

NO. 40241-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

DOUGLAS BUSH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE WOOLARD
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01347-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant. Where additional information is needed, and because of the nature of the issue raised, it will be further clarified in the argument section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is a claim that there is insufficient evidence to prove that the defendant failed to register as a sex offender. The statement in the Appellant's Brief indicates that this is a multiple act crime and therefore the jury was improperly instructed because there was no State v. Petrich, 101 Wn.2d 566, 693 P.2d 173 (1984) language used in the jury instructions. Further, the appellant claims that the charging done by the State includes the wrong time period and therefore is improperly presented to the jury. The Court's Instructions to the Jury (CP 35) sets forth at No. 12 the elements of the crime of Failing to Register as a Sex Offender. Instruction No. 12 sets forth the elements as follows:

(1) that on, about, or between July 30, 2009, and August 6, 2009, the defendant was required to register as a sex offender; and

(2) that on, about, or between July 30, 2009 and August 6, 2009, the defendant knowingly failed to comply with a requirement of sex offender registration; and

(3) that the acts occurred in the State of Washington.

-(Court's Instructions to the Jury, Instruction No. 12 – CP
35)

The State called in its case in chief Cathryn Driggers. Ms. Driggers is a Support Specialist III with the Clark County Sheriff's Office and specifically in the Sex Offender Registration Unit. (RP 59). Her job duties included maintenance of records and police reports to help the detectives evaluate the various sex offenders that they had in their care. (RP 59). Ms. Driggers indicated that part of her case load was the defendant and specifically zeroed in on the dates around July 30, 2009 into early August, 2009. It was during that period of time that the defendant claimed that he was registered at a specific address in Clark County.

Detective Patrick Kennedy worked for the Clark County Sheriff's Office in the Sex Offender Registration Unit. He testified that the defendant was being monitored as a sex offender in Clark County and he conducted an investigation to determine whether or not the defendant was living at the address that he claimed to be living at. (RP 79). The detective indicated that on July 29, 2009 the defendant came in and registered another address. The officer began checking this most recent address

between July 30 and August 3rd. He came in contact with the owner of the residence in question, looked around, and determined that there was no evidence that the defendant was living there at that time. (RP 82). He indicated that he conducted this search on August 6, 2009. It had previously been established that the defendant had 72 hours after he registered at that address to be living there and the officer told the jury that it was longer than 72 hours and the defendant, as a registered sex offender, was not living where he was telling people that he was living. (RP 83).

The officer indicated that ultimately he came in contact with the defendant who indicated to him that he stayed there periodically for maybe three or four days prior to the July 30, 2009 date. He indicated that he didn't keep any of his toiletries there nor did he receive mail there nor did he pay the rent or utilities.

QUESTION (Deputy Prosecutor): And, when did he (defendant) indicate the last time was that he had spent the night at that 123rd Avenue address?

ANSWER (Detective Kennedy): He had told me – we tried to establish a timeline during the interview because he registered on July 30th that he was living there that date. He told me in that interview that he stayed there three or four days prior – three or four days in a row at that address before registering it and then he indicated that he was no longer living at that address. So, we tried to establish that timeline to make sure to lock down these dates.

QUESTION: Okay. And, do you – was this interview, with the defendant, audio recorded?

ANSWER: Yes, it was.

QUESTION: And, has there been a transcript made of that interview with him?

ANSWER: Yes, there is.

QUESTION: And, have you had an opportunity to review that today?

ANSWER: Yes.

QUESTION: And, does it appear to be a verbatim report of that interview with the defendant?

ANSWER: Yes, it does.

QUESTION: And, who else was present for this?

ANSWER: Also present at the time was Sergeant Mike Davis of the Vancouver Police Department, Department of Corrections Office Jayne Keplin, Mr. Bush, myself and Department of Corrections Officer Josh Gonzales.

QUESTION: Okay. Now, I'd like to ask you a specific response to a question, which is referenced on Page 27. Do you have a –

MR. RUCKER (Defense Counsel): Objection, Your Honor. This is hearsay. If the officer wants to testify as to what he recalls and if he doesn't have a recollection then we can appropriately use refreshed recollection using the report but not reading from the report. That's hearsay.

JUDGE WOOLARD: Rephrase your question, please?

MS. KLEIN (Deputy Prosecutor): Thank you, Your Honor.

MR. RUCKER: Thank you, Your Honor.

