STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0220

State of Minnesota,
Respondent,

vs.

Kevin Herman Larson,
Appellant.

Filed December 20, 2021
Affirmed
Cochran, Judge
Concurring specially, Cleary, Judge,[*] and Worke, Judge

Carlton County District Court
File No. 09-CR-19-1949

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Lauri A. Ketola, Carlton, County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Cochran, Judge; and Cleary, Judge.

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

NONPRECEDENTIAL OPINION

Cochran, Judge

This appeal arises from appellant's conviction and sentencing on two counts of failing to register as a predatory offender. Appellant argues that his convictions violate the constitutional protection against double jeopardy, his right to substantive due process, and are not supported by the evidence. He also argues that the prosecutor committed prejudicial plain error by misstating the law in his opening and closing statements, and that the district court abused its discretion by sentencing him to the statutory maximum. We affirm.

FACTS

Appellant Kevin Herman Larson was convicted of second-degree criminal sexual conduct in 1993, an offense requiring him to register as a predatory offender pursuant to Minnesota Statutes section 243.166 (1992). He has consistently refused to register. This failure to register has led to numerous convictions and appeals for various violations of the registration statute.[1]

[1] *See State v. Larson*, No. A05-0040, 2006 WL 618857 (Minn. App. Mar. 14, 2006) (*Larson I*), *rev. denied* (Minn. May 16, 2006); *State v. Larson*, No. A06-0623, 2007 WL 2993608 (Minn. App. Oct. 16, 2007) (*Larson II*), *rev. denied* (Minn. Dec. 19, 2007); *State v. Larson*, No. A07-2145, 2008 WL 5396820 (Minn. App. Dec. 30, 2008) (*Larson III*), *rev. denied* (Minn. Mar. 17, 2009); *State v. Larson*, No. A10-1562, 2011 WL 2672239 (Minn. App. July 11, 2011) (*Larson IV*), *rev. denied* (Minn. Sept. 20, 2011); *State v. Larson*, No. A15-1085, 2016 WL 4596403 (Minn. App. Sept. 6, 2016) (*Larson V*), *rev. denied* (Minn. Nov. 23, 2016); *State v. Larson*, No. A17-1274, 2018 WL 4288994 (Minn. App. Sept. 10, 2018) (*Larson VI*), *rev. denied* (Minn. Nov. 27, 2018); *State v. Larson*, No. A18-1179, 2019 WL 3000749 (Minn. App. July 1, 2019) (*Larson VII*) *rev. denied* (Minn. Sept. 25, 2019).

In the summer of 2019, as Larson neared his anticipated October 2019 release from custody for a failure-to-register sentence he was then serving, his prison case manager spoke with his probation officer regarding Larson's continued refusal to register. The probation officer contacted the Bureau of Criminal Apprehension (BCA) to request assistance in registering Larson. A BCA agent travelled to the prison and met with Larson on two occasions—August 28, 2019, and September 9, 2019. On both occasions Larson refused to sign pre-filled registration forms the BCA agent presented to him.

The state then charged Larson with two counts of refusing to register pursuant to Minnesota Statutes section 243.166, subd. 5(a)(1) (Supp. 2019).[2] Count I was based on his refusal to register when presented with registration paperwork in August and count II was based on his refusal to register when presented with registration paperwork in September. A jury found Larson guilty of both counts. Larson waived his *Blakely*[3] right to a jury trial on aggravated sentencing factors, and the district court sentenced him to two concurrent sentences for the statutory maximum prison term. This appeal follows.

