STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2006

State of Minnesota,
Respondent,

vs.

James Robert Bazoff,
Appellant.

Filed December 16, 2019
Affirmed in part, reversed in part, and remanded.
Cochran, Judge

Traverse County District Court
File No. 78-CR-16-175

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Matthew P. Franzese, Traverse County Attorney, Wheaton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and Smith, John, 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

COCHRAN, Judge

Appellant James Robert Bazoff was convicted of two counts of failure to register as a predatory offender under Minn. Stat. § 243.166 (2016) following a jury trial—one count of failure to timely register a new primary address (count one) and one count of failure to timely register a new secondary address (count two). Bazoff appeals, arguing that the evidence is not sufficient to support either conviction and that the verdicts are legally inconsistent. Bazoff also raises additional arguments in his pro se supplemental brief.

We conclude that the evidence is sufficient to support the conviction of count one but not of count two. Because we reverse the conviction of count two, we do not reach the issue of whether the verdicts are legally inconsistent. We also conclude that Bazoff's pro se arguments either are not properly raised on appeal or lack merit. Therefore, we affirm in part, reverse in part, and remand to correct the warrant of commitment.

FACTS

Bazoff is required to register as a predatory offender due to a prior offense. In compliance with the registration requirements, Bazoff submitted an address verification form with the Bureau of Criminal Apprehension (BCA) in September 2015. On the form, Bazoff listed his sister's house as his primary address and his place of employment. Bazoff also indicated two secondary addresses: his mother's house in Mounds View and an address in North Dakota. The form also included a 26-point duty-to-register section. Bazoff initialed all 26 points, acknowledging that he understood he must register any change to his primary address at least five days in advance of moving and any change to

his secondary addresses within five days of any change taking effect, among other requirements.

Later that month, Bazoff submitted a predatory-offender change-of-information form with the BCA. On the form, Bazoff listed a new primary address of 305 12th Street North, Wheaton, Minnesota (the apartment). He provided a start date of October 4 for the new primary address. Bazoff indicated that his secondary addresses and place of employment were unchanged.

On August 18, 2016, a little less than a year later, Bazoff completed a new change-of-information form with local law enforcement. Bazoff registered his sister's house (the house) as a new primary address. Bazoff also listed the apartment as his secondary address with an effective date of August 18.

After Bazoff submitted the form, the state charged him with two counts of failing to register as a predatory offender in violation of Minn. Stat. § 243.166, subd. 5. Count one alleged that when Bazoff changed his primary address to the house, he violated the registration requirements by failing to register a primary address five days in advance of obtaining a new primary address. Count two alleged that Bazoff violated the registration requirements when he obtained a new secondary address without first notifying the BCA or local law enforcement.

Before trial, the parties stipulated that Bazoff was required to register as a predatory offender between August 1 and August 18 of 2016. The district court informed the jury about the stipulation and instructed that the fact that Bazoff was required to register was proven.

During trial, the state presented the testimony of several witnesses, including a Wheaton police officer, the Wheaton police chief, Bazoff's neighbor at the apartment, and a former employee of the Traverse County Sheriff's Office. Bazoff presented the testimony of his sister and testified on his own behalf.

The trial testimony established that on August 5, 2016, Bazoff told a police officer that he was moving into the house the next day. On August 6, the officer went to the house around 9:00 p.m. and found Bazoff there. The officer testified that it appeared that Bazoff was living at the house.

Two days later, on August 8, 2016, Bazoff called the police about a suspected break-in at the apartment. The Wheaton police chief responded to the call. Bazoff told the chief he was in the process of moving. The chief testified that he saw a large mess on the floor, but no bed or mattress in the apartment. Bazoff introduced pictures that conflicted with the chief's testimony, purportedly showing a bed and a tanning bed in the apartment after the police chief responded to the break-in call. On rebuttal, the chief maintained that he did not see a bed or tanning bed in the apartment.

Over the next two weeks, the officer and police chief occasionally watched the house. The officer and police chief both noticed cars in the driveway, and the officer observed lights on inside. Bazoff's neighbor at the apartment testified that he saw someone carrying two or three boxes of household items out of the apartment in early August and saw Bazoff on that same day. The neighbor did not see Bazoff after this encounter.

