

WSH083

WSH083

NO. 65468-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHAYNE WEDEMEYER,

Appellant.

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

The Honorable Anita Farris, Judge

BRIEF OF APPELLANT

CYNTHIA B. JONES
CHRISTOPHER H. GIBSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The information was defective because it omitted an essential element of the crime charged. CP 1; 20.

2. The evidence was insufficient to convict appellant as charged and tried.

Issues Pertaining to Assignments of Error

1. A charging document must properly notify a defendant of the charges against him by including the essential elements of the crime. Is reversal required because the information failed to allege the reporting deadline for the crime of failure to register?

2. Was the evidence insufficient to convict appellant of failing to register when the to-convict instruction required a finding the offense was completed "on or about the 15th day of August, 2006," but where the evidence proved, at best, that appellant had only failed to comply with the registration statute as of September 3, 2006?

B. STATEMENT OF THE CASE

1. Procedural Facts

On December 31, 2008, the Snohomish County Prosecutor charged appellant Shayne Wedemeyer with failing to register as a sex offender, claiming he "did, on or about the 15th day of August 2008, cease to reside at [his registered address] and did knowingly fail to provide timely written

notice to the county sheriff's office[.]” CP 1. On October 29, 2009, the prosecutor filed an amended information alleging Wedemeyer failed to register “on or about the 15th day of August 2006,” rather than the original date of “on or about the 15th day of August 2008,” as provided in the original information. CP 1, 20 (emphasis added).

A jury trial was held March 15-16, 2010, before the Honorable Anita Farris. 1RP.¹ The jury found Wedemeyer guilty. CP 35. The court imposed a standard range sentence. CP 46; 2RP 5-6. Wedemeyer appeals. CP 47-48.

2 Substantive Facts

In 1993, Wedemeyer was convicted of third degree child rape, which triggered his duty to register as a sex offender. 1RP 14; CP 30. On July 12, 2006, Wedemeyer registered his address as 44021 179th Place SE, Gold Bar, Washington. (Wedemeyer's mother's address.). 1RP 72; CP 30. At trial, Wedemeyer's mother, Lorna Galbreth, told the jury she thought her son moved out of her home in “July or August of 2006, I believe.” 1RP 20. When questioned further, Galbreth admitted she was not sure exactly when her son moved out. 1RP 21.

Detective David Coleman, the detective responsible for tracking Wedemeyer's registration compliance, testified he went to Galbreth's

¹ The Verbatim Report of Proceedings is referenced as follows: 1RP - March 15 -16, 2010; 2RP – May 5, 2010.

house on December 2, 2008 to verify whether Wedemeyer lived there because he received a different address verification for Wedemeyer from patrol officers in January 2007. 1RP 72-73. The detective testified he received at least five address verifications between January 8, 2007 and August 23, 2008, which reported Wedemeyer was living at 40702 169th Street SE, Gold Bar, Washington. 1RP 103. When asked why it took him over two years to follow up on Wedemeyer's whereabouts, Coleman admitted that because Wedemeyer was considered a low risk to reoffend, and because he had other higher risk individuals to monitor, Wedemeyer was simply not a high priority. 1RP 72.

C. ARGUMENT

1. THE INFORMATION CHARGING WEDEMEYER IS DEFECTIVE BECAUSE IT FAILED TO INCLUDE REFERENCE TO THE REPORTING DEADLINE, WHICH IS AN ESSENTIAL ELEMENT OF THE CRIME OF FAILURE TO REGISTER.

Due process requires the State to provide adequate notice of the nature of the charges against the accused, including notice of every essential element the State must prove to obtain a conviction. Wedemeyer's failure to register conviction must be reversed because the State failed to meet its due process obligation by failing to set forth in the charging document the reporting deadline allegedly missed by

Wedemeyer, which is an essential element of the crime of failure to register.

The amended information charging Wedemeyer provides:

That the defendant, having been convicted on or about the 2nd day of November, 1993, of a sex offense or kidnapping offense, to wit: Rape of a Child in the Third Degree, being required to register pursuant to RCW 9A.44.130, and having registered as residing at a fixed residence, did, on or about the 15th day of August 2006, cease to reside at that residence and did knowingly fail to provide timely written notice to the county sheriff's office; proscribed by RCW 9A.44.130, a felony[.]

CP 20.

A charging document is constitutionally defective under the Sixth Amendment and Washington Constitution article I, section 22, if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the established "essential elements" rule is to apprise the defendant of the charges against him and allow preparation of a defense. Id.

When Wedemeyer was required to report is an essential element of the crime charged. Former RCW 9A.44.130 (11)(a) provides in relevant part "A person who knowingly fails to register or who moves within the

state without notifying the county sheriff as required by this section is guilty of a class C felony."² (Emphasis added).