DECISION

Minnesota requires people convicted of certain crimes to register as predatory offenders. Minn. Stat. § 243.166 (2018 & Supp. 2019). Larson does not dispute in this appeal that he was required to register. He argues that (1) his dual convictions violate his constitutional protection from double jeopardy, (2) the registration requirement violates his

[2] During trial, defense counsel objected that subdivision 5(a)(1) was a sentencing provision containing no substantive requirement Larson could violate. The district court allowed the state to amend the complaint to include Minn. Stat. § 243.166, subd. 3(a) (2018).
[3] *Blakely v. Washington*, 542 U.S. 296 (2004).

right to substantive due process, (3) the state did not prove the required elements of the crime beyond a reasonable doubt, (4) the prosecutor committed prejudicial error in this opening and closing statements, and (5) the district court abused its discretion in its sentencing decision.[4] We review each argument in turn.

I. Larson's two convictions did not violate the constitutional protection from double jeopardy.

Before the district court, Larson moved for the dismissal of both counts of failing to register on double jeopardy grounds, or, in the alternative, dismissal of count II only. The district court denied both requests based on *State v. Ehmke*, 752 N.W.2d 117 (Minn. App. 2008). On appeal, Larson argues that the district court erred in denying his motion. He contends that his two most recent convictions of failing to register violate the double jeopardy clauses of the United States and Minnesota constitutions as "repeated prosecutions for the same offense." In the alternative, he argues that, at a minimum, one of his two current convictions violates double jeopardy.

"An appellate court reviews de novo the constitutional issue of double jeopardy." *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999). Based on our de novo review, we conclude that the double jeopardy clauses of the federal and state constitutions are not implicated in this case because Larson committed *two separate and distinct offenses* when

[4] Larson also argues in a pro se supplemental brief that (1) the registration statute criminalizes living, (2) the BCA unilaterally "assigned" him the "crime of assignment," (3) he is being imprisoned as an investigatory tactic, (4) the requirement that he provide his address violates his privacy rights, (5) the BCA agent acted as a vigilante, and (6) signing the form would constitute an admission of guilt. Because none of his arguments present a cognizable claim for relief on the facts in the record, we do not address them.

he failed to register on two separate occasions—once in August 2019 and once in September 2019.

The double jeopardy clauses of the federal and state constitutions guarantee that a criminal defendant may not be tried more than once for the same crime. *See* U.S. Const. amend. V (providing that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"); Minn. Const. art. 1, § 7 (providing that "no person shall be put twice in jeopardy of punishment for the same offense"). These constitutional guarantees provide three important protections to criminal defendants. They protect against (1) "a second prosecution for the *same offense* after acquittal"; (2) "a second prosecution for the *same offense* after conviction"; and (3) "multiple punishments for the *same offense*." *State v. Hill*, 918 N.W.2d 237, 242 (Minn. App. 2018) (emphasis added) (quotation omitted). With these constitutional principles in mind, we consider whether Larson's two most recent convictions of failing to register constitute a violation of double jeopardy.

Minnesota has long required persons convicted of certain crimes to register as predatory offenders. *See* 1991 Minn. Laws ch. 285, § 3, at 1325-26 (codified at Minn. Stat. § 243.166 (Supp. 1991)) (establishing registration requirement). This registration requirement imposes a *continuing* obligation. *Ehmke*, 752 N.W.2d at 122; *Longoria v. State*, 749 N.W.2d 104, 106-07 (Minn. App. 2008), *rev. denied* (Minn. Aug. 5, 2008). The obligation does not expire until the statutory registration period ends. Minn. Stat. § 243.166, subd. 6(a) ("[A] person required to register under this section shall continue to comply with this section until ten years have elapsed since the person initially

registered in connection with the offense, or until the probation, supervised release, or conditional release period expires, whichever occurs later."). And this court has held that a defendant's prior conviction of failing to register does not bar a future prosecution for a subsequent failure to register. *Ehmke*, 752 N.W.2d at 121-22.

