STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2011
v	No. 295815 Jackson Circuit Court
KYTE MONTESE PEETE, Defendant-Appellant.	LC No. 09-005195-FH

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of violating the Sex Offenders Registration Act (SORA), MCL 28.725(1) and MCL 28.729(1), by failing to update the sex offender registration within ten days of changing or vacating his residence or domicile. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, a prison term of 46 to 180 months. Defendant appeals as of right. We affirm.

We first address defendant's claim that insufficient evidence was presented at trial to sustain his conviction. Challenges to the sufficiency of evidence are reviewed de novo. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). The Court reviews the evidence "in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). Circumstantial evidence and the reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The SORA requires, in pertinent part, a registered individual to "notify the law enforcement agency . . . where his or her new residence or domicile is located . . . within 10 days after the individual changes or vacates his or her residence." MCL 28.725(1). The SORA defines "residence" in pertinent part, as "that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging." MCL 28.722(g). In addition, the statute contemplates that a person may have more than one residence, and provides that, "that place at which the person resides the greater part of the time shall be his or her official residence for purposes of this act." *Id.*

On October 29, 2008, defendant, a convicted sex offender, was placed on parole and assigned to the supervision of parole officer Cheryl Evans. On December 1, 2008, defendant

registered his address as 412 Page Avenue in Jackson, which was the address of a Department of Corrections home for parolees. On January 13, 2009, defendant met with Evans and subsequently fled her office. An absconder warrant was issued. On January 14, 2009, Evans went to 412 Page Avenue to determine if defendant was still residing at that location. Evans was familiar with the upstairs bedroom to which defendant was assigned, as well as his personal items. Evans observed no sign of defendant or his belongings in the house, and observed that another parolee was moving into defendant's room. At a subsequent visit to 412 Page Avenue on January 27, 2009, Evans observed no sign of defendant or his belongings, and another parolee was in defendant's room. Evans notified Trooper James Wolodnik, the Sex Offender Registry Coordinator for the State Police Post in Jackson. Visits to 412 Page Avenue on February 1, 2009, and February 10, 2009, revealed no evidence that defendant still resided at that location. Defendant was arrested on the absconder warrant on February 25, 2009.

Defendant first argues that the evidence was insufficient to establish that he had either a new residence or domicile during the relevant time period of January 14, 2009, through February 1, 2009. He maintains that he was homeless during this time period and, therefore, did not violate the act by failing to register his residence because he did not have a residence.

Viewing the evidence in the light most favorable to the prosecution, the evidence established that Evans went to defendant's registered residence on four different occasions and saw no sign of defendant or his belongings on any of those visits. Moreover, two new parolees had moved into defendant's assigned bedroom during the period at issue. Although defendant introduced a document that he signed under penalty of perjury indicating that 412 Page Avenue was still his "address," a reasonable juror could find that 412 Page Avenue was no longer defendant's *residence* and that he failed to notify local law enforcement of his new residence or domicile within ten days of vacating 412 Page Avenue.

Although SORA's reporting requirements do not apply to the homeless, *People v Dowdy (On Remand)*, 287 Mich App 278, 282; 787 NW2d 131 (2010), lv granted 486 Mich 935 (2010), defendant never argued at trial that he was homeless. In fact, he maintained that he still lived at 412 Page Avenue during the relevant period. Moreover, while defendant seems to argue that the prosecution must establish that he had a *new* residence or domicile that he could have reported once he left the previous residence, the plain language of the statute does not require such proof. It only requires proof that defendant did not notify local law enforcement of his new residence.

Defendant also argues that the prosecutor committed misconduct in eliciting testimony from Wolodkin regarding his erroneous interpretation of SORA, and then using this testimony to misstate the law in closing and rebuttal arguments. We review unpreserved allegations of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

The prosecutor and Wolodkin misstated law with regard to SORA's reporting requirements with regard to homeless people. Even assuming that the prosecutor committed misconduct by eliciting the erroneous testimony and relying on this testimony in closing and rebuttal arguments, defendant's substantial rights were not affected by the misconduct. Defendant never asserted at trial that he was homeless or did not have a regular place to sleep,

and, in fact, he maintained that he was still living at 412 Page Avenue during the period at issue. Moreover, "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial. However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (citations omitted). The court instructed the jurors on the charged crime, and defendant does not argue these instructions were improper. Any prejudice resulting from the arguments was cured. *Id*.

Defendant also claims that he was denied the effective assistance of counsel. He asserts that his defense was to raise a reasonable doubt as to whether Evans' visits to the home proved beyond a reasonable doubt that defendant was living elsewhere. He contends that defense counsel was ineffective by failing to object when the prosecutor argued that "defendant had to register where he was habitually sleeping on a daily basis even if he was not habitually sleeping anywhere."

To establish ineffective assistance of counsel, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's error there is a reasonable probability that the results of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). A defendant "must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Where no *Ginther*[1] hearing was held and no factual findings were made, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Even assuming that counsel was ineffective by failing to object to the prosecutor's comments, defendant has failed to meet his burden to establish that there is a reasonable probability that the result of the proceeding would have been different if counsel had done so. *Toma*, 462 Mich at 302-303. Defendant does not explain how the prosecutor's improper comments undercut his defense, and such comments would only prejudice defendant if he were asserting that he was actually sleeping elsewhere during the period in question. Defendant has not shown that the proceedings were fundamentally unfair or how the result would be different in light of the evidence against him.

Defendant also argues that defense counsel was ineffective failing to impeach Evans with evidence of prior inconsistent statements she made regarding defendant's room on January 14, 2009. At the preliminary examination, Evans testified that on January 14, defendant's "property had been moved out of his room and another parolee had moved in." At trial, Evans testified, "His stuff was gone and another parolee was going to – was moving up there." Defendant has failed to show that he would be entitled to a new trial on this matter because the inconsistency is too minor to have affected the jury's verdict, and he has not shown how the result of his trial

---

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

would have been different if counsel had attempted to impeach Evans. Whether the new parolee had already moved in or was moving in does not affect Evans' testimony showing that defendant and his belongings were gone. Defense counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant also refers to a hearsay statement allegedly made by Evans that Wolodnik memorialized in an Incident Report, but defendant acknowledges that because the report was not in the trial record, this Court cannot consider it on appeal. Defendant acknowledges that he was only submitting the Incident Report as supportive of his request for a remand.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro