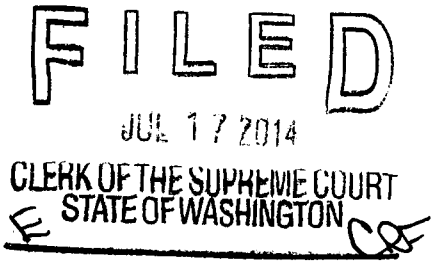
90493-6

Supreme Court No. (to be set)
Court of Appeals No. 44173-0
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Lester James
Appellant/Petitioner

Cowlitz County Superior Court Cause No. 12-1-00128-3
The Honorable Judge Michael Evans

PETITION FOR REVIEW



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I. IDENTITY OF PETITIONER

Petitioner Lester James, the appellant below, asks the court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Lester James seeks review of the Court of Appeals opinion entered on June 17, 2014. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: A criminal statute must provide (1) adequate notice of what is forbidden and (2) objective guidelines to guard against arbitrary application. RCW 9A.44.130 requires sex offenders to register any "change" of "residence address," but does not define those terms. Is the statute unconstitutionally vague as applied to Mr. James?

ISSUE 2: The prosecution alleged that Mr. James had "changed" his "residence address." The state did not 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?

ISSUE 3: The prosecution was required to prove that Mr. James "knowingly failed to comply" with his registration requirements. The state did not prove that Mr. James understood he had changed his residence address, since he was only temporarily absent from his apartment and he intended to

return to live there. Was the evidence insufficient to prove that Mr. James knowingly failed to comply with the registration requirements?

ISSUE 4: An impermissible limitation on cross-examination infringes the right to confrontation. Here, the trial court prevented Mr. James from cross-examining a critical state witness about his potential bias despite the absence of any contrary state interest. Did the limitation of cross-examination infringe Mr. James's Sixth Amendment right to confrontation?

ISSUE 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?

IV. STATEMENT OF THE CASE

Lester James lived in a Longview apartment complex that housed sex offenders. RP 44, 79. Mr. James is a convicted sex offender. He registered his address in August of 2011. Ex. 1; RP 16, 79. When he first moved in, Mr. James had a roommate named Andrew Alston. RP 82. Alston wanted his own room. RP 82. He moved to a different unit in the apartment complex. RP 82. He later moved into a house in Kelso. RP 82.

Mr. James did not have much in the way of personal property. He kept what he did have in his unit in the apartment complex. RP 80, 99.

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. Around Christmas, he fell

behind on his rent. RP 45-46, 84. He did not 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. 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. RP 50. According to Mr. Weathers, Mr. James continued to rent his unit up through the time he was arrested for failure to register.[1] Mr. Weathers believed the arrest occurred "later in January." RP 48, 50. During this timeframe, Mr. Weathers also rented Mr. James's unit to another sex offender named Richard Barnard. RP 46. The record does not indicate whether Mr. Weathers intended Barnard to move in as a roommate, or if he simply forgot that Mr. James already occupied the unit. RP 46-47.

Officers went to Mr. James's apartment three times in December and January. They did not find Mr. James home. As a result, Mr. James was charged with Failure to Register. CP 1; RP 32-35. The Information

[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

charged him with failing to register "on, about, or between November 1, 2011 and January 11, 2012". CP 1.

At Mr. James's bench trial, the prosecution introduced a registration packet signed by Mr. James. Ex. 1. The packet included a paragraph he initialed, indicating that he understood he was required to register by certified mail if he "change[d] his... residence address." Ex. 1, p. 3. The packet also included a definition of the phrase "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.

The state called Barnard as a witness. He testified that he was 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. The court assigned an attorney. RP 62. After Barnard spoke with the attorney, the attorney met with the prosecutor. Barnard then agreed to continue testifying against Mr. James. RP 74.

Mr. James sought to cross examine Barnard about his motivation for testifying. RP 65-75. At the time, Barnard faced his own charge of Failure to Register. RP 73. Mr. James planned to show that Barnard hoped 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 cross-examination about Barnard's pending charges, his living situation in recent months, or his compliance with registration requirements. RP 66-67.

