This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0865

Robert Alan Keogh, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 31, 2022
Affirmed
Florey, Judge

St. Louis County District Court
File No. 69HI-CR-18-152

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

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

Kimberly J. Maki, St. Louis County Attorney, Tyler J. Kenefick, Assistant County Attorney, Hibbing, Minnesota (for respondent)

Considered and decided by Bryan, Presiding Judge; Worke, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this appeal from the postconviction court's denial of postconviction relief, appellant makes five arguments: (1) he received ineffective assistance of counsel when his attorney conceded his guilt without his consent; (2) the district court's failure to instruct

the jury on the requirement of unanimity was plain error; (3) the district court's failure to instruct the jury on the definition of "secondary address" was plain error; (4) the attorneys' and district court's references to appellant as a "predatory offender" was plain error; and (5) the cumulative effect of these errors deprived appellant of a fair trial. We affirm.

FACTS

In February 2018, police officers received a report of a suspicious person living in a garage. Upon arriving at the garage, an officer discovered that appellant Robert Alan Keogh had been renting the garage for several months. Because appellant, as a predatory offender, is required to register certain address changes within five days of the change, Minn. Stat. § 243.166, subd. 4a(b) (2016), respondent State of Minnesota charged him with violating his predatory-offender-registration requirements in violation of Minn. Stat. § 243.166, subd. 5(a) (2016). The state alleged that appellant failed to provide law enforcement with all "secondary addresses in Minnesota, including all addresses used for residential or recreational purposes" and "the addresses of all Minnesota property owned, leased, or rented" by him. Minn. Stat. § 243.166, subd. 4a(a)(2)-(3) (2016).

Prior to trial, appellant stipulated to the first element of his failure-to-register offense: that he is required to register as a predatory offender under the laws of Minnesota. He thereby waived his right to a jury's determination of that issue.

During his opening argument, appellant's attorney made the following statements indicating the key issue in the case:

> The issue that ultimately you are going to have to decide when it's all done and over with—one of the elements that critical [sic] that you'll have to find that the State proves beyond a

> reasonable doubt is that [appellant] *had knowledge that he is required to register rental property* and with that knowledge he decided not to do so. That's going to be the critical and singular issue for you to decide after you hear all of the evidence.
>
> . . . *Did he have knowledge that he was required to register. That's the issue.*

(Emphasis added.) Defense counsel also emphasized the circumstances leading police officers to investigate the matter:

> What the evidence is going to show is this . . . . [U]nfortunately for [appellant], he chose to pick a garage where there [were] other people that lived in the neighborhood and they found out that [appellant] was hanging out in that rental garage monkeying around fixing up his pop-up camper and they didn't want him in their neighborhood.
>
> . . . .
>
> And what you're going to find out is that law enforcement wasn't aware of [appellant] being in that rental garage until the neighbors picked up the phone and called the Hibbing Police Department complaining about this undesirable that's living in their neighborhood.
>
> . . . .
>
> After you hear the evidence, you are going to find out that he had no idea that he had to register.

The state called three witnesses at trial: two police officers and the owner of the garage. The second police officer testified that he received a complaint in February 2018 of "a suspicious male" living in a garage. He went to the garage where he met appellant. Appellant informed the officer that he rented the garage to store and fix his truck and that he had a contract for deed for the garage. The owner of the garage testified that he verbally

agreed to rent the garage to appellant in fall 2017 so that appellant could "store stuff there and just rent it for storage space."

The first police officer testified about predatory-offender-registration procedures, including that predatory offenders must confirm the accuracy of their registration information annually. He explained that offenders must initial each of 26 paragraphs in a duty-to-register form, acknowledging that they have read and understand their registration responsibilities. He testified that appellant was out of compliance with his registration requirements from November 2017 to February 5, 2018 (the date appellant registered the garage) because appellant failed to register the garage within five days of renting it. The officer acknowledged on cross-examination that appellant made changes to and updated his registration information at least 83 times over the years.

The district court accepted several documents into evidence during the first officer's testimony, including a duty-to-register form signed by appellant on September 1, 2000. A paragraph in that form initialed by appellant states that "I understand I must register any changes of employment, vehicles, other residences, including all property I own, lease or rent." The district court also accepted a duty-to-register form signed by appellant on August 11, 2017. A paragraph in that form initialed by appellant states:

> I understand that I must register . . . any changes in my vehicles, employment, any property I own, lease, or rent in Minnesota, or any addresses where I stay overnight on a regular or occasional basis when I am not staying at my primary address, within five days of that change.

The district court also accepted into evidence a February 2018 email between the first officer and the Bureau of Criminal Apprehension (BCA) which states that appellant was living in a garage in a pop-up camper.

Appellant chose not to testify and called no witnesses.

