STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0097

State of Minnesota,
Respondent,

vs.

Matthew James Preston,
Appellant.

Filed December 6, 2021
Affirmed
Johnson, Judge

Carver County District Court
File No. 10-CR-20-40

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

Mark Metz, Carver County Attorney, Kelly J. Small, Assistant County Attorney, Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Carver County jury found Matthew James Preston guilty of failure to register as a predatory offender. We conclude that Preston's constitutional right to a speedy trial was

not violated. We also conclude that Preston's *pro se* arguments do not require reversal or a new trial. Therefore, we affirm.

FACTS

As a consequence of a prior conviction, Preston is required to register as a predatory offender until at least November 2022. *See* Minn. Stat. § 243.166, subd. 1b(a)(2)(ii) (2020). Between 2012 and 2018, Preston fulfilled his registration requirement approximately 25 times.

On August 12, 2019, Preston was released from the Carver County jail. On that date, he signed a change-of-information form stating that his new primary address was a particular residence in the city of Carver. The form also was signed by a representative of the Carver County Sheriff's Department. A friend of Preston, whose residence was the new primary address on the change-of-information form, picked him up at the jail. She later testified at trial that she drove him to her home, that they visited there for a couple of hours, and that she then drove him to Minneapolis and dropped him off near Lake Calhoun (now known as Bde Maka Ska). She testified that Preston did not ask her for permission to reside at her home, that Preston never lived in her home, and that he never spent a night at her home. She testified that while Preston was at her home, she saw his registration papers lying on a counter, noticed that he had used her address as his new primary address, and confronted him about it. She testified that he responded by stating that he could not use his father's address and had no other address to provide.

On August 22, 2019, at 11:16 p.m., Preston sent a text message to his probation officer, a Carver County corrections officer, stating, "Just letting you know I'm going to

be moving to St. Paul this weekend sometime. [Redacted] is the address." The probation officer responded the following morning with a text message that stated, in part, "you need to register that address today." Preston did not reply.

On August 29, 2019, Preston met with his probation officer at her office in Carver County. The probation officer informed Preston that the records of the state bureau of criminal apprehension (BCA) showed a primary address for him that did not match the St. Paul address that he had texted to her the prior week. Preston responded that he "had gone to St. Paul and updated it." The probation officer asked him for a copy of the change-of-information form, and Preston said that he "did not receive a copy of it."

On October 9, 2019, the probation officer became aware that BCA records still showed that Preston's primary address was that of his friend's residence in the city of Carver. The probation officer asked a detective in the Carver County Sheriff's Department to look into the matter. The detective contacted Preston's friend, who informed the detective that Preston never resided at her home. The detective also contacted an officer of the St. Paul Police Department, who stated that the department had not received a change-of-information form from Preston. The detective also requested the BCA's file on Preston, reviewed it, and did not find a change-of-information form signed by Preston that was more recent than the August 12, 2019 form. On October 16, 2019, the detective telephoned Preston, who stated that he was living in St. Paul, that he had completed a change-of-information form, and that he had told the St. Paul Police Department in person of his change of address. The telephone call was recorded and was introduced into evidence at trial and played for the jury.

On January 14, 2020, the state charged Preston with one count of failure to register as a predatory offender, in violation of Minn. Stat. § 243.166, subd. 5(a)(1).

On March 27, 2020, while he was detained in the Carver County jail, Preston called his probation officer by telephone. During that conversation, Preston stated for the first time that he had submitted a change-of-information form to the St. Paul Police Department *by mail*, not *in person*, as he earlier had said. The telephone call was recorded and was introduced into evidence at trial and played for the jury.