Barnard testified that he'd moved into the apartment unit on January 5, 2012. He did not see Mr. James there, but found Mr. James's personal items in the apartment. These included clothing (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 about the death of his son. RP 83. He explained that he still lived in the apartment at the time of his arrest. He had left his belongings there, intending to return. RP 78-96.

The court found Mr. James guilty. The judge based the verdict primarily on Barnard's statement that he began renting the unit on January 5, 2012. RP 122-123. The court found that Mr. James had changed his address on January 5th and had not registered by the time of his arrest on January 11th. RP 120-123, 127-128.

At sentencing, Mr. James agreed to the state's summary of his criminal history. RP 130. He did not agree to a particular offender score. A worksheet filed with the court indicated an offender score of nine. CP 21.

The court found that Mr. James had six prior convictions, including one offense listed as "DV-PROT ORDER VIOL." CP 6. The court did not find this offense to be a felony, but included it in the offender score. CP 4, 5.

Mr. James timely appealed. CP 17.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that RCW 9A.44.130 is unconstitutionally vague as applied. The Court of Appeals' decision conflicts with *Jenkins*. In addition, this case presents a significant question of constitutional law that is of substantial public interest. RAP 13.4 (b)(2), (3), and (4).

The Supreme Court reviews constitutional violations *de novo*. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). Absent First Amendment concerns, a vagueness challenge requires analysis of the statute as applied. *State v. Duncalf*, 177 Wn.2d 289, 297, 300 P.3d 352 (2013).

Criminal statutes must provide fair notice of the conduct proscribed. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). A statute is unconstitutional if it assigns criminal liability "in

terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application." *Watson*, 160 Wn.2d at 7 (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed 322 (1926)). Such statutes provide inadequate notice to citizens, and permit arbitrary or discriminatory application by law enforcement.[2] *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).

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 address."[3] Nor has the legislature explained what constitutes a "change" of one's "residence address." *See* RCW 9A.44 *generally*.

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[2] In addition, Statutes that use inherently subjective terms violate due process. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d 496 (2000). Courts have found terms such as "vulnerable" and "known prostitute" inherently subjective. *State v. Johnson*, 43582-9-II, 2014 WL 1226456 (Wash. Ct. App. Mar. 25, 2014); *City of Spokane v. Neff*, 152 Wn.2d 85, 89, 93 P.3d 158 (2004).

[3] By contrast, the phrase "fixed residence" *is* defined by statute. RCW 9A.44.128. The definition is apparently meant to distinguish between those who are homeless and those who are not. 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 Wn. 2d 614, 625, 106 P.3d 196 (2005). Furthermore, under the maxim *expressio unius est exclusio alterius*, the omission of the phrase "fixed

The absence of any definition for these terms renders RCW 9A.44.130 unconstitutionally vague as applied to Mr. James. First, the terms "residence" and "residence address" can have different meanings.[4] Likewise, the phrase "change[] his or her residence address"[5] may be defined in more than one way: 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).

The statute is vague as applied to Mr. James: his guilt or innocence rests on the meaning assigned to these undefined terms. Under some definitions, he did not "change" his "residence address." None of the testimony or findings suggests that he received an eviction notice, stopped

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residence" from RCW 9A.44.130(4)(a) is presumed to be intentional. *See, e.g., In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008) (Martin I).

[4] *See e.g. State v. Drake*, 149 Wn. App. 88, 94-95, 201 P.3d 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.")

receiving mail at the apartment, or left without intending to return. *See* RP, *generally.* The trial court found that Mr. James's belongings remained at his apartment after January 5th. Around January 5th, his landlord agreed to let him pay his rent late. RP 46, 49-50, 84, 123, 126.

Given these circumstances, Mr. James's temporary absence from his apartment did not constitute a "change" of his "residence address" under many possible definitions of these terms. 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.

The Court of Appeals has previously found the phrase "changes his or her residence address" to be unconstitutionally vague. *State v. Jenkins*, 100 Wn. App. 85, 91, 995 P.2d 1268 (2000) (addressing former RCW 9A.44.130(5) (1999)). The *Jenkins* court held that the phrase did not provide adequate notice because "person of common intelligence must necessarily guess" as to its meaning. *Jenkins*, 100 Wn. App. at 91. The legislature never addressed this flaw after the Court of Appeals issued its decision in *Jenkins*.[6]

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[5] RCW 9A.44.130(4)(a).

