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NO. 59722-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PETERSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita L. Farris, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/appellant/plaintiff~~ containing a copy of the document to which this declaration is attached.

Snohomish County Prosecutor
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Patrick Murphy 8-31-2007
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support appellant's conviction for failure to register as a sex offender.

2. Ineffective assistance of counsel deprived appellant of his constitutional due process right to a fair trial.

3. Appellant was denied his right to a unanimous jury verdict on the means of committing the crime of failure to register.

4. The information was defective because it omitted an essential element of the crime. CP 41-42.

Issues Pertaining to Assignments of Error

1. Where the evidence failed to establish numerous elements of the crime beyond a reasonable doubt, must appellant's conviction for failure to register be reversed and dismissed with prejudice?

2. Was defense counsel ineffective in agreeing to a "to convict" instruction that omitted elements of the crime? CP 33.

3. Criminal defendants have the right to a unanimous jury verdict on the means of committing a crime. Is reversal required because substantial evidence did not support each alternate means of proving appellant failed to properly register?

4. A charging document must properly notify a defendant of the charges against him. Is reversal required because the information failed to allege the "knowledge" element of the crime of failure to register?

B. STATEMENT OF THE CASE

1. Procedural History

The state charged appellant Michael Eugene Peterson with failure to register as a sex offender. CP 41-42. The Honorable Anita L. Farris presided over the trial in which a jury found Peterson guilty. CP 21. The court ordered a standard range sentence of 15 days confinement. CP 4-17. This appeal timely follows. CP 2-3.

2. Substantive Facts

In 1988, Peterson was convicted of third degree rape. 3RP¹ 41. Upon release from custody in 1991, Peterson was told to register as a sex offender. 3RP 69. He registered as "homeless" multiple times, including on September 6, 2005. 3RP 44-45, 69-70. At some point, Peterson moved into an apartment located at 1508 22nd Street in Everett. 3RP 18-19. On September 12, 2005, he registered that address with the Snohomish County Sheriff's Office. 3RP 45-46, 61.

¹ The verbatim report of proceedings is contained in five volumes referenced as follows: 1RP - 10/19/06; 2RP - 10/27/06; 3RP - two consecutively paginated volumes from 1/29/07 and 1/30/07; 4RP - 2/26/07.

On November 2, 2005, an Everett police detective went to the apartment to verify Peterson still lived there. 3RP 31-32. No one responded to her knock on the door. 3RP 32, 34. The officer then contacted the landlord of the apartment building, who said Peterson moved out four days earlier. 3RP 32-33. A detective from the Snohomish County Sheriff's Office changed Peterson's registration address to "failure to verify." 3RP 36, 61-63. On December 6, 2005, Peterson registered as homeless with the Snohomish County Sheriff's Office. 3RP 63.

C. ARGUMENTS

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT PETERSON OF FAILURE TO REGISTER.

The state failed to prove each element of the crime of failure to register beyond a reasonable doubt. The conviction must therefore be reversed and the charge dismissed with prejudice.

Due process under the Fourteenth Amendment of the United States Constitution requires the state to prove every element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the state, a rational trier of fact could find each element of the crime beyond a reasonable doubt. Smith, 155

Wn.2d at 502. The conviction must be reversed and the charge dismissed with prejudice if there is insufficient evidence to prove each element. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). A sufficiency challenge may be raised for the first time on appeal. City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

a. The State's Theory Of The Case Was That Peterson Violated One of Two Different Sections Of The "Failure To Register" Statute.

As a threshold matter, it is necessary to determine which subsection of the statute is at issue in this case. Former RCW 9A.44.130(1) states "[a]ny adult . . . residing whether or not the person has a fixed residence . . . in this state who . . . has been convicted of any sex offense . . . shall register with the county sheriff for the county of the person's residence."² But the statute specifies many different ways in which a person may violate the law. Neither the charging documents nor the jury instructions specify which section of the statute Peterson allegedly violated.³ CP 33, 41-42, 43-44, 47-48.

² Former RCW 9A.44.130, Laws of 2003, ch. 215 § 1, was the version in effect at the time of Peterson's alleged offense. All references to the registration statute in this brief are to this former version.

³ The judgment and sentence does not specify the subsection under which Peterson was convicted. CP 4-17.

