

68120-6

68120-6

NO. 68120-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DONNIE DURRETT,

Appellant.

2012 JUN 25 PM 2:37
COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

SAMANTHA D. KANNER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	3
1. THE INFORMATION AND THE TO CONVICT INSTRUCTION CONTAINED THE ESSENTIAL ELEMENTS OF THE CRIME	6
2. DURRETT CANNOT SHOW THAT HE WAS PREJUDICED BY THE LANGUAGE CONTAINED IN THE INFORMATION	11
3. ANY ERROR IN THE TO CONVICT INSTRUCTION WAS HARMLESS	14
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Bennett, 154 Wn. App. 202,
224 P.3d 849, review denied,
168 Wn.2d 1042 (2010)..... 6, 10, 11

State v. Campbell, 125 Wn.2d 797,
888 P.2d 1185 (1995)..... 4

State v. Durrett, 150 Wn. App. 402,
208 P.3d 1174 (2009)..... 6

State v. Hopper, 118 Wn.2d 151,
822 P.2d 775 (1992)..... 5

State v. Hutchinson, 135 Wn.2d 863,
959 P.2d 1061 (1998)..... 14

State v. Kjorsvik, 117 Wn.2d 93,
812 P.2d 86 (1991)..... 4, 11, 12, 13

State v. Mills, 154 Wn.2d 1,
109 P.3d 415 (2005)..... 14

State v. Moavenzadeh, 135 Wn.2d 359,
956 P.2d 1097 (1998)..... 4

State v. Peterson, 145 Wn. App. 672,
186 P.3d 1179 (2008), aff'd,
168 Wn.2d 763 (2010)..... 6, 8

State v. Peterson, 168 Wn.2d 763,
230 P.3d 588 (2010)..... 9

State v. Scott, 110 Wn.2d 682,
757 P.2d 492 (1988)..... 5, 14

State v. Sibert, 168 Wn.2d 306,
230 P.3d 142 (2010)..... 15, 16, 17

State v. Williams, 162 Wn.2d 177,
170 P.3d 30 (2007)..... 5

Statutes

Washington State:

RCW 9A.44.130 1, 2, 7, 10

A. ISSUE PRESENTED

1. A charging document challenged for the first time on appeal will be considered sufficient unless it omitted essential elements of the crime and prejudiced the defendant. The information alleged that Durrett, who was required to register based on a prior conviction, knowingly failed to register as a sex offender under RCW 9A.44.130 (2006). Under this statute, there is only one punishable offense: knowingly failing to register as required. Did the charging document contain all essential elements of the crime where the information mirrored the language of the statute?

2. Jury instructions challenged on appeal are considered sufficient if the jury was informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted. The "to convict" instruction used in Durrett's trial contained the same language as the information. A definitional jury instruction explained that one of the requirements of registration is that a person lacking a fixed residence must report weekly to the county sheriff's office. Was the jury instructed as to all essential elements of the charged crime?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Donnie Durrett, was charged by amended information with Failure to Register as a Sex Offender. CP 18-19. The State alleged that, during a time intervening between November 2, 2009 through January 29, 2010, Durrett, having previously been convicted of Rape in the First Degree, was required to register as a sex offender and knowingly failed to comply with the requirements of RCW 9A.44.130 (2006)¹. Id. A jury found Durrett guilty of Failure to Register as a Sex Offender. CP 20, 40.

2. SUBSTANTIVE FACTS.

Durrett was previously convicted of Rape in the First Degree and was therefore required to register as a sex offender. CP 18-19; Ex. 17. As of October of 2009, Durrett was registered in King County, Washington as lacking a fixed residence, and therefore was obligated to appear and sign in at the King County Sheriff's Office (KCSO) once a week in order to maintain compliance with

¹ Durrett was charged under the 2006 version of the Failure to Register statute, which was in effect during the charging period. The statute has since been amended.

registration requirements. RP 44²; Ex. 9. From 2003 through 2009, prior to the charging period, Durrett had received four notifications from the KCSO explaining the registration obligations and procedure. Ex. 8. Durrett also received notice of these obligations from the King County Superior Court on four previous occasions. Ex. 10. Durrett's last report before the charging period was when he had signed in at the KCSO on October 29, 2009. RP 55; Ex. 12. Following that week, Durrett failed to report for three months. RP 55.

