STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0205

State of Minnesota,
Respondent,

vs.

Bryan Dale Purdom,
Appellant.

Filed May 27, 2014
Affirmed
Schellhas, Judge

Polk County District Court
File No. 60-CR-12-1566

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

Gregory A. Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's denial of his postconviction-relief petition, arguing that (1) his failure-to-register-as-a-predatory-offender conviction is not supported by sufficient evidence and (2) his trial counsel was ineffective. Appellant also raises several pro se arguments. We affirm.

FACTS

In August 2002, the district court required appellant Bryan Purdom to register as a "sex offender" after he was convicted of second-degree criminal sexual conduct. In March 2011, the court required him to register as a predatory offender for life after he pleaded guilty to knowingly violating at least one registration requirement or intentionally providing false information. In December 2011, Purdom signed a "Change of Information Form," listing a prior Minnesota address and a "Current Primary Address," effective late January 2012. In February 2012, Purdom signed an "Address Verification Form," listing a New Mexico address, along with a "Duty to Register" form.

In April 2012, Purdom told a carnival-games operator that he and his wife had separated, he "didn't want to be in that area anymore," and he was looking for a job. Purdom then traveled to Texas to work with the carnival-games operator. On July 5, Purdom and the operator left Texas; they arrived in Fertile, Minnesota, on July 7 to work at the Polk County Fair. From July 7 through July 10, Purdom worked with the carnival-games operator and slept in a recreational vehicle (RV) at the fairground. Around noon on July 10, the operator discharged Purdom, and, around 1:00 p.m., Purdom telephoned

Polk County Sheriff's Office Administrative Sergeant Brian Lundeen, saying that he had been in Fertile for two or three days, needed to "complete the paperwork as an offender," and would go to the sergeant's office the next morning to do so. Purdom then ended the phone call. With assistance from a Bureau of Criminal Apprehensions (BCA) special agent and law enforcement from Clay County and the Barnesville Police Department, Sgt. Lundeen began a search for Purdom, who arrived at the Ada Police Department at about 4:45 p.m. and told an officer that he needed to register. The officer did not know about Sgt. Lundeen's search for Purdom and therefore allowed Purdom to complete a registration form and leave. Purdom listed his prior address as his New Mexico address and his current address as "no address at this time." A Clay County deputy arrested Purdom that night.

Respondent State of Minnesota charged Purdom with failure to register as a predatory offender on or about July 7–10, 2012, under Minn. Stat. § 243.166, subds. 1b(a)(1)(iii), 3a, 5(a), (c) (2010). Two attorneys represented Purdom. Purdom stipulated before trial that, "[o]n or about July 7–10, 2012, the defendant was a person required to register as a predatory offender, and the defendant's duty to register as a predatory offender had not elapsed on July 10, 2012," and he did not testify. A jury found Purdom guilty, and the district court sentenced him in November 2012. Purdom appealed from the conviction, but this court granted Purdom's motion to stay the appeal and remand for postconviction proceedings.

Purdom petitioned the district court for postconviction relief, claiming that one of his trial attorneys advised him to enter the pretrial stipulation. He asked the court to

vacate his conviction and sentence and order a new trial, grant him judgment of acquittal, or order an evidentiary hearing. The district court denied the petition without a hearing, and we dissolved the stay and reinstated this appeal.

D E C I S I O N

Sufficiency of Evidence

Purdom argues that his conviction is not supported by sufficient evidence. Appellate courts reviewing a claim of insufficient evidence "view the evidence in the light most favorable to the verdict and assume that the fact finder believed the state's witnesses and disbelieved any contrary evidence" and determine whether the fact-finder could have reasonably concluded that the defendant was guilty beyond a reasonable doubt. *Gulbertson v. State*, 843 N.W.2d 240, 245 (Minn. 2014) (quotation omitted).

The state asks this court to review Purdom's sufficiency-of-the-evidence arguments only for plain error, arguing that Purdom did not preserve this issue for appeal because he neither moved for judgment of acquittal nor a new trial. The state's argument is of no consequence. "[A] conviction based upon anything less than 'proof beyond a reasonable doubt of every fact necessary to constitute the crime' violates the Due Process Clause of the Fifth Amendment, and amounts to plain error affecting a defendant's substantial rights." *State v. Clow*, 600 N.W.2d 724, 726 (Minn. App. 1999) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)), *review denied* (Minn. Oct. 21, 1999). The interests of justice require this court to address insufficiency-of-the-evidence arguments. *See* Minn. R. Civ. App. P. 103.04 (permitting appellate courts to "review any . . . matter as the interest of justice may require").

