STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1529

State of Minnesota,
Respondent,

vs.

Dashondra Webster,
Appellant.

Filed July 22, 2013
Affirmed
Halbrooks, Judge

Scott County District Court
File No. 70-CR-12-4169

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Willis, 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

HALBROOKS, Judge

Appellant challenges his conviction of failure to register as a predatory offender, arguing that (1) the prosecutor committed misconduct by repeatedly asking "were they lying" questions during cross-examination and (2) his ten-year conditional-release period must be reduced to five years or his case remanded for resentencing because he did not validly waive his right to a jury trial on the issue of whether he was assigned a risk-level III under Minn. Stat. § 244.052 (2010) at the time of the violation of the registration statute. Appellant also submitted a pro se supplemental brief. Because any prosecutorial misconduct that occurred did not impair appellant's right to a fair trial and because his sentence is authorized by statute, we affirm.

FACTS

In October 2011, appellant Dashondra Webster rented a room at the Savage Motor Inn (the motel). As a consequence of a prior conviction of third-degree criminal sexual conduct, Webster is required to register his address with local police. The most recent address information that Webster provided to the Savage Police Department listed the "Savage Motel" as his primary address and did not list a secondary address.

In late 2011, Webster worked the second shift at the Gedney factory, commuting to work with his sister. After Webster's sister stopped working for Gedney in December 2011, he began getting rides from C.A., a coworker. They began spending time together socially at her home in Apple Valley and at the motel and developed a sexual relationship.

In February 2012, the Savage Police Department conducted a regularly scheduled registration check on Webster. Detective Sergeant Laura Kvasnicka, the head of the investigative unit, visited the motel on February 15 at approximately 1:00 p.m. and on February 17, around 11:30 a.m. She was unable to make contact with Webster. Officer Andrew Dahmes was assigned to assist Detective Kvasnicka. Officer Dahmes testified that he was shown a picture of Webster for identification purposes, but had not met him personally. Officer Dahmes visited the motel on February 17 at approximately 7:00 p.m. and on February 18 at approximately the same time. In both instances, he knocked on Webster's door and got no response.

During one of these visits, Officer Dahmes spoke to T.A., the motel's on-site manager, who told him that Webster had not been living at the motel for approximately one month. T.A. stated that Webster had offered to pay $100 a month to keep the room as "a physical address, but [would] not actually live there." T.A. sent Officer Dahmes a series of text messages that she had exchanged with Webster about the move. She testified that she knew that the messages were sent between February 18 and February 22 because she had totaled her truck on the 18th. Officer Dahmes forwarded this information to Detective Kvasnicka.

Webster was subsequently arrested and charged with one count of knowingly violating the predatory-offender registration requirement or intentionally providing false information, in violation of Minn. Stat. § 243.166, subd. 5 (2010). The parties agreed that they would not mention Webster's underlying conviction to the jury and stipulated that Webster was required to register his address.

C.A. testified at trial that she asked Webster to move in with her in January and that he moved in on or around February 10. She stated that they moved Webster's personal belongings to her house at that time but that he wanted to keep his address at the motel so that "if there were any cops looking for him, they wouldn't come to [C.A.'s] house." C.A. testified that she learned that Webster had a duty to register after he was arrested.

C.A. also testified that she met T.A. after her relationship with Webster began. C.A. said that she was jealous of T.A. and concerned that T.A. was also involved in a sexual relationship with Webster. T.A. testified that she knew that C.A. was jealous of her, but that she and Webster were not in "any kind of relationship" that should have caused C.A. to be jealous.

T.A. testified that she spoke to Webster in late January or early February and that he told her that he was going to be living in Apple Valley, but wanted to use the motel as an address. According to T.A., Webster began leaving the rent under the mattress in his room in February rather than giving it to her personally. Webster instructed her that if anyone asked where he was, "to tell them that he was at work or that he wasn't [there]," but that he still occupied the room.

T.A. knew that Webster had moved out because she checked the rooms every day and, in February, entered Webster's room more often than usual for repairs. She testified that, although he had previously had "a lot of bags of clothing and video games" in his room, after February the room was empty with the exception of a few shirts, some food, and bedding. T.A. stated that when she checked the room during the week of February

23, the food in the refrigerator had mold on it. She also testified that she knew when residents arrived or left the building because her dogs would bark.

The jury found Webster guilty of failing to register his address. The district court sentenced him to 21 months' incarceration for violation of the registration statute. Because Webster's prior conviction resulted in his classification as a risk-level III sex offender, the district court also ordered a ten-year conditional-release period. This appeal follows.

D E C I S I O N

I.

Webster argues that the prosecutor committed misconduct by repeatedly asking "were they lying" questions during cross-examination. Because Webster did not object to the questions at trial, the plain-error doctrine applies. *See State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under the plain-error doctrine, the defendant bears the burden of showing that there was error and that the error was plain. *Id.* at 302. "An error is plain if it was 'clear' or 'obvious.' Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id.* (citation omitted).

If the defendant demonstrates error that is plain, the state bears the burden of showing that the misconduct did not affect the defendant's substantial rights. *Id.* The state meets this burden by showing that there is "no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted).

