IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM AARON BARGE, Appellant.	No. 41196-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — William Aaron Barge appeals his conviction of failure to register as a sex offender, arguing that the State presented insufficient evidence to support his conviction, that the absence of an opportunity to challenge his sex offender classification denied him due process, and that the sex offender classification statutes violate his right to equal protection. Finding no error, we affirm.

FACTS

As a result of his 1997 Lewis County conviction of third degree rape of a child, Barge was required to register as a sex offender. Before his most recent release from prison, the Department of Corrections' End of Sentence Review Committee (ESRC) classified him as a level II offender. After his release, the Lewis County Sheriff's Office did its own assessment and agreed with the level II classification.

On April 22, 2009, Barge appeared at the Lewis County Sheriff's Office and registered as a level II sex offender with a fixed residence. Detective Bradford Borden, who is in charge of sex offender registration in Lewis County, told Barge that his risk classification required him to report to the office every 90 days. Barge then signed a form stating that he had to report on June 16, 2009, between 8:00 am and 5:00 pm. This was the date the sheriff's office had previously set for second quarter registration for level II and level III sex offenders in the county. The form stated in bold print that "it is a felony offense to not report on the established date." Ex. 2.

Barge did not report on June 16. Rather, he called the sheriff's office early the next morning and appeared in person a few hours later. As a consequence, the State charged him with knowingly failing to register "on the required day for the 90 day reporting requirement" under former RCW 9A.44.130(7) and (11)(a) (2006).[1] Clerk's Papers at 31.

The matter proceeded to a bench trial after Barge waived his right to a jury. Detective Borden testified that Barge reported on June 17, 2009, rather than the set reporting date of June 16. He said that Barge called at 8:20 am on June 17, and came in later that morning, explaining that he had forgotten about the reporting date until he got home on June 16 after 6:00 pm. Borden added that he was in his office until 7:00 pm on June 16 and did not hear from Barge that night. When Barge came in on June 17, he acknowledged having signed and received a copy of the reporting notification form.

Barge's ex-girlfriend testified that she picked him up from work at about 5:00 pm on June 16 and drove him home. Barge testified that when he got home from work, he realized his

[1] In an amendment that took effect on June 10, 2010, the legislature eliminated the 90-day specification in the reporting requirement. Laws of 2010, ch. 265, § 1.

oversight and called the sheriff's office then and the next morning. When he got to the office on June 17, he explained that he had forgotten about the reporting date because of his many community supervision requirements. He did not deny signing and receiving a copy of the reporting notification form.

The trial court found Barge guilty, noting that his explanation for his behavior was not a defense. The court then denied Barge's motion for arrest of judgment, finding substantial evidence that he failed to report on the date directed. Based on Barge's offender score of 14, which included two prior convictions of failure to register, the trial court imposed a high-end sentence of 57 months but granted a stay of sentence pending this appeal.

DISCUSSION

Sufficiency of the Evidence

Barge argues initially that the State produced insufficient evidence to support his conviction. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *Salinas*, 119 Wn.2d at 201.

Barge was charged with violating former RCW 9A.44.130(7) and (11)(a). Former subsection (7) provided as follows:

> All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. . . . Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this

section.

Former RCW 9A.44.130(11)(a) added that "[a] person who knowingly fails to comply with any of the requirements of this section" was guilty of a class C felony if that person had a prior felony sex offense conviction.

Barge argues that the only act punishable under these provisions was the failure to report every 90 days. He contends that by failing to report on June 16 after registering on April 22, he failed to report only after a 55-day interval and therefore did not commit a crime.

We recently rejected a similar sufficiency argument raised by another offender who missed the same June 16 reporting date in Lewis County. *State v. Caton*, 163 Wn. App. 659, 665-66, 260 P.3d 946 (2011). Caton contended that his failure to report on June 16, 2009, occurred only 27 days after his initial registration and thus did not violate the 90-day reporting requirement in former RCW 9A.44.130(7). *Caton*, 163 Wn. App. at 676. Citing the unchallenged findings establishing that he knowingly failed to report on the designated reporting date, as well as additional testimony that he was a level II sex offender and subject to the reporting requirement, we concluded that sufficient evidence supported Caton's conviction. *Caton*, 163 Wn. App. at 676-77.