[6] At the time of the *Jenkins* decision, the legislature had already amended the statute to address a similar, but not identical challenge. *See* Laws 1999, 1st Spec. Sess. Ch. 6, §1 ("It is the intent of this act to revise the law on registration of sex and kidnapping offenders in response to the case of *State v. Pickett*,[95 Wn. App. 475, 479-480, 975 P.2d 584, 587

Here, the Court of Appeals purported to circumvent this problem by presuming that Mr. James knew of the definition of residence set forth in *Pickett.* Opinion, pp. 7-8. There are two problems with this reasoning. First, although the *Pickett* court defined "residence," it did not clarify what actions constitute a "change" of residence. Thus, even after *Pickett,* a person of common intelligence would be left to guess at the meaning of the phrase "change[] his or her residence address." RCW 9A.44.130(4)(a). A "change" of residence could be effectuated by staying elsewhere for a few days. Alternatively, a person who left home for two weeks but intended to return might not have changed residences under the statute. *See, e.g., Willingham*, 169 Wn.2d at 195 (addressing the phrase "usually and publicly resident within this state" contained in RCW 9A.04.080(2)).

Second, to avoid vagueness problems, a statute's meaning must be available to the average person through "reasonable research efforts." *State v. Maxwell*, 74 Wn. App. 688, 691, 878 P.2d 1220 (1994). The registration statute fails this test. Citizens cannot be expected to research Court of Appeals opinions to learn the meaning of a term in a criminal statute. The Court of Appeals' decision in *Pickett* cannot rescue RCW 9A.44.130 as applied to Mr. James. *Id.* Furthermore, even if a registrant

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(1999)]). *Pickett* involved a sufficiency challenge and an issue of statutory interpretation. *Jenkins*, by contrast, involved a vagueness challenge.

discovered the definition of "residence" outlined in *Pickett*, she or he would still need to harmonize that decision with other cases such as *Willingham*.

The Supreme Court should accept review and hold that RCW 9A.44.130 is unconstitutionally vague as applied. *Jenkins*, 100 Wn. App. at 93. The Court of Appeals' decision conflicts with *Jenkins*. Furthermore, this significant constitutional issue is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(2), (3), and (4).

B. The Supreme Court should accept review and hold that the state failed to prove the charge beyond a reasonable doubt. The Court of Appeals' decision conflicts with *Drake*. Furthermore, this case raises issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b)(2) and (4).

Due process requires the state to prove every element of an offense. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction based on insufficient evidence must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The test for sufficiency of the evidence is whether a rational trier of fact could have found all of the elements 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).

1. The state did not prove that Mr. James changed his residence address.

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." 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.[7] A person's residence is the place one uses "'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.'" Opinion, p. 7 (quoting *Pickett*, 95 Wn. App. at 478).

Mr. James's residence throughout the charging period remained the apartment he rented from his landlord, Brian Weathers. Although he had temporary absences after his son's death, he left his clothing and other property at the apartment. RP 123. Around January 5th, he negotiated with Weathers and obtained permission to stay despite his difficulties paying rent. RP 46, 49-50, 84. A friend dropped him off at the apartment

[7] 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.*

building after January 5th. RP 78-107. He testified that he always intended to return to that apartment, even when he spent the night elsewhere. RP 84-85, 87. 89, 96, 100.

The state did not prove that Mr. James intended to reside elsewhere. No evidence established that he received mail or paid utilities at another address. *See* RP, *generally.* The court did not find that he intended to reside elsewhere, or that he received mail and paid utilities at another address. RP 120-128. Because the state bore the burden of proof, the lack of findings on these points suggests that it failed to carry its burden. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002).

The evidence and the court's findings suggest that Mr. James did not change his residence. The Supreme Court should accept review and hold that the state failed to prove that Mr. James changed his residence address. *Drake*, 149 Wn. App. at 95. This case presents an issue of substantial public interest, and should be decided by the Supreme Court. RAP 13.4(b)(4).