On August 18, the police chief encountered Bazoff at the house. The chief told Bazoff that he was required to register at least five days prior to moving. Bazoff became

angry and went inside the house. Later that day, Bazoff went to the local law enforcement office and filed the change-of-information form listing the house as his new primary address and his apartment as a new secondary address effective August 18. At trial, Bazoff testified that he knew he was required to register a new primary address at least five days in advance of living at a new address.

The jury found Bazoff guilty of both counts. The court accepted the verdict and adjudicated appellant guilty on count one. The court left count two unadjudicated. The warrant of commitment, however, shows convictions for both counts.

This appeal follows.

D E C I S I O N

Bazoff challenges his convictions on several grounds. First, he argues that the evidence is insufficient to support the convictions. Next, he maintains that the jury's verdicts are inconsistent, requiring a new trial. Finally, Bazoff makes a number of arguments in a pro se supplemental brief. We address each issue in turn.

I. Sufficiency of the Evidence

Bazoff maintains that the evidence introduced at trial is insufficient to prove beyond a reasonable doubt that he is guilty of either offense.[1] The state contends that the evidence is sufficient to support each conviction. We consider each charge separately.

[1] The district court appears to have intended to adjudicate a conviction on only one count. While the district court's orally pronounced sentence prevails over an inconsistent record due to clerical error, appellate courts look to the official judgment of conviction in the district court file "as conclusive evidence of whether an offense has been formally adjudicated." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted). Because the parties acknowledge that Bazoff was convicted for multiple offenses in their

A. The evidence is sufficient to support Bazoff's conviction of failure to register a new primary address under Minn. Stat. § 243.166.

As a preliminary matter, the parties disagree over whether the traditional direct-evidence standard or the heightened circumstantial-evidence standard applies to this court's review of the sufficiency of the evidence for count one. The state maintains that count one is sufficiently supported by direct evidence. Bazoff argues that the circumstantial-evidence standard applies because the state relied solely on circumstantial evidence.

The circumstantial-evidence standard is appropriate when proof of the offense, or a single element of the offense, is based solely on circumstantial evidence. *State v. Fairbanks*, 842 N.W.2d 297, 307 (Minn. 2014). Circumstantial evidence is "evidence from which the [fact-finder] can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotations omitted). Direct evidence, on the other hand, is "based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.* (quotations omitted).

To determine whether the direct-evidence standard or the circumstantial-evidence standard applies to our review of count one, we first examine the elements of the offense. To convict a predatory offender of failing to register, the state must prove (1) that the defendant is required to register as a predatory offender; (2) that the defendant knowingly violated a registration requirement or intentionally provided false information to a law

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appellate briefs, we review the sufficiency of the evidence supporting both convictions, consistent with the warrant of commitment.

enforcement authority; (3) venue; and (4) that the registration time period had not elapsed. Minn. Stat. § 243.166, subd. 5(a). The only element in dispute with regard to count one is the second element—whether Bazoff knowingly violated the registration requirement set forth in Minn. Stat. § 243.166, subd. 3(b), that he register a new primary address at least five days before starting to live at the new address.

In this case, either standard could conceivably apply because the second element was proved by both direct and circumstantial evidence. But, when a disputed element is sufficiently proven by direct evidence alone, "it is the traditional standard, rather than the circumstantial-evidence standard, that governs." *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016) (citations omitted). Witness testimony is direct evidence "when it reflects a witness's personal observations and allows the jury to find the defendant guilty without having to draw any inferences." *Id.* at 40. We conclude that the disputed element in this case is proven through direct-evidence alone—specifically Bazoff's trial testimony and Bazoff's signed duty-to-register form. Accordingly, the traditional standard applies.

Under the traditional direct-evidence standard, we limit our review to "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that the jury believed the state's witnesses and disbelieved evidence to the contrary. *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011).

Under Minn. Stat. § 243.166, subd. 3(a), an offender is required to register a new primary address at least five days before the person starts living at the new primary address.

