

NO. 348466

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

DUSTIN HAWK CHAMBERS

DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant, Dustin Hawk Chambers, was charged with failure to register as a sex offender based on failure to check in with the county Sheriff weekly while homeless. [CP 44-45]. The charging document charged Appellant as follows:

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 44-45]

At trial, the State presented evidence of Appellant's prior conviction in tribal court for indecent liberties from 2009. [CP 34-35 (Exhibits 1, 2, and 3); RP 25:12-26:6]. As part of pre-trial motions, the State argued that Appellant's prior conviction in tribal court qualified as a "sex offense" under RCW 9A.44.128(10)(1). [CP 38-42] The State elected not to argue that Appellant's indecent liberties conviction was the

legal equivalent of child molestation based on an element lacking in the tribal statute. [RP 8:2-16]. The bench trial was held on November 3, 2016. [RP 3:6] The court found that Appellant was required to register due to his tribal conviction for indecent liberties. [RP 47:7:24]. Appellant was found guilty after a bench trial. [CP 20-33; RP 49:5-7].

ARGUMENT

- A. The means of a prior sex offense conviction is a matter of definition, not an element of the crime of failure to register as a sex offender.

Appellant was charged with failure to register as a sex offender. [CP 44-45] The State proved the presence of the prerequisite sex offense conviction by means of a crime that required Appellant to register if he were on tribal land. [RP 47:7-24; CP 34-35 (Exhibits 1, 2, and 3); CP 38-42] Appellant argues that the different means by which a person has a previous conviction for a sex offense constitutes an alternative means of committing the crime of failure to register as a sex offender that must be pled as an essential element in the charging document. However, the means by which the sex offense conviction exists is merely a matter of the definition of a “sex offense,” not an alternative means of committing the crime; and, definitions need not be included in the charging document.

A defendant has a constitutional right to be informed of the nature and cause of the accusation against him or her to enable the defense to

prepare his defense and to avoid a subsequent prosecution for the same crime. *State v. Noltie*, 116 Wn.2d 831, 840 (1991); Article 1, section 22 of the Washington State Constitution. The omission of any element of the charged crime, statutory or otherwise, renders the charging document constitutionally defective. *State v. Kjorsvik*, 117 Wn.2d 93, 97 (1991). The constitutional right of a criminal defendant to be appraised with reasonable certainty as to the charges against him is ordinarily satisfied by a charging document which charges a crime in the language of the statute, where the crime is defined with certainty within the statute. *State v. Merrill*, 23 Wn.App. 577, 580 (Div.3, 1979), review denied, 92 Wn.2d 1036; *State v. Grant*, 89 Wn.2d 678, 686 (1978).

Appellant's assignment of error can be resolved quite simply by asking- what are the elements of the crime of failure to register? If the issue raised by Appellant, the means by which the prerequisite sex offense exists, is not an element of the crime, it need not be included in the charging document. By extension, the State may attempt to prove the existence of the prerequisite conviction by any means applicable under the law.

Under RCW 9A.44.132(1), "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.” RCW 9A.44.130(1)(a) provides that “any adult... residing... in this state who has been found to have committed or has been convicted of any sex offense...shall register with the county sheriff for the county of the person’s residence....” RCW 9A.44.130 then sets out the guidelines and time frames by which an offender must notify the sheriff of changes in residency.

RCW 9A.44.128(10) defines a “sex offense” for the purposes of the failure to register crime. “Sex offense” includes

- (a) Any offense defined as a sex offense by RCW 9.94A.030;
- (b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);
- (c) Any violation under RCW 9A.40.100(1)(b)(ii) (trafficking);
- (d) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);
- (e) A violation under RCW 9A.88.070 (promoting prostitution in the first degree) or RCW 9A.88.080 (promoting prostitution in the second degree) if the person has a prior conviction for one of these offenses;
- (f) Any violation under RCW 9A.40.100(1)(a)(i)(A) (III) or (IV) or (a)(i)(B);
- (g) Any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or this subsection;
- (h) Any out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing

in the state of conviction; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection;

- (i) Any federal conviction classified as a sex offense under 42 U.S.C. Sec. 16911 (SORNA);
- (j) Any military conviction for a sex offense. This includes sex offenses under the uniform code of military justice, as specified by the United States secretary of defense;
- (k) Any conviction in a foreign country for a sex offense if it was obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established pursuant to 42 U.S.C. Sec. 16912;
- (l) 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.

