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Court of Appeals  
Division III  
State of Washington

No. 34846-6-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DUSTIN H. CHAMBERS,

Defendant/Appellant.

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Appellant's Brief  
(amended)

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to support the conviction for failure to register as a sex offender as charged in the Information.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was Mr. Chambers' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime as charged in the Information?

C. STATEMENT OF THE CASE

Mr. Chambers was convicted by the Court for failure to register as a sex offender. The Amended Information stated:

On or between February 9, 2016 and March 15, 2016 in the County of Okanogan, State of Washington, the above-named Defendant, having been convicted on or about November 19, 2009, of a sex offense or kidnapping offense that would be classified as a felony under the laws of Washington, to wit: Indecent Liberties, being required to register pursuant to RCW 9A.44. 130, and lacking a fixed residence, did ( 1) knowingly fail to provide written notice to the county sheriff where he or she last registered within three business days of ceasing to have a fixed residence or ( 2) did knowingly fail to report weekly, in person, to the sheriff of the county where he or she is registered or (3) did knowingly fail to provide the county sheriff with an accurate accounting of where he or she stays during the week; contrary to Revised Code of Washington 9A.44. 130(5).

CP 44 (emphasis added).

At the beginning of the trial during motions in limine, the prosecutor, Mr. Platter, addressed the Court as follows:

“MR. PLATTER: Your Honor, what I would address regarding this – and this is kind of in response to Ms. MacDougall’s [defense attorney] comment on the last in limine motion – (inaudible) the – the following page, page 3, the middle paragraph, discusses a – comparison of the indecent liberties tribal charge to our child molestation third degree. That’s not really at this point something that the state would likely be arguing anyway. It’s – it’s fairly clear that the duty to register is – is – clearly there under just the – the duty to register with the tribe, transferring to the duty to register with the state. So, my – my take is that the defendant may want to argue some facts pointing out how the – the tribal charge of indecent liberties is not actually equal to the – the state child molestation third. That at this point is not something I’m going to dispute or even put forward. So we can – we can really strike that middle paragraph from the state’s motion in limine . . . And – to – to advise the court, we have a four-year difference in age, and it appears that the tribal charge does not have that same requirement. I don’t have any proof of the – the victim’s age in that case. So in all reality I don’t know that I’d (inaudible) to prove that they are comparable charges. So we can strike

that, lines 9 from – through 18 from the state’s motion in limine and I won’t be asserting that.

THE COURT: So with that exclusion, that section, the defense position?

MS. MACDOUGALL: Your Honor, [is] [t]he state stipulating, then, agreeing that child molestation third under state statute is different than the indecent liberties under the tribal code that my client was convicted of[?]

MR. PLATTER: What I’m saying is, I’m not asserting that as a basis for his duty to register under state law. ‘Cause there are two – under the statute referenced in my motion – the correct one – 9A.44.128(10)(I), a sex offense includes any tribal conviction for an offense for which the person would be required to register as a sex offender while residing on the reservation or conviction – That is the basis the state is asserting. The other (inaudible), which would be that an offense that under the laws of this state would be classified as a sex offense, I’m not asserting that because in all reality I don’t think that I can prove the elements are the same. So, without, I think, (inaudible) needing to stipulate to anything we’re just not even going to assert that as a basis.’”

RP 6-8.

At trial, the State presented certified copies of the tribal court judgment and sentence and the guilty plea to indecent liberties. RP 25. The State also presented evidence that Mr. Chambers registered as homeless and checked in weekly as required until February 8, 2016, at which point he stopped reporting. RP 28-32. The State did not present any evidence that the tribal court conviction was equivalent to a felony sex offense in the state of Washington. RP 23-35.

This appeal followed. CP 5-19.

D. ARGUMENT

1. Mr. Chambers' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime as charged in the Information.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is

indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

If the State elects, even through inadvertence, to charge a defendant with different alternative of the crime than it intends to prove, that is what it has to prove. *State v. Goldsmith*, 147 Wn. App. 317, 324-25, 195 P.3d 98, (2008) (citing *State v. Bryant*, 73 Wn.2d 168, 171, 437 P.2d 398 (1968) (“It is axiomatic that the state has the burden of proving every element of the crime charged.”)).

