

**FILED**

NO. 332985-III

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

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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STATE OF WASHINGTON,

Respondent,

v.

WARREN EUGENE MCCREA

Appellant.

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**BRIEF OF APPELLANT, WARREN E. MCCREA**

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Submitted by:

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## **I. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

### **A. ASSIGNMENTS OF ERROR**

1. The information was defective when it did not allege Mr. McCrea acted knowingly.

2. The trial court erred when it instructed the jury of the statutory definition of residence.

### **B. ISSUES PRESENTED**

1. Was the information defective when it did not allege that Mr. McCrea acted knowingly?

2. Did the trial court err when it used the statutory definition of residence?

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

### **A. Factual History.**

Pursuant to an Information that was filed on October 14th, 2014 in the Okanogan County Superior Court, Warren McCrea ("Mr. McCrea") was charged with one count of Failure to Register as a Sex Offender<sup>1</sup>. CP at 36-37. The State, in an effort to broaden the timeframe in which the allegation occurred, filed an amended the Information on March 9th, 2015. CP at 38-9; RP at 4. Trial was conducted on March 10th and

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<sup>1</sup> RCW 9A.44.130(2); RCW 9A.44.132

March 11th, 2015. RP at 1-189. On the first day of trial, prior to voir dire, the court made inquiries into the submitted jury instructions. RP at 12. The court noted that the defense did not submit proposed jury instructions to the court. *Id.* Ultimately, the defense stated to the court that there were no objections to the jury instructions provided by the State. RP at 13.

On March 11th, 2015, the court provided both parties with the jury instructions the court intended on providing to the jury. RP at 143; CP 13-33. The court stated, while it may have changed the order of the instructions that the State provided, there were no substantive changes made. RP at 143. The court, inquired, as to whether either party had exceptions or objections to the proposed jury instructions, to which, both parties replied it did not. RP at 143-44. The jury was seated and the court proceeded to recite the jury instructions for the jury's consideration. RP at 146-59; CP at 13-33. While reciting the jury instructions, the court read to the jury, instruction number 12 which defined the term "fixed residence." RP at 155; CP at 27.

The jury, ultimately, returned a verdict of guilty as to count 1. CP at 35. Finally, the jury also responded to a special verdict inquiry in the affirmative. CP at 34.

**B. Procedural History.**

An Information was filed on October 14th, 2014 in the Okanogan County Superior Court, where Mr. McCrea was charged with one count of Failure to Register as a Sex Offender<sup>2</sup>. CP at 36-37. Additionally, an amended Information was filed on March 9th, 2015 charging Mr. McCrea with one count of Failure to Register as a Sex Offender<sup>3</sup>. CP at 38-9. Trial was conducted on March 10th, 2015 and March 11th, 2015. RP at 1-189. The court's jury instructions were filed on March 11th, 2015. CP at 13-33. Ultimately, the jury returned a verdict of guilty and special verdict answer on March 11th, 2015. CP at 34-35. The Okanogan Superior Court filed its Felony Judgment and Sentence on March 18th, 2015. CP at 2-12. Consequently, the Notice of Appeal was filed on March 20th, 2015. CP at 1.

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<sup>2</sup> RCW 9A.44.130(2); RCW 9A.44.132

<sup>3</sup> RCW 9A.44.130(2); RCW 9A.44.132

### **III. DISCUSSION**

#### **A. The information was defective when it did not allege Mr. McCrea acted knowingly.**

Mr. McCrea's conviction should be reversed without prejudice because the information charging Mr. McCrea with Failure to Register as Sex Offender was defective because the State failed to allege that Mr. McCrea acting knowingly in the Information.

RAP 2.5(a) states, in relevant part, "a party may raise the following claimed errors for the first time in the appellate court:

. . . (3) manifest error affecting a constitutional right."

Additionally, the Sixth Amendment to the United States Constitution provides in part, "In all . . . prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." Furthermore, the Washington State Constitution, Article I, section 22 states, in part, "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him."

