No. 44173-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lester James,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00128-3

The Honorable Judge Michael Evans

Appellant's Opening Brief

Corrected Copy

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal statute is unconstitutionally vague if it fails to provide (1) adequate notice of what is forbidden and (2) objective guidelines to guard against arbitrary application.

RCW 9A.44.130 does not define the term "residence" or the phrase "residence address," and does not explain what is meant by a "change" of residence address. Is the statute unconstitutionally vague as applied to Mr. James, who was temporarily absent from his apartment for a period of less than a week, who had permission from his landlord to remain in the apartment despite difficulty paying his rent, who left clothing and other property in the apartment during his temporary absence, and who showed no intention of abandoning the apartment?

2. To obtain a conviction for failure to register, the prosecution was required to prove that Mr. James "knowingly failed to comply" with his registration requirements. Here, the prosecution did not prove that Mr. James "knowingly failed to comply," because it did not prove he knew he had changed his residence address. Was the evidence insufficient to prove that Mr. James knowing failed to comply with the registration requirements?

3. The prosecution alleged that Mr. James had an obligation to re-register because he had "changed" his "residence address." The prosecution failed to prove that he intended to abandon his apartment, and the evidence showed that he was temporarily absent for less than a week, that he stayed part of the time in another unit in the same apartment building, that he left clothing and other property in his apartment unit, and that he arranged with his landlord to continue residing there despite difficulty paying rent. Was the evidence insufficient to prove the essential elements of failure to register beyond a reasonable doubt?

4. An accused person's right to cross-examine an adverse witness may not be limited unless (1) introduction of the testimony would be so unfairly prejudicial as to disrupt the fairness of trial and (2) the state's interest in excluding the evidence outweighs the accused person's need for the evidence. Here, the trial court prevented Mr. James from cross-examining a critical state witness on the issue of bias, despite the absence of any contrary state interest. Did the limitation of cross-examination infringe Mr. James's Sixth Amendment right to confrontation?

5. At sentencing, the offender score is calculated using prior felony convictions. In this case, the sentencing court erroneously added one point to Mr. James's offender score for a gross misdemeanor. Did the trial court err by including a gross misdemeanor in Mr. James's offender score?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Lester James lived in a Longview apartment complex that catered to sex offenders. RP 44, 79. He was a convicted sex offender, and he registered his address in August of 2011. Ex. 1, Supp. CP; RP 16, 79. He lived in unit one of the apartment complex, and kept his property there as well (although he did not have much in the way of personal property). RP 80, 99. When he first moved in, he had a roommate named Andrew Alston, but Alston wanted his own room; he moved to a different unit and then into a house in Kelso. RP 82.

Mr. James's son died in December of 2011. RP 81. This was a very hard time for Mr. James, and he spent more time than usual with his family and friends. RP 81-84, 89, 91, 96, 100. At Christmas time, he fell behind on his rent. RP 45-46, 84. He was unable to make a rent payment that was due on Christmas day. RP 49. Around January 5th, he spoke with his landlord Brian Weathers about his difficulties, and Mr. Weathers agreed that he would not evict Mr. James. RP 46, 49-50, 84. Although Mr. James spent some nights elsewhere during this time period, he left his personal belongings in the rental unit and considered it his home. RP 80, 84-85, 100.

The landlord, Mr. Weathers, never evicted Mr. James or otherwise directed him to leave unit one. RP 50. According to Mr. Weathers, Mr. James continued to rent unit one up through the time he was arrested[1] for failure to register, which (according to Mr. Weathers), was "later in January." RP 48, 50. During this timeframe, Mr. Weathers also rented the unit to another sex offender named Richard Barnard.[2] RP 46.

Officers went to the apartment three times in December and January. They did not find Mr. James home on any of their visits. As a result, Mr. James was charged with Failure to Register. CP 1; RP 32-35. The Information specified a charging period of "on, about, or between November 1, 2011 and January 11, 2012". CP 1.

Mr. James waived his right to a jury trial. RP 1.