To convict Bazoff of violating this registration requirement, the state was required to show beyond a reasonable doubt both that Bazoff failed to register the house as his new primary address at least five days in advance of moving and that Bazoff knew that he violated the requirement when the violation occurred. *State v. Mikulak*, 903 N.W.2d 600, 603-04 (Minn. 2017).

Bazoff raises two separate arguments with regard to whether the evidence is sufficient to show that he knowingly violated this registration requirement. First he argues that the evidence is insufficient to prove that he had a new primary address before he registered the new primary address on August 18. Viewing the evidence in a light most favorable to the conviction, we conclude that the evidence is sufficient in this regard. Bazoff submitted a change-of-information form on August 18. The form indicated that the apartment—his previous primary address—became a secondary address on August 18. The form listed the house as Bazoff's new primary address. We conclude that by indicating that the apartment became his secondary address on August 18, the house necessarily became his primary address on that same date. And, the form was signed by Bazoff on that date, August 18. Accordingly, because Bazoff did not register the house at least five days in advance of when he indicated it became his new primary address, he failed to register in accordance with Minn. Stat. § 243.166, subd. 3(a).

Next, Bazoff argues that the evidence is not sufficient to prove that he knowingly violated this registration requirement. But Bazoff acknowledged on the 2015 duty-to-register form that he was required to notify law enforcement five days before

moving. And at trial, Bazoff confirmed that he knew he was required to register a new primary address in advance of moving.

Viewing the evidence in the light most favorable to the verdict, we conclude there is sufficient evidence to support Bazoff's conviction because a fact-finder could reasonably conclude that he was guilty, beyond a reasonable doubt, of knowingly failing to timely register a new primary address as required by Minn. Stat. § 243.166, subd. 3(b). We affirm the district court's conviction on count one.

B. The evidence is insufficient to support Bazoff's conviction of failure to register a secondary address under Minn. Stat. § 243.166.

In addition to failing to register the house as his new primary address at least five days in advance of living there, Bazoff was also convicted of failing to register the house as a secondary residence prior to making the house his primary residence. The parties agree that the evidence supporting the conviction for count two is purely circumstantial. Accordingly, we review the sufficiency of evidence under the circumstantial-evidence standard.

A conviction based on circumstantial evidence warrants heightened scrutiny. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). When a conviction is based on circumstantial evidence, this court conducts a two-step analysis. *Harris*, 895 N.W.2d at 601. First, we identify the circumstances proved at trial, disregarding evidence that is not consistent with the jury's verdict. *Id.* Second, we consider the inferences that can be drawn from the circumstances proved. *Id.* Appellate courts give no deference to the fact-finder's choice among reasonable inferences at this second step. *Id.* The evidence is sufficient if

the circumstances proved, viewed as a whole, are "consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.*

To convict Bazoff of count two, the state was required to prove that Bazoff had a new secondary address and that he knowingly failed to register the address within five days of the address becoming effective. Minn. Stat. § 243.166, subds. 4a, 5(a). A secondary address is one where a person "regularly or occasionally stays overnight" when not at the person's primary address. *Id.*, subd. 1a(i).

The circumstances proved in this case are as follows: Bazoff submitted a predatory offender change-of-information form in September 2015. On that form, Bazoff registered the apartment as his primary address, and two secondary addresses, including his mother's Mounds View residence. Bazoff listed the house owned by his sister as his place of employment. On August 5, 2016, an officer met Bazoff at the apartment. Bazoff told the officer he would be moving the next day to the house. On August 6, 2016, Bazoff was at the house at 9:00 p.m. Two days later, Bazoff called the police to the apartment about a suspected break-in. The police chief searched the apartment for an intruder. While inspecting the apartment, the chief saw items covering the floor. The chief did not see a bed or mattress. Bazoff told the chief he was in the process of moving. In early August, Bazoff's neighbor at the apartment saw someone carrying out small boxes. Over the next two weeks the officer and police chief noticed lights on and cars in the driveway at the house. On August 18, Bazoff filed another change-of-information form. Bazoff listed the

apartment as a secondary address effective August 18, and the house as his new primary address.

