

X

No. 86532-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 40422-2-II)

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL EDWARD CATON,

Appellant.

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SUPREME COURT
STATE OF WASHINGTON

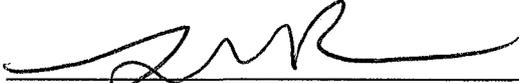
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RESPONSE TO PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
And the Superior Court of Lewis County

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A. COURT OF APPEALS DECISION

The Petitioner, Michael Edward Caton¹, seeks review of the published opinion in *State v. Caton*, Court of Appeals, Division II, cause number 40422-2-II, filed September 13, 2011. A copy of the opinion is attached hereto for the Court's reference as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it determined that former RCW 9A.44.130(7) did not violate the separation of powers doctrine?
2. Did the Court of Appeals err when it found that Caton's equal protection rights were not violated?
3. Did the Court of Appeals err when it found that former RCW 9A.44.130(7) was not constitutionally vague as applied?
4. Did the Court of Appeals err when it found the State had presented sufficient evidence to sustain a conviction for failure to register as a sex offender?
5. Did the Court of Appeals err when it found that Caton had not properly preserved his confrontation clause argument and therefore was barred from raising it for the first time on appeal and if so, was the Confrontation Clause violated by the admission of Caton's sex offender registration form?

C. STATEMENT OF FACTS

The State urges this Court to adopt the Facts as presented in the Court of Appeals decision. See Appendix A 1-3.

¹ Hereafter, Caton.

D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

This Court should not accept review in the present case. Caton argues five reasons why this court should accept review. None of Caton's arguments are persuasive. Caton's urges this court to accept review regarding a statutory analysis of a crime that is no longer in existence. Further, Caton's arguments regarding the Confrontation Clause and sufficiency of evidence do not warrant review by this court. The State respectfully requests this Court not to accept review of Caton's case.

1. The Court Of Appeals Properly Denied Caton's Separation of Powers Challenge Of Former RCW 9A.44.130(7).

A statute is presumed constitutional and it is the burden of the party attacking the statute to prove the statute is unconstitutional beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), *citing Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). "[W]here legislation tends to promote the health, safety, morals or welfare of the public and the legislation bears a reasonable and substantial relation to that purpose, every presumption will be indulged in favor of constitutionality." *State v. Melcher*, 33 Wn. App. 357, 359, 655 P.2d 1169 (1982), *citing Duckworth v. Bonney*

Lake, 91 Wn.2d 19, 586 P.2d 860 (1978). Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010).

The Washington State Constitution divides power between the executive, judicial and legislative branches of government. Const. art. II, III and IV. Each branch of government is restrained from invading the power vested in a different branch of government. *State v. Chavez*, 163 Wn.2d 262, 273, 180 P.3d 1250 (2008). While not explicitly stated in the Washington State Constitution, the separation of powers doctrine is implicitly recognized as a founding principle in our state and the federal constitutions. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.3d 691 (1997) (citations omitted). When there is an allegation of a violation the separation of powers doctrine in regards to state government only the state constitution is implicated. *Id.*

The legislature is charged with the authority to define crime and set punishments. Const. art. II, § 1; *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.3d 80 (2000). The elements of a crime are to be defined by the legislature. *State v. Wadsworth*, 139 Wn.2d at 735. The legislature can properly delegate authority when (1) the legislature provides standards to indicate the task to be done and

designates an agency to accomplish it and (2) there are procedural safeguards in place to control arbitrary action and abuse of discretionary power. *State v. Simmons*, 152 Wn.2d 450, 455, 98 P.2d 789 (2004).

Former RCW 9A.44.130(7)² required a sex offender to report to the county sheriff every 90 days.

All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office and shall occur during normal business hours.

RCW 9A.44.130(7). Failing to comply with the ninety day reporting requirement is a crime. Former RCW 9A.44.130(11)(a).³ Caton argues that by giving the county sheriff the task of setting the actual report date the legislature is improperly designating the power to define an essential element of the crime to the sheriff's office therefore, the statute violates of the separation of powers doctrine. Petitioner's Brief 5-6. Caton's argues that the legislature did not supply any standards in regards to how the county sheriff was to apply the 90 day requirement and the county sheriff could therefore

² RCW 9A.44.130(7) as it was in effect in 2009 and will hereafter be referred to as RCW 9A.44.130(7) (with the exception of the section headings).

³ RCW 9A.44.130(11)(a) as it was in effect in 2009 and will hereafter be referred to as RCW 9A.44.130(11)(a).

arbitrarily set the date of the 90 day reporting. Petitioner's Brief 5-6. Caton urges this court to follow *State v. Ramos*⁴ and find the delegation to the sheriff's office violates the separation of powers doctrine. Brief of Petitioner 6-7. Caton's argument is misplaced and *Ramos* is distinguishable.

In *Ramos*, the defendant, Domingo Ramos, Jr., was classified as a risk level II sex offender solely by the Thurston County Sheriff's Office. *State v. Ramos*, 149 Wn. App. 226, 269-270, 202 P.3d 383 (2009). Ramos was convicted of two counts of Sexual Exploitation of a Minor in 1995, with no requirement to register as a sex offender. In 2001 the law changed and Ramos was now required to register as a sex offender. The Thurston County Sheriff's Office classified Ramos as a Level II sex offender. *Id.* at 269. As a result of this classification, Ramos had to report every 90 days to the Thurston County Sheriff's Office. *Id.* Ramos failed to report in 2007 and was charged and convicted of failure to register under RCW 9A.44.130(7). *Id.* at 270.

