IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TERRY ALVIN PETERSON, Appellant.	No. 40877-5-II UNPUBLISHED OPINION

Van Deren, J. — Terry Alvin Peterson appeals his convictions for failure to register as a sex offender and tampering with a witness. He argues: (1) the charging information failed to include all the essential elements of the crime of failure to register as a sex offender; (2) sufficient evidence does not support his conviction for tampering with a witness; (3) the trial court imposed an unconstitutionally vague prohibition on his accessing or viewing pornography; and (4) the trial court abused its discretion in imposing a substance abuse evaluation as a community custody condition.[1] The State concedes that the restriction relating to pornography in the community custody provisions was unconstitutionally vague and should be stricken. We accept the State's

[1] In his statement of additional grounds for review, Peterson contends that, because he called no witnesses at trial, the State improperly called rebuttal witnesses. But Peterson misperceives the course of the trial. Here, the State called all its witnesses during its case in chief, not during rebuttal. His claim fails and we do not further discuss it.

concession on the pornography community custody condition but otherwise affirm Peterson's convictions and the community custody condition relating to the substance abuse evaluation, and we remand for further proceedings consistent with this opinion.

FACTS

On November 2, 2009, Peterson registered as a sex offender with the Kitsap County Sheriff's Office using the address of Elsie Clotfelter, a friend of Peterson's mother, Margaret Crist. Shortly thereafter, David Payne, a Washington State Department of Corrections community corrections officer, visited Clotfelter's residence. After he observed some of Peterson's personal possessions at her home and Clotfelter confirmed that Peterson was living there, Payne felt "satisfied, at that point, that [Peterson] was making at least an effort to move there." Report of Proceedings (RP) at 89.

On December 11, Payne issued a warrant[2] for Peterson's arrest unrelated to his registration requirement. According to Payne, Peterson would have known about the warrant. On January 6, 2010, Poulsbo Police Department Detective David Gesell sent an annual sex offender address verification form to Peterson's registered address at Clotfelter's home, but the form was returned unopened after several delivery attempts. On January 25, Gesell contacted Clotfelter at her residence and she said that Peterson had not lived there for at least a month and that she had not seen him. On March 5, a law enforcement officer located Peterson's vehicle at Crist's residence and arrested him based on probable cause for failure to report and the December 11 warrant.

[2] This warrant is not part of the record and was not described to the jury. According to Peterson's statements at sentencing, the warrant involved a failed urine test.

The State initially charged Peterson with failure to register as a sex offender. On March 8, Peterson telephoned Crist from jail.[3] He told her that he was "going to tell them that that's my address, it's at Elsie's [residence]." Ex. 7A (March 8, 2010 telephone call) at 13 sec.–18 sec. Later in the conversation, they discussed what Clotfelter should say about Peterson's living situation if she was questioned by the police:

> Peterson: But tell [Clotfelter] that I'm going to put that in as my address . . . . and they're going to be contacting her to see if I was living there.
> Crist: What is she supposed to say?
> Peterson: Huh?
> Crist: Is she supposed to say yes?
> Peterson: Yes. That's what we had talked about and agreed upon and then when I get out, when all this is over and done with I was going to go live with her and be there and not play these stupid games, you know what I mean?
> . . . .
> Peterson: But they're going to be calling her and asking her if I was living there and tell her, tell her to tell them, yes, that I'd been working somewhere and that I came and went as I pleased and that she wasn't my keeper.

Ex. 7A (March 8, 2010 telephone call) at 1 min., 50 sec.–2 min., 20 sec.; 3 min., 55 sec.–4 min., 7 sec.

On March 12, concerned about potential witness tampering in Peterson's case, Poulsbo Police Department Officer Darrell Moore, Jr., contacted Crist by telephone. According to Moore, Crist stated that she "knew Peterson violated" his sex offender registration because he had not lived at Clotfelter's residence "for the entire month prior to . . . Peterson being arrested" and that he had been living in a van, staying with friends, and occasionally sleeping at Crist's house without her permission. RP at 145. On April 15, Peterson called Clotfelter from jail and stated:

> They're going to ask you if I lived there the whole time and just tell them yes.

