

NO. 68615-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CARL HOWARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE HARRY McCARTHY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Is it constitutionally required that a defendant be present when the court—after consultation with counsel—answers a jury question regarding a matter of law? Has the defendant shown that this Court’s decision in State v. Jasper,¹ is incorrect and harmful?

2. Does the language contained in the charging document, that mirrors the language of the statute, include all the essential elements of the crime of failure to register as a sex offender?

3. Did the trial court abuse its discretion in admitting evidence that the defendant attempted to avoid detection and arrest?

4. The State concedes that certain conditions of community custody should not have been imposed.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with failure to register as a sex offender. CP 9. A jury found the defendant guilty as charged. CP 57. With an offender score of 12, the defendant received a standard range sentence of 43 months. CP 58-69.

¹ 158 Wn. App. 518, 245 P.3d 228 (2010), affirmed, 174 Wn.2d 96 (2012).

2. SUBSTANTIVE FACTS

Prior to March 3rd, 2011, the defendant had been convicted of a “sex offense” that required him to register as a sex offender. 5RP² 82. The defendant stipulated to this fact for trial. Id. Prior to March 3rd, 2011, the defendant had been convicted on multiple separate occasions for failure to register as a sex offender. 5RP 82. The defendant stipulated that he had been convicted on two separate occasions for failure to register as a sex offender. Id.

Abstinence Housing and Human Services (AHHS) runs a clean and sober transitional housing program. 4RP 62-63. It is a “zero tolerance” program that places persons from prison in transitional housing. 4RP 63-64. A violation results in immediate discharge from the program. Id.

On January 4, 2011, the defendant was accepted for residency at AHHS's East Russell Street house in the City of Kent in the County of King. 4RP 64, 70. Upon occupancy, the house manager went over the program's rules, one by one, with the defendant initialing each rule and signing the contract acknowledging his understanding of all the rules. 4RP 70, 109;

² The verbatim report of proceedings is cited as follows: 1RP—3/13/12, 2RP—3/14/12, 3RP—3/19/12, 4RP—3/20/12, 5RP—3/21/12, 6RP—3/22/12, 7RP—3/23/12, and 8RP—4/13/12.

Trial Exhibit 4. Two rules whose violation will result in immediate termination are consuming alcohol and/or drugs, and failing to provide a UA or alcohol swab upon request. 4RP 78, 84.

In early March, the AHHS assistant program manager received information that the defendant had been violating his curfew. 4RP 94. The house manager, Michael Parker, was therefore instructed to have the defendant provide a UA when he returned to the residence. 4RP 91-92.

Subsequently, in the early morning hours of March 3rd, Parker, who lived at the residence, was awakened by the door being slammed—it was the defendant and an unknown female arriving at the residence. 4RP 110. Parker got up and informed the defendant that he was required to provide a UA. 4RP 111. The defendant balked, but after being reminded of the rule that required him to provide a UA upon request, he agreed to provide a sample. 4RP 87, 111-12. However, the defendant refused to allow the UA to be observed, as required. 4RP 112. He then provided Parker with a supposed sample, but the sample did not smell like urine. 4RP 112.

Parker informed the defendant that his failure to provide a proper sample was unacceptable. 4RP 112. In response, the

defendant called Parker a "motherfucker" and a "peeping tom." 4RP 124. A manager from another AHHS house was called to the scene, but he too could not persuade the defendant to provide a proper observed sample. 4RP 123-26. Both managers then informed the defendant that he was terminated from the program. 4RP 114, 127. The defendant was instructed to hand over his keys, grab his things, and leave the premises. 4RP 124. After one of the managers threatened to call the police, the defendant grabbed some of his possessions and left. 4RP 114, 127.

The defendant's Community Corrections Officer (CCO) was immediately informed that the defendant had been terminated from the clean and sober program. 4RP 97, 142. Upon being contacted by his CCO, the defendant agreed to report to the CCO's office on March 4th. 4RP 143-44. However, the defendant did not appear on the 4th and he never contacted his CCO again. 4RP 144-45. A warrant was issued for the defendant's arrest. 4RP 144.

On March 10th, 2011, members of the fugitive task force located the defendant at a residence in Tacoma, Pierce County. 4RP 148; 5RP 24, 67-68. On March 11th, 2011, officers set up a perimeter around the residence after the defendant was seen leaving the residence with a child and returning to the residence

and going inside. 5RP 26. Officers knocked and announced their presence, but the defendant did not respond. 5RP 70. Officers then activated their emergency equipment and used their public address system to call the defendant outside, but again the defendant did not respond. 5RP 26-27. Officers then attempted entry with a key they had obtained from the housing authority. 5RP 27, 70. However, when they opened the door, it was pushed shut from the inside. 5RP 27.