Ramos argued on appeal that RCW 4.24.550(6)⁵ violated the separation of powers doctrine because the legislature improperly

⁴ *State v. Ramos*, 149 Wn. App. 226, 202 P.3d 383 (2009).

⁵ Any citation to RCW 4.24.550 is to the statute that was in place during the pendency of Ramos's case.

delegated the authority to classify sex offender to the legislature. *Id.* The Court of Appeals held that RCW 4.24.550(6) did violate the separation of powers because “[t]he legislature inadequately defined the element of the crime at question (risk of re-offense) and did not provide standards to assist law enforcement agencies in establishing measurement procedures of the risk of re-offense.” *Id.* at 273. The Court did caution that the legislature can properly delegate to an agency to define an element of a crime if it provides the agency adequate direction in reaching a definition. *Id.* at 275.

In contrast, the Court of Appeals found in *State v. Melcher* that the legislature did not violate the separation of powers doctrine when it delegated to the state toxicologist the power to approve techniques and methods of chemical analysis in regards to testing the alcohol content of breath and blood in regards to an essential element of driving under the influence. *State v. Melcher*, 33 Wn. App. at 359-60. The statute was found to have adequately defined the element of the crime, the permissible level of blood alcohol content a person may have, and the statute properly delegated to the state toxicologist the duty of establishing measuring procedures. *Id.* at 361. Further, the court held the delegation was administrative rather than legislative. *Id.*

In Caton's case the Court of Appeals correctly analogized the delegation of setting the date for the 90 day reporting by the county sheriff with the delegation to the state toxicologist in *Melcher*. See Appendix A 7. The legislature identified all the elements of the crime, risk level II or III sex offender, with a fixed address, must register, in person, with the county sheriff every 90 days, during normal business hours, on a date specified by the county sheriff, during normal business hours. RCW 9A.44.130(7). The delegation was administrative and allowed for the county sheriff to designate a date within the 90 day period that met the criteria and standards set forth by the legislature, a report date every 90 days during normal business hours. Caton's contention that it allows the county sheriff to set an arbitrary date is unfounded. If the law were to be interpreted as Caton urges this Court to, there would be as many different reporting days as there are risk level II and III sex offenders in a given county because they would have initially registered with the county on different days. RCW 9A.44.130(7) does not violate the separation of powers doctrine.

2. Former RCW 9A.44.130(7) Did Not Violate Caton's Equal Protection Rights.

The right to equal protection of laws is guaranteed by the 14th Amendment of the United States Constitution and Article I,

section 12 of the Washington State Constitution. Equal protection requires persons who are similarly situated to be similarly treated for any legitimate purpose of the law. *State v. Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993). The level of scrutiny used by the courts in equal protection claims is dependent on the rights involved or the nature of the classification. *State v. Hirschfelder*, 170 Wn.2d 536,550, 242 P.3d 876 (2010) (citations omitted). The rational basis test is used when analyzing a claim that does not encompass a fundamental right or suspect class or an important right or semi-suspect class. *Id.* (citations omitted). A statute is constitutional under the rational basis test if:

(1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

The United States Supreme Court has held that the equal protection clause guarantees equal treatment of individuals, not equal treatment as between geographical areas. *Salsburg v. Maryland*, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281 (1954). *Salsburg* challenged a statute that barred the use of illegally seized evidence in certain counties. The Supreme Court rejected

Salsburg's challenge of the law. *Salsburg v. Maryland*, 346 U.S. at 550-51. The Court stated,

We find little substance to appellant's claim that distinctions based on county areas are necessarily so unreasonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution. The Equal Protection Clause relates to equality between persons as such rather than areas...[Equal Protection] means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Id. (citations omitted).

The Supreme Court applied its ruling in *Salsburg* to a challenge of Sunday Closing Laws, prohibiting commercial activities on Sundays, which also carved out a number of exemptions for certain types of business at particular locations in *McGowan v. Maryland*.⁶ In *McGowan* employees of a department store were prosecuted for selling items in violation of the Sunday Closing Laws. The employees challenged the laws on equal protection grounds. The Supreme Court rejected the challenge. In regards to equal protection, the Court stated several key principles including: state legislatures have wide discretion when enacting laws that affect some groups of citizens differently than others; classification

⁶ *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961).

cannot rest on grounds that are wholly irrelevant to the achievement of the State's objective; legislatures are presumed to have acted rationally despite a law resulting in some inequality; and a statute will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961).

Caton argues that a sex offender could be required to register in one county 90 days after he registers and in another county the mandatory report date could be two days after he registers with the county sheriff. Petitioner's Brief 10. An argument similar to Caton's was made in *State v. Ragan*⁷. Ragan argued the habitual offender statute was unconstitutional as it unlawfully delegated legislative authority because the statute lacked guidelines and allowed arbitrary application of the law. The Habitual Offender Act provided that the prosecutor shall institute a habitual offender proceeding when a defendant was convicted of an offense and was also found to have certain prior felony convictions, but the law was silent as to when to charge the habitual offender allegation. See RCW 9.92.090. The allegation was that due to the lack of guidelines, the prosecutors across the state used different

⁷ *State v. Ragan*, 22 Wn. App. 591, 593 P.2d 815 (1979).

standards and the statute thereby violated the equal protection clause. The Court held:

Insofar as equal protection is concerned, the only limitation on the exercise of that discretion is that it may not be arbitrary, capricious, or based upon constitutionally invidious standards. The record in this case is barren of evidence of discriminatory application and the defendant has no ground for complaint...Territorial uniformity within a state is not a constitutional requirement.