[3] These telephone calls were not transcribed but were played for the jury at trial. The compact discs containing the audio files are part of the record on appeal.

> You know, they're going to ask if I've lived there since November and just say yes, he has, you know, and just say . . . that you're not my keeper and I had a girlfriend and I was gone quite a bit, but that I did live there. And that's the sort of questions they're going to ask.

Ex. 8A (April 15, 2010 telephone call) at 4 min., 9 sec.–4 min., 30 sec.

On May 19, Peterson called a mutual friend of his and Elsie's and stated, "Let Elsie know . . . . as long as she goes in there and just says, y'know, through February she saw me, and I quit coming around, because all I'm telling them is the truth, you know, that I quit going there, I still lived there but I quit going there because the cops were looking for me there." Ex. 9A (May 19, 2010 telephone call) at 2 min., 20 sec.–2 min., 43 sec.

On June 14, the State charged Peterson by second amended information with failure to register as a sex offender, count one, and tampering with a witness, count two. The failure to register charge stated:

> On or between December 6, 2009 and March 5, 2010, in the County of Kitsap, State of Washington, the above-named Defendant, having been convicted of a felony sex offense . . . (1) did knowingly fail to register with or notify the county sheriff; or (2) did knowingly change his or her name without notifying the county sheriff and the state patrol as required by RCW 9A.44.130; contrary to [former] Revised Code of Washington 9A.44.130(11) [(2006)].

Clerk's Papers (CP) at 9-10.

Before trial, Peterson stipulated that he knew he was required to register as a sex offender during the charged period. At trial, Crist testified that she did not recall a telephone conversation with Moore, she did not recall telling him that Peterson was not really living at Clotfelter's residence, and Peterson "did live there." RP at 99. She also stated that she had never relayed Peterson's message from the March 8 jailhouse telephone call to Clotfelter.

Clotfelter testified that she did not recall telling Gesell that Peterson had stopped living

with her in December 2009. Instead, she said that, as of January, Peterson "wasn't [at her residence] as regularly" and would "come and go and call [her]." RP at 106. In January and February, Peterson had a "basket full of dirty laundry," shoes, an alarm clock, shirts, jackets, a backpack, and textbooks at her residence; although he had not registered for school after December. RP at 107. Clotfelter stated that she saw Peterson on three occasions in February and that he had been living with her "off and on." RP at 108.

The trial court instructed the jury:

> To convict the defendant of the crime of tampering with a witness, each of the following elements of the crime must be proven beyond a reasonable doubt:
> (1) That on or about March 8, 2010, through May 19, 2010, the defendant attempted to induce a person to testify falsely; and
> (2) That the other person was
> (a) a witness or
> (b) a person the defendant had reason to believe was about to be called as a witness in any official proceeding; and
> (3) That the acts occurred in the State of Washington.

CP at 89.

The jury convicted Peterson of failing to register and of witness tampering. At sentencing, Peterson indicated that that his offenses "stemmed" from a "dirty urinalysis" and that a drug offender sentencing alternative (DOSA)[4] sentence would "be more beneficial for everybody concerned to deal with [his] problem at the source." RP at 201.

The trial court imposed concurrent sentences of 50 months on the failure to register conviction and 43 months on the tampering with a witness conviction, and 36 months of community custody after Peterson's release from prison. The trial court ordered that he "[p]ossess/access no pornography, sexually explicit materials, and/or information pertaining to

[4] RCW 9.94.660.

minors via computer (i.e. internet)," as a community custody condition. CP at 64. It also ordered Peterson to complete a substance abuse evaluation. He appeals.

ANALYSIS

I. Sufficiency of the Information

Peterson argues for the first time on appeal that the State filed a constitutionally insufficient information because, in charging him with failure to register as a sex offender, it failed to include the essential element that he moved from his previously registered address. We disagree.