After retreating from the residence to give the defendant more time to think about his decision, officers ultimately made entry using a ram. 4RP 133; 5RP 27, 73. The defendant was located in an upstairs bedroom and placed under arrest. 5RP 28. The bedroom had male clothing in the dresser and in the closet. 5RP 135. There was a photograph of the defendant and his wife on the refrigerator. 4RP 135. The defendant's wife was located in the kitchen. 4RP 134. After being arrested, the defendant told officers that he had seen them the day prior and that he should have left when he had the chance. 5RP 79.

Between March 3rd and March 11th, the defendant did not register as a sex offender. 4RP 27. The defendant last registered on December 14th, 2010, indicating that he was living at the East

Russell Street address. 4RP 45, 47. The defendant had previously requested that he be allowed to live at his wife's residence in Tacoma, but he had been specifically informed by his CCO that he could not live at that location until the address was investigated and approved. 5RP 18, 21.

The defendant testified that he provided UAs to Parker and the other manager, and that he did not understand why they did not accept the samples. 5RP 93. He admitted to leaving the residence but said he did so because he was told the cops were on their way and he felt "uncomfortable." 5RP 94. Over the next week, the defendant said he stayed at multiple locations. 5RP 105. He never registered that he was living at any other address, nor did he register that he was homeless, because, he claimed, he never moved out of the East Russell Street residence. 5RP 97-103, 109. He asserted that he did not know he had been terminated from the residence. 5RP 105. However, the contract he signed also includes a provision that he is terminated from the program upon a 72 hour absence without prior notice. Trial Exhibit 4.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE COURT DID NOT COMMIT ERROR IN RESPONDING TO A JURY QUESTION REGARDING THE LAW.

The defendant contends that his conviction must be reversed because the trial court, in consultation with defense counsel and the prosecutor, answered a jury question regarding the law without the defendant actually being present in court. The defendant's claim is in direct conflict with State v. Jasper, supra, and should be rejected.

During deliberations, the jury sent out a question asking about the law. Specifically, the jury made the following inquiry:

How long does the registered sex offender have to register as transient once they have lost their housing? Can we please see the law as written?

CP 38; 6RP 2. The court properly consulted with both attorneys. 6RP 2-6. The defendant was not present. Id. Defense counsel did not ask that the defendant be brought to court, he did not object to the defendant not being present, and no subsequent objection was ever raised in regards to this issue.

At the hearing, the prosecutor referred the court to the correct statutory provision that pertained to the jury's question.

6RP 2. The statutory provision reads as follows:

Any person required to register **under this section** who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence.

RCW 9A.44.130(5)(a) (emphasis added). The court noted that this statement of the law should have been included in the original instructions. 6RP 4. Over objection,³ the court further instructed the jury on the law as follows:

Any person required to register **under the law** who lacks a fixed residence shall provide signed notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence.

CP 39 (emphasis added⁴); 6RP 3-6.

The defendant does not contest that the court's answer is anything other than a complete and accurate statement of the law. The defendant also does not contest that it is anything other than appropriate for a jury to be fully and accurately instructed on the law. Rather, the defendant makes a single claim, an assertion that he had a constitutional right to be present, and because he was

³ The defense objection pertained only to the fact that counsel did not want the jury further instructed on the law. 6RP 3-4.

⁴ The court replaced the statutory phrase "under this section" with the phrase "under the law," as the jury is not provided with statutory cites or statute section numbers.

not, his conviction must be reversed. His position, however, is contrary to existing case law.

The Sixth Amendment and article I, section 22 of the Washington Constitution establish that a criminal defendant has the right to be present during all “critical stages” of a proceeding. In re Lord, 123 Wn.2d 296, 306-07, 868 P.2d 835 (1994). But this does not mean that a defendant has the right to appear at all stages of a criminal proceeding. See e.g., Lord, 123 Wn.2d at 306-07 (no right to be present for motions on legal matters); In re Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (no right to be present during a motion to continue); accord In re Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). These types of matters are not considered “critical stages,” in the proceedings.

A “critical stage” is one where the defendant’s presence “has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” Benn, 134 Wn.2d at 920 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). For example, a bench conference on a legal matter is not a critical stage of the proceedings if the issues involve no disputed facts. Benn, at 920; accord State v. Irby, 170 Wn.2d 874, 881-82, 246 P.3d 796 (2011).