State v. Ragan, 22 Wn. App. 591, 599, 593 P.2d 815 (1979)

(citations omitted).

The legislature's delegation of power to the county sheriff under RCW 9A.44.130(7) is analogous to the delegation of power to the county prosecutor in RCW 9.92.090. Sex offenders are not a suspect or semi-suspect class, therefore the rational basis test applies. The statute applies to all sex offenders and it is reasonable to distinguish between sex offenders and the general public. Further it is reasonable and not arbitrary and there is a rational relationship between allowing a county sheriff the latitude to perform the administrative function of setting the date for the 90 day reporting and the need for the sheriff's office to effectively staff and enforce the sex offender registration law. Equal protection is not violated by the possibility of geographical non-uniformity in the application of the law. Also, *Caton* does not cite any evidence to

support his claim of discriminatory application of RCW

9A.44.130(7). Caton's equal protection claim is without merit.

3. The Court Of Appeals Properly Found That Former RCW 9A.44.130(7) Was Not Constitutionally Vague As Applied To Caton.

A claim that a statute is vague is challenged under an as applied standard when the statute does not involve a First Amendment right. *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). A statute is unconstitutionally vague if:

- (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or
- (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

Id. (citations and internal quotations omitted). In other words, an ordinary person who would be subject to the law must be able to understand what conduct would have them liable to the statute's penalties. *Id.* 6-7. Vagueness is not uncertainty and therefore, for a statute is not considered unconstitutionally vague simply because "a person cannot predict with complete certainty the exact point at which his or her actions would be classified as prohibited conduct." *Id.* at 7 (citations and internal quotations omitted). A challenge on the grounds of unconstitutional vagueness is reviewed de novo. *Id.* at 5 (citations omitted).

Caton argues to this Court that RCW 9A.44.130(7) is unconstitutionally vague because a person of reasonable intelligence would not know whether it is a crime to not report on the date set by the county sheriff or every 90 days. Petitioner's Brief 11-12. This is simply not the case. A person of reasonable intelligence would understand that to comply with the statute a person who is designated as a risk level II or III sex offender, with a fixed address, must report in person every 90 days and that the report date is set by the county sheriff. See RCW 9A.44.130(7). Further, any failure on the part of a sex offender to comply with the sex offender registration statute is a crime. RCW 9A.44.130(11)(a). The statues were available to Caton and the sheriff's office gave him notice of the day, in writing, so he could comply with the statutory requirements. The statute is not unconstitutionally vague as applied to Caton.

4. The State Presented Sufficient Evidence To Sustain A Conviction.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When

determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Caton argues that the record does not contain substantial evidence to support a conviction because the evidence presented was that Caton registered with the Lewis County Sheriff’s Office on May 19, 2009 and was required to report on June 16, 2009, 27 days later. Petitioner’s Brief 14. Caton argues because he was convicted of failure to register as a sex offender under subsection

seven of RCW 9A.44.130, the State must prove Caton failed to report every 90 days, and the sheriff's office cannot require Caton to report on any interval shorter than 90 days. Petitioner's Brief 14. For the reasons stated above the State urges this court to reject Caton's assertion that the sheriff's office's selection for a reporting date was unconstitutional. The statute makes clear that the report date is chosen by the local sheriff's office and the person is to show up on the date required, during normal business hours. RCW 9A.44.130(7). It is uncontested that Caton failed to report to the Lewis County Sheriff's Office on the designated date, June 16, 2009 between 8:00 a.m. and 5:00 p.m. Therefore, there is sufficient evidence to convict Caton of failure to register as a sex offender. Caton's petition for review should be denied.

5. The Court Of Appeals Properly Found That Caton's Constitutional Right To Confrontation Was Not Violated.

The State urges this Court to adopt the Court of Appeals in its decision found that Caton had not properly preserved the issue of the Confrontation Clause in the trial court and therefore was barred from raising the issue on appeal. Appendix A 11-13. If this Court finds Caton may raise the issue, the State argues in the alternative that the Confrontation Clause was not violated.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront adverse witnesses. This court reviews alleged violations of the confrontation clause de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citations omitted).

Hearsay is inadmissible unless it falls into one of the exceptions or exemptions authorized by law. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007). If a hearsay exception exists, the Confrontation Clause requires a determination if the hearsay is testimonial. *Id.* at 882. Testimonial hearsay is only admissible if the declarant is unavailable and there was a prior opportunity for the accused to cross-examine the declarant. *Id.* If the hearsay evidence is determined to be non-testimonial there is no such requirement. *Id.*

Caton argues to this Court that by permitting Caton's sex offender registration form, which contained his risk level, to be admitted as evidence the trial court violated the Confrontation Clause because the form contained inadmissible hearsay. Petitioner's Brief 15. Caton's argument is that the risk level was set by the End of Sentence Review Committee (ESRC) and the form was admitted to prove an essential element of the crime, that Caton

was a risk level II sex offender. Petitioner's Brief 15-17. Caton goes on to argue that the form does not meet the business records exception to the hearsay rule and further the form violates the Confrontation Clause pursuant to the United States Supreme Court decision in *Melendez-Diaz*.⁸ Brief of Petitioner 16-17.

