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DIVISION II

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STATE OF WASHINGTON
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NO. 39073-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

HUE E. DEEN,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Carol Murphy, Judge
Cause No. 08-1-01592-4

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A. ASSIGNMENTS OF ERROR

1. The court erred in allowing Deen to be convicted where the information fails to allege all of the elements of failure to register as a sexual offender.

2. The court erred in allowing Deen to be represented by counsel who provided ineffective assistance in failing to request a limiting instruction regarding the State's use of Milleson's statement to Frawley solely for impeachment purposes.

3. The court erred in allowing Deen to be convicted where there was insufficient evidence to establish beyond a reasonable doubt that Deen was guilty of failure to register as a sex offender.

4. The court erred in allowing Deen to be convicted 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."

5. The court erred in allowing Deen to be convicted where the State committed prosecutorial misconduct that deprived Deen of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court erred in allowing Deen to be convicted 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 allowing Deen to be represented by counsel who provided ineffective assistance in failing to request a limiting instruction regarding the State's use of Milleson's statement to Frawley solely for impeachment purposes? [Assignment of Error No. 2].

3. Whether the court erred in allowing Deen to be convicted where there was insufficient evidence to establish beyond a reasonable doubt that Deen was guilty of failure to register as a sex offender? [Assignment of Error No. 3].

4. Whether the court erred in allowing Deen to be convicted 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].

5. Whether the court erred in allowing Deen to be convicted where the State committed prosecutorial misconduct that deprived Deen of a fair trial? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

1. Procedure.

Hue E. Deen (Deen), was charged by 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 or 3.6 were made or heard. Deen was tried by a jury, the Honorable Carol Murphy presiding. Deen had no objections and took no exceptions to the court's instructions to the jury. [Vol. II RP 138-139]. The jury found Deen guilty as charged of failure to register as a sex offender. [CP 50; Vol. III RP 28-32].

The court sentenced to a standard range sentence of 50-months based on an undisputed offender score of 12. [CP 71-81, 82, 83; 3-25-09 RP 3-4, 10].

Notice of appeal was timely filed on March 25, 2009. [CP 68]. This appeal follows..

2. Facts.

Detective Frank Frawley (Frawley) with the Thurston County Sheriff's Office sex offender registration office testified that he received a tip from Pierce County Detective Wright that Deen a sex offender registered in Pierce County was actually living in Thurston County. [Vol. I RP 37-38]. Frawley investigated the tip and determined that Deen had been registered in Thurston County at 3307 College Street Apartment G-2 in Lacey, but had moved to 16610 156th Avenue Court East in Buckley registering with the Pierce County Sheriff's Office in January of 2008. [Vol. I RP 44-55]. Frawley also learned that Deen's driver's license listed his address as the Thurston County College Street address. [Vol. I RP 45-46].

Beginning on August 12, 2008, Frawley drove by the College Street address at 7:30 to 8 AM and at 4 to 5:30 PM multiple times and observed a car parked at the address registered to Deen (the vehicle's registered address was the Buckley address in Pierce County. [Vol. I RP 56-59, 100]. On August 29, 2008, at approximately 9 AM, Frawley went to the College Street address. [Vol. I RP 59]. He knocked on the door, which was answered by Erin Milleson (Milleson), Deen's girlfriend, who

looked as if she had just been awakened, and asked for Deen. [Vol. I RP 59-60, 62-63]. Deen came to the door appearing much like Milleson—like he had just awakened—Frawley told him that he was investigating a tip that he was living in Thurston County while registered in Pierce County. [Vol. I RP 63]. Deen became upset and accused Frawley of harassing him. [Vol. I RP 64-65]. Deen denied living in Thurston County but admitted to Frawley that he had spent the night at Milleson's explaining that he was helping her to move out. [Vol. I RP 66-69]. Frawley with the consent of both Deen and Milleson searched the apartment and it did appear that Milleson was in the process of moving. [Vol. I RP 70-72]. Frawley took a taped statement from Milleson. [Vol. 72-76]. After taking Milleson's taped statement, Frawley arrested Deen, who continued to deny that he was living in Thurston County. [Vol. I RP 76-79].