2. The state did not prove that Mr. James "knowingly" failed to comply with the registration requirements.

Under RCW 9A.44.132, a person commits the crime of failure to register if she or he "knowingly fails to comply with any of the

requirements of RCW 9A.44.130." A person can't be convicted of failure to register if there is insufficient proof of knowledge. *Drake,* 149 Wn. App. at 94-95. Thus, to obtain a conviction based on failure to register a change of residence address, the state must prove that the accused person knew that his residence address had changed. RCW 9A.44.132. For example, in *Drake,* the Court of Appeals determined that the record did not support a finding that the defendant knowingly failed to register because he did not know that he'd been evicted from his residence. *Drake,* 149 Wn. App. at 94.

Here, the primary evidence against Mr. James was testimony that Barnard moved into the apartment 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.

No direct evidence suggested that Mr. James had been evicted. *See* RP, *generally.* His landlord actually testified to the contrary. RP 46. Mr. James left personal property in his apartment, and arranged to stay even though he had difficulty paying his rent. RP 46. The trial court did not find that he knew he'd been evicted. As in *Drake,* the evidence was

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

insufficient to prove that Mr. James knowingly violated the requirements of RCW 9A.44.130.

The Supreme Court should accept review and hold that the prosecution failed to prove that Mr. James "knowingly" failed to comply with his obligation to register a change of address. The Court of Appeals' decision conflicts with *Drake.* Furthermore, this case raises an issue of substantial public importance that should be decided by the Supreme Court. RAP 13.4(b)(2) and (4).

C. The Supreme Court should accept review and hold that the trial court infringed Mr. James's confrontation right by limiting his cross-examination of Barnard. This case raises significant constitutional issues that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The constitution guarantees an accused person the right to confront and cross-examine adverse witnesses. U.S. Const. Amends. VI, XIV; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).[9] The primary component of the confrontation right is the right to conduct meaningful cross-examination. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

Bias evidence is always relevant. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). An accused person must be allowed to

[9] Wash. Const. art. I, § 22 guarantees a similar right.

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* II, 618 F.3d at 727.

The absence of an explicit agreement "does not end the matter." *Martin* II, 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. *Martin* II, 618 F.3d at 730.

Cross-examination that is even minimally relevant must be permitted under most circumstances. *Darden*, 145 Wn.2d at 612. Cross-examination may not be barred unless the state demonstrates that it is "so prejudicial as to disrupt the fairness of the fact-finding process." *Id.* This disruptive prejudice must be balanced against the accused person's need for the information sought. *Id.*

Mr. James sought to establish Barnard's bias through cross-examination. RP 65-66. 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. The state had no legitimate interest in excluding the evidence at issue here.

The court relied heavily on Barnard's testimony that he moved into the apartment on January 5th. RP 123. Cross-examination regarding Barnard's pending failure to register charge would have exposed his potential bias and motive to fabricate. *See Martin* II, 168 F.3d at 728. The court's limitation on this cross-examination infringed Mr. James's confrontation right.

The Supreme Court should accept review and reverse Mr. James's conviction. The trial court erred by limiting cross-examination regarding Barnard's potential bias. *Martin* II, 618 F.3d at 728; *Darden*, 145 Wn.2d at 628. This case presents significant constitutional issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

D. The Supreme Court should accept review and vacate Mr. James's sentence because the prosecution failed to prove that his prior conviction for violating a protection order was a felony. The Court of Appeals' decision conflicts with *Knippling*. Furthermore, this case raises an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(1) and (4)

At sentencing, the offender score is calculated based on current and prior felony convictions; with few exceptions misdemeanor convictions do not count. RCW 9.94A.525. The prosecution bears the burden of proving that prior convictions should be included in the offender score. *See State v. Knippling*, 166 Wn.2d 93, 101, 206 P.3d 332 (2009).

In *Knippling*, the state proved the existence of a prior conviction for second-degree robbery. The state did not prove that the prior offense counted as a strike, because it did not show that the juvenile court had properly declined jurisdiction over the then-juvenile offender. *Id.*, at 101-102. Because the state failed to prove that the offense qualified as a strike, the Supreme Court vacated the defendant's persistent offender sentence. *Id.*

Here, Mr. James agreed that he'd previously been convicted of violating a domestic violence protection order. RP 130. He did not stipulate that the offense was a felony, and the state did not present any evidence establishing that it was a felony.[10] RP 130-139. Accordingly,

[10] As the Court of Appeals noted, the offense may be either a gross misdemeanor or a felony. Opinion, p. 12 (citing former RCW 26.50.110 (2006).

under *Knippling*, the state failed to meet its burden of proving that the offense qualified for inclusion in the offender score.