At a March 20, 2020 hearing before the district court, Preston demanded a speedy trial. The district court scheduled trial for May 12, 2020. But the trial did not go forward on that date because the chief justice had suspended jury trials due to the COVID-19 pandemic. *See Continuing Operations of the Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency*, No. ADM20-8001, at 3 (Mar. 20, 2020); *Order Governing the Continuing Operations of the Minnesota Judicial Branch Under Emergency Executive Order No. 20-48*, No. ADM20-8001, at 2 (May 1, 2020). Accordingly, the district court found on May 12, 2020, that there was good cause to continue the trial due to exceptional circumstances. The district court rescheduled Preston's trial for July 14, 2020. On that date, the district court continued the trial again, explaining that it was the first day on which jury trials were allowed to occur but that it was necessary for the court to try another case with a higher priority. The district court rescheduled the trial for August 4, 2020. Preston's jury trial went forward on that date. It was the second jury trial in Carver County after the suspension of jury trials in March 2020.

At trial, the state called five witnesses and introduced 11 exhibits. Preston testified in his own defense but did not call any other witnesses. The jury found Preston guilty. In October 2020, the district court imposed an executed sentence of 36 months of imprisonment. Preston appeals.

DECISION

I. Right to Speedy Trial

With the assistance of an assistant state public defender, Preston argues that he was denied his constitutional right to a speedy trial because his trial did not commence until 137 days after he first demanded a speedy trial.

The United States Constitution provides that, in all criminal prosecutions, "the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. In determining whether a delay has deprived a defendant of the right to a speedy trial, Minnesota courts generally apply the four-factor balancing test outlined in *Barker v. Wingo*, 407 U.S. 514 (1972). *See State v. Mikell*, 960 N.W.2d 230, 245 (Minn. 2021); *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015); *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). The four factors are (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the delay prejudiced the defendant. *Barker*, 407 U.S. at 530-33. The four factors must be considered together in light of the relevant circumstances, and no one factor is dispositive or necessary to a finding that a defendant has been deprived of the right to a speedy trial. *Id.* at 533.

A. Length of Delay

The first *Barker* factor, the length of the delay "serves dual purposes." *Mikell*, 960 N.W.2d at 245. It is a "'triggering mechanism' which determines whether further review is necessary." *Windish*, 590 N.W.2d at 315 (quoting *Barker*, 407 U.S. at 530). It also is a factor in determining whether a speedy-trial violation has occurred. *Mikell*, 960 N.W.2d at 245. In Minnesota, a defendant must be tried "as soon as possible after" the entry of a not-guilty plea. Minn. R. Crim. P. 11.09(b). If a defendant demands a speedy trial, "the trial must start within 60 days unless the court finds good cause for a later trial date." *Id.* A delay beyond this 60-day period is presumptively prejudicial. *Mikell*, 960 N.W.2d at 246; *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989).

In this case, Preston asserts in his appellate brief that he first demanded a speedy trial on March 20, 2020. His trial began 137 days later on August 4, 2020. Consequently, his trial was delayed for 77 days beyond the 60-day period imposed by rule 11.09(b). A delay of 77 days beyond the 60-day period is "presumptively prejudicial," which triggers further inquiry into the remaining factors, and is a moderately long delay. *See Mikell*, 960 N.W.2d at 246. Thus, the first factor weighs in favor of a finding of a speedy-trial violation.

B. Reason for Delay

The second *Barker* factor, the reason for the delay, requires consideration of whether one of the parties is responsible for the delay. *Id.* at 250-51. If a defendant's actions have caused the delay, there is no speedy-trial violation. *Id.* at 251; *State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005). If the state has caused the delay, there may

be a speedy-trial violation, depending on the particular reasons for the delay. *Mikell*, 960 N.W.2d at 251.

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.

Id. (quoting *Barker*, 407 U.S. at 531). "And if there is good cause for the delay . . . the delay will not be held against the State." *Id.*

In this case, Preston asserts that the delay in the commencement of his trial "was exclusively due to the COVID-19 pandemic." More specifically, he asserts that the delay was caused by "the government's decision to shut down the courts and temporarily cease jury trials across the state because of the COVID-19 pandemic." The state agrees that the delay was caused by the pandemic but contends that such a reason does not weigh in favor of a speedy-trial violation.