The business records exception to the hearsay rule states,

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. A defendant's right to confrontation is not violated when a court admits business records pursuant to RCW 5.45.020. *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 789 (2005). A trial court's evidentiary rulings are within the discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *State v. Dorman*, 30 Wn. App. 351, 633 P.2d 1340 (1981) (citations omitted). Allegations regarding accuracy or error in the records goes to weight not to the admissibility of the records. *State v. Flemming III*, 155 Wn. App. 489, 500-01, 228 P.3d 804 (2010). A business record is generally admissible because cross-

⁸ *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009).

examination would serve little or no purpose. *State v. Hines*, 87 Wn. App. 98, 101, 941 P.2d 9 (1997).

Caton's arguments regarding the public records exception are misguided. The record admitted at trial was Caton's sex offender registration form that is used for initial registrations and address changes. Appendix A 3. Detective Borden testified that Caton had been classified as a level II sex offender by the ESRC and Detective Borden had also designated Caton as a risk level II sex offender. Appendix A 3. RCW 9A.44.130 requires sex offenders who are **designated a risk level II or III** to register every 90 days. Caton was without a doubt, designated as a risk level II sex offender. What Caton appears to be arguing is that he should have been able to confront whoever did the scoring for the ESRC to ascertain the reliability and perhaps reasoning behind his designation. An attack on the designation is not an issue in a criminal prosecution under RCW 9A.44.130(7). At the time of Caton's registration and violation he was designated as a risk level II sex offender. The form was used in the normal course of business by the sheriff's office as part of the mandatory registration process. The form contained the designated risk level and other information pertaining to Caton. Cross-examination of someone

from the ESRC would have served no purpose because the designation had already been made.

Caton also argues that the record was produced in preparation for use in criminal prosecution and therefore violates the Confrontation Clause. Petitioner's Brief 17-18. In *Melendez-Diaz* the Supreme Court held that use of a certified report of a drug analyst identifying the composition and weight of substances tested solely for criminal prosecution, without testimony, violated the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, ___U.S.___, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009). The Court rejected the notion that the report was a business record because "a clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysis did here: create a record for the sole purpose of providing evidence against a defendant." *Melendez-Diaz*, 129 S. Ct. at 2539.

Caton's argument is without merit because the record was not produced for the sole purpose of providing evidence against him in a criminal prosecution. The record was part of his initial registration as a sex offender with the Lewis County Sheriff's Office. While a person may be prosecuted in the future for failing to comply with the sex offender registration requirements, the form itself is not

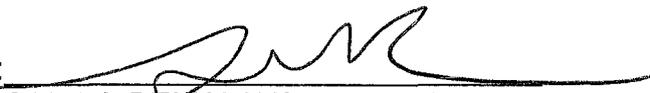
produced solely for criminal prosecution. The Confrontation Clause was not violated by the admission of the sex offender registration form.

E. CONCLUSION

This Court should deny Caton's petition for review.

RESPECTFULLY submitted this 20th day of October, 2011.

JONATHAN MEYER
Lewis County Prosecuting Attorney

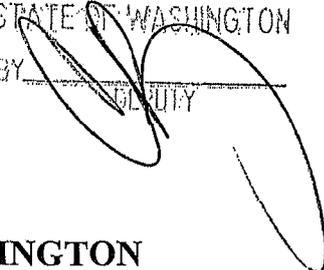
by: 
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Appendix A

COA Decision 40422-2-II

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STATE OF WASHINGTON
BY: 

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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL EDWARD CATON,
Appellant.

No. 40422-2-II

PUBLISHED OPINION

VAN DEREN, J. — Michael Caton appeals his conviction for failure to register as a sex offender. He argues: (1) the legislature violated separation of powers principles when it authorized county sheriffs under former RCW 9A.44.130(7) (2006) to designate a reporting date within a 90 day period for certain registered sex offenders, (2) former RCW 9A.44.130(7) violates equal protection principles on the same basis, (3) former RCW 9A.44.130(7) is unconstitutionally vague, (4) admission of Caton’s sex offender registration form at trial violated his right to confront witnesses, and (5) sufficient evidence does not support his conviction. In a statement of additional for review grounds,¹ he also contends: (1) the trial court erroneously included his failure to register as a sex offender conviction when calculating his offender score, (2) the trial court erred when it sentenced him to community custody, (3) sentencing him under

¹ RAP 10.10.

former RCW 9A.44.130(11)(a) violated ex post facto prohibitions, and (4) the county sheriff failed to follow statutory sex offender registration requirements. We affirm.

FACTS

On May 19, 2009, Caton registered as a sex offender with the Lewis County Sheriff's Office. When he registered, he signed a notification form acknowledging his understanding (1) that he was required to report to the sheriff's office every 90 days, (2) that his reporting date was June 16, 2009, between 8:00 a.m. and 5:00 p.m., and (3) that failure to report on that date was a felony offense.² Lewis County Sheriff's Detective Bradford Borden provided Caton with a copy of the notification form.

To reasonably manage the 90 day reporting requirement for all sex offenders living in Lewis County, the county specified four predesignated reporting days, one in each quarter of the year. It did not set individual reporting dates for each sex offender because doing so would be "very chaotic." Report of Proceedings (RP) at 61.