C. ARGUMENT

Durrett contends that both the information and the "to convict" jury instruction were deficient because they did not include essential elements of the crime. Durrett's argument depends on his assertion that the crime of Failure to Register includes an essential element of failing to report weekly to the sheriff. This argument fails because failing to report weekly is not an essential element of the crime. Further, Durrett cannot

² The verbatim report of proceedings consists of two volumes. Only one volume, containing the record from October 24 and 25, 2011, will be cited in this brief, as "RP."

demonstrate that he was prejudiced by the wording of the information or that the instructions did not properly inform the jury as to the applicable law.

An information is constitutionally sufficient if it includes all of the essential elements of the crime, both statutory and non-statutory. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998). The purpose of the essential elements rule is to afford the defendant notice of the nature and cause of the allegations against him so that he may properly prepare a defense. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). An information challenged for the first time on appeal is more liberally construed in favor of validity than an information challenged before or during trial. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

Courts apply a two-prong test to determine an information's sufficiency post-verdict: (1) Do the necessary elements appear in any form, or can the elements be found by fair construction, in the information, and if so, (2) can the defendant show that he was actually prejudiced by the inartful language that caused the lack of notice? Id. at 105-06. Courts considering the first prong look at the

face of the information only, but courts considering the second prong may look beyond the face of the information to determine if the defendant actually received notice of the charges that he had to defend against. Id. at 106. The information need not contain the exact words used in a statute or case law to be sufficient. Id. at 108-09. "Even missing elements may be implied if the language supports such a result." State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). Courts read the information as a whole and are guided by common sense and practicality in construing the language. Id.

Likewise, "to convict" instructions should include all of the essential elements of the crime because they are the "touchstone that a jury must use to determine guilt or innocence." State v. Williams, 162 Wn.2d 177, 186, 170 P.3d 30 (2007). However, the requirements of due process are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted. State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). An appellate court reviews challenges to the

sufficiency of the charging document and the "to convict" instruction *de novo* as they involve questions of law. Id. at 182.

1. THE INFORMATION AND THE "TO CONVICT" INSTRUCTION CONTAINED THE ESSENTIAL ELEMENTS OF THE CRIME.

The only essential elements of the crime of Failure to Register as a Sex Offender are that, in Washington, a defendant who was required to register knowingly failed to comply with the requirements of sex offender registration. State v. Bennett, 154 Wn. App. 202, 207-08, 224 P.3d 849, review denied, 168 Wn.2d 1042 (2010). The different registration requirements are not elements or alternative means. Id. at 207; State v. Peterson, 145 Wn. App. 672, 186 P.3d 1179 (2008), aff'd, 168 Wn.2d 763 (2010). The subsections of the failure to register statute are definitional statements pertaining to the different ways an offender is required to register. State v. Durrett, 150 Wn. App. 402, 406-07, 208 P.3d 1174 (2009).

"The failure to register statute imposes one duty: to register with the sheriff." Peterson, 145 Wn. App. at 677-78. The former version of the statute establishes the only punishable offense as follows:

A person who knowingly fails to register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense.

RCW 9A.44.130(11)(a) (2006).

Here, the State alleged by information that during a specified period of time, Durrett, in King County, Washington, was required to register as a sex offender due to his prior conviction of Rape in the First Degree and that Durrett did "knowingly fail to comply with the requirements of RCW 9A.44.130." CP 18. The "to convict" instruction mirrored the language of the information and provided as follows:

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

- (1) That during the time intervening between November 2, 2009, and January 29, 2010, the defendant was required to register as a sex offender;
- (2) That during the time intervening between November 2, 2009, and January 29, 2010, the defendant knowingly failed to comply with the requirement of sex offender registration.
- (3) That the act occurred in the State of Washington.

CP 27.