Having determined the circumstances proved, we next consider whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). We conclude that the circumstances proved are consistent with a reasonable inference of guilt—that Bazoff was occasionally staying overnight at the house as early as August 6, when he told police that he was moving, and while his primary address was still his apartment, but he failed to register the house as a secondary address. We also conclude, however, that the circumstances proved are consistent with rational alternative inferences other than guilt—that Bazoff was merely visiting the house prior to August 18 when he registered the house as his primary address; that Bazoff was working at the house but returning to his apartment at night; or that Bazoff was spending nights at one of the other secondary addresses that he listed on the September 2015 change-of-information form, including his mother's house. The state presented no evidence that precludes these alternative inferences. *See State v. Hughes*, 749 N.W.2d 307, 313 (Minn. 2008) (concluding that the state has the burden of removing all reasonable doubt).

Because the circumstances proved are consistent with rational alternative hypotheses that are inconsistent with guilt, we conclude that the evidence is insufficient to support the conviction of failure to register a new secondary address in accordance with Minn. Stat. § 243.166, subd. 4a(a)(2). Accordingly, we reverse Bazoff's conviction on this

count. Because we reverse on count two, we do not reach the legally inconsistent verdict issue raised by Bazoff.

II. Pro se Arguments

In his pro se supplemental brief, Bazoff makes additional arguments including an ineffective-assistance-of-counsel claim and a claim of prosecutorial misconduct. The brief is difficult to follow. We address Bazoff's arguments to the extent we understand them.

A. Ineffective Assistance of Counsel

Bazoff argues his attorneys provided ineffective assistance. To prevail on a claim of ineffective assistance of counsel, Bazoff must prove (1) that his counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). A person seeking to establish a claim of ineffective assistance of counsel bears the burden of proof. *State* v. *Jackson*, 726 N.W.2d 454, 463 (Minn. 2007). To satisfy that burden, an appellant "must do more than offer conclusory, argumentative assertions, without factual support." *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007). An appellate court need not analyze both prongs of the *Strickland* test if an analysis of one prong is determinative. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009).

Bazoff asserts that his trial counsel was ineffective in four ways: (1) failure to communicate, resulting in improper handling of evidence; (2) failure to follow process;

(3) failure to present evidence; and (4) failure to adequately prepare a defense. Bazoff does not rely on case law to support his claims.

"Generally, an [ineffective-assistance-of-counsel] claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). "A postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *Id.* (quotation omitted). Without those additional facts, "any conclusions reached by [an appellate] court as to whether [an] attorney's assistance was deficient would be pure speculation . . . ." *Id*. But an appellate court may consider an ineffective-assistance-of-counsel claim if the trial record is sufficiently developed. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004).

Here, given the record developed at trial, we are able to review only one of Bazoff's ineffectiveness claims on direct appeal: his claim that he received ineffective assistance of counsel due to a lack of communication between his attorneys when transferring his file. During the course of the proceedings, Bazoff was represented by three different public defenders. He argues that his attorneys were ineffective because one of the attorneys failed to give the attorney who ultimately represented him at trial several photographs that Bazoff believes are exculpatory. Bazoff himself provided the photographs to his trial attorney shortly before trial. Though the photographs were introduced at trial, Bazoff argues that if his trial attorney had received them earlier, his case may have settled and not gone to trial.

This argument lacks merit because Bazoff cannot establish the second requirement of the *Strickland* test: "that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. At trial, the jury reviewed the photos, Bazoff's trial attorney and the prosecutor addressed them, and Bazoff described them to the jury. Even assuming the representation was deficient,[2] we are not convinced that the result of the proceedings would have been different if the trial attorney had received the photographs earlier because the jury did not find the evidence sufficient to acquit Bazoff.

With respect to the remainder of Bazoff's ineffective-assistance-of-counsel claims, the trial record is not adequately developed for our review. Bazoff's additional claims may be brought in a timely subsequent petition for postconviction relief.

B. Prosecutorial Misconduct

Bazoff argues that the prosecutor committed misconduct by misstating the law, breaking stipulations, and disparaging the defense during closing argument.