As it relates to the constitutional requirements of the charging document, "a charging document is constitutionally adequate *only* if all essential elements of a crime, statutory and

nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *State v. Peterson*, 145 Wn. App. 672, 675, 186 P. 3d 1179, 1180 (2008)(citing *State v. Vangerpen*, 125 Wn. 2d 782, 787, 888 P. 2d 1177 (1995)). Additionally, "[w]here, as here, the defendant challenges the sufficiency of an information for the first time on appeal, the court construes the document liberally in favor of validity." *State v. Brown*, 169 Wn. 2d 195, 197, 234 P. 3d 212, 213-14 (2010). In making this determination, "the court asks (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information, and, if so, (2) whether the defendant nonetheless was actually prejudiced by the unartful language." *Id.* at 198.

**i. The essential elements of  
RCW 9A.44.130(4) do not appear  
in any form in the Information.**

"All of the essential elements of a crime must be alleged in the information." *State v. Brown*, 169 Wn. 2d 195, 197, 234 P. 3d 212, 213 (2010)(citing *State v. Kjorsvik*, 117 Wn. 2d 93, 97, 812 P. 2d 86 (1991)(citing also CrR 2.1(a)(1)).

To illustrate, in *Brown*, "Brown argued for the first time that the information was defective in failing to allege that he acted *knowingly*, an essential element of the crime of escape." 169 Wn. 2d 195, 197, 234 P. 3d 212, 214 (2010). The court found that the charging document, even after construing the information liberally, "did not allege *knowledge* in the information by any fair construction." *Id.* at 198 (emphasis added). Consequently, "[b]ecause the information did not adequately apprise Brown of the elements of the crime, the charge must be dismissed without prejudice." *Id.*

Additionally, to illustrate a fact pattern more on point, the court in *State v. Peterson* was tasked with a similar inquiry. 145 Wn. App. 672, 186 P. 3d 1179 (2008). In *Peterson*, the defendant was charged with failure to register as a sex offender. Likewise, the State failed to allege in the information that the defendant acted *knowingly*. *Id.* at 675. Specifically, the State alleged:

Peterson was charged with a general violation of RCW 9A.44.130 - the State did not specify whether Peterson moved to a new fixed address or became homeless. The second information alleges that Peterson "having registered as residing at a fixed residence, did, on or about the week of November 2, 2015 to the week of November 22, 2005, cease to reside at the residence and did fail to provide written notice to the county sheriff's office within

72 hours after ceasing to reside there; proscribed by RCW 9A.44.130, a felony"

*Id.*

In this instance, the court is faced with an identical inquiry as to that addressed in *Peterson*. *See Id.* On October 14th, 2014, the State filed an information charging Mr. McCrea with one count of Failure to Register as a Sex Offender. CP at 36-37. Specifically, the State alleged:

On or about the 20th day of August, 2014, in the County of Okanogan, State of Washington, the above-named Defendant having been convicted on or about the 4th day of May, 2005, of a sex offense or kidnapping offense that would be classified as a felony under the laws of Washington, to-wit, two counts of Rape of a Child in the first degree, Grant County Superior Court, Juvenile Department, #04-8-00682-0, being required to register pursuant to RCW 9A.44.130, and having registered as residing at a fixed residence, did, on or about the 20th day of August, 2014, cease to reside at that residence and did fail to provide written notice to the county sheriff within 72 hours of moving to a new fixed residence within the same county, or within 48 hours after ceasing to have a fixed residence, or within 10 days after moving to a new fixed residence in a new county; contrary to Revised Code of Washington 9A.44.130(5) and (6).

*Id.* Additionally, the State filed an amended information on March 9th, 2015 which alleged:

On or about the 20th day of August, 2014, in the County of Okanogan, State of Washington, the above-named Defendant having been convicted on or about the 4th day of May, 2005, of a sex offense or kidnapping offense that would be classified as a felony under the laws of

Washington, to-wit, two counts of Rape of a Child in the first degree, Grant County Superior Court, Juvenile Department, #04-8-00682-0, being required to register pursuant to RCW 9A.44.130, and having registered as residing at a fixed residence, did, on or about the 20th day of May, 2014, and November 24, 2014 cease to reside at that residence and did fail to provide written notice to the county sheriff within 72 hours of moving to a new fixed residence within the same county, or within 48 hours after ceasing to have a fixed residence, or within 10 days after moving to a new fixed residence in a new county; contrary to Revised Code of Washington 9A.44.130(5) and (6).