The state introduced into evidence the registration packet completed by sheriff department staff in August of 2011. Ex. 1, Supp. CP. The first five pages of the registration packet contained a review of the statutes and registration requirements. Mr. James initialed a paragraph on page three indicating that he understood he was required to register by certified mail if he "change[d] his… residence address within the same

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[1] In Mr. Weathers' words: "Well, before the thing went down or, why I'm here, yes, he was still -- uh -- in Unit 1." RP 48

[2] It is not clear from the record whether or not Mr. Weathers allowed Barnard to move in as Mr. James's roommate (as Mr. Alston had been), or if he simply forgot that the unit was already occupied. RP 46-47.

county." Ex. 1, p. 3, Supp. CP. He signed the document indicating that he had read and understood it. Ex. 1, p. 5, Supp. CP.

The next three pages of the registration packet consisted of "Sex Offender Law Changes that went into effect on 7/22/2011". Mr. James signed the last page of this document. Ex. 1, p. 8, Supp. CP. Included in this section was a definition of the term "fixed residence":

> "Fixed residence" means a building that a person lawfully and habitually uses as living quarters a majority of the week.
> Ex. 1, p. 6 Supp. CP.

The last three pages of the registration packet consisted of Mr. James' registration materials, indicating his address at unit one of the Longview apartment building. Ex. 1, pp. 9-11, Supp. CP.

Barnard was called as a witness by the state, and gave his address as homeless. He later testified that he was in custody "at DOC". RP 52, 57. Barnard acknowledged that he is a sex offender with a registration requirement. RP 54-62. He requested an attorney to advise him about the possible risk of testifying about his own residence addresses. RP 54-64. An attorney was assigned. RP 62. Barnard spoke with the attorney, the attorney met with the prosecutor, and then Barnard agreed to continue with his testimony against Mr. James. RP 74.

Mr. James sought to cross examine Barnard about his motivation for testifying. RP 65-75. Barnard was in custody at the time facing his own charge of Failure to Register. RP 73. Mr. James hoped to show that Barnard was motivated to curry favor with the prosecution regarding his own case, even if no formal deal had been reached. RP 66. The court refused to allow Mr. James to cross-examine Barnard about his pending charges, his living situation in recent months, or his compliance with registration requirements. RP 66-67.

Barnard told the court that he moved into unit one on January 5, 2012. He said that he did not see Mr. James there, but there were personal items still there in the apartment. These included clothing (including pants, shirts, socks, and underwear, strewn around the small space), as well as soap, shampoo, and the like. RP 68-70, 72, 76, 123.

Mr. James testified, and explained his emotional response to the death of his son. RP 83. He told the court that he still lived in unit one—the apartment at which he had registered—at the time of his arrest, and that he had left his belongings there, intending to return. RP 78-96.

The trial judge found Mr. James guilty of failing to register. The primary basis for the guilty verdict was Barnard's statement that he began renting the unit on January 5, 2012. RP 122-123. Based on this, the court

found that Mr. James changed his address on January 5th, and that he had not registered by the time he was arrested on January 11th. RP 127-128.

At the sentencing hearing, Mr. James's attorney agreed to the state's summary of criminal history. RP 130. An offender score worksheet filed with the court indicated that Mr. James had 9 points (including one point for commission of the offense while on community custody). General Scoring Form (11/2/12), Supp. CP.

The Judgment and Sentence signed by the court included an Appendix listing Mr. James's criminal history. His prior convictions consisted of a juvenile sex offense, three prior failure to register charges, a custodial assault, and an offense listed as "DV-PROT ORDER VIOL." CP 6. The Judgment and Sentence (and the appendix) noted that Mr. James was on community custody at the time of the offense, adding one point to the offender score. CP 6.

Mr. James timely appealed. CP 17.

ARGUMENT

I. RCW 9A.44.130 IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. JAMES.

A. Standard of Review

The constitutionality of a statute is reviewed *de novo*. *City of Spokane v. Neff*, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). A manifest error

affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

B. The statute criminalizing failure to register as a sex offender is unconstitutionally vague because it does not adequately define what it means to "change" one's "residence."

Due process requires that citizens be given fair warning regarding criminalized conduct. *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. A statute fails to provide constitutionally adequate 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." *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007) (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed 322 (1926)).

