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NO. 59722-1-I

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PETERSON,

Appellant.

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

The Honorable Anita L. Farris, Judge

REPLY BRIEF OF APPELLANT

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Attorney for Appellant

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/appellant/plaintiff~~ Snohomish County Prosecutor containing a copy of the document ~~to which~~ this declaration is attached.
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Patrick Mayovsky 2-4-2008
Name Done in Seattle, WA Date

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A. ARGUMENT IN REPLY

THE EVIDENCE WAS INSUFFICIENT TO CONVICT PETERSON OF FAILURE TO REGISTER.

RCW 9A.44.130(6)(a)[1] unambiguously requires the state to prove Peterson lacked a fixed residence. RCW 9A.44.130(5)(a) unambiguously requires the state to prove Peterson moved from one residence to another. In claiming the evidence was sufficient to convict, the state nevertheless argues it does not matter where Peterson lived because he failed to notify the sheriff within 10 days of leaving his last registered address. Brief of Respondent (BOR) at 4-5.

Questions of statutory interpretation are reviewed de novo. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate court assumes the Legislature means exactly what it says. Keller, 143 Wn.2d at 276. "[C]ourts are to give effect to that plain meaning as an expression of legislative intent." State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). For this reason, courts "may not read into a statute matters that are not in it and may not

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[1] Former RCW 9A.44.130, Laws of 2003, ch. 215 § 1, was the version in effect at the time of Peterson's alleged offense. All references to the registration statute in this brief are to this former version.

create legislation under the guise of interpreting a statute." Kilian, 147 Wn.2d at 21. "In determining the elements of a statutorily defined crime, principles of statutory construction require the court to give effect to all statutory language if possible." State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). This Court must give the plain language of criminal statutes their literal and strict interpretation. State v. Wilson, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994).

Peterson's argument is that RCW 9A.44.130 means exactly what it says. Under RCW 9A.44.130(6)(a), the state needed to prove Peterson was homeless. See State v. Stratton, 130 Wn. App. 760, 766-67, 124 P.3d 660 (2005) (conviction reversed for insufficient evidence where defendant lived at residence but convicted for failure to register as transient under RCW 9A.44.130(6)(a)). Under RCW 9A.44.130(5)(a), the state needed to prove Peterson had a fixed residential address. See State v. Pickett, 95 Wn. App. 475, 478-80, 975 P.2d 584 (1999) (conviction reversed for insufficient evidence where state charged homeless sex offender with failing to register a residential address). Reversal is required because the state proved neither.

The state argues holding the state to its burden of proof under the plain language of the statute leads to the "absurd" result that the state may

have difficulty prosecuting the offense,[2] but the courts will not "arrogate to [themselves] the power to make legislative schemes more perfect, more comprehensive and more consistent." State v. Taylor, 97 Wn.2d 724, 729, 649 P.2d 633 (1982). The state's argument boils down to a complaint that it is too difficult to prove a statutorily enumerated element of the crime. BOR at 6-7. Such policy arguments must be directed to the Legislature. This Court "cannot modify the unambiguous elements of an offense in the guise of statutory interpretation." State v. D.H., 102 Wn. App. 620, 629-30, 9 P.3d 253 (2000).

In the alternative, the state claims evidence was sufficient to show Peterson became homeless and failed to notify the sheriff within the time allowed for a homeless person. BOR at 7-8. Although there was no evidence of where Peterson lived between November 2 and December 6, the state contends a jury could reasonably infer he was homeless between these dates because he did not pay rent on his previous apartment. BOR at 8.

Although all reasonable inferences from the evidence must be drawn in favor of the state and most strongly against the defendant, evidence remains insufficient when the existence of an essential fact rests on guess,

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[2] BOR at 6-7.

speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006) (insufficient evidence that substance was controlled); see also State v. Jones, 140 Wn. App. 431, 166 P.3d 782, 785 (2007) (insufficient evidence to support conviction for possession with intent to deliver controlled substance within 1,000 feet of school bus stop where actual distance between bus stop and locus of offense was unclear). A jury could only speculate Peterson was homeless during this time period. As the state elsewhere points out, Peterson registered numerous times between 1991 and 2005, either as having an address or as being homeless. BOR at 1. Peterson's fluctuating residential status showed no predictable pattern. At trial, the state candidly conceded it did not know where Peterson had been living during the charging period. 3RP 13.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse Peterson's conviction and dismiss the charge with prejudice based on insufficiency of evidence. In the event this Court declines to

dismiss with prejudice, then the conviction should be reversed and the case remanded for a new trial.

DATED this 4th day of February, 2008.

Respectfully Submitted,

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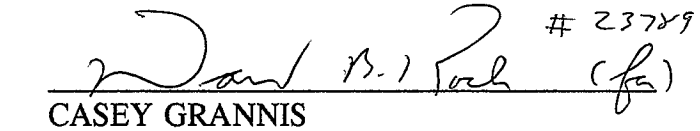

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