If these three prongs are met, we then assess "whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Because the district courts "are in the best position to monitor the conduct of prosecutors and assess the impact, if any, of alleged misconduct," we will reverse only "where the misconduct, viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired." *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007).

Minnesota courts have not adopted a rule that prohibits an attorney from asking "were they lying" questions on cross-examination. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). But the supreme court has cautioned against their use, noting that these questions generally do not have probative value and are considered "improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *Id.* But "were they lying" questions may be probative "in evaluating the credibility of a witness claiming that everyone but the witness lied or, . . . [if] the witness flatly denies the occurrence of events." *Id.* (quotation omitted). It is not enough simply that a witness's testimony contradicts another's testimony, when the first witness does not otherwise "state or insinuate that [the second witness was] deliberately falsifying" their testimony. *State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005).

During his testimony during direct examination, Webster repeatedly accused C.A. and T.A. of lying or being untruthful. He said that T.A.'s testimony was "[n]ot at all" accurate concerning the nature of their relationship and that her testimony about her dogs

barking and finding rotten food in his apartment was "not true." And he implied that T.A. lied about totaling her truck, stating that "she was telling me about a car accident that she supposedly had, but I'm looking at the truck that she says she totaled and I'm like, Man, this don't look totaled to me."

Webster testified that C.A.'s testimony that he moved in with her on February 10 "was a lie," and that "she lied to the Court . . . [when] she said that she went to work" on February 10. He testified that he told her that he was required to register and that he could not move in with her until he got permission from her parents, who owned the house.

On cross-examination, the prosecutor repeatedly asked Webster if the other witnesses were lying. He began cross-examination by asking Webster whether "basically all the other four people that testified here in court today . . . everyone other than you is lying about where you lived. Is that right?" The prosecutor then asked "[t]hat you're not living at the Savage Motor Inn . . . for basically the month of February essentially, give or take a few days, all those four people that were under oath before you, they're all lying?" The prosecutor also questioned Webster about Officer Dahmes's testimony that he had not seen Webster in person prior to trial, stating, "So he's lying about that too?"

The following exchange occurred between the prosecutor and Webster concerning C.A.'s testimony:

> Q: So again [C.A. is] lying when she testified that she didn't know you were required to register with law enforcement?
> A: She's lying. . . . [S]he knew my requirements. . . .
> Q: She's lying about that?
> A: Yeah, she is. We was at—

> Q: I asked you a question.
> A: Go ahead.
> Q: She's lying?
> A: Yes.
> Q: Just like everybody else in this case other than you. Is that right?
> A: They lying about certain things, yes.

Toward the end of his cross-examination, the prosecutor continued:

> Q: So these two women, who don't even like each other, are both lying about the same thing to get you into trouble?
> A: Like I say, you can call it what you want. I can prove—I can prove every aspect of what [C.A.] was saying. She's lying. She's lying. I can prove it.
> Q: You talked about February 10 at length. Who cares. These two women are lying about you living—moving out of the Savage Motor Inn? These two women that don't like each other, the one that doesn't want you talking to her, these two women are lying about you, a person that they like, to get you into trouble?
> A: Yeah, [C.A.] said I moved in her place February 10. [T.A.] said I moved out in January. So which one is it? They're lying. They don't know which—they just saying that because they mad because they got played. They got played. I was a player.

In *State v. Leutschaft*, we determined that a defendant's testimony that a witness's allegations were "absolutely untrue . . . arguably opened the door to the prosecutor's right to confirm what the defense in the case was" because he "appeared to hold in central focus her credibility in the narrow sense of truthfulness versus lying [by] . . . arguably insinuat[ing] that she was fabricating aspects of the incident." 759 N.W.2d 414, 423 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). We concluded that "it is reasonably debatable whether the 'were they lying' questions were error, and, therefore, they were not plain error." *Id.*

Here, Webster arguably opened the door to the questions on cross-examination that referenced T.A. and C.A. His theory of defense depended on the jury believing that he was credible and that the two women were lying about where he lived. As in *Leutschaft*, it is reasonably debatable whether these questions were in error, and therefore, if they constituted misconduct, the error was not plain.

Although some of Webster's testimony on direct examination contradicted the officers' testimony, he did not expressly accuse either officer of lying. He testified that he met Officer Dahmes at the motel once and that they spoke briefly about whether Officer Dahmes was looking for him. While Officer Dahmes testified that he had never met Webster before the February 2012 checks, this discrepancy could be attributable to memory issues or misunderstanding and not the truthfulness of either witness.

Webster also testified that as of February 22, he had moved some items into storage at C.A.'s house but that shoes, paperwork, a cell-phone charger, dirty clothing in a hamper, sheets, dishes, food, and toiletries remained in his motel room. The district court admitted into evidence nine photographs of the motel room taken by Detective Kvasnicka on February 23. But Detective Kvasnicka did not testify as to the contents of the motel room until she was called back to provide rebuttal testimony after Webster testified.

