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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 34785-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

K.D.H.,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Christine A. Pomeroy, Judge

Cause No. 05-8-01064-8

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A. ASSIGNMENTS OF ERROR

1. The court erred in convicting K.D.H. where the information fails to allege all of the elements of failure to register as a sexual offender.
2. The court erred in entering Findings of Fact and Conclusions of Law findings nos. 11-15; and conclusions nos. 2-4. [CP 20-23].
3. The court erred in convicting K.D.H. where there was insufficient evidence to establish beyond a reasonable doubt that K.D.H. was guilty of failure to register as a sex offender.
4. The court erred in convicting K.D.H. pursuant to RCW 9A.44.130 where the rule of lenity requires reversal and dismissal of this conviction because the statute is ambiguous as to the meaning of “residence.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court erred in convicting K.D.H. where the information fails to allege all of the elements of failure to register as a sexual offender? [Assignment of Error No. 1].
2. Whether the court erred in convicting K.D.H. where there was insufficient evidence to establish beyond a reasonable doubt that K.D.H. was guilty of failure to register as a sex offender? [Assignments of Error Nos. 2 and 3].
3. Whether the court erred in convicting K.D.H. pursuant to RCW 9A.44.130 where the rule of lenity requires reversal and dismissal of this conviction because the statute is ambiguous as to the meaning of “residence?” [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure.

K.D.H., a juvenile D.O.B. 05-02-89, was charged by first amended information filed in Thurston County Superior Court with one count of failure to register as a sexual offender. [CP 3].

Prior to trial no motions regarding CrR 3.5 were made or heard. On March 30, 2006, the matter came before the court, the Honorable Christine A. Pomeroy presiding, for trial. [RP 15-143]. After hearing both the State's and K.D.H.'s cases, the court found K.D.H. guilty. [RP 136]. The court sentenced K.D.H. to a standard range disposition of 30-days [CP 5-10; RP 140-143], and entered the following written Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Respondent's date of birth is 05/02/89.
2. The Respondent is charged with Violation of Sex Offender Registration occurring on or about October 25, 2005 through December 13, 2005 as stated in the First Amended Information filed on March 30, 2006.
3. The Respondent entered a guilty plea in Thurston County Juvenile Court on April 2, 2004 to the charge of Child Molestation in the First Degree and was ordered to comply with Sex Offender Registration requirements (Exhibit #2).
4. The Respondent registered for the first time on 07/01/04 with the Thurston Count Sheriff's Office when he was

released from custody. The Respondent registered to 6913 36th Ave SE, Lacey, WA 98503.

5. On 8/11/04, the Respondent changed his address through the Thurston County Sheriff's Office to 7201 38th Dr SE, Lacey, WA 98503.
6. On 9/3/04, the Respondent changed his address through the Thurston County Sheriff's Office to 1618 Tullus St NE, Olympia, WA 98506.
7. On 11/18/04, the Respondent changed his address through the Thurston County Sheriff's Office to 16101 Reichel Rd SE, Rainier, WA 98576.
8. On 9/26/05, the Respondent changed his address through the Thurston County Sheriff's Office to 922 Wilson St NE, Olympia, WA 98501.
9. On 10/24/05, the Respondent changed his address through the Thurston County Sheriff's Office to 2406 Maxine St SE, Lacey, WA 98503 (Exhibit #3).
10. Every time the Respondent changed his address through the Thurston County Sheriff's Office he signed and dated the Registration Requirements form, reminding him of the rules regarding sex offender registration in the State of Washington (Exhibit #4 and #5).
11. Sgt Campbell of the Lacey Police Department testified that on 11/12/05, he had contact with the Respondent regarding an unrelated incident. During this contact Sgt Campbell attempted to verify the Respondent's address at 2406 Maxine St SE, as was listed in the school records. The Respondent told Sgt Campbell that he did not live at that address. The Respondent said he stayed there for a few weeks in early 2005, but has not stayed there since then. He said he was currently living in a trailer on the side of his mom's boyfriend's house in East Olympia near Ralph's Thriftway, and he did not know the address. Sgt Campbell

relayed this information to Detective Leischner of the Thurston County Sheriff's Office.