This court recently rejected an argument that is very similar to Preston's argument. In *State v. Jackson*, we reasoned that "the circumstances of the pandemic in July 2020 rendered a trial unsafe and did not reflect a deliberate attempt by the state to hamper the defense" and that a delay after the defendant's speedy-trial demand "was unavoidable" due to concerns about public health and safety. ____ N.W.2d ____, ____, 2021 WL 5173146, at *3 (Minn. App. Nov. 8, 2021). We noted that the district court in *Jackson* had found good cause to delay the trial. *Id.* Accordingly, we determined that the delay was "not attributable to either party." *Id.* Because the relevant circumstances of this case are quite

similar to those of *Jackson*, we determine that the delay in this case is attributable to neither party. Thus, the second factor is neutral.

C. Assertion of Right

The third *Barker* factor requires consideration of both "whether and how" a defendant asserted his right to a speedy trial. *Mikell*, 960 N.W.2d at 252. The inquiry is "necessarily contextual" and includes a consideration of "the strength of an accused's efforts to secure a speedy trial." *Id.*

In *Jackson*, the defendant requested a speedy trial twice during the pandemic, and his trial was continued because of the statewide suspension of jury trials. ____ N.W.2d at ____, 2021 WL 5173146 at *1, 4. But Jackson did not object to the state's request that the district court find good cause for a delay. *Id.* at *4. We stated that "the context of the demand illustrates that all parties were aware that a safe trial could not occur within the 60-day period." *Id.* We determined that the circumstances surrounding Jackson's speedy-trial demand "weaken the strength of Jackson's demand for a speedy trial in our overall balancing." *Id.*

In this case, Preston demanded a speedy trial on March 20, 2020. But at an April 22, 2020 hearing, he indicated that he may be interested in waiving his speedy-trial demand in exchange for placement in a treatment program. On May 12, 2020, Preston re-asserted his right to a speedy trial but did not seek to be released from pre-trial detention. Preston's attorney expressly stated that he was "not going to argue for his conditions of release" because Preston was being held on alleged probation violations, which the State could seek to prove. On July 14, 2020, Preston's attorney again asserted a demand for a speedy trial

and again refrained from seeking Preston's release because of the pending probation-violation allegations. He requested simply that the trial be "expedited as much as possible, given the COVID situation."

Preston's assertions of his right to a speedy trial were no more vigorous than in *Jackson*. His attorney repeatedly asserted the right but, in context, his demand had limited strength. Thus, the third factor weighs only slightly in Preston's favor.

D. Prejudice

The fourth *Barker* factor requires consideration of whether Preston was prejudiced by the delay. *See id.* The caselaw recognizes three types of interests that may be prejudiced: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Windish*, 590 N.W.2d at 318. The third type of prejudice is the most serious "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Doggett v. United States*, 505 U.S. 647, 654 (1992) (quotation omitted).

Preston contends that he experienced the first two types of prejudice and that his situation was exacerbated by the pandemic. But the first and second interests are "not implicated" if a defendant is "already in custody for another offense." *Mikell*, 960 N.W.2d at 253 (quotation omitted). As stated above, while Preston was awaiting trial in this case, he also was in custody for alleged probation violations. Consequently, he cannot show that he suffered either the first or second types of prejudice. He does not contend that he suffered the third type of prejudice. Thus, the fourth factor weighs in favor of a finding that Preston's right to a speedy trial was not violated.

E. Summary

To resolve Preston's argument, we must perform a "delicate and sensitive balancing" to determine whether the state brought him to trial "quickly enough so as not to endanger the values that the speedy trial right protects." *Id.* at 255. The delay in Preston's trial was moderately long. Preston asserted his right to a speedy trial in the district court but not with great strength. Because of the chief justice's orders suspending jury trials due to the pandemic, the state and the district court could not have tried Preston within the 60-day period, for reasons that are attributable to neither party. Indeed, the district court found that there was good cause for a delay beyond the 60-day period, and Preston did not object to that finding in the district court, and he does not contend on appeal that the good-cause finding was erroneous. Importantly, Preston has not identified any valid form of prejudice arising from the 77-day delay beyond the initial 60-day period. Therefore, on balance, we conclude that Preston's constitutional right to a speedy trial was not violated.