A definitional instruction provided the compliance provision applicable to the State's theory of the case:

A person commits the crime of failure to register as a sex offender when that person, having been convicted of a sex offense for which he is required to register as a sex offender with the county sheriff's office, knowingly fails to comply with the requirements of sex offender registration.

A requirement of sex offender registration is that a person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours.

CP 26.

Durrett contends that the requirement of reporting weekly to the sheriff is an essential element that needed to be included in the information and the "to convict" instruction. Durrett cites no authority in support of this proposition. Rather, he cites dicta contained in a footnote within Peterson, and attempts to broaden its application contrary to the Washington Supreme Court's intent. App. Br. at 7.

In Peterson, the defendant was charged with the crime of Failure to Register. Id. at 766. The information did not specify whether the defendant had moved to another fixed residence or whether he was homeless. Peterson, 145 Wn. App. at 674-75.

In fact, the State did not know where the defendant was residing. Id. On appeal, Peterson claimed that Failure to Register is an alternative means crime and thus the various means applicable to the State's theory are essential elements that needed to be in the charging document. Id.

Both this Court and the Washington Supreme Court rejected that argument and recognized that Failure to Register is not an alternative means crime and that residential status is not an essential element. State v. Peterson, 168 Wn.2d 763, 771, 230 P.3d 588 (2010). The footnote cited by Durrett merely provides an example of how the State could fail to provide sufficient evidence if it showed only a failure to change address within 24 hours of moving when the procedure provided for 72 hours. Id. at 771 n.7. Thus, the only logical application of the footnote to this case would be that if the State had offered testimony that Durrett did not report to the county sheriff Monday through Thursday of each week in the charging period, but failed to offer testimony regarding reporting on Fridays, the State would not have met its burden of showing a failure to comply because compliance requires weekly, not daily, reporting.

Moreover, Durrett fails to acknowledge that the very argument he provides here was expressly rejected by this Court in Bennett, supra. Bennett was also charged by the State with Failure to Register. 154 Wn. App at 205. The State's theory of the case was that Bennett had not complied with registration because he failed to send the county sheriff notice of a change of address and where he planned to stay after ceasing to have a fixed residence. Id. at 206. Identical to the instruction given here (CP 27), the second element of the "to convict" instruction in Bennett read only that during the specified time frame "the defendant knowingly failed to comply with the requirements of sex offender registration." Id. Further, a definitional instruction, like Instruction 6 here (CP 26), contained the procedures for registration.

This Court expressly found that the "to convict" instruction did not need to include the provisions of failing to send notice because they were not essential elements of the charge. Id. at 207. Rather, the court approved of the "to convict" instruction because it found that the essential element was merely "knowingly failing to register as required by RCW 9A.44.130." Id.

While this Court's decision in Bennett does not discuss charging language, it clearly explains what constitutes the essential elements of this crime. Id. at 207. As the charging language and the "to convict" language here are identical to the language approved in Bennett, it is clear that all essential elements were included in the information and the instruction. CP 18, 26-27. As Bennett held that the registration provision of failing to give the county sheriff notice of a change of residence is not an essential element of the crime, neither is the registration provision of failing to report weekly. Rather, these provisions "merely articulate the definition of continuing compliance." Bennett, 154 Wn. App. at 207.

2. DURRETT CANNOT SHOW THAT HE WAS PREJUDICED BY THE LANGUAGE CONTAINED IN THE INFORMATION.

In determining the sufficiency of a charging document post-verdict an appellate court must address the second prong of the test by asking whether the defendant can show that he was actually prejudiced by the inartful language that caused the lack of notice? Kjorsvik, 117 Wn.2d at 105. Looking beyond the information

under which he was tried, as permitted by Kjorsvik, it is clear that Durrett received notice of the charge that he had to defend against. The original information filed in this case, upon which Durrett was arraigned, included specific language alleging that he did not comply with the requirement of reporting weekly to the sheriff of the county. CP 1. Further, the certification for determination of probable cause specifically alleges in the first sentence of the factual section that Durrett "is a convicted sex offender who has failed to report weekly as required with the King County Sheriff's Office." CP 2.