On June 9, Caton was arrested for a "driving offense." Clerk's Papers (CP) at 7. On June 10, after his release from jail, he appeared at the sheriff's office, believing that, as a registered sex offender, he was required to report to the sheriff after release from confinement for any offense. Borden did not give him a new registration date, leaving June 16 as Caton's next reporting date.

On June 16, Caton failed to report to the sheriff's office; instead he reported on June 17. The State charged him under former RCW 9A.44.130(7) and former RCW 9A.44.130(11)(a)

² The trial court admitted this form as "Plaintiff's Identification 2" at trial. Report of Proceedings at 59. It is not part of the record on appeal.

with failure to register as a sex offender for failing to report in person “on the required day for the 90 day reporting” period. CP at 1.

At a bench trial, Borden stated that he worked in the Lewis County Sheriff’s Office Sex Offender Registration Unit and was its sex offender registration file custodian. He stated that the sheriff’s office ultimately sets the risk level for registered sex offenders, but that the Washington State Department of Corrections’s End of Sentence Review Committee (ESRC) also sets offenders’ risk levels when they are released from confinement. Borden stated that the sheriff’s office prepared Caton’s registration form and used it for “initial registration[] and changes of address.” RP at 57. Over Caton’s hearsay and foundation objections, the trial court admitted the registration form.

Referring to Caton’s sex offender registration form, Borden stated that ESRC classified him as a level II offender. Borden classified Caton as a level II sex offender on the Lewis County registration form based on Caton’s sex offender registration file, including the ESRC’s report. Borden stated that the ERSC’s report contained “a synopsis of the details concerning” Caton and, that, based on numeric assessment tools, the ERSC had elevated him to a level II offender. RP at 65. Caton unsuccessfully renewed his objection to the registration form’s admission on hearsay and foundation grounds, arguing that “it’s based on some other documentation to indicate risk level II and that that should be a prerequisite foundational requirement, prior to the admission of that document.” RP at 66.

The trial court convicted Caton as charged. It calculated his offender score as 9+ and sentenced him to 50 months’ incarceration and 36 months’ community custody.

ANALYSIS

I. SEPARATION OF POWERS

Caton, citing *State v. Torres Ramos*, 149 Wn. App. 266, 202 P.3d 383 (2009), argues that the legislature's authorization of county sheriffs under former RCW 9A.44.130(7) to determine sex offenders' reporting date during the 90 day reporting period violates separation of powers principles because it allows them to define an essential element of the crime of failure to register as a sex offender.

We review a statute's constitutionality de novo. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008). We presume the statute's constitutionality, and the party challenging it must prove its unconstitutionality beyond a reasonable doubt. *Abrams*, 163 Wn.2d at 282.

Washington courts have recognized the separation of powers doctrine as a founding, implicit principle of our state and federal constitutions. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997). The doctrine serves to ensure that the fundamental functions of each government branch remain inviolate. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). When separation of powers challenges are raised involving different branches of state government, only the state constitution is implicated. *Carrick*, 125 Wn.2d at 135 n.1.

Authority to define crimes and set punishments rests firmly with the legislature. *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). Specifically, the legislature is responsible for defining the elements of a crime. *State v. Evans*, 154 Wn.2d 438, 447 n.2, 114 P.3d 627 (2005); *Wadsworth*, 139 Wn.2d at 735. "[I]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others." *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998). Such a delegation is proper, however, when (1) the legislature provides standards to indicate what is to be done and designates the agency to accomplish it and (2) procedural

safeguards exist to control arbitrary administrative action and abuse of discretionary power.

State v. Simmons, 152 Wn.2d 450, 455, 98 P.3d 789 (2004).

We also review questions of statutory interpretation, such as the essential elements of a crime, de novo. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). When interpreting a statute, we seek to ascertain the legislature's intent. *Jacobs*, 154 Wn.2d at 600. “[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Jacobs*, 154 Wn.2d at 600 (alteration in original) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). We determine the “plain meaning” of a statutory provision from the ordinary meaning of its language, as well as the general context of the statute, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600 (quoting *Campbell & Gwinn*, 146 Wn.2d at 9-10)). We interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The elements of a crime are “those facts ‘that the prosecution must prove to sustain a conviction.’” *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005) (quoting BLACK'S LAW DICTIONARY 559 (8th ed. 2004)). “An ‘essential element is one whose specification is necessary to establish the very illegality of the behavior.’” *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005) (quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). It is proper to look first to the statute to determine the elements of a crime. *Miller*, 156 Wn.2d at 27.

Former RCW 9A.44.130(7) provided:

All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours.

Former RCW 9A.44.130(11)(a) provided, “A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony.”

In *Ramos*, we considered whether the legislature’s delegation of authority under former RCW 4.24.550(6)(b) (2005), allowing the county sheriff to assign risk classifications to sex offenders, violated separation of powers principles.³ 149 Wn. App. at 269-70. We observed that the statute, by allowing the county sheriff to classify offenders with a risk level I or II, allowed the county sheriff to define an element essential to a violation of the requirements of former RCW 9A.44.130(7). *Ramos*, 149 Wn. App. at 271-72. We further observed that former RCW 4.24.550(6)(b) did not provide standards, definitions, or methodologies to guide local law enforcement agencies in determining an offender’s classification. *Ramos*, 149 Wn. App. at 275-76. We held that the legislature’s delegation of this function to the county sheriff was improper. *Ramos*, 149 Wn. App. at 276.