QUESTION: I'm wondering what exactly he said when you asked him when the last time he spent the night at the 123rd Avenue address was. Do you remember that?

ANSWER: Without refreshing my memory from the transcript, no.

QUESTION: No. Would it help you to refresh your recollection by reviewing that transcript?

ANSWER: Absolutely.

MS. KLEIN: Your Honor, if he may refresh his recollection by reviewing the transcript, page 27?

JUDGE WOOLARD: Yes.

DETECTIVE KENNEDY: Thank you, Your Honor. Twenty-seven? Page 27?

MS. KLEIN: Yes. The very bottom.

DETECTIVE KENNEDY: Okay.

QUESTION: Okay. So, then you asked him when is the last time you stayed there, and my understanding that is referencing he 23rd (sic) Avenue address, is that accurate?

ANSWER: That is accurate.

QUESTION: What was his response?

ANSWER: His response was, "A couple of days before I registered the address."

QUESTION: Okay. And, did you talk to him about whether or not he understood his registration requirements?

ANSWER: Yes, I did.

QUESTION: And, what did he indicate about that?

ANSWER: He indicated that he did understand his registration requirements.

QUESTION: Okay. And, there was testimony before from Ms. Driggers about how when a person initially registers they have to initial every paragraph on that document. Did he talk to you about that at all?

ANSWER: He – yes, he did. Yes, he did.

QUESTION: And, what did he say about that?

ANSWER: He stated – I asked him in the interview, “Do you understand your registration requirements?”, and he answered, “Yes, I understand my registration requirements. The guy down there had read them to me and I read them, initialed them and made sure that I understood them.”

QUESTION: Okay. And so, he is indicating that the last time he stayed at the 23rd (sic) Avenue address was a couple of days before he registered there. He registered there on July 30th, correct?

ANSWER: Correct.

QUESTION: And, you are speaking to him on August 6th, 2009?

ANSWER: Yes.

QUESTION: Okay. So, is it fair to say between July 30th and August 6th, 2009, more than 72 hours had elapsed?

ANSWER: Yes, I believe that would be fair to say.

-(RP 84, L3 – 87, L20)

Evidence is sufficient to ‘support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (*quoting State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), cert. denied, 127 S. Ct. 440 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. Luther, 157 Wn.2d at 77-78 (*citing State v. Alvarez*, 105 Wn. App. 215, 223, 19 P.3d 485 (2001)).

In considering the sufficiency of evidence, the Appellate Court gives equal weight to circumstantial and direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (*citing State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). It does not substitute its judgment for that of the jury on factual issues. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002) (*citing State v. Farmer*, 116 Wn.2d 414, 425, 805 P.2d 200, 812 P.2d 858 (1991)), review denied, 149 Wn.2d 1013 (2003). “In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only

that substantial evidence supports the State's case.” State v. Jones, 93 Wn. App. 166, 176, 968 P.2d 888 (1998), review denied, 138 Wn.2d 1003 (1999). Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077, 139 L. Ed. 2d 755, 118 S. Ct. 856 (1998); World Wide Video, Inc. v. City of Tukwila, 117 Wn.2d 382, 387, 816 P.2d 18 (1991).

The question was also raised in the appellant’s brief that there were multiple incidents involved and therefore there was a Petrich violation. However, the following case law seems to indicate that this is not accurate.

A sex offender has a statutory duty to register with the sheriff of the county of residence. RCW 9A.44.130(1)(a). The offender must keep that registration current as to his/her whereabouts. The statute establishes different timelines for changing registration if the offender has a fixed address or is homeless. If residing at a fixed address, an offender who changes addresses within the same county must register with the county sheriff within 72 hours of moving. RCW 9A.44.130(5)(a). If moving to a different county, the offender must notify the sheriff of the new county 14 days before moving and the sheriff of the previous county of registration

within 10 days of the change of address. RCW 9A.44.130(5)(a). Anyone lacking a fixed residence “shall provide signed written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence.” RCW 9A.44.130(6)(a). Violation of these requirements leads to the charge of failure to register, a class C felony. RCW 9A.44.130(11)(a).

The issue raised by the defense is discussed in State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010):

Presented as a challenge to the sufficiency of the State's evidence, this case requires us to consider what elements constitute the crime of failure to register as a sex offender (failure to register) under former RCW 9A.44.130 (Laws of 2003, ch. 215, § 1). Specifically, we must determine whether a registrant's residential status must be proved at trial and whether the crime is an alternative means crime. We hold that failure to register as a sex offender is not an alternative means crime and that the elements of the crime do not include a registrant's particular residential status. Accordingly, the evidence was sufficient to sustain the defendant's conviction.