The Court of Appeals acknowledged that the record did not establish whether the offense was a felony or a gross misdemeanor. Opinion, pp. 12-13. However, instead of holding that the state failed to meet its burden, the Court of Appeals erroneously declined to rule on the issue. Opinion, pp. 12-13.

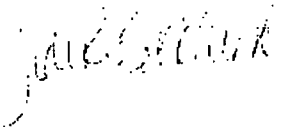
The Supreme Court should accept review and vacate Mr. James's sentence. The Court of Appeals' decision conflicts with *Knippling*. Furthermore, this case presents an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(1) and (4).

VI. CONCLUSION

The Supreme Court should accept review, reverse Mr. James's conviction, and dismiss the charge with prejudice. In the alternative, the case must be remanded for a new trial. If the court does not reverse the conviction, it should vacate the sentence and remand for resentencing.

Respectfully submitted July 14, 2014.

BACKLUND AND MISTRY



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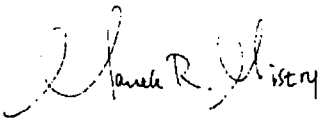

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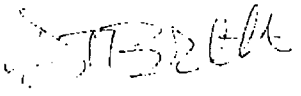

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Lester James, DOC #834394
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and I sent an electronic copy to

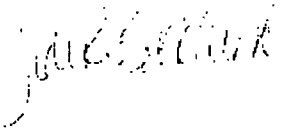
Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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 July 14, 2014.



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APPENDIX:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LESTER JIM JAMES, Appellant.	No. 44173-0-II UNPUBLISHED OPINION

WORSWICK, J. — Following a bench trial, the trial court found Lester James guilty of failure to register as a sex offender. James appeals his conviction and sentence, asserting that (1) the sex offender registration statute, RCW 9A.44.130, is unconstitutionally vague as applied, (2) the State failed to present sufficient evidence in support of his conviction, (3) the trial court violated his right to confrontation by limiting the scope of his cross-examination of a witness, and (4) the trial court miscalculated his offender score. We affirm.

FACTS

James is a convicted sex offender required to register his residence under RCW 9A.44.130. In August and October of 2011, James registered his address as unit 1 of an apartment complex in Longview, Washington.

On December 21, 2011, Olga Lozano, a civilian investigator for the Longview Police Department, went with Detective Danielle Jenkins to James's registered address to verify that he was living there. They were not able to make contact with James on that date. Lozano again went to the Longview apartment complex to verify James's registered address on January 4,

2012 and January 8, 2012, but she was unable to make contact with James on either date. The State charged James with failure to register as a sex offender, alleging that he committed the offense on, about, or between the dates of November 1, 2011 and January 11, 2012.

At trial, Lozano testified that when she went to James's registered address on January 8, Richard Barnard was at the apartment. Before calling Barnard to testify, the State moved to exclude evidence of Barnard's sex offender registration status, asserting that Barnard's status was not relevant to any issue in the case. James's defense counsel opposed the State's motion and argued that Barnard's status was relevant to show "his motives to give answers that he believes the prosecution will want in order to curry favor in the prosecution's eyes." Report of Proceedings (RP) at 66. The trial court agreed with the State and excluded evidence related to Barnard's status as a registered sex offender.

Barnard testified that he moved into unit 1 of the Longview apartment complex on January 5, 2012, that the unit was unoccupied when he moved in, and that he did not have any roommates during the month of January. Barnard further testified that when he moved into the unit, the unit was empty apart from some clothing, soap, and shampoo. Barnard stated that he gave these items away and that no one came to the apartment to claim them. Barnard also stated that the first time he met James was a month or two after moving into unit 1. When defense counsel cross-examined Barnard, the following exchange took place:

> [Defense counsel]: . . . And you're sure this was on the 5th that you—
> [Barnard]: Yes, I got out of prison on the 5th.
> [Defense counsel]: Out of prison where?
> [Barnard]: Uh, Monroe.
> [Defense counsel]: Monroe, for what?
> [State]: Objection, Your Honor. Relevance?
> [Trial court]: Sustained. Sustained.
> . . . .