Prior to closing arguments, the attorneys discussed the jury instructions with the district court. Relevant here, the district court instructed the jury that the parties had stipulated that appellant is required to register as a predatory offender. It further instructed that, to find appellant guilty, the jury must find that:

> [T]he Defendant knowingly violated any of the requirements to register . . . .
>
> The requirements to register include providing the corrections agent or law enforcement authority with the following information.
>
> 1. All of the person's secondary addresses in Minnesota including all addresses used for residential or recreational purposes or
>
> 2. Addresses of all Minnesota property owned, leased or rented by the person.
>
> Registration must occur within five days of the date either of the—of either of the above clauses.

Defense counsel did not object to these jury instructions.

After the district court instructed the jury and during closing arguments, defense counsel again stated that "there is one issue here today" and that issue is whether appellant "intentionally" or "knowingly" violated the registration requirements. Counsel noted that appellant went almost three months without registering but as soon as officers confronted

him, he registered, making the inference that he intentionally avoided registering "non-sense." Counsel further emphasized that appellant had updated his information 83 times since he became a registrant. And defense counsel again recounted the circumstances leading to the second officer discovering appellant in the garage:

> [The neighbors] were calling the police. They were calling the BCA. Let's call it what it is folks. [Appellant], on February 5, 2018, was an undesirable person living in a neighborhood where nobody wanted him. His mistake was, he should have been living in the woods somewhere. That's why law enforcement got involved.

The jury found appellant guilty. The district court convicted him and sentenced him to a 31-month prison term. Appellant petitioned for postconviction relief, and the postconviction court denied his petition. This appeal follows.

DECISION

We review a postconviction court's denial of a postconviction petition for an abuse of discretion. *See Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A postconviction court abuses its discretion if its decision is arbitrary or capricious, based on an error of law, or based on clearly erroneous factual findings. *Id.* We review the postconviction court's determinations of legal issues de novo and its factual findings for clear error. *Id.*

I. The postconviction court did not abuse its discretion by determining that defense counsel did not concede appellant's guilt.

Appellant argues that he received ineffective assistance of counsel because his attorney improperly conceded his guilt by stating in closing argument that appellant had been "living in" the garage. He argues that because he never conceded to living in the

garage, but rather said he rented it for a storage space, his attorney's concession requires reversal. We disagree.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). When counsel admits a defendant's guilt without the defendant's consent, we presume the defendant's right to counsel was violated. *Id.* at 254. This is because "[t]he decision to admit guilt is the defendant's decision to make." *Id.* If counsel concedes guilt without the defendant's permission, then the "defendant is entitled to a new trial, regardless of whether he would have been convicted without the admission." *Id.*

We apply a "two-step analysis to ineffective-assistance claims involving an alleged unauthorized concession of guilt." *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017). First, we ask whether defense counsel conceded guilt. *Id.* Second, if counsel conceded guilt, we ask whether the defendant acquiesced to the concession. *Id.*

Here, the postconviction court concluded that "[d]efense counsel's isolated statement during closing argument [that appellant 'was living in' the neighborhood] does not amount to an admission of guilt." We agree. Defense counsel's statement, in context, emphasized the neighbors' displeasure with appellant's presence in the neighborhood, not appellant's status as living in versus merely using the garage. And the statement is one line in nine transcript pages of defense counsel's closing argument. Further, the defense focused throughout the trial on whether appellant *knew* he was required to register the garage address, not whether appellant lived in or merely used the garage. Thus, defense counsel's statement did not concede the issue that the defense made central: whether

appellant knew of his duty to register the garage. We conclude that the postconviction court did not abuse its discretion by determining that defense counsel did not concede appellant's guilt.

II. The postconviction court did not err by concluding that the district court's failure to give a unanimity instruction is not plain error.

Appellant next argues that the district court erred by failing to instruct the jurors that they must unanimously agree on which of two acts constitute appellant's knowing violation of his registration requirements: (1) renting the garage as a storage space without registering it or (2) living in the garage as a "secondary address" without registering it. He argues that "there was a significant possibility some jurors found he committed one act and other jurors found he committed the other." He asserts that this violated his right to a unanimous verdict. We disagree.

We first note that appellant did not object to the absence of a unanimity instruction at trial. Although a party usually must preserve a challenge to jury instructions by objecting to them before they are given, we "may consider plain error not brought to the district court's attention if the error affects substantial rights." *State v. Infante*, 796 N.W.2d 349, 355 (Minn. App. 2011) (citing *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007) (citing Minn. R. Crim. P. 31.02)). A plain-error examination involves four steps. *Id.* We ask whether there was (1) error (2) that was plain, and if so (3) "whether the error affected the defendant's substantial rights." *Id.* (quotation omitted). And if these three elements are met, we (4) address the error only if necessary "to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted).