Therefore, under RCW 9A.44.128(10), there are twelve separate means of having the prerequisite “sex offense” conviction for the purposes of the failure to register crime. Appellant’s argument is that the State is required to allege the means under RCW 9A.44.128(10) by which the sex offense conviction exists as an actual element of the crime. However, the means by which the previous sex offense was committed is not an element of the crime; it is the definition of what constitutes a “sex offense.” The existence of the prerequisite conviction itself is the element and the State need only allege the presence of a prior sex offense conviction for the

charging document to be constitutionally sufficient. By that extension, the lack of the specific means in the charging document does not foreclose the State from arguing the presence of a sex offense under any of the means contained within RCW 9A.44.128(10) as part of its case at trial.

The Supreme Court addressed the question of what the essential elements of the crime of failure to register are in *State v. Peterson*, 168 Wn.2d 763 (2010). The elements of a crime are commonly defined as “[t]he constituent parts of a crime-[usually] consisting of the actus reus, mens rea, and causation- that the prosecution must prove to sustain a conviction.” *Id.* at 772 citing *State v. Fisher*, 165 Wn.2d 727, 754 (2009).

In *Peterson*, the defendant contended that the State needed to prove the fact that the defendant was homeless as an element of failure to register. *Id.* at 771. This was because, the defendant argued, a person’s residential status informs the deadline by which he must register. *Id.* at 772. Therefore, the defendant argued, if the State cannot prove residential status, it cannot prove an obligation to register within a certain deadline. *Id.*

The Court disagreed. “Although Peterson is correct that a registrant’s residential status informs the deadline by which he must register, it is possible to prove that a registrant failed to register within any applicable deadline without having to specify the registrant’s particular

residential status.” *Id.* at 772. This is what happened in *Peterson* because the defendant registered outside of any deadline contained within the statute. “It was therefore unnecessary to show his particular residential status in order to prove a violation of the statute.” *Id.*

The Court went on to say that “Peterson’s specific residential status was not essential to proving the criminal act at issue: that he failed to provide timely notice of his whereabouts under any of the statutorily defined deadlines after vacating his registered address.” *Id.* at 772. See also *State v. Bennett*, 154 Wn.App. 202 (Div.1, 2010) (residential status is not an element of the crime of failure to register).

Looking at WPIC 49C.02, the jury instruction pertaining to the elements of failure to register, the first element is that “the defendant was convicted of [a [felony] [sex] [kidnapping] offense]. The second element is that “due to that conviction, the defendant was required to register in the [State of Washington] [County of _____]....” WPIC 49C.02. The third element is that the defendant failed to comply with a requirement of sex offender registration. WPIC 49C.02. Nowhere in the elemental jury instruction is the State required to prove as an element the means by which the defendant has a prior sex offense conviction. The State would admittedly need to prove that the charge qualifies as a “sex offense” to satisfy the first element; however, that does not make the means of the sex

offense conviction an actual element. The State simply needs to prove that the asserted prerequisite conviction falls under the *definition* of a sex offense.

This is further supported by a look at WPIC 49C.10 which is the definition of a “sex offense” instruction. That instruction simply instructs the jury that the specific given offense *is* a sex offense. WPIC 49C.10. It does not ask the finder of fact to determine whether a particular charge is a sex offense or not as that is a question of law, not of fact. The job of the finder of fact is to determine whether the conviction for that crime exists. If it does, then the defendant has a conviction for a sex offense under the definition of a sex offense. Appellant did not, and does not, challenge that his tribal conviction for indecent liberties does in fact qualify as a sex offense under the statutes and that the conviction requires him to register under state law. Appellant merely now asserts that the State did not allege which portion of the definition the State intended on relying on to prove his conviction qualified as a sex offense. It should be noted, however, that the State did include the particular charge as “to wit” language in the charging document. [CP 44-45].