A statute can be unconstitutionally vague in two ways. First, it may provide inadequate notice, so that ordinary people cannot understand what conduct it prohibits. Second, it may authorize arbitrary or discriminatory application by law enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *State v. Williams*, 144 Wn.2d 197, 203-04, 26 P.3d 890 (2001). A statute is unconstitutionally vague if either element is satisfied. *Id.*

Statutes that use inherently subjective terms such as "loiter," "wander," "lawful excuse," or "pornography" violate due process. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d 496 (2000); *State v. Sansone*, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005).[3] Such statutes "trap the innocent by not providing fair warning" or "delegate basic policy matters to policemen, judges, and juries for a resolution on an ad hoc and subjective basis." *Lorang*, 140 Wn.2d at 30-31 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

A vagueness challenge requires analysis of the statute as applied to the facts of the case.[4] *State v. Jenkins*, 100 Wn. App. 85, 89, 995 P.2d 1268 (2000).

RCW 9A.44.130(4)(a) requires any person obligated to register to provide written notice to the county sheriff within three business days of changing his or her "residence address." Neither that provision nor any other part of chapter RCW 9A.44 defines "residence" or "residence

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[3] *Valencia* and *Sansone* addressed the vagueness of conditions of community placement rather than the constitutionality of statutes. *Valencia*, 169 Wn.2d at 791; *Sansone*, 127 Wn.App. at 638. Although sentencing conditions are not given the presumption of constitutionality that applies to legislative enactments, the analysis undertaken in *Valencia* and *Sansone* is analogous to the analysis of vague statutory terms here.

[4] A claim that a statute is unconstitutionally vague on its face is only permitted if the statute implicates the First Amendment. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

address." Nor has the legislature explained what constitutes a "change" of one's "residence address." *See* RCW 9A.44 *generally.*

By contrast, the phrase "fixed residence" *is* defined by statute;[5] however, the section under which Mr. James was charged refers to a person's "residence address," while other parts of RCW 9A.44.130 reference the phrase "fixed residence." *Compare* RCW 9A.44.130(4)(a) *with* RCW 9A.44.130(1)(a), (2)(a), (3)(a)(vii), (3)(a)(viii), (5)(a)-(c). Because the legislature used the phrase "fixed residence" in some provisions and the phrase "residence address" in others, the two phrases are deemed to have different meanings. *State v. Roggenkamp*, 153 Wash. 2d 614, 625, 106 P.3d 196 (2005). Furthermore, under the maxim *expressio unius est exclusio alterius*,[6] the omission of the phrase "fixed residence" from RCW 9A.44.130(4)(a) is presumed to be intentional.

The term "residence" (or "residence address") may be defined in several different ways. In addition to the statutory definition of "fixed residence" found in RCW 9A.44.128, courts have applied a variety of factors to determine whether or not a particular dwelling qualifies as a residence. *See e.g. State v. Drake*, 149 Wn. App. 88, 94-95, 201 P.3d

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[5] *See* RCW 9A.44.128. The definition is apparently meant to distinguish between those who are homeless and those who are not.

[6] "The expression of one thing is the exclusion of another." *Black's Law Dictionary* (6th ed. 1990). *See, e.g., In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008) (Martin I).

1093 (2009) (finding that the inquiry turned on whether the person intends to return to a dwelling place); *State v. Stratton*, 130 Wn. App. 760, 765, 124 P.3d 660 (2005) (providing several dictionary definitions for the term); *State v. Willingham*, 169 Wn.2d 193, 195, 234 P.3d 211 (2010) (finding that one's "residence" is not necessarily changed by a two-week absence from the state); *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999) ("Residence as the term is commonly understood is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.")

Likewise, the phrase "change[] his or her residence address" is vague. RCW 9A.44.130(4)(a). A change of residence address could occur when a person ceases to pay rent, receives a notice of eviction, moves belongings to another location, sleeps some predetermined number of nights at another location, changes her/his mailing address, or leaves without intending to return to the original address. *See, e.g., Drake*, 149 Wn. App. at 94-95 (finding that the accused had not changed his residence address when he began living in his car in the driveway.).