Barge does not challenge any findings of fact, including those establishing that he knowingly failed to report to the sheriff's office on June 16, 2009, one of the quarterly preset reporting dates. Former RCW 9A.44.130(7) allowed sheriffs to impose such preset reporting dates, and Barge does not expressly challenge that grant of authority.[2] *See Caton*, 163 Wn. App.

[2] The legitimacy of the sheriff's authority to set a reporting date within the 90-day reporting period appears to be the real basis for complaint, but Barge's sufficiency challenge does not present this issue for review.

at 671-72 (rejecting equal protection challenge to statutory provision allowing counties to set reporting date within 90-day registration period for level II and III sex offenders). Under former RCW 9A.44.130(11)(a), the failure to comply with *any* requirement of former RCW 9A.44.130 constituted a crime, and the State here provided sufficient evidence that Barge violated one such requirement. There is no ambiguity in the statutory reporting requirements that triggers the rule of lenity, and we reject Barge's sufficiency challenge. *See State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005) (if a criminal statute is ambiguous, the rule of lenity requires appellate courts to interpret the statute in favor of the defendant absent legislative intent to the contrary).

Due Process Right to Challenge Sex Offender Classification

Barge next contends that the ESRC, the Lewis County Sheriff, and the trial court denied him procedural due process by not giving him an opportunity to contest his sex offender classification.

Barge made no attempt to challenge his level II classification below. Generally, an appellate court may refuse to consider a claim of error not raised before the trial court. RAP 2.5(a); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). An exception exists for a claim of manifest error affecting a constitutional right. RAP 2.5(a)(3); *Gordon*, 172 Wn.2d at 676. "Manifest" under RAP 2.5(a)(3) requires a showing of actual prejudice, or a showing that the alleged error had practical and identifiable consequences in the trial of the case. *Gordon*, 172 Wn.2d at 676; *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Barge contends that his right to procedural due process was violated because he was denied the opportunity to challenge his risk level classification. Both the Fourteenth Amendment and the Washington Constitution provide that no person shall be deprived of life, liberty, or

property without due process of law. *State v. Green*, 157 Wn. App. 833, 847, 239 P.3d 1130 (2010). Procedural due process requires notice and an opportunity to be heard before the government can take a person's liberty or property interests. *Green*, 157 Wn. App. at 847. Barge argues that his classification as a level II sex offender subjected him to further punishment and thus gave him a liberty interest in being free from improper classification.

Before the quarterly reporting requirement was added to former RCW 9A.44.130 in 2006, the Supreme Court rejected a due process challenge to the sex offender classification statutes in *In re Personal Restraint of Meyer*, 142 Wn.2d 608, 16 P.3d 563 (2001). The court concluded that the statutes were procedural rather than punitive and thus created no liberty interest. *Meyer*, 142 Wn.2d at 619. In so holding, the court added that an offender could obtain judicial review of an arbitrary and capricious classification by filing a writ of certiorari. *Meyer*, 142 Wn.2d at 624. The court also noted that an offender could get his risk classification changed by petitioning the superior court of conviction to relieve him of the duty to register. *Meyer*, 142 Wn.2d at 614 n.2; former RCW 9A.44.140(3) (1998). There is no statutory provision for a hearing before the ESRC and local law enforcement agency to determine an offender's risk level classification. *In re Det. of Enright*, 131 Wn. App. 706, 713, 128 P.3d 1266 (2006), *review denied*, 158 Wn.2d 1029 (2007).