Purdom is a person required to register as a predatory offender for life due to 2002 and 2011 convictions. The district court read a stipulation to the jury about Purdom's duty to register. The state could prove that he committed the offense of failure to register as a predatory offender on or about July 7–10, 2012, by proving that he was a person who (1) was required to register due to a criminal-sexual-conduct conviction, (2) lacked a primary address, and (3) "knowingly violate[d]" subdivision 3a(c)'s requirement that he register within 24 hours of entering the jurisdiction where he was staying. *See* Minn. Stat. § 243.166, subds. 1b(a)(1)(iii) (requiring persons to register who were convicted of criminal sexual conduct), 3a(c) (requiring persons who lack primary address to register within 24 hours of entering jurisdiction where they are staying), 5(a) (providing that a person commits a felony by "knowingly violat[ing]" section 243.166), (c) (sentencing provision). We interpret the "knowingly violates" language in section 243.166, subdivision 5(a), to require the defendant to perceive directly that the defendant's conduct violated section 243.166. *Cf. State v. Watkins*, 840 N.W.2d 21, 29 (Minn. 2013) (interpreting "'knowingly violates this subdivision' as used in . . . Minn. Stat. § 629.75 [(2012)] . . . to require the defendant to perceive directly that the contact violated the . . . statute").

Purdom argues that the evidence is insufficient to prove that he lacked a primary address until he lost his job. He maintains that, on July 10, 2012, his residence was in the RV at the fairground. We disagree. The predatory-offender statute defines primary address as "the mailing address of the person's dwelling" and dwelling as "*the building* where the person lives under a formal or informal agreement to do so." Minn. Stat.

§ 243.166, subd. 1a(c), (g) (2010) (emphasis added). A recreational *vehicle* is *not* a building. Moreover, on July 10, Purdom stated on his registration form that he lacked an address and that his prior address was in New Mexico, where he had not resided since April 2012.

In his pro se brief, Purdom also argues that the evidence is insufficient to prove that he *knowingly* failed to register within 24 hours of his July 7, 2012, entry into the jurisdiction where he was staying. "[I]ntent is a state of mind and is, therefore, generally provable only by inferences drawn from a person's words or actions in light of all the surrounding circumstances." *State v. Johnson*, 719 N.W.2d 619, 630–31 (Minn. 2006) (quotation omitted). "If a conviction, or a single element of a criminal offense, is based solely on circumstantial evidence, such evidence, viewed as a whole, must be consistent with guilt and inconsistent with any other rational hypothesis except that of guilt." *State v. Fairbanks*, 842 N.W.2d 297, 307 (Minn. 2014). "If the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt, then the evidence is sufficient to sustain the conviction." *Id.*

Here, the circumstances proved include that, in February 2012, Purdom signed an "Address Verification Form," listing a current New Mexico address, and a "Duty to Register" form, acknowledging,

> I understand that if I do not have a primary address I must report to the law enforcement authority with jurisdiction in the area where I will be staying *within 24 hours of leaving my former primary address*. . . . I understand that if I move to a new jurisdiction I must report to that law enforcement authority *within 24 hours of entering the jurisdiction*.

(Second emphasis added.) In February 2012, Purdom moved from Minnesota to New Mexico; in April 2012, he moved from New Mexico to Texas; and, on July 5–7, 2012, he resided in Fertile, Minnesota. On July 10, Purdom informed Sgt. Lundeen by telephone that he had been in Fertile for two or three days and needed to "complete the paperwork as an offender." Purdom then completed a predatory-offender registration form on which he listed his prior address as in New Mexico and current address as "no address at this time."

The jury was in the best position to evaluate the circumstantial evidence, and we should give the jury due deference. *See Fairbanks*, 842 N.W.2d at 307 ("A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference."). We conclude that the circumstances proved are consistent only with guilt—that Purdom knowingly violated section 243.166, subdivision 3a(c)—and that sufficient evidence supports Purdom's conviction.

Ineffective Assistance of Counsel

Purdom challenges the district court's summary denial of his postconviction-relief petition. Appellate courts review the denial of evidentiary hearings on postconviction-relief petitions "for an abuse of discretion," *Hooper v. State*, 838 N.W.2d 775, 786 (Minn. 2013), and analyze ineffective-assistance-of-counsel claims "under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, [2064] . . . (1984)," *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

A postconviction court need not hold an evidentiary hearing if "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to

no relief." Minn. Stat. § 590.04, subd. 1 (2010). "[T]o receive an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a defendant is required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland*." *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013) (quotation omitted). To prevail under *Strickland*, "an appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Dereje v. State*, 837 N.W.2d 714, 721 (Minn. 2013) (quotation omitted).