II. *Pro Se* Arguments

Preston has filed a *pro se* supplemental brief in which he presents five arguments (which we have combined into four), each of which consists of only one paragraph, without any citations to legal authorities. *See* Minn. R. Crim. P. 28.02, subd. 5(13), (17). We have thoroughly considered his arguments and have determined that he is not entitled to relief on any of the grounds asserted, for the reasons that are summarized below.

A. Sufficiency of the Evidence

Preston argues, in essence, that the evidence is insufficient to support the jury's verdict for two reasons: first, because he did not violate his predatory-offender registration

requirement and, second, because he did not do so knowingly. The state did not respond to Preston's arguments concerning the sufficiency of the evidence.

Preston was convicted of violating a statute that makes it a crime for a person who is required to register to "fail[] to fulfill a requirement that violates any provision of this section." Minn. Stat. § 243.166, subd. 5(a)(1). The jury instructions reflect the language of subdivision 3(b) of section 243.166, which provides that, "at least five days before the person starts living at a new primary address," a person who is required to register "shall give written notice of [his] new primary address to the assigned corrections agent or to the law enforcement authority with which the person currently is registered." Minn. Stat. § 243.166, subd. 3(b). Importantly, the same subdivision also provides, "The written notice required by this paragraph must be provided in person." *Id.* Accordingly, Preston was required to give notice both in writing and in person. *See id.*

For the first part of his argument, Preston contends that he provided his St. Paul address to his probation officer by text and in person and that he also filled out a change-of-information form and "sent" it to the BCA. Preston's August 22, 2019 text message does not satisfy the statutory requirement because it was not given in person. Preston's August 29, 2019 conversation with his probation officer in her office does not satisfy the statutory requirement because it was not given in writing. The probation officer testified that she did not help Preston provide written notice to her when he was in her office because Preston told her that he had already registered by visiting the St. Paul Police Department in person. But Preston testified at trial that he submitted a change-of-information form by mail, not in person. However, representatives of the St. Paul Police Department and the

BCA testified that they did not receive any notice of Preston's St. Paul address. That evidence casts doubt on Preston's testimony that he sent a change-of-information form by mail, which, in any event, would not be a valid means of registration. *See* Minn. Stat. § 243.166, subd. 3(b). Thus, the state introduced evidence that is sufficient to prove that Preston did not give notice of his St. Paul address, both in writing and in person, to either his probation officer or the St. Paul Police Department.

For the second part of his argument, Preston contends that he did not violate the registration requirement knowingly. In a prosecution under section 243.166, subdivision 5(a)(1), "mistake of law is a defense because it negates the existence of the required mental state." *State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017). Similarly, a mistake of fact as to the existence of one's primary address may cause the evidence to be insufficient to prove a knowing violation. *State v. Alarcon*, 932 N.W.2d 641, 649-50 (Minn. 2019).

In this case, the state introduced circumstantial evidence that Preston knowingly did not comply with the registration requirement. The circumstances proved are described above. "In identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent with the jury's verdict." *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). The question on appeal is whether "the circumstances proved, when 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." *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017).

Four pieces of circumstantial evidence are especially significant. First, Preston had properly registered his primary address, in writing and in person, on approximately 25 prior

occasions. Second, Preston informed both his probation officer and a Carver County detective that he had submitted a change-of-information form to the St. Paul Police department in person. Third, Preston testified at trial that he submitted a change-of-information form by mail, not in person. Fourth, neither the St. Paul Police Department nor the BCA have any record of a change-of-information form signed by Preston after August 12, 2019. The only reasonable inference from these circumstances that is consistent with the jury's resolution of conflicting evidence is that Preston was aware that he needed to register both in writing and in person but knowingly violated the registration requirement by not submitting any change-of-information form, in person, to either the St. Paul Police Department or the BCA.

Thus, the evidence is sufficient to support the jury's verdict.

B. Evidence of Incarceration

Preston also argues that the district court erred by admitting evidence that he previously was incarcerated at the Rush City prison and the Scott County jail. Preston apparently refers to exhibit number 4, which is a change-of-information form that he signed in 2014. The exhibit was referenced in the testimony of a BCA special agent, who testified about the BCA's records of Preston's prior registrations. There is no reference in the trial transcript to the Scott County jail, but there are multiple references to the Carver County jail, from which Preston was released in August 2019.