A jury must "unanimously find that the government has proved each element of [an] offense." *Id.*; *see also Pendleton*, 725 N.W.2d at 730-31. "But if the statute establishes *alternative means* for satisfying an element, unanimity on the *means* is not required." *Infante*, 796 N.W2d at 355 (quotation omitted); *see also Pendleton*, 725 N.W.2d at 732 (noting that "jurors are not always required to agree on alternative ways in which a crime can be committed"). In other words, "[t]he jury need not unanimously agree on each element underlying the facts so long as the differing factual circumstances show equivalent blameworthiness or culpability." *Infante*, 796 N.W.2d at 356 (quotation omitted).

The state had to prove that appellant "knowingly violat[ed]" any provisions of the registration statute. Minn. Stat. § 243.166, subd. 5(a)(1). The registration statute lists several alternative means by which a person required to register might violate its requirements. *Id.*, subd. 4a (setting out information that must be provided in registration). In this case, the relevant means are (1) failing to register the garage as a rental property or (2) failing to register the garage as a secondary address. *Id.*, subd. 4a(2), (3). And here, appellant failed to register a single address for a period of time. Those actions could fall within either of the means just listed, but they do not constitute separate instances of knowingly violating the registration statute. Because unanimity on which of these two means of committing the offense is not required, *see Infante*, 796 N.W.2d at 355-56, the district court did not err by not giving the unanimity instruction.

Appellant likens his case to *State v. Stempf*, 627 N.W.2d 352 (Minn. App. 2001), but that case is distinguishable. In *Stempf*, the state charged the defendant with one count of controlled-substance possession but introduced evidence that the defendant possessed

0.1 grams of methamphetamine in his workplace and an additional 0.3 grams while a passenger in a truck. *Id.* at 354. The district court did not give a unanimity instruction. *Id.* We reversed, concluding that the two instances of possession were "separate and distinct culpable acts" occurring at different places. *Id.* at 358-59. As such, the jury was required to "agree unanimously on one act of possession that [had] been proven beyond a reasonable doubt," and the failure to instruct the jury on the unanimity requirement "violated appellant's right to a unanimous verdict." *Id.* at 357-58.

Here, in contrast, there is one instance relating to one location that constitutes the violation. And there are two means by which appellant was alleged to have committed that violation: failing to register the address as a rental property or failing to register the address as a secondary address. The means of his failing to comply with the registration requirements could be one or the other, but both means occurred at the same time and place. This is unlike *Stempf*, in which the act was unlawfully possessing a controlled substance, and there were two independent instances of that act. *Id.* at 359.

In sum, the postconviction court did not abuse its discretion by determining that the district court did not err by not giving a unanimity instruction here. Because we conclude there was no error, we need not consider whether appellant's substantial rights were affected.

III. Any error in the district court's failure to instruct the jury on the definition of "secondary address" did not affect appellant's substantial rights.

Appellant argues that the district court plainly erred by failing to inform the jurors of the definition of "secondary address." We need not determine whether the district court erred because we conclude that the error did not affect appellant's substantial rights.

Although district courts "enjoy[] considerable latitude in selecting jury instructions," *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016), those instructions "must fairly and adequately explain the law of the case and not materially misstate the law." *Id.*; *see also State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) ("We review the jury instructions as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury."). Minn. Stat. § 243.166, subd. 1a(i) (2016), defines "secondary address" as "the mailing address of any place where the person regularly or occasionally stays overnight when not staying at the person's primary address."

Here, the district court instructed the jury that appellant must register his "secondary addresses in Minnesota including all addresses used for residential or recreational purposes." The postconviction court determined that this instruction was not error. We question this determination because, absent a definition of "secondary address," some jurors may have thought that the garage constitutes a secondary address even if appellant did not "regularly or occasionally stay[] overnight" there. Further, the district court's

instruction suggests that addresses used only for recreational purposes may constitute secondary addresses, even if the defendant does not stay overnight.[1]

However, we need not resolve whether the district court's failure to instruct the jury on the definition of "secondary address" constitutes error that is plain because, as the postconviction court determined, any error did not affect appellant's right to a fair trial or any other substantial right. Review of the record reveals ample evidence that appellant failed to report renting the garage despite consenting to the requirement to do so by signing his yearly registration form. *See Kelley*, 855 N.W.2d at 283-84 (explaining that an "erroneous jury instruction will not ordinarily have a significant effect on the jury's verdict if there is considerable evidence of the defendant's guilt" and concluding that erroneous instruction did not affect appellant's substantial rights); *see also* Minn. Stat. § 243.166, subd. 4a(3) (stating that a registrant must register addresses of any rented property). And appellant reported many registration changes to law enforcement in the past, showing that he understood the registration requirements. Because appellant has failed to satisfy the third prong of the plain-error test, we conclude that the postconviction court did not abuse its discretion by determining that the absence of a "secondary address" instruction was not plain error. *See Pearson*, 891 N.W.2d at 596.