In *Larson III*, this court addressed the issue of double jeopardy in a very similar context. In *Larson III*, Larson also challenged two convictions of failing to register. 2008 WL 5396820, at *4. Those convictions were based on his failure to register on two separate occasions (once in June 2006 and once in September 2006) while he was incarcerated for failing to register. *Id.* at *1. Larson argued that his convictions implicated "the constitutional prohibition against double jeopardy." *Id.* at *4. He further argued that "his conduct on the two dates alleged in the complaint constitute the same offense for double-jeopardy purposes because his circumstances had not materially changed" between the two dates. *Id.* In analyzing Larson's argument, this court acknowledged that his circumstances had not materially changed between the two offenses but did not agree that Larson was therefore exempted from the requirement to register as a predatory offender. *Id.* This court concluded that "[a]ppellant's repeated violations of the registration statute were properly prosecuted separately because separate prosecutions are not barred when the offense is continuous and the defendant commits the same violation multiple times." *Id.* In reaching this conclusion, this court emphasized that "the predatory-offender-registration requirement is a *continuing obligation*." *Id.* (emphasis added). Although this court's decision in *Larson III* is not binding precedent, its reasoning remains persuasive.

Applying that reasoning, we discern no reason to reach a different conclusion in this case. Here, Larson also failed to register on two separate occasions, once in August 2019 and once in September 2019, thereby continuing his long-standing refusal to register. Though his circumstances did not materially change between August and September, Larson "commit[ted] the same violation multiple times" when he refused to register on these two separate dates. *See id.* On each occasion, he was presented with registration forms and refused to sign the forms. These repeated failures to register constitute separate and distinct violations of the ongoing predatory-offender-registration requirement. For these reasons, the two convictions of failing to register at issue in this appeal do not implicate the double jeopardy clauses of the federal and state constitutions.

This conclusion is reinforced by this court's decision in *State v. Erickson*, 367 N.W.2d 539 (Minn. App. 1985). *Erickson*, which this court cited in both *Ehmke* and *Larson III*, held that repeated prosecutions for failure to abate an ongoing nuisance could "proceed over claims of double jeopardy until the nuisance is abated." 367 N.W.2d at 540 (quotation omitted). As this court recognized in *Erickson*, each distinct failure to satisfy an ongoing obligation is a separate crime. *See id.* And separate prosecutions for repeated failures to meet an ongoing obligation do not trigger double jeopardy concerns. *Id.*

Larson argues the supreme court's recent decision in *State v. Washington*, 908 N.W.2d 601 (Minn. 2018) instructs that the registration statute permits only one prosecution for failing to register as a predatory offender. As a result, Larson contends that his "repeated prosecutions for this singular offense—including his two instant convictions—violates double jeopardy." Larson's reliance on *Washington* is misplaced.

Washington did not address or resolve the double-jeopardy issue presented in this case. *Id.* at 603-04, 606-08. Instead, the supreme court interpreted the meaning of the phrase "the date of the current offense" as used in the Minnesota Sentencing Guidelines for purposes of calculating an offender's criminal-history score. *Id.* Under the sentencing guidelines, prior felony sentences are used to calculate criminal-history scores unless a period of 15 years has elapsed between "the date of the current offense" and the expiration of the prior felony sentence. Minn. Sent. Guidelines 2.B.l(c) (Supp. 2019). In *Washington*, the "current offense" at issue was Washington's failure to register as a predatory offender between June 9, 2013 and August 4, 2015. 908 N.W.2d at 604. The state charged Washington with a single count of failure to register over this 14-month period and Washington was convicted of that offense. *Id.* at 604-05. On appeal, Washington argued that for purposes of calculating his criminal-history score, "the date of the current offense" was the last date of the 14-month date range—August 4, 2015. *Id.* at 607. Under his interpretation, his prior felony conviction would have decayed because more than 15 years would have passed between the current offense and the expiration of his prior felony sentence. *Id.* The supreme court disagreed, concluding that Washington committed a continuing offense. *Id.* at 606-07. And it held that, in the context of a continuing offense, "the date of the current offense" is not limited to a single date but includes the entire range of dates over which the offense continued including the first day of the offense—June 9, 2013 in Washington's case. *Id.* at 608.