At trial, Preston did not object to the admission of this evidence. Accordingly, the plain-error rule applies. *See* Minn. R. Crim. P. 31.02. Under plain-error review, we will reverse a conviction only if the appellant shows (1) an error, (2) that the error was plain,

and (3) that the plain error affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Because Preston did not object, the state did not have an opportunity at trial to justify the admission of the evidence. On appeal, the state contends that Preston's history of compliance with his registration requirement on prior occasions was offered to prove that he knowingly violated the statute on this occasion. Because the evidence appears to have had a proper purpose, we cannot conclude that the district court plainly erred.

In addition, it is unlikely that the evidence affected Preston's substantial rights. In most cases, a defendant may be prejudiced by evidence that he previously was incarcerated. *See, e.g.*, *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006); *State v. Hjerstrom*, 287 N.W.2d 625, 627-28 (Minn. 1979). But in a prosecution for failure to register as a predatory offender, the defendant's prior incarceration likely would be understood to be a natural consequence of the prior conviction that gave rise to the registration requirement. Moreover, Preston himself referred to his detention at the Carver County jail. Accordingly, the evidence about which Preston complains likely did not cause the jurors to view him in a less-favorable light.

Thus, the district court did not plainly err by admitting evidence that he previously was incarcerated at the Rush City prison and the Scott County or Carver County jail.

C. Response to Jury Question

Preston also argues that the district court erred by not providing detailed answers to questions posed by the jury during its deliberations.

The jury asked three questions of the district court. Two questions referred to two particular exhibits, and one question referred to the alleged date of the offense. The district court discussed the matter with the attorneys for both parties, first off the record and then on the record. Both attorneys stated on the record that they had no objection to the district court's proposed response. The district court declined to give the jury substantive answers to its questions and simply stated, "Respectfully, you must decide this case based on the evidence presented during the trial."

A district court may answer a jury's questions in various ways. *See* Minn. R. Crim. P. 26.03, subd. 20(3). A district court has broad discretion in formulating a response to a jury's question. *See State v. Murphy*, 380 N.W.2d 766, 772 (Minn. 1986); *State v. Harlin*, 771 N.W.2d 46, 51-52 (Minn. App. 2009), *rev. denied* (Minn. Nov. 17, 2009). In this case, we apply the plain-error test because Preston did not object at trial. *See* Minn. R. Crim. P. 31.02; *Griller*, 583 N.W.2d at 740. It appears that the jury's first two questions sought factual information that had not been introduced into evidence, so it would have been improper for the district court to provide a direct answer to the question. The district court also did not abuse its broad discretion by declining to answer the third question, which sought clarification about the alleged offense date.

Thus, the district court did not plainly err by not providing direct answers to questions posed by the jury during its deliberations.

D. Claim of Ineffective Assistance

Preston also argues that he received ineffective assistance of counsel. Specifically, he asserts that his trial attorney did not prepare a defense, provided Preston with discovery

materials only two days before trial, did not seek to introduce recordings of telephone calls between Preston and his friend in the city of Carver, did not seek to introduce Preston's own cell-phone records, and was unprepared for trial.

"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 post-conviction proceeding allows for the development of "'additional facts to explain the attorney's decisions,' so as to properly consider whether a defense counsel's performance was deficient." *Id.* (quoting *Black v. State*, 560 N.W.2d 83, 85 n.1 (Minn. 1997)). An appellate court may consider an ineffectiveness argument on direct appeal only if the trial record is sufficiently developed such that the claim can be decided based on the trial record. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004).

In this case, the trial record, by itself, does not allow for a determination of Preston's claim of ineffective assistance of counsel. Thus, we will not consider the issue on direct appeal. Nonetheless, Preston's right to assert the claim in a future post-conviction action is preserved. *See State v. Christian*, 657 N.W.2d 186, 194 (Minn. 2003); *Gustafson*, 610 N.W.2d at 321; *State v. Xiong*, 638 N.W.2d 499, 504 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002).

Affirmed.