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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-125**

State of Minnesota,
Respondent,

vs.

Nicholas Dawyon Todd,
Appellant.

**Filed March 15, 2011
Affirmed
Ross, Judge**

Ramsey County District Court
File No. 62-CR-08-19150

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John C. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Renée Bergeron, Special Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Nicholas Todd was convicted of failing to register as a sex offender. Evidence at
trial indicates that Todd's registered address was that of a house from which he moved

without registering a new address and that he lived at his girlfriend's home without registering it at least as a secondary address. The jury found Todd guilty. Because Todd fails to convince us that his trial was unfair or that the evidence did not support the verdict, we affirm.

FACTS

Nicholas Todd's 2001 second-degree criminal-sexual-conduct conviction required that he register as a predatory offender for the rest of his life. But law enforcement officials began looking for Todd in November 2008 after the Bureau of Criminal Apprehension's yearly address-verification letter sent to Todd was returned unopened and unsigned. BCA Agent Eric Meyers investigated. He went to the Sims Street address where Todd was registered and asked Lana Mitchell, the current resident, if she knew Todd. Mitchell said that she knew Todd as the brother of her former boyfriend, Jerod Peppers, but that Todd had never lived at the Sims Street address.

Ramsey County filed a criminal complaint alleging that Todd violated the registration law. But the bases of the violation were broadly stated under multiple theories.

Mitchell testified for the state after first invoking her Fifth Amendment right against self-incrimination and then securing use immunity for her testimony. She testified that she had lied to Agent Meyers when she told him that Todd never lived in the Sims Street house. She said that he moved there in April 2008 when Todd's brother was living with her. She testified that Todd had planned to live and collect his mail there but also to spend time at his girlfriend's home. His offender status and his girlfriend's Section-8

housing status prevented Todd from living in her home. Mitchell estimated that Todd spent 60% of his time at the Sims Street house and the rest of his time elsewhere including at his girlfriend's.

Mitchell ended her relationship with Todd's brother in August 2008, and Peppers moved out of the Sims Street address on August 9. Mitchell testified that Todd continued living there for two months and removed the last of his possessions by the end of October 2008.

The jury convicted Todd of violating the predatory offender registration statute. Todd appeals.

D E C I S I O N

Todd raises four challenges to his conviction. He claims that he was denied due process because the state failed to provide notice of the grounds on which he was accused of violating the offender registration law, that he lacked effective assistance of counsel at trial, that the evidence was insufficient to convict him, and that prosecutorial misconduct prevented him from receiving a fair trial. None of Todd's challenges leads us to reverse his conviction.

I

We first address Todd's due process, insufficient-notice-of-charge claim. Todd was charged with violating the predatory offender registration law, Minnesota Statutes section 243.166 (2008). There are many ways by which a person could fail to properly register under this statute. The complaint focuses on several, alleging that between March 23 and December 26, 2008, Todd

knowingly fail[ed] to register an address or change of information as required, or fail[ed] to return an annual verification letter with the appropriate law enforcement authority as required, or intentionally provide[d] false information on registration materials or provide[d] false information to a corrections agent, law enforcement authority, or the BCA.

The facts in the accompanying probable-cause statement describe Todd's failure to fill out the BCA's annual verification letter and his alleged false registration at the Sims Street address. They do not mention Todd's spending time at his girlfriend's or refer to his end-of-October move.

Before trial, Todd sought to narrow the complaint, moving to compel the state to elect the specific provisions under which it was prosecuting him. The prosecutor responded, stating that "proof will show that until [Todd's] apprehension on December 26th, . . . there was no change of information or . . . a correct registered address at [the Sims Street] location." The district court denied Todd's motion.

The trial commenced and Mitchell's testimony supported several bases for prosecution, specifically, that Todd failed to register his girlfriend's address as a secondary residence and failed to register a change of address after allegedly moving in October. The district court tailored the jury instructions to fit the state's evidence. It instructed the jury that it could convict Todd for not doing any one of the following three actions:

[O]ne, providing the address of the person's primary residence . . . within five days before living at the new location or, two, providing the addresses of all the person's secondary residences in Minnesota, including all the addresses used for residential or recreational purposes . . .

within five days before living at the new location or, three, immediately informing the agent or authority that the primary address is no longer valid because of the change in circumstance.