Milleson testified Deen, her boyfriend of three years, did not live with her. [Vol. I RP.142-143]. She admitted that he had lived with her and her roommate for a short time at the College Street address registering it with the Thurston County Sheriff's Office, but had moved to Pierce County to live with his sister, Erica Moore, because it he didn't she and her roommate would have been evicted. [Vol. I RP 145-148, 163-164]. Milleson did not live in at the College Street apartment after August 2008

because she could not longer afford the apartment as her roommate had moved home. [Vol. I RP 143-145]. Milleson recalled the morning Frawley came to her door looking for Deen and described him as intimidating—"I did feel threatened in my own home," [Vol. I RP 150], "I did feel threatened. I thought that I was going to jail." [Vol. I RP 156, 161-162]. Milleson explained that she used Deen's car to drive to work (the grave yard shift of 10 PM to 6 AM) and that Deen would stay over a couple of days to when she was off work (Tuesdays and Wednesdays), but that his permanent residence was his sister's house as he was registered and where he kept all of his things. [Vol. I RP 165-167; Vol. II RP 25-27, 35-36, 41].

Deen did not testify in his own defense.

Brittany Haase (Haase), Milleson's former roommate, testified that Deen had lived with the two girls for a short time but had moved out and went to live with his sister so that they, she and Milleson, would not be evicted. [Vol. II RP 60-62]. She did recall that Deen would come and spend the night with Milleson on occasion, but he did not live with them. [Vol. II RP 63, 65, 67-68, 78]. She also confirmed that it was Milleson who drove Deen's car—a gray Prelude—and that she was allowed to use Deen's car too. [Vol. II RP 65-66].

Both Erica Moore, Deen's sister, and Joseph Moore, Deen's brother-in-law, testified that Deen's residence was there home (he stayed there most nights, received his mail there, contributed to household expenses, and kept his property there) and that he had registered the same with the Pierce County Sheriff's Office as he was required to do. [Vol. II RP 88-93, 115-119]. Both also testified that Deen had a car, but that he kept it parked at his girlfriend's, Milleson's, home. [Vol. II RP 97, 118-119].

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 provides, in relevant part:

> (5)(a) ....If any person required to register pursuant to this section moves to a new county, the person must send signed written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register within twenty-four hours of moving. The person must also send signed written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered....
>
> (11)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a Class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section.....

Thus under this statute there are three alternative means for committing this crime when moving between counties: 1) failing to send written notice 14 days before moving to the county sheriff of the new county; 2) failing to register with the county sheriff of the new county within 24 hours of the move; or 3) failing to notify the county sheriff with whom a person was last registered within 10 days of move.

Here, the information charging Deen with this offense alleged a single alternative—failing to notify the county sheriff of the new county to

which he was moving in the appropriate fashion—but as charged, the information did not allege all of the elements of the crime. The information states:

> In that the respondent, HUE EDWARD DEEN, in the State of Washington, on or between July 28, 2008 and August 29, 2008, having been previously convicted of Indecent Liberties, and therefore required to register as a sex offender in Washington, did knowingly fail to comply with sex offender registration requirements, to-wit: the defendant knowingly failed to report to the Thurston County Sheriff's Office of his change of address as required by law.

[CP 3].