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[1] We note that the model criminal jury instructions do not refer to the definition of "secondary address," *see* 10 *Minnesota Practice*, CRIMJIG 12.100 (2021), but the statute expressly defines that term, Minn. Stat. § 243.166, subd. 1a(i). Although it is ultimately the district court's responsibility to ensure its instructions accurately reflect the law, we think it may benefit parties and district courts to incorporate the definition of "secondary address" in the model instructions or the comments thereto.

IV. The postconviction court did not abuse its discretion by determining that references to appellant as a "predatory offender" or "sex offender" do not constitute plain error.

Appellant argues that district court plainly erred by allowing references to appellant as a "predatory offender" and "sex offender." We are not persuaded.

A criminal defendant has the right to prevent a jury from seeing the potentially prejudicial evidence of the defendant's prior convictions. *State v. Wemyss*, 696 N.W.2d 802, 808 (Minn. App. 2005) (*Wemyss I*) (citing *State v. Berkelman*, 355 N.W.2d 394, 396-97 (Minn. 1984)), *reversed and remanded*, No. A04-1001 (Minn. Aug. 16, 2005) (*Wemyss II*) (mem.).[2] This is because the likely prejudice of allowing such evidence will usually outweigh its probative value. *Berkelman*, 355 N.W.2d at 396. Thus, a defendant may keep evidence of prior convictions from the jury even if a prior conviction is an element of the present offense. *Id.*; *see also Wemyss I*, 696 N.W.2d at 808 (applying this principle in predatory-offender-registration context). Subject to limitations not at issue here, a defendant may stipulate to the existence of a prior conviction and thereby remove the issue

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[2] The subsequent history of *Wemyss I* does not undermine its analysis of whether the district court in that case erred by admitting certain evidence, but we provide an overview of that subsequent history for context. The supreme court reversed and remanded our decision in *Wemyss I* for us to "determine and properly apply the correct harmless-error standard for erroneous evidentiary rulings" as between the standards for ordinary evidentiary rulings and evidentiary rulings implicating constitutional error. *Wemyss II*, No. A04-1001 (Minn. Aug. 16, 2005) (mem.). On remand, we applied the harmless-error standard for ordinary evidentiary rulings but left intact our analysis of whether the district court's acceptance of certain evidence was error. *State v. Wemyss*, No. A04-1001, 2006 WL 9518, at *3 (Minn. App. Jan. 3, 2006) (*Wemyss III*), *rev. denied* (Minn. Mar. 28, 2006). We again affirmed Wemyss's conviction, concluding that, although certain evidence was wrongfully admitted, the error was harmless. *Id.* at *4.

from the jury's consideration. *Berkelman*, 355 N.W.2d at 396-97; *see also Wemyss I*, 696 N.W.2d at 808.

In *Wemyss I*, we concluded that failure to remove references to "predatory offender" or "sex offender" both orally and in documentary exhibits constituted error. 696 N.W.2d at 808-09. There, the defendant stipulated that he was required to register in part "to avoid the potential prejudice of the repeated references to him as a 'predatory offender' or 'sex offender' before the jury." *Id.* at 809. He also objected to the state's exhibits containing those terms. *Id.* at 806. We held that references to the defendant as a predatory offender deprived the defendant of the benefit of his stipulation and should have been eliminated. *Id.* at 809.

Here, we first note that the term "predatory offender" appears throughout the registration statute and is part of the terminology used under that statute. *See generally* Minn. Stat. § 243.166. And although *Wemyss I* allows a defendant to ask to exclude terms such as "predator" and "predatory offender," it does not mandate that a court acquiesce to that request. Additionally, *Wemyss I* is distinguishable from our case. Unlike the defendant in *Wemyss I*, appellant did not request to avoid the terms, nor did he object to their use; rather, he merely stipulated to the fact that he is required to register as a predatory offender. Significantly, defense counsel used these terms to establish a defense: review of the record in this case shows that it was part of appellant's trial strategy to establish that neighbors viewed him as "undesirable" because he was a predatory offender. And it was part of that trial strategy to acknowledge that appellant is required to register and has complied with this requirement many times. Thus, we conclude that the postconviction court did not

abuse its discretion by determining that there was no error in allowing references to appellant as a predatory offender.

V. The cumulative effect of the alleged errors does not constitute plain error.

Appellant finally argues that the cumulative impact of the alleged errors is "undeniable" and that his conviction must be reversed. But because we conclude that none of appellant's contentions alone demonstrate reversible error, the cumulative effect of the alleged errors likewise does not rise to the level of reversible error.

Affirmed.