory and undeveloped essential elements argument should be rejected for the same reasons as in *Mason*. Stewart does not provide analysis or authority for his argument that the specific provision or provisions of RCW 9A.44.130 he violated should have been in the information. Furthermore, like the defendant *Mason*, he erroneously attempts to buttress his essential elements argument by conflating it with

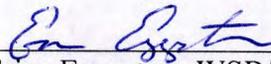
the alternative means analysis. This Court should disregard Stewart's claim that the information was defective for lack of proper development.

V. CONCLUSION

The defendant, Michael Stewart, is a sex offender with a lifetime duty to register. He did not notify law enforcement of his location during the charging period of May 9, 2018, to June 5, 2018. His conviction was based on this specific, unchanging, and continuous criminal conduct. Though Stewart potentially violated several different provisions of RCW 9A.44.130, binding precedent in *Peterson* holds that these are not alternative means. This Court should not overrule *Peterson*, disregard Stewart's unsupported essential elements claim, and affirm his conviction.

RESPECTFULLY SUBMITTED this 3rd day of January, 2020.

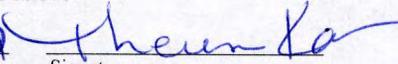
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PIERCE COUNTY PROSECUTING ATTORNEY

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