Reviewing the statutes, pattern jury instructions, and *Peterson*, the essential elements of the crime of failure to register are laid out in RCW 9A.44.132(1) with supplement from RCW 9A.44.130- (1) the defendant

has a prior conviction for a sex offense, (2) that due to that conviction, the defendant was required to register, and (3) that during the period, the defendant knowingly failed to comply with a requirement of the registration statute. WPIC 49C.02. RCW 9A.44.128 is simply a supplemental “definition” section which defines the term “sex offense” for the purposes of the failure to register crime. It cannot legitimately be argued that a definition contained in an RCW Chapter entitled “Definitions” constitutes an essential element of any given charge rather than just being a definition. If a defendant’s residential status, which actually guides the specific registration requirements, is not an element of the crime, then the type of prior sex offense conviction a defendant has certainly is not.

The State asserted all of the essential elements in the First Amended Information. [CP 44-45]. The State was then free to present its case and prove that Appellant’s prior conviction for Indecent Liberties qualified as a “sex offense” under any of the twelve definitions listed in RCW 9A.44.128(10).

B. Definitions need not be included in the charging document.

It is well established that definitions of terms need not be included in the charging document. In *State v. Johnson*, 180 Wn.2d 295 (2014), the defendant challenged the information because the charging language did

not include the definition of “restrain” within the language for the charge of unlawful imprisonment. *Id.* at 299. The Court of Appeals held that the charging document was insufficient for its failure to include that definition within the charging language. *Id.* However, the Supreme Court reversed, holding that definitions are not essential elements of a crime and need not be included in charging language. *Id.* at 302.

The information is constitutionally sufficient if all essential elements of a crime are included in the document. *Id.* at 300; *State v. Vangerpen*, 125 Wn.2d 782, 787 (1995). “An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” *Id.* at 300; *State v. Zillyette*, 178 Wn.2d 153, 158 (2013). This essential elements rule exists to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense. *Id.* at 300.

“The State need not include definitions of elements in the information.” *Id.* at 302. “We have never held that the information must also include definitions of essential elements. *Id.* See also *State v. Allen*, 176 Wn.2d 611, 626-27 (2013) (the “true threat” requirement of harassment is not an essential element of the crime of harassment and need not be included in the charging document. The concept of a “true threat” merely defines and limits the scope of the essential threat element...)”

Like the concept of a “true threat,” the Court in *Johnson* held that the definition of “restrain” defines and limits the scope of the essential elements. *Johnson*, 180 Wn.2d at 302. “That does not make the definition itself an essential element that must be included in the information.” *Id.* See also *State v. Saunders*, 177 Wn.App. 259 (Div.1, 2013) (the definition of “restrain” is not an essential element of kidnapping for purposes of being included in a to-convict instruction, it is merely a definitional term that clarifies the meaning of “abduct” which is the essential element.)

In the current case, the charging document alleged the defendant had a previous conviction for a “sex offense.” [CP 44-45] The means of the sex offense, whether it be by a crime that would be the equivalent of a felony Washington State crime, or a crime that would require registration on tribal land, or any of the other twelve means of having a sex offense, is merely part of the definition of a “sex offense.” The State was not required to allege the specific type of sex offense conviction in the charging document. Further, the State is permitted to prove the existence of the sex offense conviction under any of the twelve means available under RCW 9A.44.128(10).

C. Failure to register as a sex offender is not an alternative means crime.

Appellant further contends that the means by which the sex offense conviction exists, a crime that would be the equivalent of a felony Washington State crime versus a crime that would require registration on tribal land, creates an alternative means of committing the crime of failure to register. This argument effectually would make all twelve means of having the prerequisite sex offense conviction under RCW 9A.44.128(10) separate ways of committing the crime of failure to register, requiring the specific definition of “sex offense” to be specifically alleged in the charging document.