CP at 38-9.

Clearly, the State did not allege that Mr. McCrea acted knowingly in failing to register as a sex offender in either information filed, which is contrary to the elements listed in the statute. *See Id.* Specifically, RCW 9A.44.132 states, in part, "A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and *knowingly* fails to comply with any of the requirements of RCW 9A.44.130." *Emphasis added.*

In fact, in viewing both the information and the amended information, in a liberal manner, the State does not allege a knowledge element in the slightest. As such, Mr. McCrea was not sufficiently apprised of the charge he was facing in violation of Mr. McCrea's constitutional right "to demand the nature and

cause of the accusation against him" as stated in Article I, section 22 of the Washington State Constitution.

Now, the State may argue, as it did in *Brown*, that citing the statute in the information cured the deficiency. *See Brown*, 169 Wn. 2d 195, 198, 234 P. 3d 212, 214 (2010). However, the court in *Brown* determined "mere reference to a statute does not sufficiently allege the essential elements." *Id.* (*citation omitted*).

Additionally, the State may argue that the "to convict" jury instruction provided notice to the defendant that the State must prove that Mr. McCrea acted knowingly and therefore the deficiency in the information had been corrected. However, this contention would be misplaced, as well, because "this court has specifically held that an information which is constitutionally defective because the information fails to state every statutory element of a crime *cannot* be cured by a jury instruction which itemizes those elements." *State v. Holt*, 104 Wn. 2d 315, 322, 704 P. 2d 1189, 1193 (1985).

**ii. The appellant does not need to establish prejudice when the information is constitutionally deficient.**

In determining whether a charging document is insufficient "the court asks (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information, and if so, (2) whether the defendant nonetheless was actually prejudiced by the unartful language used." *State v. Brown*, 169 Wn. 2d 195, 198, 234 P. 3d 212, 214 (2010).

In this instance, the information was constitutionally deficient because it did not, in any manner of speaking, allege that Mr. McCrea acting knowingly in failing to register. *See supra*. Consequently, due to this deficiency, Mr. McCrea "need not show prejudice if the information cannot be saved even by a liberal reading." *State v. Marcum*, 116 Wn. App. 526, 536, 66 P. 3d 690 (2003).

Ultimately, so long as the court finds that the charging instrument was deficient in listing the requisite elements, the court should not consider whether Mr. McCrea was prejudiced by this omission and Mr. McCrea's conviction should be reversed without prejudice. *See Id.*

**B. The trial court erred when defining the term residence to the jury.**

Mr. McCrea's conviction should be reversed and remanded for retrial because the trial court, erroneously, provided the incorrect jury instruction regarding the definition of residence creating a manifest error affecting a constitutional right.

- i. The Stare Decisis doctrine should be abandoned regarding the court's previous holdings that jury instructional errors are only manifest errors when they specifically fail to properly advise the jury of elements of the charged crime.**

Pursuant to RAP 2.5(a), "an appellate court will review only those issues properly raised in the trial court." *State v. Stearns*, 119 Wn. 2d 247, 250, 830 P. 2d 355, 357 (1992). As it pertains to alleged errors within the jury instructions, it is well settled that "[a]s long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude." *Id.* This court, however, should re-consider whether the well established rule limiting constitutional violations pertaining to jury instructions should be limited strictly to the "to convict" instruction.

"This court has infrequently discussed under what conditions it should disregard the doctrine of stare decisis and overturn an established rule of law." *State v. Ray*, 130 Wn. 2d 673, 677, 926 P. 2d 904, 905 (1996). Specifically, "[t]his court should reverse itself on an established rule of law only if the rule is shown to be incorrect or harmful." *Id.* at 678 (*citing State v. Lucky*, 128 Wn. 2d 727, 735, 912 P. 2d 483 (1996)).