In reaching this holding, we distinguished *State v. Melcher*, 33 Wn. App. 357, 655 P.2d 1169 (1982). *Ramos*, 149 Wn. App. at 273. In that case, Melcher argued that former RCW 46.61.506(3) (1979) improperly delegated legislative authority because the statute allowed the state toxicologist to approve methods of chemical analysis for determining breath or blood alcohol content levels and a driver’s blood alcohol level is one element of the crime of driving under the influence. *Melcher*, 33 Wn. App. at 359-60. But Division Three of this court reasoned that the statute “d[id] not delegate the power to make a law; rather, it delegate[d] the ‘power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.’” *Melcher*, 33 Wn. App. at 361 (internal quotation marks omitted) (quoting

³ Former RCW 4.24.550(6)(b) provided, “Local law enforcement agencies that disseminate information pursuant to this section shall . . . assign risk level classifications to all offenders about whom information will be disseminated.”

Carstens v. DeSellem, 82 Wash. 643, 650, 144 P. 934 (1914)). Because the statute adequately defined the element of the crime in question (permissible level of blood alcohol content) and properly delegated the duty of establishing measurement procedures for this objective standard to the state toxicologist, the delegation was administrative, not legislative. *Melcher*, 33 Wn. App. at 361. Thus, the delegation was not subject to challenge under separation of powers principles. *Melcher*, 33 Wn. App. at 361.

The legislature's delegation to county sheriffs to set the reporting date for sex offenders who are required to register is more akin to the delegation of power in *Melcher* than to the delegation in *Ramos*. Here, the legislature defined the elements of the crime as knowingly failing to comply with former RCW 9A.44.130(7)'s 90 day reporting requirement. It established the 90 day reporting period as an objective standard. It delegated the power to determine the "fact . . . upon which the law makes, or intends to make, its own action depend," i.e., the reporting date within the 90 day period, to the county sheriff. *Melcher*, 33 Wn. App. at 361 (internal quotation marks omitted) (quoting *Carstens*, 82 Wash. at 650). Thus, the delegation was administrative, allowing each county to manage the reporting requirement in accord with its staffing levels and staff availability, and it did not violate separation of powers principles. Caton's claim fails.

II. EQUAL PROTECTION

Caton also argues that former RCW 9A.44.130's authorization of county sheriffs to specify a reporting date within the 90 day reporting period for level II and III sex offenders violates his federal and state constitutional guarantees of equal protection.

Constitutional equal protection guarantees require similar treatment under the law for similarly situated persons. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. I, § 12; *State v.*

Ward, 123 Wn.2d 488, 515, 69 P.2d 1062 (1994). “Where persons of different classes are treated differently, there is no equal protection violation.” *Ward*, 123 Wn.2d at 515.

We review an allegedly discriminatory statutory classification affecting suspect classes under a strict scrutiny test. *Ward*, 123 Wn.2d at 516. But “[s]ex offenders are not a suspect class for purposes of equal protection review.” *Ward*, 123 Wn.2d at 516. Therefore, we review Caton’s claim under a rational basis test. *Ward*, 123 Wn.2d at 516. A law satisfies this test if it rests on a legitimate state objective, and the law is not wholly irrelevant to achieving that objective.⁴ *Ward*, 123 Wn.2d at 516.

Here, the legislature stated explicitly that the State’s policy is “to assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in RCW 9A.44.130.” LAWS OF 1990, ch. 3, § 401. Our Supreme Court has recognized this as a legitimate state objective. *Ward*, 123 Wn.2d at 516-17. Granting law enforcement agencies discretion in specifying a reporting date allows them to effectively allocate their resources and provides them with a manageable number of sex offenders to monitor on each reporting date. *See Ward*, 123 Wn.2d at 517. Therefore, allowing counties to set the reporting date within the 90 day registration period for level II and III sex offenders is not arbitrary and rationally relates to the state’s interest in assisting local law enforcement in this task. Accordingly, we hold that

⁴ Caton cites to additional rational relationship review factors: (1) whether the law applies equally to all members in the designated class, (2) whether there are reasonable grounds for distinguishing between those within and those without the class, and (3) whether the law has a rational relationship to the law’s purpose. *Petersen v. State*, 100 Wn.2d 421, 445, 671 P.2d 230 (1983). Because our Supreme Court declined to apply these factors in *Ward* and, because these factors overlap with the standard applied in *Ward*, we decline to apply them.

authorizing county sheriffs to set the reporting date in former RCW 9A.44.130(7) does not violate equal protection guarantees.

III. VAGUENESS

Caton further argues that former RCW 9A.44.130(7) is unconstitutionally vague because it fails to provide adequate notice of the conduct it requires or proscribes. We disagree.

We review a vagueness challenge to a statute's constitutionality de novo. *State v. Watson*, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). When the statute does not involve First Amendment⁵ rights, we review a vagueness challenge by examining the statute as applied to the particular facts of the case. *Watson*, 160 Wn.2d at 6. A challenger bears the burden of proving beyond a reasonable doubt that a statute is unconstitutionally vague and, because we presume a statute is constitutional and the standard for finding a statute unconstitutionally vague is high, only in exceptional cases may a challenger overcome this presumption. *Watson*, 160 Wn.2d at 11.