> [Defense counsel]: You have to register as a sex offender?
> [State]: Objection, Your Honor. Relevance?
> [Trial court]: Sustained.
> [Defense counsel]: Your Honor, once again, so I can make my record here, should it be necessary—uh—this person's registration status, why they're in custody right—why he's in custody right now, is all relevant to his motivation on how he answers the questions that were prepared by the prosecution and the Defense. Uh, he's in custody. Uh, he always has a Defense with him—uh—charged with failure to register himself. This is highly relevant to his credibility.

RP at 72-73.

Brian Weathers, a property manager for the Longview apartment complex, testified that he had a conversation with James in January 2012, about James's rent being past due since December 25, 2011. According to Weathers, James stated that he did not have any rent money at that time, but that he could pay his rent after receiving his tax return. Weathers testified that he had agreed to James's proposal but that James never paid his past due rent. Weathers stated that he did not evict James from the unit before renting it to Barnard. Weathers also stated that he knew James had items from a rent-to-own store while living in unit 1.

James testified that he received $2,000 a month from the Puyallup Tribe of Indians and that his rent for unit 1 of the Longview apartment complex was around $300 per month. James further testified that he could not make his December 25, 2011 rent payment because he had spent his money on funeral costs for an individual that James considered to be his son. James stated that, because he was emotionally distraught over the loss of his son, he spent several nights with family members in Shelton and at Andrew Alston's home in Kelso; James became friends with Alston when Alston lived in a different unit at the Longview apartment complex. James also stated that when he spent nights at Alston's home, he would bring a backpack

containing a change of clothes. James testified that he had helped Alston pay for rent or food when he came to visit but denied that he had lived at Alston's home.

Alston testified that James spent several nights at his home but stated that James did not live there. Additionally, contrary to James's testimony, Alston testified that James never brought a backpack with him when he came to visit, and that James did not help pay for rent. The trial court found James guilty of failure to register as a sex offender, calculated his offender score at 9, and sentenced him to 43 months of incarceration and 36 months of community custody. James timely appeals his conviction and resulting sentence.

ANALYSIS

I. RCW 9A.44.130

James first contends that RCW 9A.44.130 is unconstitutionally vague as applied because the statute does not sufficiently define what it means to "change" one's "residence." We disagree.

The constitutionality of a statute is a question of law that we review de novo. *State v. Watson*, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). Where, as here, the challenged statute "does not involve First Amendment rights, we evaluate the vagueness challenge by examining the statute as applied under the particular facts of the case." *State v. Jenkins*, 100 Wn. App. 85, 89, 995 P.2d 1268 (2000) (citing *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). We presume statutes to be constitutional, and the challenger bears the burden of proving vagueness beyond a reasonable doubt. *Coria*, 120 Wn.2d at 163. To meet this burden, James "must show, beyond a reasonable doubt, that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the

statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Coria*, 120 Wn.2d at 163. James appears to challenge the constitutionality of RCW 9A.44.130 only on the first ground.

With regard to this first ground, "[t]he due process clause of the Fourteenth Amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe." *Watson*, 160 Wn.2d at 6. To meet this standard, "the language of a penal statute 'must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.'" *Watson*, 160 Wn.2d at 6-7 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). And, "[a] statute fails to provide the required notice if it 'either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Watson*, 160 Wn.2d at 7 (quoting *Connally*, 269 U.S. at 391). But "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions" become prohibited conduct. *Watson*, 160 Wn.2d at 7 (alteration in original) (internal quotation marks omitted). Rather, "a statute meets constitutional requirements '[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement.'" *Watson*, 160 Wn.2d at 7 (alteration in original) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)).

RCW 9A.44.130 sets forth the registration requirements for convicted sex offenders and provides in relevant part:

> (4)(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. . . .
>
> (5)(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. . . .
>
> (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. . . .

An offender who knowingly fails to comply with the registration requirements of RCW 9A.44.130 commits the crime of failure to register as a sex offender. RCW 9A.44.132.