RCW 9A.44.130(4)(b) states: "Failure to register within the time required under this section constitutes a per se violation of this section and is punishable as provided in subsection (11) of this section." (Emphasis added).

Wedemeyer was charged with violating RCW 9A.44.130(5)(a), which provides: "If any person required to register pursuant to this section changes his or her residence address 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." (Emphasis added).

Under the statute, a person cannot be convicted for failing to report to the county sheriff during some unspecified period of time. The statute sets forth specific timeliness requirements that must be complied with in order to avoid conviction.

"An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The failure to comply with the reporting deadline is necessary to establish the very illegality of the

² Laws of 2006 ch. 129 § 2 (effective Sept. 1, 2006). All statutory references to RCW 9A.44.130 are to the version in effect as of the time of the offense.

registration offense. The failure to report within 72 hours of moving is therefore an essential element of the crime Wedemeyer was charged with committing and therefore needed to be set forth in the charging document.

In concluding the deadlines in the failure to register statute are not alternative means, the Court of Appeals also concluded they are not elements of the crime. State v. Peterson, 145 Wn. App. 672, 678, 186 P.3d 1179 (2008), affirmed, 168 Wn.2d 763, 230 P.3d 588 (2010). Although the Supreme Court affirmed the result reached by the Court of Appeals, it did not agree with its analysis of the "elements" issue. State v. Peterson, 168 Wn.2d 763, 771, 772, 230 P.3d 588 (2010). The Supreme Court recognized the alternative means question and the elements question are different and should be analyzed separately. Id. at 771.

The Court noted "[c]ommon sense suggests the statutory deadline is part of the State's burden of proof." Id. at 771 n.7 (not deciding question but noting it would be insufficient for the State to prove failure to register within 24 hours of relocating when the statutory deadline is 72 hours); cf. State v. Castillo, 144 Wn. App. 584, 183 P.3d 355 (2008).³

³ In deciding the sufficiency of evidence issue the Castillo court held;

The State must show that Mr. Castillo (1) changed his residence on or after August 8, 2006, (2) knowingly failed to provide written notice of the change of his address to the Yakima County sheriff's department within 72 hours of moving, and (3) had previously been convicted of a sex offense that required registration.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." Peterson, 168 Wn.2d at 772 (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (quoting Black's Law Dictionary 559 (8th ed. 2004))).

To convict Wedemeyer, the jury had to find he moved from his registered address to a new address within the county, and knowingly failed to provide written notice of that address change to the county sheriff within 72 hours of moving. The charging document omitted an essential element of the crime by failing to include the element that Wedemeyer failed to report his move to the Snohomish County Sheriff within 72 hours of moving. See CP 20.

Statutes are construed to avoid unlikely, absurd, or strained results. State v. Ammons, 136 Wn.2d 453, 457, 963 P.2d 812 (1998). One of the requirements of the registration statute is that persons obligated to register must do so within a certain deadline and that the failure to do so constitutes a per se violation. RCW 9A.44.130(4)(b) and (5)(a).

Absurd results follow if the reporting deadline is not an element of the crime of failure to register. For example, an offender could report at

144 Wn. App. at 588.

some point *after* the specified deadline for reporting and still not be guilty of a punishable offense, in contradiction to statutory mandate. Such a senseless result flows from the premise that the failure to comply with the reporting deadline is not an essential element of the crime.

Absurd results follow in related contexts if the deadline is not an element of the crime. RCW 9A.44.130(5)(a) requires notification of a county sheriff within 72 hours of moving. A person could fail to notify the sheriff within 24 hours of moving and yet still be found guilty of failing to register if the 72 hour deadline is not an essential element of the crime. See Peterson, 168 Wn.2d at 771 n.7 (it would be insufficient for the State to prove failure to register within 24 hours of relocating when the statutory deadline is 72 hours).

Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(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 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and

reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The information did not allege Wedemeyer failed to register within 72 hours of moving from his mother's home. CP 20. The information is deficient because it lacks the reporting deadline, which is an element of the crime.

A charging document need not include the exact words of a statutory element; words conveying the same meaning and import are sufficient. Kjorsvik, 117 Wn.2d at 108. The charging document here contains no words conveying the deadline element of the crime.

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of when Wedemeyer was required to report his move is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Wedemeyer's conviction. McCarty, 140 Wn.2d at 425.