We consider a statute void for vagueness if either (1) the statute fails to define the criminal offense with sufficient definiteness—allowing ordinary people to understand what conduct the statute proscribes—or (2) the statute fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Watson*, 160 Wn.2d at 6. Caton appears to challenge former RCW 9A.44.130(7) only on the first ground.

“The due process clause of the Fourteenth Amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe.” *Watson*, 160 Wn.2d at 6. To meet this standard, “the language of a penal statute ‘must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.’”

⁵ U.S. CONST.

Watson, 160 Wn.2d at 6-7 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). “A statute fails to provide the required notice if it ‘either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Watson*, 160 Wn.2d at 7 (quoting *Connally*, 269 U.S. at 391).

But, because “[s]ome measure of vagueness is inherent in the use of language,” we “do not require ‘impossible standards of specificity or absolute agreement.’” *Watson*, 160 Wn.2d at 7 (alteration in original) (quoting *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991)); *Watson*, 160 Wn.2d at 7 (internal quotation marks omitted) (quoting *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). In addition, “[b]ecause of the inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute” and we consider such materials “[p]resumptively available to all citizens.” *Watson*, 160 Wn.2d at 8 (alteration in original) (internal quotation marks omitted) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

Unconstitutional vagueness is not mere uncertainty, and a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which their actions become prohibited conduct. *Watson*, 160 Wn.2d at 7. Given this, “a statute meets constitutional requirements ‘[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement.’” *Watson*, 160 Wn.2d at 7 (alteration in original) (internal quotation marks omitted) (quoting *Douglass*, 115 Wn.2d at 179)).

Here, former RCW 9A.44.130(7) required that sex offenders with a fixed residence report to the county sheriff every 90 days on a date specified by the sheriff. Former RCW

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9A.44.130(11) stated that failure to comply with any of the requirements of former RCW 9A.44.130 constituted a felony. These statutes were presumptively available to Caton. The Lewis County Sheriff's Office informed Caton that the next specified reporting date was June 16, 2009, and that failure to report on that date was a crime. Accordingly, a person of ordinary intelligence would understand that failure to report on June 16 was a crime. Caton's vagueness challenge fails.

IV. CONFRONTATION CLAUSE

Caton additionally argues that the trial court's admission of his sex offender registration form containing Borden's classification of him as a level II sex offender, based in part on his ERSC classification, violated the confrontation clause and requires reversal. Specifically, he argues that "the trial court admitted and relied upon [the registration form] to find the essential element that . . . Caton was a level II or III sex offender, yet this document merely recited information derived from another document that was not proffered by the State or admitted at trial." Br. of Appellant at 24.

The Sixth Amendment to the United States Constitution⁶ and article 1, section 22 of the Washington Constitution⁷ guarantee criminal defendants the right to confront and cross-examine witnesses. The confrontation clause provides that the State can present testimonial out-of-court statements of an absent witness only if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But the State can present nontestimonial hearsay

⁶ "[T]he accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI.

⁷ Under Washington's constitution, the accused also has "the right to . . . meet the witnesses against him face to face." WASH. CONST. art. I, § 22.

under the Sixth Amendment subject only to evidentiary rules. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Accordingly, “the existence of an applicable hearsay exception is not dispositive as to the issue of admissibility at trial. Rather, the Confrontation Clause requires another layer of analysis.” *State v. Kirkpatrick*, 160 Wn.2d 873, 882, 161 P.3d 990 (2007). The State has the burden on appeal of establishing that statements are nontestimonial. *State v. Koslowski*, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009). We review confrontation clause violations for constitutional harmless error. *Koslowski*, 166 Wn.2d at 431.

Caton raises this constitutional claim for the first time on appeal. RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. But RAP 2.5(a)(3) allows appellants to raise claims for the first time on appeal if such claims constitute manifest constitutional error. To establish manifest constitutional error allowing appellate review, appellants must demonstrate actual prejudice resulting from the error on the record. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). “Essential to this determination is a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial.” *Kirkman*, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

In *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007), our Supreme Court held that a confrontation clause violation was “manifest” because, had it been raised at trial, the challenged statement would have been excluded, thus fatally undermining the State’s case. Here, Borden testified that the county sheriff ultimately sets an offender’s risk level and that he classified Caton as a level II sex offender. The trial court could have relied on Borden’s testimony that he classified Caton as a level II offender after reviewing all of Caton’s records, thus requiring Caton to report every 90 days. Even assuming that the trial court erroneously

admitted the form, its exclusion would not have fatally undermined the State's case.

Accordingly, any error here is neither manifest nor subject to our review.

V. SUFFICIENCY OF THE EVIDENCE

Caton also contends that sufficient evidence does not support his conviction because (1) the State showed that he failed to report to the county sheriff within 27 days, not within 90 days, after registering as a sex offender and (2) no admissible evidence established that he was a level II sex offender required to report because admission of the form used by Borden to classify Caton as a level II sex offender violated the confrontation clause.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. In the sufficiency context, we consider circumstantial evidence equally as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970, *abrogated in part on other grounds by Crawford*, 541 U.S. 36.

