

No. 48717-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

BRYAN MACKER,

Appellant.

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

The Honorable James Orlando

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REPLY BRIEF

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## A. REPLY ARGUMENT

1. The State presented no evidence regarding where Mr. Macker was actually located or evidence that he failed to provide notice, therefore it does not matter what alternative the State now asserts it was solely proceeding under below.

The Respondent argues that the statutes setting forth the offense of failure to register, and in particular the statute, RCW 9A.44.130, defining the various different registration duties, do not create an alternative means crime. BOR, at pp. 4, 6 (citing State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)).

Presumably, the Respondent cites Peterson for the rule that only an alternative means crime requires proof of *every single* alternative means, absent an election. But the complexities of that issue are not pertinent, because here, the State completely failed to prove the crime because there was no evidence below in the 1-day bench trial as to where or when Macker was located or found. Compare Peterson, at 772 (where proof showed Peterson failed every possible requirement of statute, it was unnecessary to show which particular residential status, and therefore which particular time deadline, applied).

The Respondent goes on to argue that it did, in any event, choose to argue its case to the bench trial court solely under sections (5) and (6) of RCW 9A.44.130 (respectively, failure to

register in a new Washington county after moving there; and failure to notify the most recent county of registration of becoming a person who lacks a fixed residence in Washington). BOR, at pp. 8-9.

Therefore, the State argues, it is not relevant that Mr. Macker may have moved to another state, such that he would be subject only to the requirement of giving notice of such move and not registration. BOR, at p. 9. Mr. Macker, the State argues, may have been unable to be found at his mother's Graham home because he may have moved to some other Washington county or may have been a person who lacked a fixed residence, in Washington. BOR, at pp. 8-9.

However, the State's very brief closing argument simply asserted that Mr. Macker "did not live" at his mother's house in Graham, that his mother "hadn't seen her son for two months," and that Macker "was not living there." 1/28/16RP at 101-03.

**b. Registration and notice, by statute, are two different things.**

When the Legislature uses different language, it means different things. State v. Roggenkamp, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005). As the Respondent concedes (albeit with qualifications), there was no evidence adduced that Mr. Macker did

not send notice to the Pierce County sheriff of a move to another state in the United States. BOR, at pp. 11-12. The Respondent relies on the fact that Ms. Conger, the sheriff's office employee who accepts Pierce County address registrations for sex offenders, said "no" when asked by the deputy prosecutor if Mr. Macker had ever tried to register another address other than his mother's address in Graham. BOR, at pp. 11-12. But Mr. Macker, if he had shortly moved to Oregon, Idaho, etc., would not have been under any duty to register any address or any particular address with the Pierce County sheriff, only to provide notice of the move. Notice is something different than address registration. State v. Roggenkamp, 153 Wn.2d 625–26.

Conger was never asked if Mr. Macker did or did not send notice to Pierce County. The State argues that Ms. Conger would surely have been "intentionally misleading the court" if she had given her answer of "no" to the deputy prosecutor's question about whether the defendant had attempted to register another address, while being aware that Mr. Macker had sent "notice" of a move to another state of the Union. BOR, at pp. 13-14. But Conger was not asked about "notice," and a move to another state does not require any address registration be sent to Pierce County, only

notice of the move. The sufficiency of the evidence is assessed by looking only to the record on appeal, to determine if evidence adequate to allow the fact-finder to find proof of the crime beyond a reasonable doubt is present in that record. Its absence requires reversal for insufficient evidence under Due Process. U.S. Const. amend. 14; see, e.g., State v. Johnson, 132 Wn. App. 400, 410, 132 P.3d 737 (2006) (stating the established rule that the “sufficiency of the evidence test” is applied “to the record on appeal.”).

## **B. CONCLUSION**

Based on the foregoing, and on his Appellant’s Opening Brief, the appellant, Mr. Macker, requests that this Court of Appeals reverse his conviction.

DATED this 7th day of August, 2016.

Respectfully submitted,  
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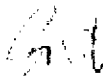
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**SIGNED** IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2016.



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# WASHINGTON APPELLATE PROJECT

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