In pre-trial colloquy, the state revealed, "our theory of the case is that he had a fixed residence, ceased to provide this, and was required to report where he was residing within 72 hours. We don't really know where he was. He may have been homeless, he may have gone and lived at another fixed residence, we don't know. He just failed to report within 72 hours, and then it was discovered on the 22nd." 3RP 13. The state adhered to its alternative theory during closing argument. In addressing whether Peterson gave proper notice, the prosecutor said, "[t]here was no evidence that came from the stand that he gave any kind of written notice of a new address, and there was no evidence that he gave any notice to the sheriff that he was homeless, either one of the two possibilities that exist." 3RP 95. Under the state's dual theory of the case, Peterson violated either RCW 9A.44.130(5)(a) or RCW 9A.44.130(6)(a).

RCW 9A.44.130(6)(a) provides in relevant part:

Any person required to register under this section who lacks a fixed residence shall provide written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence.

RCW 9A.44.130(6)(a) addresses the notification requirements of someone who is homeless, i.e., lacks a fixed residence. See State v.

Stratton, 130 Wn. App. 760, 766, 124 P.3d 660 (2005) (explaining this subsection was added to require transient individuals to register).

RCW 9A.44.130(5)(a), in contrast, provides:

If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff within seventy-two hours of moving. If any person required to register pursuant to this section moves to a new county, the person must send written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register with that county sheriff within twenty-four hours of moving. The person must also send written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered.

RCW 9A.44.130(5)(a) addresses the notification requirements of someone who moves from one residential address to another; i.e., someone who is not homeless. State v. Pickett, 95 Wn. App. 475, 478-80, 975 P.2d 584 (1999).

The state's final amended information charged Peterson as follows:

That the defendant, having been convicted on or about the 5th day of February, 1988, of a sex offense or kidnapping offense, to wit: Third Degree Rape, being required to register pursuant to RCW 9A.44.130, and having ceased residing at a fixed residence, did on or about the week of November 2, 2005 to the week of November 22, 2005, cease to reside at that 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.

CP 41.

The information is a mishmash of RCW 9A.44.130(5)(a) and RCW 9A.44.130(6)(a).⁴

b. The Evidence Was Insufficient To Prove All The Elements Under RCW 9A.44.130(5)(a).

"In determining the elements of a statutorily defined crime, principles of statutory construction require the court to give effect to all statutory language if possible." Smith, 155 Wn.2d at 502. The plain terms of RCW 9A.44.130(5)(a) require the state to prove Peterson moved from one residence to another without notifying the sheriff. There was no evidence Peterson moved to a new residence between November 2 and November 22 after moving from his Everett apartment. The state therefore failed to prove this element of the crime. See Pickett, 95 Wn. App. at 478-80 (reversing for insufficient evidence where state charged homeless sex offender with failing to register a residential address because a homeless person does not have a "residence" to register).

Even assuming the evidence was sufficient to show Peterson moved into a new residence, additional elements remain unproven. RCW

⁴ Earlier versions of the information incorporated the "48 hour" requirement applicable to homeless offenders under RCW 9A.44.130(6)(a). CP 43-44, 47-48.

9A.44.130(5)(a) distinguishes between those who move within the same county and those who move to a different county.

If Peterson moved to a new residence within the county, the state needed to prove Peterson failed to provide written notice to the county sheriff of the change of address. But as a threshold matter, the state did not show Peterson remained in the county after leaving his Everett apartment. In the absence of such evidence, the state cannot prove Peterson had a duty to register with the Snohomish county sheriff.

If Peterson moved to a new county, the state needed to prove he either (1) failed to send written notice of the change of address at least 14 days before moving to the sheriff in the new county of residence; or (2) failed to send written notice within 10 days of the change of address to the county sheriff with whom he last registered. The state, however, did not produce any evidence showing Peterson moved outside the county after leaving his Everett apartment. In the absence of such evidence, the state cannot prove Peterson had a duty to send written notice to the county sheriff in the new county or the old county of residence.

c. The Evidence Was Insufficient To Prove All The Elements Under RCW 9A.44.130(6)(a).

Under RCW 9A.44.130(6)(a), the state needed to prove Peterson (1) ceased to have a fixed residence; and (2) failed to notify the county

where he last registered; (3) within 48 hours of ceasing to have a fixed residence.