Barge contends that *Meyer* and the limited relief it offers is not controlling here. He maintains that with the subsequent enactment of former RCW 9A.44.130(7) and the creation of the offense of failure to register every 90 days as a level II or III offender, such offenders secured a liberty interest in being free from improper classification. *See In re Det. of Bergen*, 146 Wn. App. 515, 525, 195 P.3d 529 (2008) (laws that dictate particular outcome based on particular

facts can create liberty interests that trigger due process protection), *review denied*, 165 Wn.2d 1041 (2009).

But even if Barge is correct in arguing that he had a due process right to challenge his sex offender classification either before or during his prosecution for failure to register, which we do not hold, he made no attempt to exercise that right either before trial, at trial, in his motion for arrest of judgment, or at sentencing. *See Enright*, 131 Wn. App. at 710 (court examined merits of due process claim where a sexually violent predator unsuccessfully sought to challenge his level III classification during hearing on less restrictive alternative petition). As a consequence, the record is insufficient to determine whether Barge was improperly classified and thus prejudiced by the inability to challenge his classification either before or during trial. Because there is no showing of manifest error, Barge has not preserved his procedural due process challenge for appellate review.

Equal Protection and the Risk Classification Statutes

Finally, Barge argues that RCW 4.24.550(6)(b) and RCW 72.09.345, the risk classification statutes, violate equal protection by allowing similarly situated sex offenders to be disparately classified depending on each county sheriff's criteria.[3]

The classification of sex offenders according to their risk of reoffending is authorized by RCW 72.09.345 and RCW 4.24.550. *Enright*, 131 Wn. App. at 712. When a sex offender is scheduled for release from confinement, the ESRC accesses all relevant records and information to determine the risk the offender poses to the community. RCW 72.09.345(3), (4); *Enright*, 131

[3] We cite the current statutes for clarity; the pertinent substantive provisions here remained unchanged since Barge committed his offense. *State v. Singer*, 159 Wn.2d 224, 227 n.3, 149 P.3d 372 (2006).

Wn. App. at 713. Level I offenders are considered a low risk to reoffend, level II are at moderate risk, and level III are at high risk to reoffend. RCW 72.09.345(6); *Enright*, 131 Wn. App. at 713. The ESRC notifies the sheriff or other local law enforcement agency in the offender's community of the offender's pending release and the recommended classification. RCW 72.09.345(7); *Meyer*, 142 Wn.2d at 613. The ESRC must provide the reasons underlying level II and III classifications. RCW 72.09.345(7).

Local law enforcement agencies make the final determination of a sex offender's risk level after reviewing the ESRC's recommendation. RCW 4.24.550(6)(b); *Meyer*, 142 Wn.2d at 613. If the local law enforcement agency decides to classify an offender differently, it must notify the ESRC and submit its reasons for the change. RCW 4.24.550(10). Depending on the risk level, the law enforcement agency discloses to the community relevant information concerning the offender. *Meyer*, 142 Wn.2d at 613-14. And, under former RCW 9A.44.130(7), level II and level III offenders with fixed addresses must report quarterly to local law enforcement.

Barge argues here that the risk assessment statutes violate equal protection because they provide no standards for the ultimate classification and lead to disparate classifications depending on the sheriff or local law enforcement agency involved. As Detective Borden explained, "In Lewis County we [classify sex offenders] through a review of the documentations provided by the End of Sentence Review Committee and then we also do a risk assessment ourselves." Report of Proceedings (Apr. 23, 2010) at 18. Barge contends that there are as many approaches to assigning risk assessment levels as there are counties.

This contention is based solely on Barge's conclusory assertions made for the first time on appeal. Barge raised no such argument below, and there is nothing in the record showing how

Lewis County or any other county makes its risk assessments. *See State v. Brosius*, 154 Wn. App. 714, 721, 225 P.3d 1049 (2010) (describing assessment tool Lewis County used to classify defendant). To the extent that Barge raises a claim of disparate impact that lacks evidentiary support, we could decline to consider his equal protection challenge. *See O'Hara*, 167 Wn.2d at 99 (error is not manifest if the trial record is insufficient to determine the merits of the claim); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (RAP 2.5(a)(3) does not mandate appellate review of newly-raised argument if record does not contain facts necessary for its adjudication). But because Barge's equal protection challenge can be interpreted as one based solely on the legislature's failure to provide explicit procedures and standards for making risk assessments, the alleged error is grounded on a legal argument rather than undeveloped facts and we exercise our discretion to review it. *See State v. Osborne*, 140 Wn. App. 38, 41, 163 P.3d 799 (2007) (courts retain discretion under RAP 2.5(a) to hear issue raised for first time on appeal).