In *Goldsmith*, the State charged Mr. Goldsmith with child molestation in the first degree by the second of two alternative means.

*Goldsmith*, 147 Wn. App. at 322, 195 P.3d 98. The State charged the second alternative means of committing first degree child molestation only. But it offered only evidence to show the first alternative means. *Id.* This Court held the State was required to prove the essential elements of the crime it charged. *Goldsmith*, 147 Wn. App. at 325, 195 P.3d 98.

The Court did not agree the problem was "merely a problem of notice." *Id.* It held that the information adequately notified Mr. Goldsmith of the necessary elements of the crimes the State says he committed. The State simply failed to prove those crimes. *Id.*, citing *State v. Brown*, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (finding that one cannot be tried for an uncharged offense). The Court went on to hold that the information adequately charged and notified the defendant of the essential elements of the crime the State charged, just not the elements that the State proved or that the court instructed on. *Id.* The fact that the court's instructions set out the correct elements of the crime does not resolve the problem. *Id.*, citing *State v. Holt*, 104 Wn.2d 315, 323, 704 P.2d 1189 (1985) ("an information which is constitutionally defective because it fails to state every statutory element of a crime cannot be cured by a jury instruction which itemizes those elements" (emphasis omitted)).

In *Goldsmith*, the State also complained that the defendant "sandbagged" the prosecutors, presumably by not complaining about the information when the State could have done something about it.

*Goldsmith*, 147 Wn. App. at 326, 195 P.3d 98. But the Court held there is no authority for the proposition that the defendant has an affirmative obligation to notify the State that he did not commit the crime by the means charged, but that he did commit the crime by another means. *Id.*

Finally, the Court held that when the State charged one crime and proved another, it cannot now amend the information and again prove the same crime it proved during Mr. Goldsmith's first trial, as this violates constitutional prohibitions against double jeopardy. *Id.* The proper remedy is dismissal. *Id.*

Turning then to the facts of the present case, a convicted sex offender who lacks a "fixed residence" is required to provide written notice to the sheriff of the county where he last registered within 48 hours. RCW 9A.44.130(6)(a). In addition, he must report weekly, in person, to the sheriff of the county where he is registered. RCW 9A.44.130(6)(b).

Under the definitions in RCW 9A.44.128, "sex offense" includes: Any tribal conviction for an offense for which the person would be required to register as a sex offender while residing in the reservation of conviction; or, if not required to register in the reservation of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection.

RCW 9A.44.128(10)(I)

The State charged Mr. Chambers under the second alternative definition of a tribal conviction—an offense that under the laws of this state would be classified as a sex offense under this subsection. CP 44. However, the State presented its case under the first alternative—an offense for which the person would be required to register as a sex offender while residing in the reservation of conviction. RP 23-35.

The State did not present any evidence that the tribal court conviction was equivalent to a felony sex offense in the state of Washington, as charged in the Amended Information. RP 23-35; CP 44. In fact, the prosecutor explained at great lengths to the Court during motions in limine that it would not be presenting any evidence of guilt under the charged alternative because, “I don’t have any proof of the – the victim’s age in [the tribal court] case.” RP 6-8.

Since the State failed to prove the essential elements of the crime it charged, the evidence is insufficient and the conviction must be reversed. *Goldsmith*, 147 Wn. App. at 325, 195 P.3d 98.

E. CONCLUSION

For the reasons stated, the conviction should be reversed. Pursuant to RAP 15.2(f), Appellant's indigent status should continue throughout this appeal and he should not be assessed appellate costs if the State were to substantially prevail. See CP 1-4. Appellate counsel anticipates filing a report as to Appellant's continued indigency no later than 60 days following the filing of this brief.

Respectfully submitted March 30, 2017,

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s/David N. Gasch  
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on March 30, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the amended brief of appellant:

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