In its analysis, the supreme court emphasized that "[t]he predatory-offender-registration statute unquestionably imposes a *continuing obligation* on those subject to its

provisions." *Id.* at 606 (emphasis added). And it agreed with this court that "failing to comply or refusing to comply with the registration requirements is a continuing offense." *Id.* at 607. But the supreme court did not address the double-jeopardy issue before us and the language Larson relies on from *Washington* to support his argument is mere dicta.

In sum, given that it is settled law that the obligation to register as a predatory offender is a continuing obligation and Larson's failure to meet that obligation on two different dates in 2019 constitute separate and distinct offenses, prosecuting Larson under the same statute for these distinct offenses does not constitute a double-jeopardy violation. Accordingly, the district court did not err when it concluded that the prosecution of the two most recent failure-to-register charges did not violate the constitutional protection from double jeopardy and denied Larson's motion to dismiss on that basis.

II. The registration requirement does not violate Larson's substantive due process rights.

Larson argues for the first time on appeal that the registration requirement violates substantive due process because his incarceration will not advance the purpose of the statute. We do not ordinarily consider issues raised for the first time on appeal but may do so in the interests of justice if doing so will not work an unfair surprise on one of the parties. *State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011). Although liberty is unquestionably a fundamental right, *see* U.S. Const. amend. XIV, § 1; Minn. Const. art I § 7, nothing in the record suggests that Larson was impeded in raising this claim before the district court such that justice requires us to hear it. *Williams*, 794 N.W.2d at 874.

Even if we did reach the merits of the claim, it would not warrant relief. The predatory-offender-registration scheme is regulatory in nature and does not violate a registrant's substantive due process rights. *Boutin v. LaFleur*, 591 N.W.2d 711, 717-18 (Minn. 1999); *see also Werlich v. Schnell*, 958 N.W.2d 354, 361 (Minn. 2021) (stating that the supreme court need not question the basic constitutionality of the registration statute to analyze the constitutionality of additional consequences added since *Boutin*).

III. The evidence supports the jury's guilty verdict.

We carefully examine the record to determine whether the evidence presented, and reasonable inferences therefrom, support a reasonable jury finding that the defendant was guilty. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). We view evidence in the light most favorable to the verdict and assume the factfinder disbelieved any evidence that conflicts with the verdict. *Id.* Thus, "[a] defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). Whether a defendant's conduct meets the definition of a particular offense presents a question of statutory interpretation, which this court reviews de novo. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013).

Larson argues that the state did not present sufficient evidence to prove that he failed to register with the proper law enforcement agency. Covered persons must register with their assigned "corrections agent as soon as the agent is assigned" to them or, "[i]f the person does not have an assigned corrections agent or is unable to locate the assigned corrections agent, the person shall register with the law enforcement authority that has jurisdiction in the area of the person's primary address." Minn. Stat. § 243.166, subd. 3(a). Larson argues that the state only presented evidence that he did not register with the BCA,

which was not the corrections agent or "law enforcement authority that has jurisdiction in the area of [his] primary address." The record shows otherwise.

Both Larson's prison case manager and his assigned probation officer testified that he had not registered. Larson argues that he could have registered with local law enforcement and his registration was simply not communicated to the BCA but offers no evidence to support this hypothesis. The evidence presented reasonably supports the conclusion that Larson had not registered with either his corrections officer or the law enforcement agency with jurisdiction over his primary address, therefore we will not overturn the jury's verdict.

IV. Larson has failed to show the prosecutor engaged in reversible misconduct.

Larson argues that the prosecutor made material misstatements of the law in his opening and closing statements that warrant reversal despite Larson's failure to object during trial. "Generally, a defendant who fails to object to prosecutorial misconduct at trial waives the issue on appeal." *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006). "On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006); *see also* Minn. R. Crim. P. 31.02. The unobjecting defendant bears the burden of showing that there was a plain error, then the burden shifts to the state to show that the alleged error did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. Plain error typically is a "clear or obvious" statement contrary to "case law, a rule, or a standard of conduct." *Id.* (quotation omitted). In determining if a prosecutor misstated the law, we consider the argument as a whole. *See State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008).

