

NO. 48515-0-II

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

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STATE OF WASHINGTON, Respondent

v.

NICK GREGORY NICHOLS, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-00791-2

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The evidence is sufficient to sustain Nichols' conviction for failure to register as a sex offender.**
- II. **The State does not intend to seek a cost bill in the event it prevails in this appeal.**

## STATEMENT OF THE CASE

The State accepts Nichols' statement of the case.

## ARGUMENT

- I. **The evidence is sufficient to sustain Nichols' conviction for failure to register as a sex offender.**

Nichols' challenges his conviction by claiming that insufficient evidence supports his conviction for failure to register as a sex offender. He argues the evidence was insufficient to find that Mr. Brown's home was not his fixed address. Nichols does not assign error to any of the trial court's findings of fact. As such, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing

the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

The evidence is sufficient to sustain Nichols' conviction for failure to register as a sex offender. As Nichols notes in this brief, Mr. Brown, with whom Nichols claimed to live, told the Clark County Sheriff's Office that Nichols did not live with him but rather stayed with him a few times, sleeping in a lounge chair. Brief of Appellant at 6. The undisputed findings of fact establish that Nichols was a long-haul truck driver who was out on the road across 48 states between three weeks and 26 days *per month*. CP 35-37. Further, he merely stored items such as his truck, a cooler, some clothes, and a kayak at Mr. Brown's residence. CP 35-37.

RCW 9A.44.128 (5) defines “fixed residence”:

“Fixed residence” means a building that a person lawfully and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage. A nonpermanent structure including, but not limited to, a motor home, travel trailer, camper, or boat may qualify as a residence provided it is lawfully and habitually used as living quarters a majority of the week, primarily kept at one location with a physical address, and the location it is kept at is either owned or rented by the person or used by the person with the permission of the owner or renter. A shelter program may qualify as a residence provided it is a shelter program designed to provide temporary living accommodations for the homeless, provides an offender with a personally assigned living space, and the offender is permitted to store belongings in the living space.

Under this definition, the evidence is more than sufficient for a rational trier of fact to find that Nichols knowingly failed to register as a sex offender because he failed to stay at Mr. Brown’s residence a majority of the week, and because his long haul truck (in which he claimed to sleep) was not primarily kept at one location with a physical address.

Nichols relies entirely on *State v. Stratton*, 130 Wn.App. 760, 124 P.3d 660 (2005), but *Stratton* does not support his claim. *Stratton* was decided before the legislature adopted the above definition of “fixed residence” in 2011. (See Laws of 2011, ch. 337 § 2, eff. July 22, 2011). Further, *Stratton* involved a defendant who was living in his car, seven days per week, outside his former residence. He was locatable by law

enforcement at that address seven days per week, and he maintained his phone at that address. *Stratton* at 766. Under the definition of “fixed residence” later adopted by the Legislature, the defendant in *Stratton* would qualify as an offender living in a nonpermanent structure that is lawfully and habitually used as living quarters a majority of the week, primarily kept at one location with a physical address.

The facts in Mr. Nichols’ case more closely align with those in the unpublished decision in *State v. Richey*, 178 Wn.App. 1001, Slip Op. 43032-1-II (November 19, 2013), which this Court may consider as persuasive, nonbinding authority under GR 14.1. The defendant in *Richey* registered his address as a trailer on the property of a friend, but it was discovered that he was not actually staying at the trailer on a regular basis. Slip Op. at 1. Rather, the defendant stayed at the trailer four nights per week, and stayed with his mother the remaining nights of the week. Slip Op. at 1-3. In finding the evidence sufficient to sustain Richey’s conviction, the Court of Appeals distinguished *Stratton* by noting that the defendant in *Stratton* “returned to the address every night, could easily be contacted by law enforcement at the address, and the address was not subject to change because he had no definite departure date or alternative place to stay.” Slip Op. at 3. In contrast, the defendant stayed at his registered address only four nights per week, which did not satisfy the

definition of fixed residence. Slip Op. at 3. The Court of Appeals found it unavailing that the defendant received his mail and kept personal belongings at the trailer, and intended to return to the trailer. Slip Op. at 3. The Court said “Richey’s living arrangement at the trailer was not fixed. He stayed at the trailer for, at most, four nights a week. The remaining nights, Richey moved between his mother’s home and the homes of other friends. Because the place where Richey stayed was regularly changing, his address was not fixed.” Slip Op. at 3.

This Court should find the reasoning in *Richey* persuasive and hold that because Nichols was not at his registered address a majority of nights per week, and in fact was almost *never* at his registered address, he lacked a fixed address. According to the trial court’s unchallenged finding of fact, Nichols spent the night at his registered address between ten, at most, and four nights *per month*. He was not available for law enforcement contact at his registered address unless law enforcement was lucky enough to catch him on one of the very few nights per month he may have slept at Mr. Brown’s address. Mr. Brown, in fact, said Nichols did not live at his residence.

The evidence is sufficient to sustain Nichols’ conviction.

**II. The State does not intend to seek a cost bill in the event it prevails in this appeal.**

The State does not intend to apply for a cost bill in the event it prevails in this appeal.

**CONCLUSION**

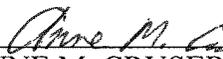
Nichols' conviction should be affirmed

DATED this 17th day of October 2017.

Respectfully submitted:

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By:

  
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**CLARK COUNTY PROSECUTOR**

**October 17, 2016 - 9:42 AM**

**Transmittal Letter**

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