Caton assigns error only to finding of fact 1.4, "[Caton's] risk level was set at a Level II by the [ESRC] and that level was adopted by the Lewis County Sheriff's Office." CP at 7. The trial court's unchallenged findings stated: (1) the Lewis County Sheriff's Office has four preset quarterly reporting dates for level II and III sex offenders and does not give individual offenders dates differing from the preset dates; (2) on May 19, 2009, Caton registered as a sex offender with the sheriff's office; (3) he registered a fixed address; (4) on May 19, he was given in writing

the quarterly report date of June 16, 2009; (5) he had knowledge that he had to report to the sheriff's office on June 16 between 8:00 a.m. and 5:00 p.m.; (6) he was arrested on June 9 for a driving offense and was released from jail on June 10; (7) he appeared at the sheriff's office on June 10 after his release from custody; (8) he failed to report to the sheriff's office on June 16; and (9) he reported on June 17. Unchallenged factual findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Here, former RCW 9A.44.130(7) required that sex offenders with a fixed residence report to the county sheriff every 90 days on a date specified by the sheriff. Former RCW 9A.44.130(11)(a) stated that failure to comply with any of the requirements of former RCW 9A.44.130 constituted a crime. The trial court's unchallenged findings established that Caton had a fixed residence in Lewis County and knowingly failed to report on June 16, 2009, the designated reporting date. Finally, Borden's testimony established that the Lewis County Sheriff's Office classified Caton as a level II sex offender, and he was thus subject to the reporting requirement. We have determined that any error in admitting Caton's sex offender registration form is neither manifest nor subject to our review and that the trial court considered Borden's unchallenged testimony of his classification of Caton. Sufficient evidence supports his conviction.

VI. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

A. Offender Score

Caton argues that the trial court erroneously included his failure to register conviction as a sex offense when calculating his offender score at sentencing. But the applicable version of the sentencing reform act of 1981, chapter 9.94 RCW, defined a "sex offense" as "[a] felony that is a violation of chapter 9A.44 RCW other than [former] RCW 9A.44.130(12)." Former RCW

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9.94A.030(46)(a)(i) (2008). Here, Caton was convicted under former RCW 9A.44.130(11)(a), not an excluded offense. His claim fails.

B. Community Custody

Caton contends that the trial court erred in sentencing him to community custody for his failure to register conviction. Former RCW 9.94A.545(2)(a) (2008)⁸ provided, “If the offender is guilty of failure to register under [former] RCW 9A.44.130(11)(a), the court shall impose a term of community custody under [former] RCW 9.94A.715 [(2008)].”⁹ Former RCW 9.94A.715(1) provided, “When a court sentences a person to the custody of the department for a sex offense not sentenced under [former] RCW 9.94A.712 [(2008)]¹⁰ the court shall in addition to the other terms of the sentence, sentence the offender to community custody.” Former RCW 9.94A.712 did not contain failure to register as a crime requiring its application. Here, Caton committed failure to register under former RCW 9A.44.130(11)(a). Thus, the statutes authorized the trial court to impose community custody as part of his sentence. His claim fails.

C. Ex Post Facto

Caton further argues that the trial court violated ex post facto prohibitions by sentencing him under former RCW 9A.44.130(11)(a) instead of the law in effect in 2001. But we apply the law in effect at the time the crime was committed. *State v. Schmidt*, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001). He committed the crime on June 16, 2009, when former RCW

⁸ LAWS OF 2008, ch. 276, § 304.

⁹ LAWS OF 2008, ch. 276, § 305. Former RCW 9.94A.715 was repealed, effective August 1, 2009, pursuant to the direction found in section 42(2), chapter 28, Laws of 2009 and section 57(3), chapter 231, Laws of 2008.

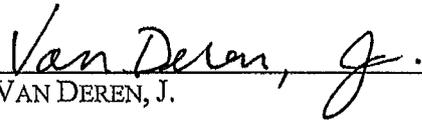
¹⁰ Former RCW 9.94A.712 was recodified as former RCW 9.94A.507 (2008), effective August 1, 2009, pursuant to the direction found in section 56(4), chapter 231, Laws of 2008.

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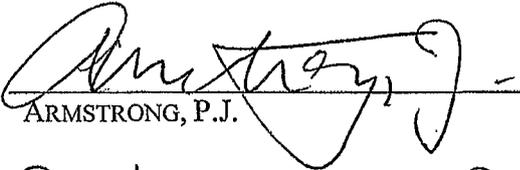
9A.44.130(11)(a) was in effect. The trial court did not retroactively apply a new statute to his crime. His claim fails.

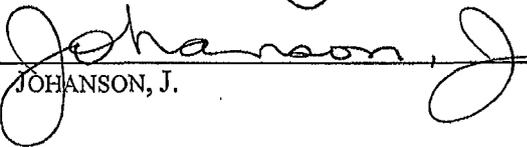
D. Sex Offender Registration Requirements

Finally, Caton contends that Borden failed to follow sex offender registration requirements, such as obtaining his fingerprints and giving him a new registration date, when he reported to Borden after his release from jail on June 10. But he was jailed for a “driving offense.” CP at 7. Former RCW 9A.44.130(4)(a)(i) provided, “Sex offenders who committed a sex offense . . . and who, on or after July 28, 1991, are in custody, as a result of that offense . . . must register at the time of release from custody.” Here, he was not released from custody as a result of a sex offense. His claim fails.


VAN DEREN, J.

We concur:


ARMSTRONG, P.J.


JOHANSON, J.