Todd did not object to these instructions, and, in fact, he expressly agreed to them. Other than his initial pretrial motion, Todd never asserted that he lacked proper notice of the facts or bases for the charge.

The Minnesota and United States Constitutions require that defendants be informed of the nature and cause of the accusations against them. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. Chauvin*, 723 N.W.2d 20, 29 (Minn. 2006). We review de novo whether a criminal complaint contains a detailed enough description to properly notify the defendant of the offense charged. *State v. Kendell*, 723 N.W.2d 597, 611 (Minn. 2006).

The complaint and the pretrial record inform us that Todd had sufficient notice of the charges. Although the complaint did not allege facts supporting two of the three grounds that were eventually described in the final jury instruction, it did allege that Todd had failed to “register an address or change of information as required,” and it cited various provisions of the predatory offender registration statute. Included among the cited provisions was section 243.166, subdivision 4a. That section lists all of the information required of registrants, including the duty to disclose all secondary addresses and to immediately inform the state of any changes in registered information, such as primary address. Although the complaint was overly inclusive, the state had sufficiently put Todd on notice of the conduct he was charged with. Even if it had not, three weeks before the

trial, Todd conceded that the court could later tailor the jury instructions to fit the evidence actually presented.

We add that Todd also fails to establish any prejudice arising from the claimed notice inadequacy. He does not explain how his defense might have differed materially had he been given the more limited and specific allegations sooner. *See State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984) (holding that a complaint was inadequate but affirming because the defendant was not prejudiced by the inadequacy). Todd's primary trial defense was to attack Mitchell's credibility. If that strategy prevailed, he would have been acquitted regardless of which of the originally stated grounds the state ultimately relied on for his conviction.

II

We next address Todd's claim of ineffective assistance of counsel. Todd claims that his trial attorney was ineffective by failing to inform the jury that, even with testimonial-use immunity for state prosecutions, Mitchell risked other Section-8-related consequences, such as prosecution in federal court, if she admitted that Todd lived in her house after November 1 as he claimed.

We review ineffective-assistance-of-counsel claims de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). The right to effective assistance of counsel in criminal cases is guaranteed by the state and federal constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. To review Todd's ineffective-counsel claims, we determine whether his counsel's performance was objectively reasonable and if not whether there is a reasonable probability that the errors affected the outcome. *Rhodes*, 657 N.W.2d at 842

(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). We presume the lawyer acted on reasonable professional judgment and with sound trial strategy. *State v. Strodtman*, 399 N.W.2d 610, 616 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987).

Todd contends that his trial attorney's cross-examination questions to Mitchell should have included more questions about her Section-8 exposure. The contention is not persuasive. Todd points to nothing in the record to suggest that Mitchell actually faced exposure to federal prosecution or that his attorney had firm ground to so imply through questioning. Todd's complaint about his attorney's performance focuses on trial strategy only, and the allegedly better strategy that he now offers lacks a factual basis.

III

We next address whether the state's evidence supports the conviction. Todd asserts that the state's primary witness lacked personal knowledge on some issues and was generally incredible. We are not persuaded.

We analyze sufficiency-of-the-evidence challenges by looking to the record to determine whether the evidence, viewed most favorably to the conviction, permits the jury to find the defendant guilty. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury has evaluated witness credibility and believed the state's evidence and disbelieved contrary evidence. *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000).

We reject Todd's credibility-based argument that the evidence is insufficient because Mitchell gave inconsistent statements. We rely on the jury's credibility determinations. And even if Mitchell wavered with regard to when Todd lived at the

Sims Street address, she consistently maintained that he did not live there in November. Because Sims Street was still Todd's registered primary address in November, Mitchell's *consistent* statements support the guilty verdict on the basis that Todd failed to register any change of address.

Todd also argues that Mitchell's statement that Todd spent 60% of his time at the Sims Street address (and 40% elsewhere) was improperly accepted because Mitchell admitted that she was rarely home. A witness may testify only to matters of her personal knowledge. Minn. R. Evid. 602. We review the admission of evidence under an abuse-of-discretion standard. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). And will reverse only if the erroneous admission of evidence prejudiced the defense. *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006).