This Court's decision in Jasper, supra, is directly on point. In Jasper, the court responded to a jury question without notifying the parties, and without the defendant being present.⁵ No factual issues were raised by the questions from the jury. Jasper, 158 Wn. App. at 539. This Court held that the trial court's failure to notify and consult with counsel violated CrR 6.15(f), but that the trial court's failure to bring the defendant to court did not violate Jasper's constitutional right to be present at a critical stage of the proceedings. Jasper, at 539-42; accord State v. Sublett, 156 Wn. App. 160, 231 P.3d 231 (2010), affirmed on other grounds, ___ P.3d ___, 2012 WL 5870484 (2012). In short, this Court held that answering the jury's question was not a "critical stage" in the proceedings. Id.

In Sublett, the trial court held an "in-chambers" conference with the attorneys to answer a jury question. The conference was held without the defendant being present. The Court of Appeals held that this was not a "critical stage" of the proceedings requiring the defendant's presence because the conference involved the purely legal question of how to respond to the jury's question.

Sublett, 156 Wn. App. at 183.

⁵ Notification and consultation with counsel is a court-rule requirement under CrR 6.15(f).

Here, there is no dispute that the trial court did nothing more than provide an accurate statement of the law in order to answer the jury's question about the law. No factual issues were raised or decided. Thus, Jasper and Sublett are directly on point and controlling. Under the doctrine of *stare decisis*, this Court must adhere to prior precedent unless the defendant can prove that the precedent is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). The defendant cites to no case that has decided this issue in conflict with Jasper and Sublett, and he has provided no argument as to how it is that these cases were wrongly decided.⁶

Moreover, the defendant never raised this issue below and therefore it is waived. This Court will generally not review a claim of error raised for the first time on appeal. RAP 2.5(a). An exception exists for "manifest" errors affecting a constitutional right. RAP 2.5(a)(3). An error is "manifest" if the defendant can plausibly show that the error had practical and identifiable consequences at

⁶ The few cases cited by the defendant are not on point. For example, the defendant cites to State v. Bennett, 168 Wn. App. 197, 275 P.3d 1224 (2012). However, Bennett did not deal with this issue. Rather, it dealt with the court's failure to make a record of what transpired when the parties held an in-chambers hearing to discuss how to answer a jury question. Similarly, in State v. Ratliff, 121 Wn. App. 642, 90 P.3d 79 (2004), it was conceded that the trial court committed error under CrR 6.15(f)(1) when it answered a jury question without notifying and consulting with the parties (additionally, the trial court's answer was determined to be an impermissible comment on the evidence).

trial. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Prejudice will not be presumed. Irby, 170 Wn.2d at 886. The defendant fails to demonstrate that his absence had any practical and identifiable consequences. While he makes conclusory statements that he may have been able to tell his attorney facts about the case, he fails to show how this was relevant in any way to the purely legal question that needed to be answered by the court. Thus, this issue has been waived.

Finally, even if the trial court's actions were held to violate the defendant's constitutional right to be present, the error was harmless beyond a reasonable doubt. Violation of the right to be present at a portion of a trial is error that is subject to a constitutional harmless error analysis under both the federal and state constitutions. Irby, 170 Wn.2d at 885-86.

Here, the trial court did nothing more than properly instruct the jury on the applicable law. A defendant has no right to have a jury improperly instructed on the law. Under the facts of this case, there can be no question but that any error in not having the defendant present when the judge answered the jury's question was harmless.

2. THE INFORMATION CONTAINED ALL THE ESSENTIAL ELEMENTS OF THE CRIME.

The defendant contends that the charging document was deficient because it did not include what he asserts is an element of the crime. Specifically, he claims that the charging document was required to allege that he “was required to register with the sheriff of his home county, or that he failed to register with that sheriff.” Def. br. at 14. This claim is without merit. The Information contained all the statutory elements of the crime. The manner, means or methods used by a defendant to meet his statutory obligation to register are not elements of the crime, just as, for example, the manner or means of committing an assault are not elements of the crime of assault.

a. The Elements Of The Crime.

In RCW 9A.44.132, the legislature set out all the elements of the crime of failure to register as a sex offender as follows: “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.44.132(1). If the person “has been convicted of a felony failure to register as a sex

offender...on two or more prior occasions," the failure to register is a class B felony. RCW 9A.44.132(1)(b).

b. The Charging Document.

The Information charging the defendant with failing to register as a sex offender contained all the required elements of the crime:

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse Richard Carl Howard of the crime of Failure to Register as a Sex Offender – Class B Felony, committed as follows:

That the defendant Richard Carl Howard in King County, Washington, during a period of time intervening between March 3, 2011 through March 11, 2011, having been convicted of Rape of a Child in the First Degree, a felony sex offense, as defined in RCW 9A.44.128; for which he was required to register as a sex offender under RCW 9A.44.130 did knowingly fail to comply with the requirements of RCW 9A.44.130, and that the defendant has been convicted in this State of a felony failure to register as a sex offender on two or more prior occasions.