A prosecutor engages in prosecutorial misconduct when the prosecutor "violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016) (quotations omitted). A prosecutor may "present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence," but may not

[2] While the failure to transfer and produce the photographs arguably rises to inadequate representation, we do not address the issue because Bazoff failed to prove that the results of the proceedings may have been different absent the alleged error. *Fields v. State*, 733 N.W.2d 465, 648 (Minn. 2007) (requiring both prongs to be met for a claim to be successful).

speculate. *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009); *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009).

Because Bazoff did not object at trial to the acts he now claims are misconduct, we review Bazoff's claims under a modified plain-error standard. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). Under this standard, Bazoff bears the initial burden of establishing error that is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A plain error is one that is "clear or obvious." *Id.* (quotations omitted). If Bazoff shows that the misconduct constitutes plain error, the burden shifts to the state to prove that any misconduct did not prejudice the defendant's substantial rights. *Id.* To meet this burden, the state must show that there is no reasonable likelihood that the absence of the misconduct would have had a significant impact on the jury's verdict. *Id.*

First, Bazoff argues that the prosecutor misstated the law by asserting that the law requires an offender to register a new primary address before an offender begins to move, not before the offender actually moves. But Bazoff misquotes the prosecutor. The prosecutor accurately stated that an offender must register a new primary address "prior to moving" to a new address. *See* Minn. Stat. § 243.166, subd. 3(b) (requiring written notice of a new primary address "at least five days before the person starts living at a new primary address"). Because the prosecutor did not misstate the law, the claim is without merit.

Second, Bazoff argues the prosecutor violated the stipulation not to discuss his prior sex offense which prejudiced him at trial. During the prosecution's examination of one of the state's witnesses, the prosecutor said, "based on your reading of [Bazoff's]—of the criminal history—or not the criminal history but the sex off—the predatory offender

registration form, had [Bazoff] moved previously?" The uttering was during the middle of questioning during the first day of the trial. And the statement was buried among other witnesses and evidence. We are not persuaded that this stammer in questioning a witness gives rise to an error that contravenes case law or standards of conduct. *Ramey*, 721 N.W.2d at 302.

Lastly, Bazoff argues that the prosecutor made statements during closing argument that improperly belittled Bazoff and disparaged the defense. When assessing alleged prosecutorial misconduct during a closing argument, we "consider the closing argument as a whole rather than focus on particular phrases or remarks." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted). "The state has a right to vigorously argue its case" and it may argue that the "evidence does not support particular defenses." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). But the state may not "belittle the defense, either in the abstract or by suggesting that the defendant raised the defense because it was the only defense that may be successful." *Id.* at 682-83. A prosecutor engages in misconduct if he expresses his personal opinion on the defendant's credibility as a witness. *State v. Ture*, 353 N.W.2d 502, 516 (Minn.1984).

The prosecutor made remarks in his closing argument about Bazoff's "bias and motivation." The prosecutor suggested that law enforcement officials "have nothing to gain by their testimony," whereas Bazoff has "bias and motivation" because he has "much more at stake." The prosecutor opined that the defense's theory is a "complete fabrication that's designed to get [Bazoff] out of the trouble that he's in." The statements made up approximately a dozen lines out of over twenty pages in the closing argument.

The comments by the prosecutor do seem to belittle Bazoff's defense and may express an opinion on the credibility of the defendant. But, the statements directed at Bazoff were surrounded by arguments about evidence, including testimony from the witnesses and Bazoff himself. When viewed in the context of the closing argument as a whole, the comments do not amount to misconduct. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (concluding that comments by the prosecutor that seemed to disparage the defense and expressed an opinion on the credibility of the defendant were not misconduct because they were a small portion of the argument).

In sum, when we review claims of prosecutorial misconduct, we will reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial. *Johnson*, 616 N.W.2d at 727-28. Based on the record, we cannot conclude that these statements impaired Bazoff's right to a fair trial. Accordingly, Bazoff's prosecutorial-misconduct claims fail.

Affirmed in part, reversed in part, and remanded.