Peterson moved out of the Everett apartment approximately October 30, 2005. He registered as homeless on December 5. But no evidence showed where he was living between those two dates. The state needed to prove he ceased to have a fixed residence during the charging period and then failed to notify the sheriff within 48 hours. There was insufficient evidence to show Peterson violated the 48 hour requirement because there was no evidence to show when Peterson ceased to have a fixed residence. See Stratton, 130 Wn. App. at 766-67 (conviction reversed for insufficient evidence where defendant lived at residence but convicted for failure to register as transient under RCW 9A.44.130(6)(a)).

Speculation regarding where Peterson lived during the charging period is insufficient evidence to prove each element of the crime under either of the state's theories. See Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764 (1962) ("A verdict cannot be founded on mere theory or speculation."); Prentice Packing & Storage Co. v. United Pac. Ins. Co., 5 Wn.2d 144, 164, 106 P.2d 314 (1940) ("The law demands that verdicts rest upon testimony, and not upon conjecture and speculation."). To uphold Peterson's conviction despite the state's failure to prove

each element would render portions of RCW 9A.44.130(5)(a) and (6)(a) meaningless. See Smith, 155 Wn.2d at 504 (conviction for driving with revoked license reversed because state failed to prove statutory element; to hold otherwise would render portions of statute meaningless). Peterson's conviction therefore must be reversed and the charge dismissed with prejudice. DeVries, 149 Wn.2d at 853.

2. DEFENSE COUNSEL'S AGREEMENT TO A DEFECTIVE "TO CONVICT" INSTRUCTION DEPRIVED PETERSON OF EFFECTIVE ASSISTANCE OF COUNSEL.

The "to convict" instruction was defective because it failed to set forth all the elements of the crime. Peterson was denied effective assistance of counsel because his attorney agreed to the defective instruction.

A conviction cannot stand if the jury instructions relieve the state of its burden of proving every element of the crime beyond a reasonable doubt. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). Where the court issues a summary instruction setting forth each element of the crime necessary to convict, the instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). The adequacy of a challenged "to convict" instruction is reviewed de novo. Id.

The doctrine of invited error applies because Peterson's trial counsel agreed to the state's proposed instructions, which included the "to convict" instruction ultimately given to the jury. 3RP 7; In re Det. of Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998). But the invited error doctrine does not preclude review where, as here, defense counsel was ineffective in agreeing to the defective instruction. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

a. The "To Convict" Instruction Omits Elements Under Each Of The Statutory Subsections Relied Upon For Conviction.

The state's single "to convict" instruction attempts to accommodate conviction under either RCW 9A.44.130(5)(a) or (6)(a) but omits elements of both. Instruction 7 states:

To convict the defendant of the crime of Failure to Register as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about February 5, 1988, the defendant was convicted of a sex offense;
2. That the defendant was required to register as a sex offender to the county sheriff;
3. That on or about the week of November 2, 2005 to the week of November 22, 2005, he did cease to reside at that residence where he had registered with the county sheriff;
4. That the defendant did knowingly fail to provide written notice to the county sheriff within 72 hours after ceasing to reside there; and
5. That these acts occurred in the State of Washington.

CP 33.

Under the RCW 9A.44.130(5)(a) theory advanced by the state, the "to convict" instruction omits several elements. RCW 9A.44.130(5)(a) requires the state to prove either that Peterson changed his residence within the same county or moved to another county, but the instruction fails to require the state to prove either one of these scenarios.

The remaining elements depend on whether Peterson stayed within the county or moved outside. If Peterson changed his residence within the same county, then the state needed to further prove he failed to provide written notice to the county sheriff of the change of address. The instruction indicates the jury must find Peterson failed to notify the sheriff's office, but omits the requirement the notification pertain to a "change of address."

If Peterson moved to a new county, then the state needed to prove he either (1) failed to send written notice of the change of address at least 14 days before moving to the county sheriff in the new county of residence; or (2) failed to send written notice within 10 days of the change of address in the new county to the county sheriff with whom he last registered. The "to convict" instruction does not include any of these elements.