Contrary to RCW 9A.44.132(1)(b), and against the peace and dignity of the State of Washington.

CP 9.

c. The Statutory Procedures, Definitions And Penalties.

In a separate statutory provision than the statute defining the elements of the crime, the legislature delineated the applicable **“procedures—definition[s]—[and] penalties”** as follows:⁷

(1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation, or as otherwise specified in this section. When a person required to register under this section is in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility as a result of a sex offense or kidnapping offense, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.

(b) Any adult or juvenile who is required to register under (a) of this subsection:

(i) Who is attending, or planning to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW shall, within three business days prior to arriving at the school to attend classes, notify the sheriff for the county of the person's residence of the person's intent to attend the school, and the sheriff shall promptly notify the principal of the school;

(ii) Who is admitted to a public or private institution of higher education shall, within three business days prior to arriving at the institution, notify the sheriff for the county of the person's residence of the person's intent to attend the institution;

(iii) Who gains employment at a public or private institution of higher education shall, within three business days prior to commencing work at the institution, notify the sheriff for the

⁷ While the full statute is not particularly relevant to the specific issue raised by the defendant on appeal, it is reproduced in total to show that the defendant's argument could be extended to any and all of the provisions of the statute.

county of the person's residence of the person's employment by the institution; or

(iv) Whose enrollment or employment at a public or private institution of higher education is terminated shall, within three business days of such termination, notify the sheriff for the county of the person's residence of the person's termination of enrollment or employment at the institution.

(c) The sheriff shall notify the school's principal or institution's department of public safety and shall provide that department with the same information provided to a county sheriff under subsection (3) of this section.

(d)(i) A principal receiving notice under this subsection must disclose the information received from the sheriff under (b) of this subsection as follows:

(A) If the student who is required to register as a sex offender is classified as a risk level II or III, the principal shall provide the information received to every teacher of any student required to register under (a) of this subsection and to any other personnel who, in the judgment of the principal, supervises the student or for security purposes should be aware of the student's record;

(B) If the student who is required to register as a sex offender is classified as a risk level I, the principal shall provide the information received only to personnel who, in the judgment of the principal, for security purposes should be aware of the student's record.

(ii) Any information received by a principal or school personnel under this subsection is confidential and may not be further disseminated except as provided in RCW 28A.225.330, other statutes or case law, and the family and educational and privacy rights act of 1994, 20 U.S.C. Sec. 1232g et seq.

(2) This section may not be construed to confer any powers pursuant to RCW 4.24.550 upon the public safety department of any public or private school or institution of higher education.

(3)(a) The person shall provide the following information when registering: (i) Name; (ii) complete residential address; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) aliases used; (viii) social security number; (ix) photograph; and (x) fingerprints.

(b) Any person who lacks a fixed residence shall provide the following information when registering: (i) Name; (ii) date and

place of birth; (iii) place of employment; (iv) crime for which convicted; (v) date and place of conviction; (vi) aliases used; (vii) social security number; (viii) photograph; (ix) fingerprints; and (x) where he or she plans to stay.

(4)(a) Offenders shall register with the county sheriff within the following deadlines:

(i) OFFENDERS IN CUSTODY. (A) Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B) kidnapping offenders who on or after July 27, 1997, are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

When the agency with jurisdiction intends to release an offender with a duty to register under this section, and the agency has knowledge that the offender is eligible for developmental disability services from the department of social and health services, the agency shall notify the division of developmental disabilities of the release. Notice shall occur not more than thirty days before the offender is to be released. The agency and the division shall assist the offender in meeting the initial registration requirement under this section. Failure to provide such assistance shall not constitute a defense for any violation of this section.

(ii) OFFENDERS NOT IN CUSTODY BUT UNDER STATE OR LOCAL JURISDICTION. Sex offenders who, on July 28, 1991, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for sex offenses committed before, on, or after February 28, 1990,

must register within ten days of July 28, 1991. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(ii) as of July 28, 1991, or a kidnapping offender required to register as of July 27, 1997, shall not relieve the offender of the duty to register or to reregister following a change in residence.

(iii) OFFENDERS UNDER FEDERAL JURISDICTION. Sex offenders who, on or after July 23, 1995, and kidnapping offenders who, on or after July 27, 1997, as a result of that offense are in the custody of the United States bureau of prisons or other federal or military correctional agency for sex offenses committed before, on, or after February 28, 1990, or kidnapping offenses committed on, before, or after July 27, 1997, must register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. Sex offenders who, on July 23, 1995, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 23, 1995. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(iii) as of July 23, 1995, or a kidnapping offender required to register as of July 27, 1997 shall not relieve the offender of the duty to register or to reregister following a change in residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation.