2. THE EVIDENCE WAS INSUFFICIENT TO CONVICT WEDEMEYER OF FAILING TO REGISTER, AS CHARGED AND TRIED.

"[T]he State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld." State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983); State v. Green, 94 Wn.2d 216, 224, 616 P.2d 628 (1980). A defendant may challenge the sufficiency of the evidence for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998); State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Schelin, 104 Wn. App. 48, 55, 14 P.3d 893 (2000), citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Jury instructions not objected to become the law of the case. Hickman, 135 Wn.2d at 102. This rule applies to all instructions, including those that define elements. See, e.g., State v. Braun, 11 Wn. App. 882, 884, 526 P.2d 1230 (1974), review denied, 85 Wn.2d 1001

(1975) (instruction defining "deadly weapon" became law of the case). "[E]lements in the "to-convict" instruction not objected to become the 'law of the case' which the State must prove beyond a reasonable doubt to prevail." Hickman, 135 Wn.2d at 99.

In order to convict Wedemeyer, the State had to prove: (1) he ceased to reside at his last registered address (his mother's home); and (2) that he failed to register his new address within 72 hours of moving. CP 20; RCW 9A.44.130(5)(a). In this regard, the jury was instructed;

To convict the defendant of the crime of failure to register as a sex offender, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 15th day of August, 2006, the defendant was required to register as a sex offender;

(2) That on or about the 15th day of August, 2006, the defendant knowingly failed to comply with the following requirements of sex offender registration;

(i) The requirement to register a change of address with the county sheriff within seventy-two hours (excluding weekends and holidays) of ceasing to permanently reside at the registered address.

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 34 (Instruction 7).

As discussed above, under RCW 9A.44.130(5)(a), Wedemeyer was not required to register on the alleged date he ceased to reside at his last residence. Rather, he was required to register within 72 hours after the date he was alleged to have ceased to reside at his last residence.

Therefore, as set forth under Instruction 7, to convict Wedemeyer the jury had to find he had completed the offense by August 15, 2006. CP 34 (see element "2" (failed to provide notice to sheriff by August 15, 2006)). During closing argument, however, the prosecutor told the jury Wedemeyer moved out of his mother's home on August 15, 2006, and that Wedemeyer was required to have registered his new address on that same date. 1RP 167. The prosecutor was wrong.

More importantly, however, the State's evidence was insufficient to prove the elements listed in Instruction 7. Specifically, the State failed to prove beyond a reasonable doubt that Wedemeyer had moved from his mother's home at least 72 hours before "the 15th day of August, 2006". CP 34.

The State's evidence only supported a finding that Wedemeyer moved from his mother's address by no later than August 31, 2006. Wedemeyer's mother was the only witness called by the State in its

attempt to establish the date Wedemeyer allegedly moved. When questioned about the date Wedemeyer moved, Galbreth admitted she could not recall the actual date. 1RP 21. At best, Galbreth could be no more specific than to state she believed Wedemeyer moved sometime in July or August of 2006. 1RP 18-24. She admitted that when questioned by a police officer over two years after Wedemeyer moved out, she was simply uncertain of the exact date he moved. 1RP 23.

Because the jury was instructed that to convict Wedemeyer it had to find he completed the offense on August 15, 2006, the State assumed the burden of proving just that. Hickman, 135 Wn.2d at 99, 102. In other words, the State had to prove Wedemeyer moved from his mother's address at least 72 hours before that date, i.e., on or before August 12, 2006. See CP 34 (Instruction 7, element "2"). The State's evidence was insufficient because as best it proved Wedemeyer moved from his mother's home by no later than August 31, 2006. The State simply failed to prove Wedemeyer had moved out of his mother's home by August 12, 2006, as required by the to-convict instruction.

Evidence is only sufficient to support a conviction when it would permit the trier of fact to find all the essential elements of the crime beyond a reasonable doubt. State v. Schelin, 104 Wn.App. at 55. Here, the State assumed the burden of proving Wedemeyer moved from his

mother's address on or before August 12, 2006. It failed to do so and therefore reversal and dismissal of the charge with prejudice is required. Hickman, 135 Wn.2d at 103.

D. CONCLUSION

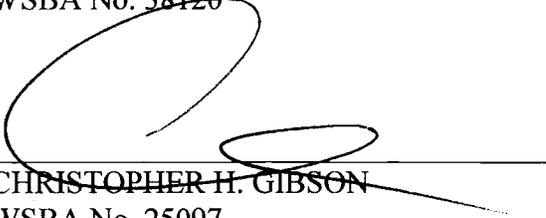
For the reasons stated, Wedemeyer requests that this Court reverse his conviction and dismiss the charge with prejudice. Alternatively, defects in the information require reversal of Wedemeyer's conviction and remand for a new trial.

DATED this 26th day of October, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.


CYNTHIA B. JONES
WSBA No. 38120


CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 65468-3-1
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SHAYNE WEDEMEYER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF OCTOBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] SHAYNE WEDEMEYER
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF OCTOBER 2010.

x *Patrick Mayovsky*