The Court in *Peterson* addressed this issue also and held that failure to register is not an alternative means crime. The defendant in *Peterson* claimed that the various deadlines and entities with which an offender must register represent an alternative means of committing the crime. *Peterson*, 168 Wn.2d at 769. Peterson claimed his right to jury unanimity was violated because substantial evidence did not support each alternative means of failure to register. *Id.*

An alternative means crime is one that provides that the proscribed criminal conduct may be proved in a variety of ways. *Id.* at 769; *State v. Smith*, 159 Wn.2d 778, 784 (2007). Peterson argued that failure to register

is an alternative means crime because it can be committed by (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another. *Id.* at 770. However, the Court said “this is too simplistic a depiction of an alternative means crime.”

While a crime like theft can be accomplished in different ways by different conduct (wrongfully taking property of another versus deceiving someone to give up their property), failure to register contemplates a single act that amounts to failure to register. *Id.* at 770. Regardless of the deadlines that apply, the conduct is the same- he either moves without notice or he does not. *Id.* “The mere use of a disjunctive in a statute does not an alternative means crime make.” *Id.* at 770; *In re PRP of Jeffries*, 110 Wn.2d 326, 339 (1988). The different deadlines in the statute do not implicate alternative criminal acts. *Id.* There is only one method by which an offender fails to register, and that is if he moves from his residence without notice. *Id.*

Appellant cites to *State v. Goldsmith*, 147 Wn.App. 317 (Div.3, 2008). However, *Goldsmith* is distinguishable because, unlike the crime of failure to register, child molestation is an alternative means crime. Child molestation is committed either (1) when the person has, or (2) knowingly causes another person to have, sexual contact with a minor.

RCW 9A.44.083(1); *Goldsmith*, 147 Wn.App. at 322. In *Goldsmith*, the State charged the defendant under the second means of the crime, but the evidence at trial only proved the first alternative means of the crime. *Id.* *Goldsmith* is inapplicable to Appellant's case because *Goldsmith* pertains to an actual alternative means crime that can be committed by more than one distinct act. Failure to register cannot; and the purported alternative means asserted by Appellant is merely a definition, not an alternative act.

As stated in *Peterson*, the use of a disjunctive does not create an alternative means and the twelve different ways that the prerequisite sex offense conviction can occur do not make twelve alternative means of committing the crime of failure to register. An alternative means crime is one that can be committed by alternative *acts*. The means by which a defendant has the prerequisite sex offense conviction does not alter the *criminal act* that constitutes the crime. The presence of a sex offense is simply a prerequisite element. Either there is a sex offense conviction, or there is not. The means of the prior sex offense are irrelevant to the actual criminal act of failing to register and does not create alternative ways of committing the crime.

D. The language in the charging document properly advised Appellant of the charges and Appellant was on notice of those charges.

Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial. *Kjorsvik*, 117 Wn.2d at 102. A different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refiling of the charge. *Id.* Applying a more liberal construction on appeal discourages “sandbagging.” *Id.* This is a potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading. *Id.*

Washington has adopted the federal standard of review for challenges to charging documents laid out in *Hagner v. United States*, 285 U.S. 427, 433 (1932) with some additions. *Id.* at 104. The standard of review set out in *Hagner* was as follows- “Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.” *Id.* at 104 citing *Hagner*, 285 U.S. at 433. *Kjorsvik*

also added an essential elements prong and an inquiry into whether there was actual prejudice. *Id.* at 105.