(iv) OFFENDERS WHO ARE CONVICTED BUT NOT CONFINED. Sex offenders who are convicted of a sex offense on or after July 28, 1991, for a sex offense that was committed on or after February 28, 1990, and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping

offense that was committed on or after July 27, 1997, but who are not sentenced to serve a term of confinement immediately upon sentencing, shall report to the county sheriff to register within three business days of being sentenced.

(v) OFFENDERS WHO ARE NEW RESIDENTS OR RETURNING WASHINGTON RESIDENTS. Sex offenders and kidnapping offenders who move to Washington state from another state or a foreign country that are not under the jurisdiction of the state department of corrections, the indeterminate sentence review board, or the state department of social and health services at the time of moving to Washington, must register within three business days of establishing residence or reestablishing residence if the person is a former Washington resident. The duty to register under this subsection applies to sex offenders convicted under the laws of another state or a foreign country, federal or military statutes for offenses committed before, on, or after February 28, 1990, or Washington state for offenses committed before, on, or after February 28, 1990, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed before, on, or after July 27, 1997. Sex offenders and kidnapping offenders from other states or a foreign country who, when they move to Washington, are under the jurisdiction of the department of corrections, the indeterminate sentence review board, or the department of social and health services must register within three business days of moving to Washington. The agency that has jurisdiction over the offender shall notify the offender of the registration requirements before the offender moves to Washington.

(vi) OFFENDERS FOUND NOT GUILTY BY REASON OF INSANITY. Any adult or juvenile who has been found not guilty by reason of insanity under chapter 10.77 RCW of (A) committing a sex offense on, before, or after February 28, 1990, and who, on or after July 23, 1995, is in custody, as a result of that finding, of the state department of social and health services, or (B) committing a kidnapping offense on, before, or after July 27, 1997, and who on or after July 27, 1997, is in custody, as a result of that finding, of the state department of social and health services, must register within three business days from the time of release with the county sheriff for the county of the person's residence. The state department of social and health services shall provide notice to the adult or juvenile in its custody of the duty to register. Any adult or juvenile who has been found not guilty by reason of insanity of committing a sex offense on, before, or after February 28, 1990, but who was released before July 23,

1995, or any adult or juvenile who has been found not guilty by reason of insanity of committing a kidnapping offense but who was released before July 27, 1997, shall be required to register within three business days of receiving notice of this registration requirement.

(vii) OFFENDERS WHO LACK A FIXED RESIDENCE. Any person who lacks a fixed residence and leaves the county in which he or she is registered and enters and remains within a new county for twenty-four hours is required to register with the county sheriff not more than three business days after entering the county and provide the information required in subsection (3)(b) of this section.

(viii) OFFENDERS WHO LACK A FIXED RESIDENCE AND WHO ARE UNDER SUPERVISION. Offenders who lack a fixed residence and who are under the supervision of the department shall register in the county of their supervision.

(ix) OFFENDERS WHO MOVE TO, WORK, CARRY ON A VOCATION, OR ATTEND SCHOOL IN ANOTHER STATE. Offenders required to register in Washington, who move to another state, or who work, carry on a vocation, or attend school in another state shall register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. The person must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom the person last registered in Washington state. The county sheriff shall promptly forward this information to the Washington state patrol.

(b) The county sheriff shall not be required to determine whether the person is living within the county.

(c) An arrest on charges of failure to register, service of an information, or a complaint for a violation of RCW 9A.44.132, or arraignment on charges for a violation of RCW 9A.44.132, constitutes actual notice of the duty to register. Any person charged with the crime of failure to register under RCW 9A.44.132 who asserts as a defense the lack of notice of the duty to register shall register within three business days following actual notice of the duty through arrest, service, or arraignment. Failure to register as required under this subsection (4)(c) constitutes grounds for filing another charge of failing to register. Registering following arrest, service, or arraignment on charges shall not relieve the offender from criminal liability for failure to register prior to the filing of the original charge.

(d) The deadlines for the duty to register under this section do not relieve any sex offender of the duty to register under this section as it existed prior to July 28, 1991.

(5)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address to the county sheriff within three business days of moving.

(b) If any person required to register pursuant to this section moves to a new county, the person must register with that county sheriff within three business days of moving. Within three business days, the person must also provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address in the new county to the county sheriff with whom the person last registered. The county sheriff with whom the person last registered shall promptly forward the information concerning the change of address to the county sheriff for the county of the person's new residence. Upon receipt of notice of change of address to a new state, the county sheriff shall promptly forward the information regarding the change of address to the agency designated by the new state as the state's offender registration agency.