James argues that RCW 9A.44.130(4)'s registration requirements are unconstitutionally vague as applied to him because the statute does not define "residence" or "residence address." But in the absence of a statutory definition, we give words used in a statute their ordinary meaning. *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). And Washington cases have repeatedly applied an ordinary meaning to the term "residence" when interpreting the provisions of RCW 9A.44.130.

For example, in *State v. Pickett*, 95 Wn. App. 475, 975 P.2d 584 (1999), Division One of this Court analyzed a former version of RCW 9A.44.130 to determine whether sufficient evidence supported a conviction for failure to register as a sex offender where the accused was

homeless during the alleged commission of the offense.[1] In holding that there was insufficient evidence in support of the defendant's conviction, the *Pickett* court relied on the ordinary meaning of the word "residence," stating, "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." 95 Wn. App. at 478. And in *Jenkins*, we relied on the *Pickett* court's statement of the ordinary meaning of "residence" in holding that a former version of RCW 9A.44.130 was unconstitutionally vague as applied because the statute did not indicate whether an offender met registration obligations by providing a mailing address as opposed to a residential address.[2] 100 Wn. App. at 91.

That prior case law has recognized this ordinary meaning of "residence" as used in RCW 9A.44.130 defeats James's claim that the term is unconstitutionally vague as applied. In *Watson* our Supreme Court reasoned that "[b]ecause of the inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute." 160 Wn.2d at 8. And, in reviewing constitutional vagueness claims, we presume that such court rulings are "'available to all citizens.'" *Watson*, 160 Wn.2d at 8 (quoting *Douglass*, 115 Wn.2d at 180) (internal quotation marks omitted). Accordingly, in reviewing James's vagueness claim we adopt the ordinary meaning of "residence" as stated in *Pickett*, which case we presume was available to James to clarify his understanding of registration obligations under RCW 9A.44.130.

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[1] The legislature has since amended RCW 9A.44.130 to correct the infirmity identified in *Pickett*, and the statute now includes reporting provisions applicable to offenders that are homeless. *See* LAWS OF WASHINGTON 1999, 1st Spec. Sess., ch. 6, §1-2.

[2] The legislature has since amended RCW 9A.44.130 to correct this infirmity and the statute now provides that an offender must provide a "complete residential address" when registering. *See* LAWS OF WASHINGTON 2006, ch. 126, § 1.

Applying this ordinary meaning of the word "residence" to the facts here, we hold that a person of common intelligence would understand RCW 9A.44.130(4) to require an offender to register within three business day of changing "the place where [the offender] lives as either a temporary or permanent dwelling, a place to which [the offender] intends to return, as distinguished from a place of temporary sojourn or transient visit." *Pickett*, 95 Wn. App. at 478. Accordingly, James has failed to show beyond a reasonable doubt that RCW 9A.44.130 is unconstitutionally vague as applied to him.

II. SUFFICIENCY OF THE EVIDENCE

Next, James contends that the State failed to present sufficient evidence in support of his conviction. Again, we disagree.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). We interpret all reasonable inferences in the State's favor. *State v. Hosier,* 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

To convict James of failure to register as a sex offender as charged here, the State had to prove beyond a reasonable doubt that James (1) had a duty to register under RCW 9A.44.130 for a felony sex offense and (2) knowingly failed to register within three business days of either (a) changing his residence or (b) ceasing to have a fixed residence. RCW 9A.44.130(4)-(5); RCW

9A.44.132. James argues that sufficient evidence did not support his conviction because the State failed to present evidence showing that he did not intend to return to his registered address.[3] We disagree. The evidence at trial showed that James ceased paying rent for his apartment at the end of 2011 and started helping Alston pay for rent and food while staying at Alston's home. Additionally, Barnard testified that he moved into unit 1 of the Longview apartment complex on January 5, that the unit was unoccupied when he moved in, and that he first met James months after moving into the unit. Although Barnard testified that there were some clothing and toiletry items in the unit when he moved in, he also testified that nobody came to claim those items. Additionally, Weathers testified that James had possessed items from a rent-to-own store when he lived in unit 1, which items were not present when Barnard moved into the unit. Taken together, and viewed in a light most favorable to the State, this was ample evidence that James did not intend to return to his registered address and, thus, was required to register under RCW 9A.44.130.