Division II found a prior version of RCW 9A.44.130 to be unconstitutionally vague. *Jenkins*, 100 Wn. App. at 91. The *Jenkins* court held that the phrase "changes his or her residence address" did not provide

adequate notice because "person of common intelligence must necessarily guess" as to its meaning. *Jenkins*, 100 Wn. App. at 91.

The facts of this case illustrate the vagueness problems from which the statute suffers. The court found that Mr. James's belongings remained at his apartment after January 5th, and that the landlord had agreed to let him pay his rent late. RP 123, 126. None of the testimony or findings suggests that he received an eviction notice, stopped receiving mail at the apartment, or left without intending to return. *See* RP, *generally.*

Given these circumstances, it is not clear that Mr. James's temporary absence from unit one constituted a "change" of his "residence address." It is likely that Mr. James did not believe he'd changed his residence address. The registration statute provided him with no guidance in determining whether he had done so. RCW 9A.44.130.

RCW 9A.44.130 is unconstitutionally vague as applied to this case. Accordingly, Mr. James's conviction must be reversed. *Jenkins*, 100 Wn. App. at 93.

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. JAMES.

A. Standard of review.

A conviction must be overturned for insufficient evidence if no rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 501,

120 P.3d 559 (2005). A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences therefrom. *State v. Caton*, 174 Wn.2d 239, 241, 273 P.3d 980 (2012).

B. The state introduced insufficient evidence to find each element of failure to register beyond a reasonable doubt.

RCW 9A.44.132 criminalizes knowing failure to comply with the registration requirements of RCW 9A.44.130. RCW 9A.44.130(4)(a) requires a registered sex offender to notify the sheriff within three business days of "chang[ing] his or her residence address." Neither the statute nor any other provision in RCW 9A.44 define "residence address" or explain what constitutes a "change" of one's residence address. *See* RCW 9A.44 *generally*.

A person can't be convicted of failure to register if there is insufficient evidence that he has changed his residence. *Drake*, 149 Wn. App. at 95. The court in *Drake* overturned a failure to register conviction for insufficient evidence based on three factors. *Drake*, 149 Wn. App. at 94-95. First, there was no evidence that the accused lacked the intent to return to the address where he was registered. Second, there was no evidence that he had received adequate notice of eviction. Third, there was evidence that he had left belongings at the address where he was registered. *Id.*

Likewise, a person can't be convicted of failure to register if there is insufficient proof of knowledge. The *Drake* decision was based in part on the absence of proof that the defendant acted "knowingly." *Drake,* 149 Wn. App. *at* 94-95.

1. There was insufficient evidence that Mr. James changed his residence address.

To find Mr. James guilty of failure to register, the state was required to prove beyond a reasonable doubt that he "changed his residence address." RCW 9A.44.130(4)(a). As noted in *Drake* and *Stratton*, the terms "residence" and "residence address" are inherently ambiguous and are not defined anywhere in the statute. *Drake*, 149 Wn. App. at 94-95, *Stratton*, 130 Wn. App. at 765.

The rule of lenity requires ambiguous statutory terms to be construed in favor of the accused when evaluating sufficiency of the evidence. *Stratton*, 130 Wn. App. at 765. In *Stratton*, the court applied to rule of lenity to find that the state had not proved failure to register. *Id.* The court found that the term "residence" was ambiguous and could have been interpreted to include the accused living in a car in the driveway of his former house. *Id.*

Case law and chapter RCW 9A.44 reveal numerous possible definitions of the term "residence." For example, the *Stratton* court turned to a standard dictionary:

> The act… of abiding or dwelling in a *place* for some time; an act of making one's home in a *place*…; the *place* where one actually lives or has his home distinguished from his technical domicile;… a temporary or permanent dwelling *place*, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit…; a *building* used as a home.

Stratton, 130 Wn. App. at 765 (emphasis in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, at 1931 (1969)).