This information failed to apprise Deen of the nature of the charge. It did not allege that he knowingly failed to notify the Thurston County Sheriff's Office within twenty-four hours of moving his residence.[1]

---

[1] This court should note that the Sate did in fact elect to charge Deen with only one of the alternatives for committing failure to register as a sex offender under RCW 9A.44.130(5)(a) and (11)(a) as evidenced by the jury instructions given. Instruction No. 8 defines this crime setting forth all of the alternatives as does Instruction No. 9. [CP 62, 63]. The phrase in the information "as required by law," [CP 3], does not alleviate the Sate of its burden on this issue as presented herein to specifically notify Deen of the elements of the crime for which he is charged. Of greater import is Instruction No. 11, the to-convict instruction, outlining the elements as follows:

> (1) That on or between July 28, 2008 and August 29, 2008, the defendant had a duty to register as a sex offender;
>
> (2) That the defendant resided within Thurston County without providing signed written notice to the Thurston County Sheriff;
>
> (3) That the defendant knowingly failed to register with the Thurston county Sheriff's Office within twenty-four (24) hours of moving into the county; and

"(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). Deen 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.

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(4) That the acts occurred in the State of Washington.

[CP 65].

Given this to-convict instruction, which is required by law to contain all the elements of the crime both statutory and common law, the defectiveness of the information is demonstrated in that the State failed to allege in the information that Deen was required to notify the Thurston County Sheriff within 24 hours of moving to Thurston County of his change of address, which is set forth in the instruction. If this is not so, then the State has also failed to provide the required notice to Deen in the information that he was required to provide Thurston County notice at least 14 days before moving to said county (the alternative that Deen failed to notify Pierce County within 10 days after moving to Thurston County is superfluous in these circumstances in that Deen was charged and tried in Thurston County). In either circumstance the information is defective as it fails to provide the requisite notice of all of the elements of the crime for which Deen was accused and had to defend against.

(2) DEEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO REQUEST A LIMITING INSTRUCTION ON THE STATE'S USE OF MILLESON'S STATEMENT TO FRAWLEY SOLELY FOR IMPEACHMENT PURPOSES.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

In the instant case, the State after demonstrating a pattern of either a fundamental lack of understanding of the law or more likely prosecutorial misconduct regarding Milleson's testimony as argued below,

was rightly allowed to impeach Milleson's testimony with the statement she gave to Frawley under ER 613 in which she says that Deen stayed with for weeks at a time. [Supp. CP Ex. Nos. 1, 7; Vol. I RP 150-155168-170; Vol. II RP 23-30, 42-44, 55-57]. This statement should not and could not have been considered by the jury as substantive evidence given Milleson's testimony that Deen did not reside at her apartment. *See* State v. Sua, 115 Wn. App. 29, 60 P.3d 1234 (2003). Counsel should have proposed a limiting instruction outlining that the jury could only use Milleson's taped statement as impeachment evidence not as substantive evidence of the crime for which Deen was charged and what impeachment meant—a means for evaluating the credibility of the witness. By failing to propose such an instruction given the paucity of evidence presented by the State as to the crime charged, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to propose such an instruction given the State's weak case when such an instruction would have benefited Deen.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270

(1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that but for counsel's failure to propose such an instruction Deen was essentially convicted on impeachment evidence (the only evidence establishing that he stayed for weeks on end with Milleson and that her apartment could thereby be construed as his residence), thus he failed to register the change in his address with Thurston County within 24 hours. This was not substantive evidence and any failure by counsel to have the jury properly consider only the substantive evidence prejudiced Deen in denying him a fair trial where the outcome, had counsel proposed the appropriate instruction, would have been different.

(3) THE EVIDENCE WAS INSUFFICIENT TO UPHOLD THE COURT'S FINDING DEEN 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 Deen changed his residence from Pierce County to Thurston County and knowingly failed to properly register as a sexual offender by failing to notify the Thurston County Sheriff within twenty-four hours of the change. [CP 65].