In addition, Durrett's counsel's closing argument focused entirely on the claim that Durrett couldn't violate the weekly reporting requirement because the sheriff's office had failed to designate a specific day of the week on which he was required to be present. RP 120-24. It was the defense theory that Durrett did not violate his duty to report because the sheriff's office had failed to designate a specific reporting day. Id. There was no claim that Durrett was not aware of the relevant requirement or did not understand how to comply. Given this record, Durrett cannot show that the information

failed to apprise him of the nature of the charge against him or hindered his ability to prepare a defense.

On appeal, Durrett does not even attempt to show that he was actually prejudiced by the information's alleged inadequacy. Durrett argues simply that the information was constitutionally inadequate and therefore that "the court must presume prejudice." App. Br. at 11. Durrett's argument does not address the alternative situation presented here, where the information contained the essential elements of the crime, and the defendant must show that he was actually prejudiced by the language in the information. See Kjorsvik, 117 Wn.2d at 111.

Here, the jury was instructed as to the procedure required for compliance with sex offender registration. Thus, to convict Durrett, the jury had to find beyond a reasonable doubt that Durrett did not report to the sheriff weekly, which Durrett contends is an essential element. Because the jury considered the procedure required and found that Durrett did not comply with that procedure by convicting him, Durrett cannot show that he was prejudiced by the information's failure to include this language.

3. ANY ERROR IN THE "TO CONVICT" INSTRUCTION WAS HARMLESS.

Generally, all elements should be included in the "to convict" instruction. See State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005). At the same time, the requirements of due process are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted. State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). A jury is presumed to read the court's instructions as a whole, in light of all other instructions. State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998).

Durrett does not argue that the instructions as a whole fail to include all the elements of the crime. Rather, he argues only that all the elements were not included in the "to convict" instruction. This is significant because the instructions did not prevent either party from arguing their theory of the case. See Mills, 154 Wn.2d at 7 ("[j]ury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the

applicable law"). Durrett's theory of the case was that he did not fail to comply because the KCSO had not specified a certain day for him to report and rather allowed individuals in his position to report in person on any weekday.

The jury instructions allowed Durrett to argue his theory of the case. A definitional instruction explained that the weekly report had to be made on a day specified by the county sheriff's office. CP 26. Further, the jury was instructed that although the lawyers might only reference specific instructions in closing argument, during deliberations the jury must consider the instructions as a whole. CP 24. In reading the instructions as a whole, it is clear that the jury was properly instructed as they informed the jury of the applicable law.

Durrett argues that the failure to reference the provision of reporting weekly constitutes total omission of an essential element that cannot be cured by looking to other jury instructions. State v. Sibert, 168 Wn.2d 306, 311-12, 230 P.3d 142 (2010). His reliance on Sibert is misplaced. Sibert was charged with two counts of Delivery of a Controlled Substance and one count of Possessing a

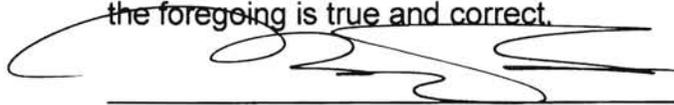
Controlled Substance with Intent to Deliver, in violation of the Uniform Controlled Substances Act. Id. at 309. The Sibert court held that identification of the particular drug, methamphetamine, was an essential element of the crime because, under the Uniform Controlled Substances Act, different drugs result in different maximum sentences. Id. at 311-12. However, the court held that even though this essential element was omitted, the omission was harmless based on two different rationales. Id. at 312-13. First, the court held that the "to convict" instructions incorporated by reference the information which had named the drug by stating that in order to convict the defendant *as charged* the jury needed to find all of the listed elements. Id. Second, the court held that any error was harmless because the only argument and testimony provided about drugs pertained to methamphetamine. Id. Thus, common sense assured the court that the only controlled substance the jury considered was methamphetamine. Id.

Here, definitional instruction number 6 was the only instruction that explained the procedures for registration. CP 26. Thus, the jury necessarily applied this definition in order to

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DONNIE WAYNE DURRETT, Cause No. 68120-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

Date