"The objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Hokanson*, 821 N.W.2d 340, 358 (Minn. 2012) (quotation omitted), *cert. denied*, 133 S. Ct. 1741 (2013). Appellate courts "review the reasonableness of counsel's performance based on the totality of the facts that existed at the time of counsel's conduct." *Staunton v. State*, 784 N.W.2d 289, 300 (Minn. 2010). "Because of the difficulties inherent in making [that] evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (quotation omitted); *see also Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials

outside the record, and interacted with the client, with opposing counsel, and with the judge."). Appellate courts "will generally not review an ineffective-assistance-of-counsel claim that is based on trial strategy." *Andersen*, 830 N.W.2d at 10.

Purdom argues that an evidentiary hearing is warranted to determine whether his trial counsel reasonably advised him to stipulate that he was required to register on or about July 7–10, 2012, "when he was not actually required to register." He also argues that his trial counsel unreasonably failed to argue at trial that, under Minn. Stat. § 243.166, subd. 3(c) (2010), Purdom did not need to register until July 12, five days after he entered and began working in Minnesota. We disagree.

"[P]arties often agree in writing to the admission of otherwise objectionable evidence, either in exchange for stipulations from opposing counsel or for other strategic purposes." *United States v. Mezzanatto*, 513 U.S. 196, 203, 115 S. Ct. 797, 802 (1995). "[D]ecisions to present certain evidence . . . are tactical decisions properly left to the discretion of trial counsel, and such decisions do not prove that counsel's performance fell below an objective standard of reasonableness." *State v. Nissalke*, 801 N.W.2d 82, 111 (Minn. 2011). By stipulating, Purdom avoided any potential prejudice from the admission into evidence of his two prior convictions, which the state planned to offer to prove his lifetime-registration requirement. *See Almendarez-Torres v. United States*, 523 U.S. 224, 235, 118 S. Ct. 1219, 1226 (1998) ("[T]he introduction of evidence of a defendant's prior crimes risks significant prejudice."); *State v. Kuhlmann*, 806 N.W.2d 844, 853 (Minn. 2011) ("Kuhlmann's stipulation to the previous-conviction elements had

the effect of protecting Kuhlmann from the possibility that the jury might improperly use his previous convictions as evidence that he committed the current offenses.").

Moreover, Purdom's five-days-to-register argument is meritless. An ineffective-assistance-of-counsel claim based on trial counsel's failure to raise a meritless claim "necessarily fails." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008); *see also State v. Davis*, 820 N.W.2d 525, 539 n.10 (Minn. 2012) ("[C]ounsel's failure to raise meritless objections is not ineffective assistance of counsel."). Section 243.166, subdivision 3(c), provides that "[a] person required to register under subdivision 1b, paragraph (b), because the person is working or attending school in Minnesota shall register with the law enforcement authority that has jurisdiction in the area" and "[a] person shall comply with this paragraph *within five days of beginning employment* or school." (Emphasis added.) But, to be a person required to register under subdivision 1b(b), a person must have been "convicted of or adjudicated delinquent in another state for an offense that would be a violation of a law described in [subdivision 3](a) if committed in this state." Minn. Stat. § 243.166, subd. 1b(b)(1) (2010). The record provides no indication that Purdom has such a prior conviction or adjudication. Moreover, Purdom erroneously treats section 243.166, subdivision 3(c), as an *affirmative defense* to failure to register under section 243.166, subdivision 3a. The plain language and statutory context of section 243.166, subdivision 3(c), shows that the statutory provision is a *registration requirement*, not an affirmative defense. Because the state did not charge him with violating that registration requirement in section 243.166, subdivision 3(c), the statutory provision is immaterial to his charge, trial, and conviction.

Purdom also raises other ineffective-assistance-of-counsel arguments in his pro-se brief. But he waived those arguments by not raising them in his postconviction-relief petition. *See Davis v. State*, 784 N.W.2d 387, 391 (Minn. 2010) (noting that an argument raised for first time on appeal from postconviction proceeding is waived); *State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007) ("Nor may a party obtain review by raising the same general issue litigated below but under a different theory." (quotation omitted)).

We conclude that the district court did not abuse its discretion by summarily denying Purdom's postconviction-relief petition because Purdom failed to allege facts that, if proven, would show that the performance of either of his trial attorneys fell below an objective standard of reasonableness.

Remaining Pro Se Arguments

Purdom argues that the district court denied him his right to an impartial judge and jury by not ruling on an objection raised by one of his attorneys. Because Purdom has failed to support his argument with legal authority or arguments beyond mere speculation, we decline to review it. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) ("We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority."), *cert. denied*, 556 U.S. 1134 (2009).

Purdom argues that the prosecutor engaged in misconduct during jury selection by implying that Purdom committed criminal sexual conduct and was a sex offender and, during his opening statement, stating that, when Purdom went to the Ada Police Department, he said that he "needed to reregister as a *sex offender*." Purdom maintains that, in fact, he said that he "needed to do some registration as a *predatory offender*."