Similarly, for purposes of tolling the statute of limitations, a person's residence is not changed by a two-week absence from the state. *Willingham*, 169 Wn.2d at 195. The *Willingham* court simply stated that "a person may be absent without changing his residence," without providing a definition of the term "residence". *Id.*

RCW 9A.44.128 provides yet another possible definition:[7]

> [A] building that a person lawfully and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage.

[7] As noted elsewhere, this definition of "fixed residence" is not referenced by RCW 9A.44.130(4)(a). Accordingly, this definition does not control.

RCW 9A.44.128(5).

In *Drake*, the court focused on the absence of evidence that the accused left without intending to return to the residence at which he was registered. *Drake*, 149 Wn. App. at 95. Starting from the dictionary definition of "residence" quoted in *Stratton*, the *Drake* court focused on the "place to which one intends to return, as distinguished from a place of temporary sojourn." *Id.*

Because the term "residence" in RCW 9A.44.130(4)(a) is ambiguous, the rule of lenity requires that it be construed in favor of Mr. James. *Stratton*, 130 Wn. App. at 765.

That *Drake* court was persuaded by evidence that the accused had left belongings behind, indicating his intent to return. *Drake*, 149 Wn. App. at 95. Likewise, here, the court found that Mr. James had left belongings behind in unit one. RP 123. The state offered no evidence that he did lacked the intent to return to that address (where he remained registered). Mr. James testified that he continued to live in unit one and always intended to return there, and Mr. Alston testified that he dropped Mr. James off at the apartment building even after Barnard claimed to have moved in. RP 78-107.

Even the definition of "fixed residence" supports Mr. James's position. RCW 9A.44.128(5). The state presented no evidence of where

Mr. James ate, received mail, or paid utilities. The court found that that Mr. James kept belongings at the apartment where he was registered, and there was evidence that he had reached an agreement with his landlord about his problems paying rent. RP 123, 46.

Mr. James did not change his "residence," his "residence address," or his "fixed residence. The evidence was insufficient for conviction. *Drake*, 149 Wn. App. at 95. Accordingly, his conviction must be reversed and the charge dismissed with prejudice. *Id.*

2. There was insufficient evidence that Mr. James "knowingly" failed to comply with the registration requirements.

The failure to register statute includes the *mens rea* element of "knowingly." RCW 9A.44.132. To be convicted of failure to register for a violation of RCW 9A.44.130(4)(a), the accused must know the applicable requirements, know that his "residence address" has changed, and know that he didn't fulfill his registration obligation. RCW 9A.44.132.

The *Drake* court found that evidence that the accused no longer had a legal right to live at the apartment where he was registered was insufficient to show that he had acted knowingly. 149 Wn. App. at 94. Nothing in the record of that case proved that the defendant knew he'd been evicted. *Id.*

Similarly, here, the primary evidence against Mr. James was testimony that Barnard moved into unit one on January 5th. RP 123. While this evidence suggested that Mr. James *may* have lost his right to live in the apartment,[8] it did not prove that he *knew* he'd lost his apartment. *Cf. Drake*, 149 Wn. App. at 95. In fact, the evidence found insufficient in *Drake* was much stronger than that in Mr. James's case:

> The State proved that Mr. Drake's rent was not paid, his landlord vacated him from his apartment and his possessions were stored and picked up by someone else after he was arrested. But the State did not prove beyond a reasonable doubt that Mr. Drake *knowingly* failed to register at a new address or as a homeless person.

Id. (emphasis added).

Here, there was no direct evidence that Mr. James had been evicted from the apartment. His landlord actually testified to the contrary. RP 46. He left property in unit one, and arranged to stay in the apartment even though he had difficulty paying rent on time. RP 46.

The trial court found Mr. James guilty of only a *de minimis* violation of the statute. RP 127. Although the charging period extended from November 1, 2011 through January 11, 2012, the court based its guilty verdict on his failure to re-register during the six day period between January 5th and January 11th, 2012. RP 120-23. Because the

[8] It may also have meant that Mr. Weathers cut losses stemming from Mr. James's late payment by assigning him a roommate.

statute allows three business days to report a changed address, Mr. James would have been required to notify the sheriff by Tuesday January 10, 2012. RCW 9A.44.130(4)(a). In short, the court found that he failed to register for one day.