The courts have held that the only instance where a jury instruction is considered manifest error affecting a constitutional right is when the jury was not advised of the elements of the charge. Specifically:

[a]n error is manifest when it has practical and identifiable consequences in the trial of the case. If the instructions allowed the jury to convict Stein without finding an essential element of the crime charged, the State has been relieved of its burden of proving all elements of the crime(s) charged beyond a reasonable doubt, and thus the error affected his constitutional right to a fair trial.

*State v. Stein*, 144 Wn. 2d 236, 240-1, 27 P. 3d 184, 186 (2001)(internal citations omitted). To elaborate further, "[e]ven an error defining technical terms does not rise to the level of constitutional error." *Stearns*, 119 Wn. 2d 247, 250, 830 P. 2d 355, 357 (1992).

Contrary to Washington precedence, failing to properly define the terms utilized in the elements amounts to improperly advising the jury of what the elements are.

Specifically, the definition of an element is essential to establishing the burden of proof the State must meet in order to attempt to convict a defendant. Depending on the nature of the definition, the element needed to be proved may be broadened or narrowed. In the event that the element is narrowed, the burden for the State is decreased which would be manifest error. *See Id.* at 240-1. In conclusion, if an element is defined incorrectly, it can hardly be assumed that the jury has been properly informed of the elements of the crime charged which is what the courts are concerned about. *See Stearns*, 119 Wn. 2d 247, 250, 830 P. 2d 355, 357 (1992).

**ii. The trial court erred when defining the term residence to the jury and therefore the jury was not properly advised of the elements and the error was manifest.**

An error is manifest when it has practical and identifiable consequences in the trial of the case. If the instructions allowed the jury to convict Stein without finding an essential element of the crime charged, the State has been relieved of its burden of proving all elements of the crime(s) charged beyond a reasonable doubt, and thus the error affected his constitutional right to a fair trial.

*State v. Stein*, 144 Wn. 2d 236, 240-1, 27 P. 3d 184, 186  
(2001)(internal citations omitted).

In this case, the court was provided with the proposed jury instructions and sought the parties' input as to whether there were any objections. RP at 143-44. Neither party objected and the court filed its instructions to the jury. *Id.*; CP 13-33. As part of those instructions, the court defined for the jury the term *residence*. CP at 27. Namely, the court defined residence as "[f]ixed residence means a building that a person lawfully and habitually uses as living quarters a majority of the week." *Id.* Consequently, the term residence is an essential term of the to-convict instruction, which the jury must be properly advised of, and states, in relevant part:

...  
...

(3) That during that time period, the defendant knowingly failed to comply with the requirement that he notify the county sheriff, in person or in writing, of a change in of his or her *residential* address within three business days of moving.

CP at 23 (Emphasis added).

The court's instruction defining the term residence was incorrect according to case law and narrowed the element that

the State was required to prove in order to meet its burden.

Specifically, "it is well established that the term "residence" as used in RCW 9A.44.130 means 'a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.'" *State v. Smith*, 185 Wn. App. 945, 954, 344 P. 3d 1244, 1249 (2015) review denied 183 Wn 2d 1011 (2015). The difference between the jury instruction used in comparison to the definition provided in *Smith* is highly significant. *See Id.*; *see also* CP at 27. Namely, the instruction used in this trial required that in order for the State to meet its burden it must prove beyond a reasonable doubt that Mr. McCrea was not present at his residence a majority of the week. *See Id.* Whereas the definition articulated in *Smith* requires that the State prove beyond a reasonable doubt that the defendant does not intend to return to his *residence*. *See* 185 Wn. App. 945, 954, 344 P. 3d 1244, 1249 (2015) review denied 183 Wn 2d 1011 (2015). The difference between the two definitions is significant as it relates to the State's burden. Specifically, the State does not carry the same burden when it is required to establish that an individual is not present in their residence a

"majority of the week" in comparison to having to prove that the defendant did not intend to return to their residence.