(6)(a) Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence. The notice shall include the information required by subsection (3)(b) of this section, except the photograph and fingerprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.

(b) A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

(c) If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written

notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vii) or (viii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.

(7) A sex offender subject to registration requirements under this section who applies to change his or her name under RCW 4.24.130 or any other law shall submit a copy of the application to the county sheriff of the county of the person's residence and to the state patrol not fewer than five days before the entry of an order granting the name change. No sex offender under the requirement to register under this section at the time of application shall be granted an order changing his or her name if the court finds that doing so will interfere with legitimate law enforcement interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage. A sex offender under the requirement to register under this section who receives an order changing his or her name shall submit a copy of the order to the county sheriff of the county of the person's residence and to the state patrol within three business days of the entry of the order.

(8) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints. A photograph may be taken at any time to update an individual's file.

(9) Except as may otherwise be provided by law, nothing in this section shall impose any liability upon a peace officer, including a county sheriff, or law enforcement agency, for failing to release information authorized under this section.

RCW 9A.44.130.

From the legislature's extensive list of procedures and definitions, the defendant pulls out a single fragment of the statute, and, for the first time on appeal, claims that there is an additional essential element of the crime of failure to register heretofore never recognized by any court of law.

d. The Information Included All The Essential Elements Of The Crime.

In conjunction with his argument that there is a new element to the crime of failure to register as a sex offender, the defendant contends that the charging document was defective because it did not contain the new “essential element” that he “was required to register with the sheriff of his home county, or that he failed to register with that sheriff.” Def. br. at 14. The defendant’s attempt to transform the procedural requirements of the statute into “essential elements” of the crime is without merit.

A charging document is constitutionally sufficient if it includes all the “essential elements” of the crime. State v. Goodman, 150 Wn.2d 774, 786, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). When a defendant challenges a charging document for the first time on appeal, appellate courts “more liberally” construe the document in favor of validity. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Under this liberal standard, “even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document.” Kjorsvik, 117 Wn.2d at 104. The court applies the two-prong test: (1) do the necessary elements

appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he or she was actually prejudiced by the inartful language. Kjorsvik, 117 Wn.2d at 105-06.

An Information is intended to notify an accused of the nature and cause of the accusation against him. State v. Eaton, 164 Wn.2d 461, 467, 191 P.3d 1270 (2008) (Johnson, J. concurring). Therefore, the charging document must contain the essential elements that inform a defendant of the charge against him. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). Essential elements are those elements that are necessary to establish “the very illegality” of the charged crime. State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

It is the legislature who has the power to define crimes and fixes penalties. State v. Manussier, 129 Wn.2d 652, 667, 921 P.2d 473 (1996); State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). And it is the legislature who defines the elements of a crime. State v. Williams, 162 Wn.2d 177, 183, 170 P.3d 30 (2007). Thus, a “crime’s essential elements, of course, depend on the

criminal statute.” Eaton, 164 Wn.2d 461 at 468 (Johnson, J. concurring).

Definition statutes do not create additional elements of a crime. See State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010) (the residential status of a defendant is not an element of the crime of failure to register as a sex offender); State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001) (the definitions of “threat” do not create alternative elements of the crime of intimidating a witness); State v. Garvin, 28 Wn. App. 82, 86, 621 P.2d 215 (1980) (the definition of “threat,” does not create an additional element of the crime of extortion, it merely defines an element of the crime), rev. denied, 95 Wn.2d 1017 (1981).

Here, the defendant seeks to have this Court hold that what the legislature has specifically defined as procedural and definitional under the statute, is in fact an additional essential element to a crime the legislature codified under a different statutory provision. A similar argument was rejected by this Court in State v. Bennett, 154 Wn. App. 202, 224 P.3d 849, rev. denied, 168 Wn.2d 1042 (2010). Instead of challenging the charging document, Bennett challenged the “to convict” jury instruction, an instruction that mirrored the language of the charging document

here. The “to convict” instruction in Bennett, provided the essential elements of the crime as follows:

(1) That during a time intervening between January 1, 2008 and April 30, 2008 ***the defendant was required to register as a sex offender***,

(2) That during a time intervening between January 1, 2008 and April 30, 2008 ***the defendant knowingly failed to comply with the requirements of sex offender registration***; and

(3) That these acts occurred in the State of Washington.