James also argues that sufficient evidence did not support the mens rea element that he "knowingly" failed to register. We disagree. At trial, the State presented a registration notification document that James had signed in August, 2011. The registration notification document contained provisions mirroring the language of RCW 9A.44.130(4)-(5). And James entered his initials next to each of these provisions, indicating that he had "read and understood" the provisions. Exhibit 1 at 3-4. Thus, the evidence showed that James was aware of his

[3] In advancing this claim, James asserts that the ordinary meaning of "residence" as stated in *Pickett* should apply. We agree. *See also State v. Drake*, 149 Wn. App. 88, 94-95, 201 P.3d 1093 (2009) (applying the *Pickett* court's definition of residence and holding that there was insufficient evidence that the defendant did not intend to return to his registered address).

registration obligations and, therefore, knowingly failed to comply with those obligations by not informing the county sheriff within three business days of either changing his residence or ceasing to have a fixed residence. Accordingly, we hold that sufficient evidence supported James's conviction for failure to register as a sex offender.

III. RIGHT OF CONFRONTATION

Next, James contends that the trial court's ruling limiting the scope of his cross-examination of Barnard violated his constitutional right of confrontation. Again, we disagree.

Both the state and federal constitutions protect the right to confrontation, including the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The purpose of cross-examination is to test the witness's perception, memory, and credibility. *Darden*, 145 Wn.2d at 620. But the right to cross-examination is not absolute. *Darden*, 145 Wn.2d at 620. A trial court may deny cross-examination if the evidence sought is vague, argumentative, speculative, or simply irrelevant. *Darden*, 145 Wn.2d at 620–21. And, "[w]here the right [to cross-examination] is not altogether denied, the scope or extent of cross-examination for the purpose of showing bias rests in the sound discretion of the trial court." *State v. Robbins*, 35 Wn.2d 389, 396, 213 P.2d 310 (1950). Accordingly, we will not disturb a trial court's decision limiting the scope of cross-examination absent a manifest abuse of that discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

James asserted at trial that evidence of Barnard's sex offender registration status was relevant to show Barnard's "motives to give answers that he believes the prosecution will want in order to curry favor in the prosecution's eyes." RP at 66. But evidence of Barnard's sex offender registration status, alone, had no tendency to make it more or less probable that he would tailor his testimony to "curry favor" with the State. *See* ER 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). And the trial court's evidentiary ruling did not prohibit defense counsel from questioning Barnard about his motive to testify, whether the State had pending charges against him, or whether the State had promised him anything in exchange for his testimony. Accordingly, we hold that the trial court did not violate James's confrontation right by excluding irrelevant evidence.

IV. Offender Score Calculation

Finally, James contends that the trial court erred in calculating his offender score at 9 because the trial court scored one point for James's conviction of violation of a domestic abuse protection order, which offense James contends is "generally" a gross misdemeanor and, thus, should not have been included in his offender score calculation. Because James cannot demonstrate on this record that the trial court miscalculated his offender score by including in its calculation James's prior offense of violation of a domestic abuse protection order, we affirm his sentence.

Under the sentencing provision applicable to James's conviction for failure to register as a sex offender, RCW 9.94A.525(18), the trial court was required to add 1 point to James's offender score for each of his prior adult felony convictions. A statement of James's criminal history, which James affirmatively agreed was correct at his sentencing hearing, lists a prior adult conviction for violation of a domestic violence protection order. Former RCW 26.50.110 (2006) provides that the violation of a court's protection order is a gross misdemeanor except that:

> (4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.
>
> (5) A violation of a court order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

On this record, we cannot determine whether James's prior conviction for violation of a domestic violence protection order was a misdemeanor or, instead, was a class C felony under former RCW 26.50.110(4)-(5). Because facts outside the record are necessary for us to determine whether the trial court, in fact, miscalculated James's offender score, we decline to reach this issue on the merits. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251

(1995) (Reviewing courts do not consider matters outside the trial record on direct appeal.). We affirm James's conviction and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Johanson, C.J.

Melnick, J.

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