Additionally, the jury was not properly advised as to when an individual is guilty of failure to register a new residence. For instance, under the instruction at issue, the question for the jury becomes whether the defendant failed to reside at residence a majority of the week, specifically, four days. Whereas if the correct instruction is utilized, the question for the jury changes to whether the defendant intended on returning to the residence, regardless of how long they were away. Ultimately, the State in this case did not have to prove the entire element, but rather, a more narrow version of the element thereby decreasing the burden in which the State had to meet. While the courts have previously held an instructional error is not manifest, this particular fact pattern would suggest otherwise in that the jury is not properly informed as to the elements required for a conviction.

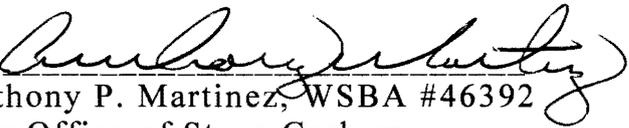
As a consequence of this erroneous instruction, the State's burden was affected by narrowing the element of the charge. Additionally, due to the narrowed definition of the element, the jury was not properly informed of the elements that the State

needed to meet. Consequently, advising the jury of the incorrect elements amounts to manifest error. *See Stein*, 144 Wn. 2d 236, 240-1, 27 P. 3d 184, 186 (2001). As such, the court should abandon precedent, determine that this instructional error was manifest and reverse Mr. McCrea's conviction so that it can be remanded for a new a trial.

#### **IV. Conclusion.**

For the reasons stated above, Mr. McCrea's conviction should be reversed because the State failed to allege in the information all of the essential elements of the crime charged. As a consequence, Mr. McCrea was not put on proper notice of the crime charged. Additionally, contrary to Washington precedent, this court should reconsider its previous rulings regarding instructional errors raised for the first time on appeal. That being said, the court in this case erred when it instructed the jury on the wrong definition of residence thereby improperly informing the jury of the proper elements that the State must meet in order to secure a conviction. Should the court reconsider its previous rulings, after evaluation of the argument above, this court should reverse Mr. McCrea's conviction.

DATED this 9<sup>th</sup> day of November, 2015.

By   
Anthony P. Martinez, WSBA #46392  
Law Office of Steve Graham  
Attorney for Appellant Warren E. McCrea

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NO. 332985 – III  
COURT OF APPEALS, DIVISION III  
THE STATE OF WASHINGTON

<b>STATE OF WASHINGTON,</b> <b>Respondent,</b>	<b>OKANOGAN COUNTY</b> <b>NO. 14-1-00363-1</b>
<b>vs.</b>	<b>AFFIDAVIT OF CERTIFICATION</b>
<b>WARREN MCCREA,</b> <b>Appellant.</b>	

**Affidavit of Certification**

I certify under penalty of perjury under the laws of the State of Washington, that on November 9th, 2015 I delivered a true and correct copy of the foregoing Brief of Appellant to:

Mr. Warren McCrea  
Airway Heights Corrections Center  
11919 Sprague Ave.  
Airway Heights, WA 992001.

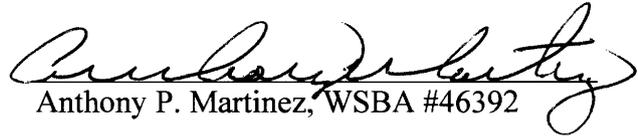
I also hand delivered on November 9th, 2015 a true and correct copy of the foregoing Brief of Appellant to:

Court of Appeals, Division III  
500 North Cedar Street  
Spokane, WA 99210.

Finally, on November 9th, 2015 I mailed a true and correct copy of the foregoing Brief of Appellant to:

1 Mr. Joseph Caldwell  
2 Okanogan Prosecuting Attorney's Office  
3 P.O. Box 1130  
4 Okanogan, WA 98840.

5  
6 Dated this 7<sup>th</sup> day of November, 2015.

7   
8 Anthony P. Martinez, WSBA #46392

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