When a defendant challenges the sufficiency of the information for the first time on appeal, we liberally construe the document in favor of its validity. *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). We consider (1) whether the necessary facts appear in any form, or by fair construction can be found, in the charging document; and, if so, (2) whether the defendant can nonetheless demonstrate actual prejudice suffered as a result of the imprecise, vague, or ambiguous charging language. *Kjorsvik*, 117 Wn.2d at 105-06. Such liberal construction reinforces the "primary goal" of the essential elements rule, which is to provide constitutionally mandated notice to the defendant of the charges against which he or she must be prepared to defend. *Kjorsvik*, 117 Wn.2d at 97, 101. The goal of notice is met where a fair, commonsense construction of the charging document "would reasonably apprise an accused of the elements of the crime charged." *Kjorsvik*, 117 Wn.2d at 109. "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." *Kjorsvik*, 117 Wn.2d at 109.

First, we examine the essential elements of the crime of failure to register as a sex

offender. Former RCW 9A.44.130(l)(a) requires sex offenders to register with the sheriff of their county of residence. *State v. Peterson*,[5] 145 Wn. App. 672, 676, 186 P.3d 1179 (2008), *aff'd*, 168 Wn.2d 763, 230 P.3d 588 (2010). The statute provides different deadlines for registration upon a change of residence or lack of residence. When a convicted sex offender moves to another state or works, carries on a vocation, or attends school in another state, he must provide "written notice" within 10 days of moving to the Washington state county sheriff with whom the offender last registered. Former RCW 9A.44.130(4)(ix). When a convicted sex offender changes his residence to another address within the same county, he must give that county's sheriff "written notice" of the change within 72 hours. Former RCW 9A.44.130(5)(a); *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). When a convicted sex offender changes his residence to an address within a new county, he must send "written notice" to his former county of registration's sheriff within 10 days of the move, provide "written notice" to the new county's sheriff 14 days before moving, and register with the new county's sheriff within 24 hours of moving. Former RCW 9A.44.130(5)(a). Any convicted sex offender who "lacks a fixed residence" is required to provide "written notice" to the sheriff of the county where he last registered within 48 hours of "ceasing to have a fixed residence." Former RCW 9A.44.130(6)(a); *Stratton*, 130 Wn. App. at 764. A person is guilty of failure to register as a sex offender when he "knowingly fails to comply with any of the requirements of this section." Former RCW 9A.44.130(1l)(a).

Peterson argues that "mov[ing]" is an essential element of the crime of failure to register

[5] We note that Division One of this court's earlier *Peterson* opinion, cited above, concerned Michael Eugene Peterson, a different appellant than Terry Alvin Peterson in this case.

as a sex offender. *Peterson*, 168 Wn.2d at 770. In *Peterson*, our Supreme Court held that the notification deadlines did not establish alternative means of committing failure to register. 168 Wn.2d at 768-771. It reasoned:

> [T]he 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 . . . . [t]here is only one method by which an offender fails to register, and that is if he moves from his residence without notice.

Peterson, 168 Wn.2d at 770.

The court also rejected the argument that residential status—whether the sex offender moved from his registered address to an address within the same county, moved to an address in a different county, or became transient—is an essential element of failure to register, reasoning that "Peterson's specific residential status was not essential to proving the criminal act at issue: that he failed to provide timely notice of his whereabouts under any of the statutorily defined deadlines after vacating his registered address." *Peterson*, 168 Wn.2d at 772.

Here, the second amended information stated that Peterson "did knowingly fail to . . . notify the county sheriff . . . contrary to [former] Revised Code of Washington 9A.44.130(11)."[6] CP at 9. Former RCW 9A.44.130(11)(a) provides that a person is guilty of failure to register as a sex offender when he "knowingly fails to comply with any of the requirements of this section."

[6] Accordingly, this case is distinguishable from *City of Auburn v. Brooke*, 119 Wn.2d 623, 836 P.2d 212 (1992). In *Brooke*, our Supreme Court held that a citation alleging only "'9.40.010(A)(2) Disorderly Conduct'" did not contain the essential elements of the charged offense, even under principles of liberal construction, because it contained only a numerical recitation of the relevant statute and the title of the alleged offense. 119 Wn.2d at 636. Here, the second amended information contains more than a numerical recitation and title of the relevant statute.