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 Deen's "residence" was not in fact 16610 156th Avenue Court East, Buckley, Pierce County, Washington during the alleged charging period. The sum of the substantive evidence elicited at trial establishes that Frawley got a tip from a Pierce County Detective that Deen was living in Thurston County, Frawley investigated and observed a car registered to Deen at his girlfriend's College Street apartment where he used to reside in Thurston County on a number of occasions, Deen's driver license listed his address the College Street apartment in Thurston County [Supp. CP Ex. No. 3], that the car registered to Deen seen at the College Street apartment was in fact registered to his residence in Buckley, and that on the morning of August 29, 2008, Frawley went to the College Street apartment waking both Deen and Milleson—his girlfriend and the tenant of the apartment who was in the process of moving out by the end of August—both of whom admitted that he had spent the night there but denied that the apartment was his residence to which he had to register with a county sheriff as he was a sex offender. Based on this evidence—the most helpful to the State—there is insufficient evidence to establish that the

College Street apartment in Thurston County was Deen's residence for purposes of the sex offender registration requirement. Even under the definition this court appears to have adopted in Stratton, something more that a technical domicile or a place of temporary sojourn or transient visit, the evidence does not establish that the College Street apartment was the place where Deen "actually lives or has his home" especially given the fact that the College Street apartment was no longer even going to be Milleson's residence in two days—she was moving out and vacated the apartment as of the last day of August. All that the evidence establishes is that Deen's car was at Milleson's apartment and that he stayed there occasionally. The State cannot establish beyond a reasonable doubt that the College Street apartment was Deen's residence based on these facts, the most favorable to the State, but there are additional facts that fully preclude Deen's conviction.

Milleson (Deen's girlfriend), Haase (Milleson's former roommate), Erica Moore (Deen's sister), and Joseph Moore (Deen's brother-in-law) all testified that Deen's residence during the charging period was the Moore home in Buckley, Pierce County. He received his mail there, his property was there, and while he spent nights at Milleson's College Street apartment with her it was only a couple of nights a week when she was off work and in fact Deen contributed to the Moore household expenses. As

for the fact that his car was often seen at Milleson's College Street apartment, again all of the above-named witnesses, testified that Deen allowed Milleson (and Haase sometimes) to keep and use his car. There is nothing in the record that establishes Deen's residence as the College Street apartment in Thurston County, thus he could not be found guilty beyond a reasonable doubt of the crime of failure to register as a sex offender for failing to notify the Thurston County Sheriff of his change of residence within 24 hours. This court should reverse and dismiss Deen's conviction

(4) RCW 9A.44.130 IS AMBIGUOUS AS TO THE MEANING OF "RESIDENCE" WITH THE RESULT THAT DEEN'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 the Legislature has failed to provide a definition of the term for purposes of the sex offender registration statute and resolved the case using a dictionary definition of "residence." This court's decision in Stratton is well taken, and should have inspired the legislature to define "residence" for purposes of the sex offender registration statute. For what is the meaning of "residence" under the sex offender statute (even considering the definition employed by this court in Stratton); is it where a person says they reside; is it where a person receives their mail; is it where their property is stored and if so how much of their property; it is what is listed on a person's driver's license; is it

where a person's car is registered; or is it where a person sleeps at night and if so how many nights in a week, a month, or a year and what of contributions to household expenses—utilities, food and rent (is a formal rental agreement/lease required). Here, Deen claims his residence as being in Pierce County and has so registered with the Pierce County Sheriff; he gets his mail at the Pierce County address; his property is at the Pierce County address save his car which he lends to his girlfriend living in Thurston County; his driver's license lists a Thurston County address; his car is registered to his Pierce County address; and he spends some nights with his girlfriend at her Thurston County address, though she had moved from the address 2 days after his arrest, but contributes to the household expenses at his Pierce County address. The answer to these questions does not resolve the issue as the Legislature has failed to define "residence" for purposes of the sex offender registration statute and thus the statute is in fact ambiguous. As such, for the reasons argued herein under the rule of lenity and in the previous section of this brief, Deen's conviction for failure to register as a sex offender must be reversed and dismissed.

(5) THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN TRYING THIS MATTER, WHICH DEPRIVED DEEN OF A FAIR TRIAL.

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney, here the State, is a quasi-judicial officer. *See* State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

> He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956),
>
> We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), *citing* State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).