No rational trier of fact could have found beyond a reasonable doubt that Mr. James acted knowingly or that he changed his residence address. His conviction must be reversed and remanded for dismissal with prejudice. *Caton*, 174 Wn.2d at 96.

3. If the phrases "residence address" and "fixed residence" are equivalent, the evidence was insufficient to prove that Mr. James failed to register in a timely fashion.

The definition of "fixed residence" at RCW 9A.44.128(5) specifies a building where a person lives "a majority of the week." If this definition of "fixed residence" determines whether or not Mr. James changed his "residence address," the evidence was still insufficient to prove a violation of RCW 9A.44.132.

The court found that Barnard moved into unit one on January 5, 2012, which was a Thursday. RP 123. If Mr. James moved out on that date, he could have spent the next three nights with a friend and still spent the majority of that week at a new "fixed residence." The state did not disprove this scenario, and the court did not make any findings undermining the possibility that this transpired. If Mr. James spent

January 5-7 at a friend's house and January 8-11 at another residence, then the second residence became his new "fixed residence" on January 11th. His three day deadline for registering with the sheriff thus did not expire until January 14th. 9A.44.130(4)(a). Mr. James could thus have complied with the registration statute by sending a signed notification by certified mail on January 14, 2012.

But the charging period ended January 11, 2012, and the Judgment and Sentence reflects an offense date terminating that date as well. CP 3. Using the definition of "fixed residence" in place of the phrase "residence address," the state failed to prove beyond a reasonable doubt that Mr. James knowingly failed to comply with the registration requirements of RCW 9A.4.130. His conviction must be reversed and the charge dismissed with prejudice. *Drake*, 149 Wn. App. at 95.

III. THE COURT DENIED MR. JAMES HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY LIMITING HIS CROSS-EXAMINATION OF BARNARD.

A. Standard of review.

Constitutional claims are reviewed *de novo*. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

B. Mr. James was denied his right to confront adverse witnesses when the trial court limited his cross-examination of Barnard.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. *State v. Darden*, 145 Wn.2d 612, 620, 26 P.3d 308 (2002) (citing *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)); U.S. Const. Amend. VI; Wash. const. art. I, § 22.

The confrontation clause requires more than "mere physical confrontation." *Darden*, 145 Wn.2d at 620 (quoting *Davis*, 415 U.S. at 315). The bedrock of the confrontation right is the guarantee of an opportunity to conduct a "meaningful cross-examination of adverse witnesses" to test for memory, perception, and credibility. *Darden*, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process. *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to confront adverse witnesses must be "zealously guarded." *Darden,* 145 Wn.2d at 620.

Bias evidence is always relevant. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002) (citing *Davis*, 415 U.S. at 316-18). An accused person must be allowed to cross-examine a witness regarding any expectation that his testimony might affect the resolution of other unrelated charges involving the witness. *United States v. Martin*, 618 F.3d

705, 727 (7th Cir. 2010) (Martin II). A witness with such expectations may have "a desire to curry favorable treatment." *Martin,* 618 F.3d at 727. The absence of an explicit agreement "does not end the matter." *Martin,* 618 F.3d at 728. Indeed, the witness need not even be aware of her or his own bias; the exposure of a witness's unconscious bias is a proper object of cross-examination. *See, e.g., United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) ("Bias is a term used…to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.") Exclusion of such evidence violates the confrontation clause. *Id; Spencer*, 111 Wn. App. at 408.

The *Darden* court set out a three-part test for when cross-examination may be limited. 145 Wn.2d at 612. First, cross-examination that is even minimally relevant must be permitted under most circumstances. Second, the state must demonstrate that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process." Finally, the state's interest in excluding the evidence must be balanced against the accused person's need for the information sought. *Id.*

In *Darden*, the trial court limited the defendant's cross-examination regarding the location of a secret surveillance post. *Darden*, 145 Wn.2d at 621. The prosecution's interest in excluding the evidence

was based on concern for the safety of the property owner who cooperated with police. The Supreme Court ruled this was "no ground to prevent relevant cross-examination" of a key witness. *Darden*, 145 Wn.2d at 626.