We hold that Todd's argument fails for lack of prejudice because, even if the "sixty-percent" statement had been omitted, Mitchell's more inculpatory testimony was that Todd moved out by November 1. She said that, by then, all of his belongings were gone and she had removed his name from the mailbox. Even if Mitchell was rarely home, she had personal knowledge of whether and when Todd had moved out.

IV

We consider whether prosecutorial misconduct prevented Todd from receiving a fair trial. Todd claims that the prosecutor's closing argument improperly sought conviction based on the "return-to-sender" verification letter even though she had agreed to withdraw that theory as a basis for conviction; improperly suggested that Todd had the burden to prove that he stayed at his registered secondary address (his sister's) when he

was not at the Sims Street address; and improperly misstated facts. The first alleged error was objected-to, the others were not.

We first address the objected-to error. During her closing argument, the prosecutor claimed that the return-to-sender verification letter was sent to the right address and that it was returned because Todd's name was no longer on the mailbox. She then declared the statutory violation: "Failure to return a verification." Todd objected, stating that the failure to return a verification letter was not properly before the jury. The district court sustained the objection. The claimed error does not merit reversal because it was not serious and it is not likely to have influenced the jury. *See State v. Wren*, 738 N.W.2d 378, 390 n.8 (Minn. 2007) (holding that if the misconduct is not serious, we should reverse only if it likely influenced the jury to convict). In addition to successfully objecting to the errant statement, Todd's counsel countered at length during his closing argument that the evidence showed that the verification letter was improperly addressed, that there is no "Sims Avenue," and that letters occasionally are returned for innocent reasons.

The first of the unobjected-to alleged errors is that the prosecutor shifted the burden when discussing the failure-to-provide-a-secondary-address ground for conviction. She stated, "[T]he only secondary address he provided was that one time where he gave his sister's address and there has been no evidence indicating that he ever stayed there." The second alleged error is the cumulative effect of alleged factual misstatements during the state's closing argument. We review both de novo, and we apply the modified-plain-error standard of *State v. Ramey*. 721 N.W.2d 294, 302 (Minn.

2006) (holding that appellant must establish that the prosecutor's actions constituted plain error, shifting the burden to the state to show that the error did not affect the appellant's substantial rights).

It is misconduct for a prosecutor to comment on a defendant's failure to contradict inculpatory testimony or call witnesses. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995). This general rule carries exceptions, but none apply or warrant discussion here. The prosecutor's commenting on Todd's lack of evidence violates the general rule and was plain error.

But we hold that there is no reasonable likelihood that the prosecutor's comments affected the verdict. The prosecutor stated unequivocally at the beginning of her closing argument, "I'm the prosecutor; and . . . it is my burden to prove this case against the Defendant, Mr. Todd, beyond a reasonable doubt." And except for the challenged stray comment, she consistently framed the burden this way throughout the argument. It was clear from her argument as a whole that the burden always remained with the state.

Todd's second unobjected-to error is the alleged accumulation of misstatements of fact in the state's closing argument. Todd asserts that the following were misstatements: (1) the prosecutor argued that Mitchell testified that when Todd was not at the Sims Street address he was at his girlfriend's but in fact Mitchell said he was at his girlfriend's or sister's; (2) the prosecutor said that Todd's name was removed from the mailbox in October but the actual date was never revealed; (3) the prosecutor argued that the BCA letter was returned because Todd did not have his name on the mailbox but the BCA

witness testified it was sent to the wrong address; (4) the prosecutor discussed immunity but did not clarify that it was state, not federal, immunity.

Even if each of these was inaccurate, we see it as unlikely that their absence would have led to any different verdict. Each of the alleged misstatements was minor, brief, isolated, and insignificant to Todd's guilt. And the prosecutor herself told the jurors that their recollection of the evidence controls, not hers, and that anything she says is merely argument. The judge instructed them likewise. We are convinced that these alleged misstatements had no bearing on the outcome.

Affirmed.