A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. Id. In cases of professional misconduct, the touchstone of due process analysis is fairness, i.e., whether the misconduct prejudiced the jury, thereby denying the defendant a fair trial guaranteed by the due process clause. State v. Davenport, 100

Wn.2d 757, 675 P.2d 1213 (1984). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Here, the State's actions throughout trial evidence a flagrant desire to obtain a conviction forming a pattern that deprived Deen of his right to a fair trial. Prior to trial, the State attempted to have the court declare Milleson a "hostile witness" because she was a "witness for the defense....[a]nd the purpose of me calling her out of order, so to speak, is to introduce a taped statement that she made." [Vol. I RP 8] Deen objected and the court properly found that the State had presented no proof that Milleson was a "hostile witness" only that she apparently would not be testifying as the State desired. [Vol. I RP 8-12]. Losing this trial tactic, the State then argued that Milleson's statement to Frawley was given under penalty of perjury and that if she took the stand she would be putting herself in jeopardy of a perjury charge. [Vol. I RP 15]. Deen's counsel immediately recognized that he could not speak for Milleson and that she may need counsel to which the State replied, "I'm not saying the State is going to charge her with perjury. What I'm saying is, she is allowed and should be advised of her rights. That doesn't automatically trigger the court having to appoint counsel to her immediately." [Vol. I

RP 15-16]. The court appointed counsel for Milleson given the implications of the State's arguments. [Vol. I RP 18-19]. Upon the appearance of Milleson's appointed counsel, the court questioned the State closely as to why it believed that Milleson may commit perjury during her testimony based on her prior taped statement to Frawley. [Vol. I RP 114-121]. The State repeatedly assured the court that Milleson's taped statement was made under penalty of perjury and thus the basis for any possibly perjury charge. [Vol. I RP 114-121]. Milleson's counsel disagreed pointing out that the statement only required Milleson to be truthful and accurate to the best of her knowledge. [Vol. I RP 114-121]. Finally, the State had to admit its misstatement and that the statement was not made under oath and could not be subject to a perjury charge. [Vol. I RP 114-121].

During trial the State did impeach Milleson with her taped statement to Frawley, which the State was entitled to do. [Vol. I RP 150-155; Vol. II RP 22-29]. It then came to light while Milleson was testifying that she had gone to the police station after giving her taped statement "to explain myself more" and was referred to the prosecutor's office whereupon she was told by the prosecutor in this case that if she changed her story criminal charges would be brought against her. [Vol. I RP 31-34, 44-47]. Milleson, who admitted to having been intimidated by

Frawley was then subject to the State exposing her to potential DWLS charges without benefit of counsel (over Deen's counsel's objection the State argued that it didn't think Milleson was entitled to counsel in this situation [Vol. II RP 25]) when Milleson admitted to driving Deen's car and that her license was suspended. [Vol. I RP 155-157; Vol. II RP 25-27

Finally, the State in closing argument contrary to its stated impeachment purpose and the only viable reason for admitting Milleson's taped statement improperly argued that Erin's taped statement was substantive evidence of Deen's guilt. [Vol. II RP 158-160, 163]. *See* State v. Sua, 115 Wn. App. 29, 60 P.3d 1234 (2003).

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). Sadly, this is what has occurred in the instant case. The State's case against Deen was not strong. Instead of dealing with the matters and issues at hand, the State by its misconduct threatened an unfavorable witness (Milleson), misstated facts to the court thereby causing the court to expend unnecessary funds to appoint counsel to Milleson, and improperly argued that impeachment evidence was substantive evidence all in order to improperly obtain a conviction. It

cannot be said based on the totality of this record that the jury rendered a verdict based solely on the admitted substantive evidence given that the State's misconduct has tainted and permeated this trial.

E. CONCLUSION

Based on the above, Deen 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 18th day of September 2009, 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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DIVISION II
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STATE OF WASHINGTON
BY_____
DEPUTY

Signed at Tacoma, Washington this 18th day of September 2009.

Patricia A. Pethick
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