Bennett, 154 Wn. App. at 207-08 (emphasis added). This Court rejected the argument that the definitions and procedures for registration set forth in the other sections of the statute constituted essential elements of the crime. Bennett, at 207-08; accord State v. Durrett, 150 Wn. App. 402, 407, 208 P.3d 1174 (2009). Rather, this Court approved the “to convict” instruction because it contained all the essential elements of the crime. Id.

The defendant’s argument is akin to arguing that the means or method of committing an assault are essential elements of the crime of assault—of which it is clear they are not. Under the law in Washington, there are three ways in which a person can commit an assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and

(3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm. State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). But the different ways of committing an assault are not elements of the crime of assault. A charging document and “to convict” instruction are sufficient if they state only that the defendant “intentionally assaulted” the victim. See State v. Daniels, 87 Wn. App. 149, 156, 940 P.2d 690 (1997), rev. denied, 133 Wn.2d 1031 (1998); State v. Plano, 67 Wn. App. 674, 680, 838 P.2d 1145 (1992); State v. Smith, 159 Wn.2d 778, 783-89, 154 P.3d 873 (2007).

The legislature specifically defined the crime of failure to register as a sex offender. The Information here tracked the statutory language. These elements are the “essential elements” of the crime and therefore the Information was sufficient here.

3. THE CIRCUMSTANCES SURROUNDING THE DEFENDANT’S DISCOVERY AND APPREHENSION SHOWED HIS CONSCIOUSNESS OF GUILT.

The defendant claims that the trial court abused its discretion in admitting evidence about his arrest. Specifically, he asserts that he was attempting to avoid apprehension because he had a warrant out for his arrest, not because he knew he had failed to

register as a sex offender, and therefore the evidence was not relevant. This argument should be rejected. While the defendant's argument is an argument that can be made to a jury, it is not an argument as to the admissibility of the evidence, i.e., it goes to the weight of the evidence, not its admissibility.

ER 404(b) allows for admission of other bad acts committed by a defendant:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

The list of purposes for admissibility under ER 404(b) is non-exhaustive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The rule contemplates that evidence of other misconduct will be admitted if (1) the evidence sought to be admitted is relevant and necessary to a material issue and (2) the probative value of the evidence outweighs its potential for prejudice. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Id. at 259.

Evidence such as flight, resisting arrest, concealment, evading arrest, or using a false name or deception to avoid arrest, constitute an admission by conduct, relevant in that it demonstrates a consciousness of guilt. State v. Bruton, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965); State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971); State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001). Such evidence is “generally admissible as tending to show guilt,” if one can draw a “substantial and real” inference of guilt that is not purely “speculative, conjectural, or fanciful.” State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27 (quoting Bruton, 66 Wn.2d at 112), rev. denied, 155 Wn.2d 1018 (2005). In other words, this type of evidence is admissible, “if the trier of fact can reasonably infer the defendant’s consciousness of guilt of the charged crime.” State v. McDaniel, 155 Wn. App. 829, 853-56, 230 P.3d 245, rev. denied, 169 Wn.2d 1027 (2010).

Here, the evidence showed that officers knocked and announced their presence at a residence the defendant was located, but that the defendant did not respond. The officers announced their presence by loudspeaker, but again the defendant did not respond. The officers attempted entry with a key, but the door was pushed shut and the defendant did not respond. The

officers then made a forced entry and arrested the defendant in an upstairs bedroom.

The defendant does not contest that his actual arrest in his wife's house was relevant and admissible. Further, he does not contest the facts, that the events occurred as the officers testified. Rather, the defendant contends that the circumstances of his arrest were not relevant because his actions were dictated by his belief that he had a warrant out for his arrest, not because he had been terminated from AHHS housing and had failed to register a change of address as required. This argument is similar to the argument rejected in State v. Hebert, 33 Wn. App. 512, 656 P.2d 1106 (1982).

In Hebert, a teacher had left her classroom, and upon returning, she found that her wallet had been stolen. A description was obtained of a man seen inside the classroom. A short time later, Hebert, who was on parole at the time, was detained by a police officer. As the officer was conducting a "pat-down" search, a box of marijuana was found in Hebert's pocket. Hebert then broke away from the officer and ran.

At trial, the evidence of Hebert's flight was admitted to show his consciousness of guilt of having committed the burglary and

theft. Hebert argued that the evidence should not have been admitted because his fleeing from the officer was because he was a parolee in possession of drugs, not because he committed the burglary and theft. This Court rejected Hebert's argument, stating that:

Hebert's flight from the officer reasonably could be considered a deliberate effort to evade arrest and prosecution for the burglary and could also reasonably be considered probative of his consciousness of guilt. Accordingly, the court did not abuse its discretion in admitting the evidence.

Hebert, 33 Wn. App. at 515.

The decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). An abuse of discretion exists only when the reviewing court concludes that no reasonable person would take the position adopted by the trial court. Powell, 126 Wn.2d at 258. Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

The defendant was free to argue to the jury that his attempt to evade arrest was because he believed there was a warrant out for his arrest. However, it is a perfectly reasonable inference to draw from the evidence that the defendant was attempting to avoid arrest because he knew he had failed to properly register as a sex offender after he was terminated from the AHHS housing.

Finally, even if error is found in the admission of the evidence, reversal is not required if the error was harmless. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The defendant must show that “within reasonable probabilities,” but for the error, the outcome of the trial would have been different. Id. at 780. To determine the probable outcome, the reviewing court must focus on the evidence that remains after excluding the tainted evidence. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986).

The defense here was that the defendant did not know he had been terminated from AHHS housing. However, considering he signed a contract that he would be terminated for violating the rules of the program, two people told him he was terminated, and he had not returned to the program residence in over a week, the defendant cannot show how the circumstances of his arrest so

prejudiced the jury that but for this evidence, the outcome of trial likely would have been different.

4. THE STATE CONCEDES CERTAIN CONDITIONS OF COMMUNITY CUSTODY WERE IMPROPERLY IMPOSED.

The court imposed certain conditions of community custody that the defendant claims are improper. Specifically, he contends that requiring him to have a sexual deviancy evaluation, disclose dating relationships to his CCO and treatment provider, abide by a curfew, not enter sex-related businesses, and not possess sexually explicit materials (see CP 67--conditions 4, 5, 7, 10 and 11) are not related to his crime of conviction and are not allowable under the applicable statute. The State agrees that in order to impose such conditions, the conditions must be crime related, and that the trial court must find that the conditions are crime related--no such findings were made here.⁸

In defining what crimes constitute a "sex offense" for purposes of sentencing, the legislature included felony convictions for failure to register as a sex offender if the person had previously been convicted for failing to register as a sex offender.

⁸ The State uses two different Appendix H forms for "sex offense" cases: one for failure to register cases, and one for all other sex offense cases. The wrong form was used in this case.

RCW 9.94A.030(45)(v).⁹ The defendant has multiple prior convictions for failing to register as a sex offender. CP 65. Thus, the defendant's conviction constitutes a "sex offense" as defined by the legislature.

Under RCW 9.94A.701, the sentencing court "shall" impose a term of community custody if the offender is sentenced to the custody of the department of corrections for a "sex offense." RCW 9.94A.701(1). Here, the defendant was sentenced to a term of 43 months in the custody of the department of corrections for a "sex offense." CP 61. Thus, the sentencing court was required to impose a term of community custody under RCW 9.94A.701.

The conditions of community custody that can be imposed are listed in RCW 9.94A.703. The statute does provide that the court can impose "crime-related treatment" and "crime-related prohibitions." See RCW 9.94A.701(3), see also State v. Williams, 157 Wn. App. 689, 239 P.3d 600 (2010) (failure to register as a sex offender and the underlying crime can be inextricably linked for purposes of imposing conditions of community custody), rev. denied, 170 Wn.2d 1022 (2011).

⁹ Many of the statutes listed in this section have been amended and/or recodified with different subsection numbering. All statutory cites listed in this section are the cites applicable to the defendant's conviction, i.e., the statutes in effect in March of 2011.

Here, having been convicted of a “sex offense,” the sentencing court properly imposed a term of community custody. However, in imposing conditions of community custody, the court imposed standard sex offense community custody conditions from a preprinted Appendix H form. CP 67-68. The court made no findings that the conditions were crime related.

The underlying crime in this case was a 20-year-old offense—rape of a child in the first degree—committed when the defendant was a juvenile. CP 65. No other facts are contained in the record as to the nature of the prior underlying offense.

While in certain factual situations, such as in the Williams case cited above, conditions such as having a sexual deviancy evaluation may be appropriate upon a conviction for failure to register as a sex offender, however, there is nothing in the record here that supports the imposition of the challenged conditions. There are no facts in the record pertaining to the circumstances of the 20-year-old underlying conviction, and the facts supporting the defendant’s current conviction appear to be related to the defendant’s substance abuse/alcohol related issues. There is no indication sexual deviancy was involved. Without any factual findings that the conditions are crime related, the State concedes

that the challenged conditions should be struck from the judgment and sentence.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 18 day of December, 2012.

Respectfully submitted,

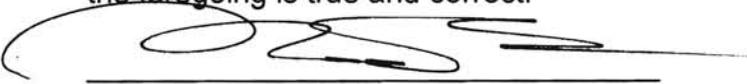
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HOWARD, Cause No. 68615-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

12-18-12

Date