The instruction fares no better under the state's RCW 9A.44.130(6)-(a) theory. Under RCW 9A.44.130(6)(a), the state needed to prove Peterson lacked a "fixed" residence and then ceased to have one, but the instruction omits the "fixed" requirement. The omission is significant because the ordinary dictionary meaning of the term "residence" is different from the term "fixed residence" as used in the statute. Stratton, 130 Wn. App. at 765-66; State v. Pray, 96 Wn. App. 25, 29-30, 980 P.2d 240 (1999). A temporary habitation may be a "residence" under the statute. Pray, 96 Wn. App. at 29-30. But a "fixed residence" means a dwelling place that is not subject to change or "permanently and definitely located." Stratton, 130 Wn. App. at 765. The instruction also omits the elements that Peterson did not provide written notice to the sheriff (1) of the county where he last registered; (2) within 48 hours.

b. Counsel's Agreement To The Defective "To Convict" Instruction Was Unreasonable and Prejudicial.

Criminal defendants have the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Reversal is required once Peterson shows (1) his attorney's performance was deficient and (2) he was prejudiced by the deficiency.

Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. While legitimate trial strategy or tactics cannot be the basis for an ineffective assistance claim, no legitimate strategy justified agreement to a jury instruction that deprived Peterson of his constitutional right to have the state prove each element of the crime. See Aho, 137 Wn.2d at 745-46 (counsel deficient in failing to investigate effective dates of relevant statutes in connection with charging period, which allowed possibility of conviction for crime under inapplicable statute).

To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Peterson was convicted for a crime even though the jury was not required to find all the elements of the crime beyond a reasonable doubt. An instruction that relieves the state of its burden of proof compels automatic reversal. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Even if the erroneous "to convict" instruction did not relieve the state of its burden of proof, an error is presumed prejudicial under harmless error analysis unless the error could not have rationally affected the verdict beyond a reasonable doubt. Id. at 341; DeRyke, 149 Wn.2d at 912. An error may be harmless if the missing element is supported by uncontroverted evidence. Brown, 147 Wn.2d at 341. As set forth in the preceding sufficiency of evidence argument, the state did not produce sufficient evidence, let alone sufficient uncontroverted evidence, for the missing instructional elements. Reversal is required because this Court cannot be confident the jury would have convicted Peterson had the trial court issued a proper "to convict" instruction.

3. PETERSON'S RIGHT TO JURY UNANIMITY WAS VIOLATED BECAUSE SUBSTANTIAL EVIDENCE DID NOT SUPPORT EACH ALTERNATE MEANS OF PROVING HE FAILED TO REGISTER.

Substantial evidence did not support either of the alternative means of committing the alleged crime. As a result, the trial court needed to either instruct the jury that it must reach unanimous agreement as to the means by which Peterson violated the registration statute or issue a special verdict form requiring the jury to specify the means relied upon. Reversal is required because in the absence of these measures, there was no

expression of jury unanimity on each of the alternative means of proving Peterson unlawfully failed to register.

"In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternate means." State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). "If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 717, 881 P.2d 231 (1994).

Reversal, however, is required where substantial evidence does not support each of the alternative means. Id. at 708. The substantial evidence test⁵ is not satisfied unless the reviewing court is convinced "a rational trier

⁵ In conducting alternative means analyses, the terms "substantial evidence" and "sufficient evidence" are used interchangeably. See Ortega-Martinez, 124 Wn.2d at 708 (sufficient evidence); Kitchen, 110 Wn.2d at 410 (substantial evidence). Whatever the label, the test for determining the necessary quantum of proof is the same.

of fact could have found each means of committing the crime proved beyond a reasonable doubt." Kitchen, 110 Wn.2d at 411.

The state's theory was that Peterson unlawfully failed to register in one of two ways. He either failed to register a new residence as required by RCW 9A.44.130(5)(a) or failed to register as homeless as required by RCW 9A.44.130(6)(a). See C.1.a., supra. The sex offender registration statute on its face specifies a number of different ways in which the crime of failure to register may be committed. The statute itself demonstrates this is an alternative means case. See State v. Arndt, 87 Wn.2d 374, 378-79, 553 P.2d 1328 (1976) (a crime is considered capable of being committed by alternate means if the face of the statute clearly demonstrates the proposition).

As set forth above, there was insufficient evidence to prove Peterson violated the statute by means of failing to register a new residential address. See C.1.b., supra. There was also insufficient evidence to prove Peterson violated the statute by means of failing to register as homeless after ceasing to have a fixed residence. See C.1.c., supra.