Former RCW 9A.44.130(4)(ix), former RCW 9.44.130(5)(a), and former RCW 9.44.130(6)(a) contain the only provisions requiring a convicted sex offender to provide written notice to a county sheriff. All the provisions pertain to providing written notice within a specified deadline after a change of address. A change of address necessarily encompasses "moving" from the sex offender's previously registered address. Thus, the second amended information adequately notified Peterson that his behavior violated the registration requirement of providing notice to the proper authority of his new residence after he moved from the registered address.

Accordingly, under principles of liberal construction, the second amended information sufficiently informed Peterson that the State had to prove that he had moved from his previously registered address. Furthermore, Peterson fails to allege or demonstrate that he suffered actual prejudice resulting from the lack of notice caused by any omission in the second amended information. *Kjorsvik*, 117 Wn.2d at 106. His claim fails.

II. Sufficiency of The Evidence—Witness Tampering

Peterson also argues that sufficient evidence does not support his conviction for tampering with a witness because he was urging Clotfelter and Crist to testify truthfully, not falsely. Again, we disagree.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. In the sufficiency context, we consider circumstantial evidence as probative as direct evidence. *State v. Goodman*, 150 Wn.2d

774, 781, 83 P.3d 410 (2004). We may infer specific criminal intent from conduct that plainly indicates such intent as a matter of logical probability. *Goodman*, 150 Wn.2d at 781. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Here, the jury could reasonably infer that Peterson believed that Crist and Clotfelter were going to be witnesses based on their knowledge of his residential situation during the relevant time periods. After Crist and Clotfelter received telephone calls from Peterson urging them to tell authorities that he had resided with Clotfelter, both Crist and Clotfelter testified at trial as directed by Peterson. This testimony was contrary to their earlier statements to law enforcement officers that Peterson had not lived with Clotfelter since December 2009 or February 2010. Moreover, after talking to Peterson, both Crist and Clotfelter testified that they did not recall making the prior statements to law enforcement.

The jury resolved the issue of Crist's and Clotfelter's credibility against Peterson. Thus, the evidence was sufficient to support the jury's verdict that the discrepancies between Crist's and Clotfelter's earlier statements to law enforcement and their later trial testimony, following Peterson's telephone calls, were a result of the influential statements Peterson made to convince both women to testify favorably toward him, and that the resulting testimony was false. We hold that the evidence was sufficient for any rational trier of fact to find the essential elements of the charged crime were proved beyond a reasonable doubt and Peterson's claim of insufficiency fails.

III. Community Custody Provisions

A. Pornography

Peterson argues and the State concedes that the term "pornography" in Peterson's community custody conditions is unconstitutionally vague and should be stricken. CP at 64. We accept the State's concession and remand for further proceedings consistent with this opinion.

B. Substance Abuse Evaluation

Peterson also argues that the trial court improperly ordered him to undergo a substance abuse evaluation as a community custody requirement because nothing suggests that his crimes were alcohol or drug related. The State responds that Peterson's statements at sentencing about a DOSA sentence being the appropriate way for him to address his issues reflect that drugs or alcohol were related to the circumstances under which Peterson committed his crimes.

We review a sentencing court's decision for abuse of discretion. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

RCW 9.94B.050(5)(c) provides that the trial court may order an "offender [to] participate in crime-related treatment or counseling services." When the trial court orders an evaluation or treatment under these provisions, the evaluation or treatment must address an issue that contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). But, in general, "[n]o causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime." *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). Furthermore, RCW 9.94A.703(3)(d) allows

the trial court to order an offender to "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.530(2) provides that the trial court may rely on information that is "admitted" or "acknowledged" "at the time of sentencing" in imposing a sentence.

Here, Peterson admitted at sentencing that his offenses "stemmed" from a "dirty urinalysis" and that a "[DOSA] program . . . would be more beneficial for everybody concerned to deal with [his] problem at the source." RP at 201. Thus, Peterson admitted that some form of substance abuse was related to the circumstances of his offenses. Based on this evidence, the trial court did not abuse its discretion in ordering a substance abuse evaluation, and his claim fails.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Penoyar, C.J.

Worswick, J.