In this case, Mr. James sought to establish Barnard's bias through cross-examination. RP 65-66. Unlike in *Darden*, where the state had an interest in keeping a police surveillance post secret, the state had no legitimate interest in excluding the evidence at issue here. The evidence was not unfairly prejudicial to the state. The right to expose witness bias through cross-examination is exactly the type of interest the confrontation clause is designed to protect. *Darden*, 145 Wn.2d at 620.

Barnard's testimony that he moved into unit one on January 5th was the key to the court's finding that Mr. James had moved out of the apartment. In fact, it was the only evidence that the court appears to have found relevant and credible on this point. RP 123. Cross-examination regarding Barnard's pending charge would have exposed his potential bias. *See Martin II,* 168 F.3d at 728. Mr. James was prejudiced by the court's limitations on his cross-examination.

The trial court erred in limiting Mr. James's cross-examination of Barnard regarding his possible motive to lie in order to curry favor with the state. *Martin,* 618 F.3d at 728; *Darden,* 145 Wn.2d at 628.

Accordingly, Mr. James's conviction must be reversed. *Darden*, 145 Wn.2d at 628.

IV. THE TRIAL COURT MISCALCULATED MR. JAMES'S OFFENDER SCORE WHEN IT ADDED A POINT FOR A PRIOR GROSS MISDEMEANOR CONVICTION.

A court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Goodwin*, 146 Wn.2d 861, 867-868, 50 P.3d 618 (2002). An accused person cannot agree to a miscalculated offender score by failing to object. *State v. Mendoza*, 139 Wn. App. 693, 703, 162 P.2d 439 (2007).[9] Challenges to unlawful sentences may be made for the first time on appeal. *State v. Sims*, 171 Wn.2d 436, 444 n. 3, 256 P.3d 285 (2011).

An offender score is calculated based on current and prior felony convictions; with few exceptions (not relevant here) misdemeanor convictions do not count. RCW 9.94A.525. Prior sex offenses add three points to an offender score for a failure to register conviction. RCW 9.94A.525(18). The sentencing court must add an additional point if the offense occurred while the offender was on community custody. RCW 9.94A.525(19).

[9] Similarly, the invited error doctrine does not preclude a challenge to a miscalculated offender score when the accused agreed to the calculation as part of a plea agreement. *In re Call*, 114 Wn.2d 315, 329, 28 P.3d 709 (2001); *Goodwin*, 146 Wn.2d at 872.

Here, Mr. James received three points for a prior sex offense, one point each for four prior felonies, and one point for being on community custody. CP 3. In addition, however, the court erroneously added one point for a charge listed as a protection order violation. CP 3. But violation of a protection order is generally a gross misdemeanor. *See* RCW 26.50.110. The court did not enter a finding that the charge was a felony rather than a gross misdemeanor. By including the prior charge in Mr. James's offender score, the court arrived at an incorrect score of nine, rather than the correct score of eight.

The trial court miscalculated Mr. James's offender score. The case must be remanded for resentencing with an offender score of eight. *Goodwin,* 146 Wn.2d at 877-78.

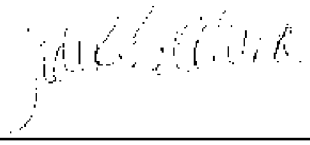
CONCLUSION

Mr. James's conviction must be reversed and the case remanded for dismissal with prejudice, because there was insufficient evidence to prove failure to register and because the registration statute is unconstitutionally vague as applied. In the alternative, the case must be remanded for a new trial because the trial court infringed his right to confront adverse witnesses by limiting his cross-examination of Barnard.

If the conviction is not reversed, the case must be remanded for sentencing with an offender score of eight, because the trial court erroneously included a gross misdemeanor in Mr. James's offender score.

Respectfully submitted on May 15, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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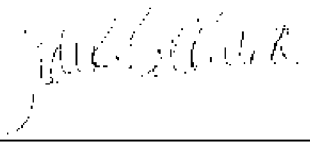
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 15, 2013.



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