Constitutional equal protection guarantees require similar treatment under the law for similarly situated persons. *Caton*, 163 Wn. App. at 670-71 (citing U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 12). Because sex offenders are not a suspect class, we review this challenge under the rational basis test. *Caton*, 163 Wn. App. at 671. Under this test, a statute violates equal protection unless it applies alike to all members within the designated class; there are reasonable grounds to distinguish between those within and those without the class; and the classification has a rational relationship to the purpose of the legislation. *Petersen v. State*, 100 Wn.2d 421, 445, 671 P.2d 230 (1983). Barge argues that the risk classification statutes fail the first part of this test due to the lack of standards for assigning risk assessment levels.

Barge incorrectly asserts that a county's risk assessment is a purely ad hoc decision. When this court considered a similar challenge to the risk assessment procedures for juvenile sex offenders, we observed that RCW 72.09.345 specifies a wide range of materials for the ESRC to consider in assigning risk levels and that this specification creates standards for classifying risk levels. *Brosius*, 154 Wn. App. at 720. Additional statutory standards exist in requiring the ESRC to specify the underlying reasons for a level II or III classification and in requiring a county sheriff to submit reasons for changing that recommended classification. *See Brosius*, 154 Wn. App. at 721. Where a sex offender was classified without ESRC input, we found that classification completely lacking in standards but noted that we were not considering a circumstance where a local law enforcement agency set a risk level with the benefit of ESRC input. *State v. Ramos*, 149 Wn. App. 266, 276 n.10, 202 P.3d 383 (2009).

Furthermore, even if the assessment standards result in offenders being classified differently based on their county location, this result does not necessarily offend equal protection guarantees. In reviewing an equal protection challenge to the former habitual criminal statute, RCW 9.92.090, we rejected the argument that the statute unlawfully delegated legislative authority because it lacked guidelines and allowed arbitrary application by the prosecuting attorney.[4] *State v. Ragan*, 22 Wn. App. 591, 598, 593 P.2d 815, *review denied*, 92 Wn.2d 1013 (1979). The only limit that equal protection placed on the prosecuting attorney's discretion under that statute was that it could not be arbitrary, capricious, or based on constitutionally invidious standards. *Ragan*, 22 Wn. App. at 599. The fact that different county prosecutors might apply

[4] The "Habitual Offender Act" gave prosecutors the discretion to institute a habitual offender proceeding and seek a life sentence when a defendant was convicted and had certain prior felony convictions. RCW 9.92.090; *State v. Lee*, 87 Wn.2d 932, 933-34, 558 P.2d 236 (1976), *appeal dismissed*, 432 U.S. 901 (1977).

different standards in invoking the statute was immaterial. "Territorial uniformity within a state is not a constitutional requirement." *Ragan*, 22 Wn. App. at 599; *see also State v. Anderson*, 12 Wn. App. 171, 174, 528 P.2d 1003 (1974) (rejecting argument that insufficient standards and safeguards in habitual criminal statute violated equal protection because defendant did not show that the prosecuting attorney had applied the statute on an arbitrary and discriminatory basis).

Barge makes no showing that county sheriffs have applied their risk assessment authority on an arbitrary and discriminatory basis. Without such a factual showing, the possibility that counties employ different procedures to make such classifications does not violate equal protection. *See McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961) (state legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality). We reject Barge's equal protection challenge and affirm his conviction.

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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

WORSWICK, A.C.J.