(Emphasis added.) Because Purdom did not object to the alleged prosecutorial misconduct in district court, we review it "under a modified plain-error test." *State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013). "Under this test, the defendant must first prove that an error was made and that it was plain." *Id.* But Purdom fails to cite, nor could we find, any legal authority even suggesting that a prosecutor might have a duty not to refer to predatory offenders as sex offenders or persons who committed criminal sexual conduct. *See State v. Vue*, 797 N.W.2d 5, 13 (Minn. 2011) ("Typically, a plain error contravenes case law, a rule, or a standard of conduct."). We therefore conclude that the prosecutor did not commit plain error.

Purdom argues that a juror's taking of an alternate juror's notes into the jury room for a short time may have prejudiced the jury. We are unpersuaded. The trial transcript reveals that, after the district court charged the jury, it identified the alternate juror and told her that she could leave her notes or give them to one of the jury attendants. The court then noted that the alternate juror had "handed her notes to her fellow juror sitting next to her before she left" but that a jury attendant retrieved the notes and that the notes were not in the jury room. Purdom did not object, so we review his argument for plain error. *See State v. Dao Xiong*, 829 N.W.2d 391, 395 (Minn. 2013). The record evidence suggests that the alternate juror's notes were in the jury room for only a short time, and we have found no caselaw or other authority plainly stating that such presence is error. *Cf. State v. Washington*, 632 N.W.2d 758, 759 (Minn. App. 2001) (similar to *Crandall*); *State v. Crandall*, 452 N.W.2d 708, 709 (Minn. App. 1990) (holding that "[a]n alternate's inadvertent presence in the jury room during jury deliberations in a criminal case is

presumptively prejudicial" (emphasis added)), *cited with approval in State v. Dame*, 670 N.W.2d 261, 266 (Minn. 2003). Even if we were to assume that the presence of the alternate's juror's notes in the jury room was error, we would not presume prejudice. Purdom's failure to object subjects his assignment of error to the plain-error test, which places the burden of showing prejudice on him. *See State v. Roberts*, 651 N.W.2d 198, 203 (Minn. App. 2002) ("[F]ailure to discharge an alternate juror is not so serious that in every situation it requires automatic reversal. Roberts has not demonstrated any prejudice in allowing thirteen jurors to deliberate." (citation omitted)), *review denied* (Minn. Dec. 17, 2002). No record evidence supports Purdom's argument that he may have been prejudiced.

Purdom argues that he may have been prejudiced by the absence of a jury lunch break. We decline to address that argument because he has failed to support it with argument or authority. *See Bartylla*, 755 N.W.2d at 22 ("We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority.").

Purdom argues that the district court erred by imposing a ten-year conditional-release term because the state did not prove to the jury that he was a risk-level-III predatory offender. *See* Minn. Stat. § 243.166, subd. 5a (2010) (providing for ten-year conditional-release term for persons "assigned to risk level III under section 244.052"). We agree that the state did not do so. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530

U.S. 466, 490, 120 S. Ct. 2348, 2362–63 (2000). The "statutory maximum" is the maximum sentence that a court may impose "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004). But we recently held that "[a] conditional-release term imposed under Minn. Stat. § 243.166, subd. 5a, is part of the statutory-maximum sentence for risk-level-III offenders convicted of violating registration requirements and does not implicate the rules set forth in *Apprendi* and *Blakely*" and that "[a]n offender's designation as risk level III under Minn. Stat. § 244.052, subd. 3(e), is analogous to a prior conviction or probation status and is not a fact that is constitutionally required to be found by a jury." *State v. Ge Her*, 843 N.W.2d 590, 591–92 (Minn. App. 2014), *review granted* (Minn. Apr. 29, 2014); *see also Rickert v. State*, 795 N.W.2d 236, 243 (Minn. 2011) ("[S]ection 609.3455, subdivision 6, does not require any additional fact-finding before the sentencing court imposes the mandatory 10-year conditional release term for first-degree criminal sexual conduct committed on or after August 1, 2005."); *State v. Jones*, 659 N.W.2d 748, 753 (Minn. 2003) ("The imposition of the 5-year conditional release term under Minn. Stat. § 609.109, subd. 7 is permissible under *Apprendi.* This 5-year conditional release term is authorized on the basis of the jury verdict, and does not require any additional findings of fact to be made by the district court.").

We conclude that (1) Purdom's conviction is supported by sufficient evidence, (2) the district court did not abuse its discretion by summarily denying Purdom's postconviction-relief petition, and (3) Purdom's pro se arguments are unpersuasive.

Affirmed.