If one or more of the alternative means is unsupported by substantial evidence and there is only a general verdict, the verdict must be reversed unless this Court can determine that it was based on only one of the

alternative means and that sufficient evidence supported that alternative means. State v. Nicholson, 119 Wn. App. 855, 860, 863, 84 P.3d 877 (2003), overruled on other grounds, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). "An appellate court must be able to determine from the record that jury unanimity has been preserved." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). That determination is impossible here. The "to convict" instruction is all-inclusive as to the means. CP 33. There was no unanimity instruction on alternative means or a special verdict specifying which of the alternative means the jury found.

Furthermore, the state did not elect one means over the other. To ensure unanimity, the state must expressly and specifically make an election to the jury. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). The state does establish election unless (1) its closing argument, when considered with the jury instructions and the charging documents, makes clear which act the state relies on to convict; and (2) there is no possibility the jury could have been confused as to which act the state relied upon. State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993), overruled on other grounds, Smith, 159 Wn.2d 778. Here, the state told the jury "[t]here was no evidence that came from the stand that he gave any kind of written notice of a new address, and there was no evidence that

he gave any notice to the sheriff that he was homeless, either one of the two possibilities that exist." 3RP 95. The state did not elect one means over the other. Cf. Williams, 136 Wn. App. at 497 (no election where state emphasized one particular act of assault but did not expressly elect to rely only on that single act).

Although the unanimity issue was not raised at trial, this Court may address it for the first time on appeal because an error involving jury unanimity is an issue of constitutional magnitude. State v. Gitchel, 41 Wn. App. 820, 822, 706 P.2d 1091 (1985); see also State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (failure to give a proper unanimity instruction may be raised for the first time on appeal). Reversal is therefore required.

4. THE INFORMATION FAILED TO NOTIFY PETERSON THAT KNOWLEDGE IS AN ELEMENT OF THE CRIME OF FAILURE TO REGISTER.

Peterson's conviction for failure to register as a sex offender must be reversed because the charging document does not set forth the knowledge element of the crime.

A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177

(1995). The purpose of the well-established "essential elements" rule is to apprise the defendant of the charges against him and allow preparation of a defense. Id.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The final amended information, like the first two charging documents, fails to allege Peterson "knowingly" failed to register. CP 41, 43, 47. Knowledge is an element of the crime of failure to register. RCW 9A.44.130(10) provides: "A person who *knowingly* fails to register with the county sheriff or notify the county sheriff . . . as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (9)(a) of

this section." (Emphasis added.) The information is deficient because it lacks the element that Peterson "knowingly" failed to register. See State v. Moavenzadeh, 135 Wn.2d 359, 361, 363-64, 956 P.2d 1097 (1998) (conviction reversed because information omitted element that defendant "knowingly" possessed stolen property); State v. Gill, 103 Wn. App. 435, 441-42, 13 P.3d 646 (2000) (conviction reversed because information charging defendant with felony harassment did not set forth element that defendant "knowingly" threatened a person).

A charging document need not include the exact words of a statutory element; words conveying the same meaning and import are sufficient. Kjorsvik, 117 Wn.2d at 108. For example, the phrase "unlawfully and feloniously" is equivalent to the term "knowingly." State v. Krajewski, 104 Wn. App. 377, 386, 16 P.3d 69 (2001). But this phrase appears nowhere in Peterson's information.

In Hopper, the Supreme Court held omission of the statutory element "knowingly" from a second degree assault charge did not render the information defective where the state alleged the defendant "assaulted" another. State v. Hopper, 118 Wn.2d 151, 159, 822 P.2d 775 (1992). The Court reasoned the ordinary meaning of "assault" includes an intentional act, and so the information imparted notice of the knowledge

element when read liberally. Id. at 158 ("[t]he word 'assault' is not commonly understood as referring to an unknowing or accidental act.").

Unlike the term "assault," the charging document phrases "failure to register" and "did fail to provide written notice" do not presume knowledge. Indeed, the offense of failure to register, unlike assault, is not even an affirmative act. The crime stems from a failure to act. People are quite capable of failing to register without knowing they are required to do so.

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of knowledge is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Peterson's conviction. McCarty, 140 Wn.2d at 425.

D. CONCLUSION

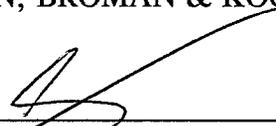
For the reasons stated, this Court should reverse Peterson's conviction and dismiss the charge with prejudice based on insufficiency of

evidence. In the event this Court declines to dismiss with prejudice, then the conviction should be reversed and the case remanded for a new trial.

DATED this 31st day of August, 2007.

Respectfully Submitted,

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