12. Detective Leischner testified that on 12/12/05, he made contact with Deann Bolin, the homeowner who resides at 2406 Maxine St SE. Ms. Bolin stated that the Respondent did not live at her residence at any time since 10/25/05.
13. The Respondent was arrested on 12/13/05.
14. Ms Bolin testified at trial, consistent with her statement to Detective Leischner.
15. David Bolin, Ms Bolin's son, testified at trial that he never let the Respondent come into his home without his mother's knowledge between October 2005 through December 2005. Mr Bolin further testified that he was not even residing in his mother's home during November 2005 and December 2005. Mr Bolin was staying at his girlfriend's house during that time frame.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the Respondent and the subject matter.
2. The State's witnesses are credible.
3. The Respondent did not reside at 2406 Maxine St SE, Lacey, WA 98503 during the time frame of 10/25/05 through 12/13/05.
4. The State has proved beyond a reasonable doubt all the elements of Violation of Sex Offender Registration.

[CP 20-23].

Timely notice of appeal was filed on May 3, 2006. [CP 11-17].

This appeal follows.

2. Facts.

Lacey Police Officer David Campbell served as a school resource officer at North Thurston High School and contacted K.D.H. regarding an altercation at school. [RP 17-18]. During the contact, K.D.H. told Campbell that he was not living at the address listed in his school records. [RP 18-19]. Campbell contacted Thurston County Sheriff's Detective Darryl Leischner because Campbell knew K.D.H. was a sex offender, who was required to register as such. [RP 19-20].

Leischner testified that he is in charge of the sex offender registration unit of the Thurston County Sheriff's Office and that he is familiar with K.D.H. because he is a registered sex offender and had successfully changed his registered address five times in approximately the last year. [RP 29-35]. According to Leischner, K.D.H.'s last known registered address was 2406 Maxine Street SE. [RP 35-36]. Leischner got a report that K.D.H. may not be residing at this last known address and contacted the home owner (Deann Bolin). [RP 35-37]. Based on the information he received during his contact with Deann Bolin, Leischner had K.D.H. arrested. [RP 37-38].

Deann Bolin, the person who owns the home at 2406 Maxine Street SE, testified that K.D.H. had stayed at her home prior to the start of the 2005 school year, specifically down in the basement where her son

David lived, but denied that she had ever given K.D.H. permission to live at her residence during the school year (October through December 2005). [RP 23-25]. She further testified that K.D.H. in fact had not lived at her residence during October through December 2005. [RP 26]. David Bolin testified that he had let K.D.H. stay with him in the basement of his mother's home before the 2005 school year began, but when K.D.H. asked him to ask his mother to let him register the address his mother refused and K.D.H. moved from the address. [RP 107-113].

K.D.H. did not testify in his own defense. However, friends of K.D.H.'s (Rachel Benavides, Michael Patterson, and Matt Patterson) as well as K.D.H.'s sister, Amber Moore, his mother, Gail Hanna, and his mother's boyfriend, Justin Jensen; all testified that K.D.H. did in fact reside at 2406 Maxine Street SE because they had been to that address with K.D.H. observed he was living there and/or had dropped him off at the address because that was where he was residing after October 24, 2005. [RP 51-55, 64-68, 72-76, 79-83, 86-89, 94-98].

D. ARGUMENT

- (1) A CONVICTION FOR FAILURE TO REGISTER AS A SEXUAL OFFENDER PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ELEMENTS OF THE OFFENSE MUST BE REVERSED AND DISMISSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. Art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information “will be more liberally construed in favor of validity....” State v. Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

- (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was

nonetheless actually prejudiced by the inartful language which caused a lack of notice?

State v. Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts constituting the offense in ordinary and concise language....” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” State v. Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

RCW 9A.44.130(5)(a) provides, in relevant part:

If any person required to register pursuant to this section changes his or her residence within the same county, the person must send written notice of the change of address to the county sheriff within seventy-two hours of moving.

Here, the first amended information charging K.D.H. with this offense did not allege these elements:

In that the respondent, [K.D.H.], in the State of Washington, on or about October 25, 2005 through December 13, 2005, having been previously convicted of a sex offense, to-wit: Child Molestation in the First Degree, and therefore required to register as a sex offender in Washington, did knowingly fail to comply with sex offender registration requirements.

[CP 3].