-(Peterson at 765).

Later, in the opinion, it is explained in more detail:

Peterson claims that the various deadlines and entities with which an offender must register represent alternative means of committing the crime. He claims his right to jury unanimity was violated because substantial evidence did not support each alternative means of failure to register.

An “alternative means crime” is one “that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.” State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

[W]hen the crime charged can be committed by more than one means, the defendant does not have a right to a unanimous jury determination as to the alleged means used to carry out the charged crime or crimes should the jury be instructed on more than one of those means. But, in order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented.

Id. at 783 (emphasis added) (*citing* State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988)).

The legislature has not statutorily defined alternative means crimes, nor specified which crimes are alternative means crimes. This is left to judicial determination. “[T]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits.” State v. Klimes, 117 Wn. App. 758, 769, 73 P.3d 416 (2003). An example of an alternative means crime is theft because it may be committed by (1) wrongfully obtaining or exerting control over another's property or (2) obtaining control over another's property through color or aid of deception. State v. Linehan, 147 Wn.2d 638, 644-45, 647, 56 P.3d 542 (2002).

Peterson argues that failure to register is an alternative means crime because it can be accomplished in three different ways: (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another. This is too simplistic a depiction of an alternative means crime, as a comparison between theft and failure to register makes plain. The

alternative means available to accomplish theft describe distinct acts that amount to the same crime. That is, one can accomplish theft by wrongfully exerting control over someone's property or by deceiving someone to give up their property. In each alternative, the offender takes something that does not belong to him, but his conduct varies significantly. In contrast, the failure to register statute contemplates a single act that amounts to failure to register: the offender moves without alerting the appropriate authority. His conduct is the same—he either moves without notice or he does not. The fact that different deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering.

The mere use of a disjunctive in a statute does not an alternative means crime make. In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988). Here, the different deadlines in the statute, while presented in the disjunctive, do not implicate alternate criminal acts. There is only one method by which an offender fails to register, and that is if he moves from his residence without notice.

-(Peterson at 769-770)

The Court concludes:

Having concluded that failure to register is not an alternative means crime, and that residential status is not an element of the crime, it is clear that the State presented sufficient evidence to convict Peterson of the crime of failure to register. The prosecution charged Peterson with violating the 72-hour registration deadline. The evidence the State presented at trial proved that Peterson had not registered within 72 hours, specifically that he did not register until December 6, 2005. Having left his residence on November 2, 2005, he was outside of any of the statutorily prescribed deadlines when he finally registered. Accordingly, we hold that there was sufficient evidence to convict Peterson of the crime of failure to register.

CONCLUSION

Failure to register is not an alternative means crime, and an offender's residential status is not an element of the crime of failure to register. The evidence was sufficient to convict Peterson, and we affirm the Court of Appeals.

-(Peterson at 774-775)

In our situation, the allegation is for a short period of time when the defendant has misrepresented his residence. It's clear that he understood his requirements and obligations and further that he violated these intentionally.

The State submits that there is adequate information to allow this matter to go to the jury.

III. CONCLUSION

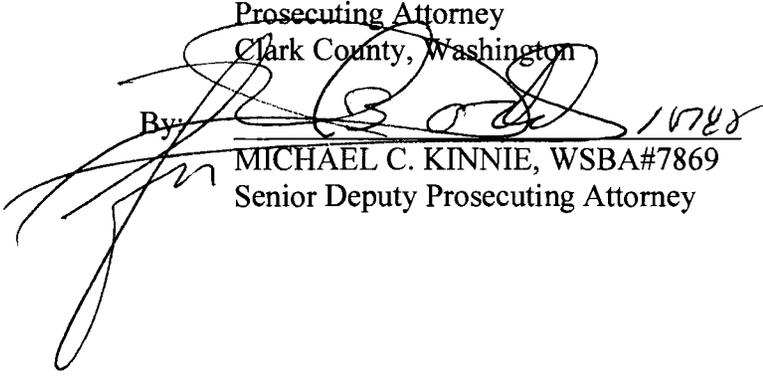
The trial court should be affirmed in all respects.

DATED this 2nd day of Nov, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