A two-prong test is to be applied when a charging document is challenged for the first time on appeal. *Id.* The first prong- the liberal construction of the charging document language- looks to the face of the document. *Id.* at 106. The construction is often asked as “do the necessary facts appear in any form, or by fair construction can they be found, in the charging document?” *Id.* at 105. The second prong looks beyond the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend against. *Id.* Put another way, “can the defendant show that he or she was nonetheless actually prejudiced by the inartful [*sic*] language which caused a lack of notice?” *Id.*

Appellant never challenged the charging document until this appeal. Therefore, Appellant must show that he had no notice of the allegations and could not prepare a defense. However, the State included “to wit” language in the charging document that gave specific notice as to which charge the State would be relying on for the sex offense conviction. [CP 44-45] Furthermore, the State and Appellant’s trial counsel both engaged in extensive argument and discussion the morning of trial regarding the fact that Appellant’s underlying conviction was tribal and

how that related to the duty to register under state law. [RP 6:16-19:22]
The defendant was on notice as to the charge the State was asserting and that the State would be arguing that it was a sex offense under RCW 9A.44.128(10)(l).

Appellant alleges that the language in the charging document- “of a sex offense or kidnapping offense that would be classified as a felony under the laws of Washington...” binds the State to only present evidence that Appellant has a sex offense conviction under specific subsections of RCW 9A.44.128(10). However, this position relies on Appellant’s argument that failure to register is an alternative means crime, which is not.

The State is required to include all essential elements of the charge in the charging document. *Kjorsvik*, 117 Wn.2d at 97. The best guidance the State has for assuring its compliance with this rule is to attempt to charge a crime using the language of the statute. *Merrill*, 23 Wn.App. at 580; *Grant*, 89 Wn.2d at 686. The language in RCW 9A.44.132(1) references a “felony sex offense;” however, the definition of a “sex offense” under RCW 9A.44.128(10) provides for multiple means of having a conviction that would be *equivalent* to a “felony sex offense.” This requires the State to attempt to charge the crime of failure to register in a way that encompasses all subsections within the definition of “sex

offense,” recognizing the multiple definitions of “sex offense” may not necessarily apply under a strict interpretation of the phrase “felony sex offense.” To require the State to specifically list the particular definition subsection of a “sex offense” would create a *de facto* alternative means crime and would undermine established case law.

The State’s use of the phrase “a sex offense... that would be classified as a felony under the laws of Washington” is the State’s attempt to follow the wording and intent of both RCW 9A.44.132(1)’s use of the term “felony sex offense” and RCW 9A.44.128(10)’s inclusion of multiple different offenses constituting an equivalent to a felony sex offense. While Appellant reads the State’s phrasing as to mean “an offense that is comparable to a specific Washington State felony crime,” the State’s phrasing reads more appropriately as “an offense that would be classified as a felony sex offense under Washington’s sex offender registration laws” which includes the laws setting out the “sex offense” definition in RCW 9A.44.128(10). The language “that would be classified as a felony” makes reference to the specific felony level failure to register offense under RCW 9A.44.132(1), as opposed to gross misdemeanor failure to register under RCW 9A.44.132(2).

The question is whether Appellant was informed of the nature and cause of the accusation against him to enable the defense to prepare his

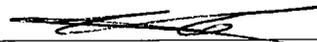
defense and to avoid a subsequent prosecution for the same crime. *Noltie*, 116 Wn.2d 840; Article 1, section 22 of the Washington State Constitution. Appellant was charged with having a prior sex offense conviction that fell within the felony level registration requirements. [CP 44-45] The State included “to wit” language including both the crime and date of the underlying conviction. [CP 44-45] Appellant was therefore on notice of the crime the State was asserting as the basis for the registration requirement.

CONCLUSION

Appellant’s due process rights were not violated under either the Washington State or United States Constitutions. The State included all essential elements in the charging document and the means by which a defendant’s prior conviction qualifies as a “sex offense” is not an essential element of the crime. Furthermore, failure to register is not an alternative means crime. The State was free to prove the existence of the sex offense conviction under any of the definitions of a sex offense.

Dated this 25 day of May, 2017

Respectfully Submitted:

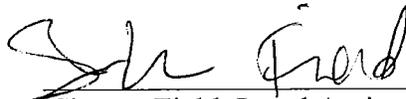

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