Larson argues the prosecutor misstated the law by telling the jury (1) Larson was required to register with the BCA, (2) the BCA had jurisdiction over his primary address, and (3) Larson was required to sign the forms presented to him. None of these unobjected-to statements constitutes reversible error. The BCA collects and maintains registration information reported by probation agents and local law enforcement and conducts annual address verifications; thus, the statement that Larson was required to register with the BCA was a generalization of the process, not a clear or obvious misstatement of the law. Minn. Stat. § 243.166, subd. 4(c), (e)(1). The BCA's law enforcement powers, and thus its jurisdiction, extend throughout the state. Minn. Stat. §§ 299C.01, .03 (2020). Finally, the prosecutor's argument as a whole was that Larson had not registered at all, not solely that Larson had failed to register when presented with the forms. Considering the argument as a whole, Larson has failed to show that the prosecutor made clear or obvious misstatements of the law.

V. The district court did not abuse its discretion in sentencing Larson to the statutory maximum sentence.

We review a district court's decision to depart from the sentence prescribed by the sentencing guidelines for an abuse of discretion and generally do not overturn a sentence which is legally permissible and factually supported. *Vickla v. State*, 793 N.W.2d 265, 269 (Minn. 2011).

The career-offender statute allows an aggravated upward durational departure up to the statutory maximum sentence "if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed

as part of a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4 (2018). Failure to register as required is punishable by up to five years in prison. Minn. Stat. § 243.166, subd. 5(b). The career-offender statute, standing alone, is sufficient to warrant departure from the presumptive sentence. *Vickla*, 793 N.W.2d at 269; *see also* Minn. Sent. Guidelines 2.D.3.b(9). The district court found that Larson had at least five prior felony convictions, all arising from his continued failure to register. Larson does not dispute this fact. Because the district court's sentencing decision is legally permissible and supported by the record, we will not overturn it.

Affirmed.

CLEARY, Judge (concurring specially)

Although I concur with the majority opinion as it pertains to the issue of double jeopardy, and affirm in all other respects, I write specially to express my concern regarding the room for prosecutorial abuse of violations of a "continuing obligation" to register. *State v. Ehmke,* 752 N.W.2d 117,122 (Minn. App. 2008) (persons convicted of certain crimes have a continuing obligation to register as predatory offenders).

Here, a BCA agent travelled to the prison where Larson was incarcerated on August 28, 2019, and met with him. Larson refused to sign the pre-filled predatory-offender registration form. This pantomime was repeated 12 days later, on September 9, 2019, with the same result, refusal to sign the form. Presumably, the result would have been the same for every day between August 28 and September 9, resulting in 13 counts of failure to register, rather than two counts. *See* Minn. Stat. § 243.166, subd. 3(a) (2018). Therein lies the problem. While the predatory offender registration statute provides for a continuing obligation to register, and although these refusals may constitute two separate and distinct offenses, there is no discernible end to such prosecutions for an intransigent defendant.

Some might observe that it is within a defendant's power to avoid such an outcome by cooperating with authorities, but that does not obviate the potential for abuse of such prosecutorial power. I remain concerned that multiple prosecutions could result with no intervening event between a request to register, a refusal, and another request to register (perhaps even on the same day?) to add another felony count. Here there was no change in circumstances nor any intervening event to distinguish the factual basis for Larson's two convictions.

Nevertheless, the current caselaw, as the majority opinion notes, provides that the "continuing obligation" to register allows for such prosecutions. *Ehmke,* 752 N.W.2d at 122. Whether that should be so is a question for another day. I suggest it should not be so.

WORKE, Judge (concurring specially)

I join in the opinion of Judge Cochran and in the special concurrence of Judge Cleary.