This information failed to appraise K.D.H. of the nature of the charge. It did not allege that he knowingly failed to notify the Thurston County Sheriff's Office within seventy-two hours of moving his residence. "(S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury instructions](,)" State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000), the information is defective, and the conviction obtained on this charge must be reversed and dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). K.D.H. need not show prejudice, since Kjorsvik calls for a review of prejudice only if the "liberal interpretation" upholds the validity of the information. *See State v. Kjorsvik*, 117 Wn.2d at 105-06.

(2) THE EVIDENCE WAS INSUFFICIENT TO UPHOLD THE COURT'S FINDING K.D.H. GUILTY BEYOND A REASONABLE DOUBT OF FAILURE TO REGISTER AS A SEXUAL OFFENDER.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

As charged in this case, the State was required to prove beyond a reasonable doubt that K.D.H. changed his residence and knowingly failed to properly register as a sexual offender by failing to notify the Thurston County Sheriff within seventy-two hours of the change. Recently, this court addressed a similar issue in State v. Stratton, 130 Wn. App. 760, 124

P.3d 660 (2005). In Stratton, this court found that RCW 9A.44.130 was ambiguous and reversed the defendant's conviction for failure to register as a sex offender. In doing so, this court based its decision on the fact that "residence" is not defined in RCW 9A.44.130, thus this court used the following dictionary definition:

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. Webster's Third New International Dictionary, at 1931 (1969).

State v. Stratton, 130 Wn. App. at 765.

Here, the evidence was insufficient to show that K.D.H.'s "residence" was not in fact 2406 Maxine Street SE during the alleged charging period. While it is true that Deann Bolin testified that K.D.H. did not have her permission to reside in her basement where her son, David—K.D.H.'s friend, lived; other friends of K.D.H.'s (Rachel Benavides, Michael Patterson, and Matt Patterson) as well as K.D.H.'s sister, Amber Moore, his mother, Gail Hanna, and his mother's boyfriend, Justin Jensen; all testified that K.D.H. did in fact reside at 2406 Maxine Street SE because they had been to that address with K.D.H. observed he was living there during the time period and/or had dropped him off at the address because that was where he was residing. K.D.H. abided at,

actually lived at, returned to the 2406 Maxine Street SE, and this address was not a place of temporary sojourn or of transient visit—in other words 2406 Maxine Street SE was K.D.H.’s residence. *See Stratton, supra.* There is nothing in the statute under which K.D.H. was charged and convicted or in the definition used by this court in Stratton that requires the owner of the property to acquiesce or even be aware that a person is living at their address for it to be that person’s “residence” in this context.

The State failed to establish sufficient evidence that K.D.H.’s “residence” was not 2406 Maxine Street SE as he had registered with the Thurston County Sheriff’s Office during the charging period, with the result that his conviction should be reversed.

(3) RCW 9A.44.130 IS AMBIGUOUS AS TO THE MEANING OF “RESIDENCE” WITH THE RESULT THAT K.D.H.’S CONVICTION PURSUANT TO THIS STAUTE MUST BE REVERSED AND DISMISS.

When interpreting a statute, the court must give effect to the plain meaning of the statutory language. State v. Radan, 98 Wn. App. 652, 657, 990 P.2d 962 (1999). A court may not engage in statutory construction if the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court’s notions of what is good policy, recognizing the principle that “drafting of a statute is a legislative, not judicial function.”

State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court's goal in statutory interpretation is to identify and give effect to the Legislature's intent, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), *review denied*, 145 Wn.2d 1013 (2001); if the language of a statute is unambiguous, the language of the statute is not subject to judicial interpretation. Id. When the legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.2d 1216 (2002). Under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App. at 358.

As argued in the previous section of this brief, this court in Stratton, supra, found that RCW 9A.44.130 was ambiguous with regard to the meaning of "residence." As such, for the reasons argued in the previous section of this brief, K.D.H.'s conviction for failure to register as a sex offender must be reversed and dismissed.

E. CONCLUSION

Based on the above, K.D.H. respectfully requests this court to reverse and dismiss his conviction for failure to register as a sex offender.

DATED this 3rd day of August 2006.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 3rd day of August 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 3rd day of August 2006.

Patricia A. Pethick
Patricia A. Pethick

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