We conclude that the fact that Webster's testimony contradicted portions of the officers' testimony raises a credibility issue but does not justify the use of "were they lying" questions. *See Morton*, 701 N.W.2d at 235. The prosecutor's questions, to the extent that they required Webster to comment on the truthfulness of the officers, were

improper. But viewed in light of the entire record, the misconduct was not "of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired." *See Haynes*, 725 N.W.2d at 529. Although the questions in the context of the officers were improper, Webster's direct testimony included multiple accusations of lying on the part of C.A. and T.A. It was therefore not improper to pose the "were they lying" questions as to C.A. and T.A.

II.

The district court sentenced Webster to 21 months' incarceration followed by a ten-year conditional release. Webster argues that his ten-year conditional-release period must be reduced to five years or that his case must be remanded for resentencing because he did not validly waive his right to a jury trial on the issue of whether he was assigned a risk-level III at the time that he violated the registration requirement. He contends that under *Apprendi v. New Jersey*, whether he was assigned a risk-level III is a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." *See* 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000).

Although Webster raises this issue for the first time on appeal, we exercise our discretion to review it in the interests of justice. *See State v. Allen*, 706 N.W.2d 40, 43 (Minn. 2005) (reviewing an *Apprendi* claim in the interests of justice although it was not raised in district court); *see also State v. Wiskow*, 774 N.W.2d 612, 615 (Minn. App. 2009) (same).

"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*, 530 U.S. at 490, 120 S. Ct. at 2362-63. The statutory maximum "is the maximum sentence a judge 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) (emphasis omitted). The Minnesota Supreme Court has concluded that conditional release "is constitutionally significant for purposes of *Apprendi*." *State v. Jones*, 659 N.W.2d 748, 754 (Minn. 2003).

The state argues that there was no error because Webster's sentence did not exceed the maximum sentence authorized by the jury's verdict.[1] Minn. Stat § 243.166, subd. 5 (2010), provides a maximum executed sentence of five years for violation of the registration statute. Subdivision 5a provides:

> Notwithstanding the statutory maximum sentence otherwise applicable to the offense or any provision of the sentencing guidelines, when a court commits a person to the custody of the commissioner of corrections for violating subdivision 5 and, at the time of the violation, the person was assigned to risk level III under section 244.052, the court shall provide that after the person has completed the sentence imposed, the commissioner shall place the person on conditional release for ten years.

[1] The state argues that Webster's sentence should also be affirmed because Minn. Stat. § 243.166, subd. 6(c) (2010), also authorizes a ten-year conditional-release term. But subdivision 6(c) requires a ten-year period of registration if a person required to register is subsequently incarcerated for a new offense or following revocation of probation, supervised release, or a conditional release period for an offense. This statute does not provide an alternative authorization for a ten-year conditional-release term.

Webster argues that the statutory maximum sentence for purposes of *Apprendi* is five years and that the ten-year conditional-release period required by subdivision 5a constitutes a departure from that maximum. We disagree.

Webster's argument is inconsistent with the supreme court's holding in *State v. Jones*. In *Jones*, the district court imposed a 15-year sentence based on an enhancement statute that authorized "not less than double the presumptive sentence and not more than the statutory maximum" based on findings using a preponderance-of-the-evidence standard. 659 N.W.2d at 751-52. The district court also imposed a ten-year conditional-release term under a provision authorizing conditional release "for the remainder of the statutory maximum period, or for ten years, whichever is longer." *Id.* at 752.

This court concluded that the maximum penalty prescribed by statute was 15 years. *Id.* But the supreme court reversed in part, determining that the maximum penalty was 15 years plus a five-year conditional-release term based on the jury verdict. *Id.* at 752, 754. The supreme court concluded that the five-year conditional release was authorized by Minn. Stat. § 609.109, subd. 7 (2000), which provided: "[n]otwithstanding the statutory maximum sentence otherwise applicable to the offense . . . [i]f the person was convicted for a violation of section . . . 609.344 . . . the person shall be placed on conditional release for five years." *Id.* The supreme court characterized this provision as a "mandatory aspect of the sentence to be imposed by the district court" and therefore "relevant in determining the maximum conditional release term allowed under these circumstances." *Id.* at 753.

Similarly, section 243.166, subdivision 5a, is a mandatory aspect of the sentence imposed by the district court. It applies "[n]otwithstanding the statutory maximum sentence otherwise applicable," rather than extending beyond the statutory maximum sentence. *Id.* Webster's sentence, which includes a 21-month prison sentence and ten-year conditional-release term, does not exceed the statutory maximum sentence allowed by subdivision 5, which authorizes a maximum executed sentence of five years, or subdivision 5a, which authorizes a ten-year conditional-release period. His sentence does not constitute a departure from the sentencing guidelines. Therefore, *Apprendi* is not implicated, and the district court did not err in sentencing Webster as it did.

III.

Webster submitted a pro se supplemental brief in which he reiterated many of the facts in the record and asserted that he was compliant with the registration requirements. Upon careful review, we conclude that Webster's brief contains mere assertions of error, without support from legal argument or authority. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) ("An assignment of error in a brief based on 'mere assertion' and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection."), *aff'd*, 728 N.W.2d 243 (Minn. 2007). These additional arguments are therefore waived.

Affirmed.