

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ALAN DAVIDSON,

Appellant.

No. 40353-6-II

UNPUBLISHED OPINION

Johanson, J. — Timothy Davidson appeals his conviction for failure to register as a sex offender, arguing that (1) the State did not present sufficient evidence to prove that he had moved from his registered residence and (2) his sentence exceeds the statutory maximum for the crime. He makes additional claims in a Statement of Additional Grounds (SAG).¹ We affirm.

FACTS

Davidson is required to register as a sex offender. On June 5, 2009, when he was released from Airway Heights Correctional Center, he moved into Martin Atkins's house in Spanaway and registered that address with the Pierce County Sheriff's Office. Thereafter, he did not report any

¹ A commissioner of this court considered the matter pursuant to RAP 18.14 and referred it to a panel of judges.

changes of address to the sheriff's office.

On July 22, 2009, Davidson was reading a newspaper and drinking a beer in War Memorial Park when Tacoma Police Officers Kevin Lorberau and Steven Butts approached him in response to a report of a suspicious person in the park. Davidson fit the description, and the officers asked him for identification. Davidson stated that he had none and gave them a false name. When Officer Lorberau asked Davidson where he lived, he told the officer that he was homeless. The officers told Davidson they would need to confirm his identity before he could leave. Davidson attempted to leave anyway, and the officers placed him under arrest for obstructing. They then found a card in Davidson's pocket that accurately identified him.

Officer Lorberau discovered a warrant for Davidson on a community custody violation as well as his status as a sex offender. After being advised of his constitutional rights, Davidson told Officer Lorberau that he still lived at the address in Spanaway and that he had been lying earlier when he claimed he was homeless. Officer Lorberau contacted Atkins, who told him that Davidson had not been at the residence for a number of days.

The State charged Davidson with failure to register as a sex offender.² Davidson waived his right to a jury trial. Davidson testified that he had been sleeping outside between a shed and a fence back behind Atkins's house after the first two weeks of living with Atkins because he had felt uncomfortable sleeping inside with Atkins, who he claimed had a sexual interest in him. He testified further that Atkins did not know at first that Davidson was sleeping in the backyard, but

² The State also charged him with obstructing a law enforcement officer, for which he was acquitted, and with making a false or misleading statement to a public servant, for which he was found guilty. He does not appeal from that conviction.

that Atkins “kind of warmed up to the idea” later. 2 Report of Proceedings at 102.

Atkins testified that Davidson never slept in his backyard nor would he have allowed Davidson to do so. He stated that the neighbors would have noticed Davidson in the backyard and would have notified Atkins. He testified further that he never saw Davidson or any sign of him in the backyard when he watered his plants in the early mornings. And he denied having had any conversation with Davidson about the possibility of living in his backyard.

The trial court found Davidson guilty for failure to register as a sex offender and sentenced him to 33 months’ confinement and 36 months’ community custody.

ANALYSIS

First, Davidson argues that the State failed to present sufficient evidence that he had moved from Atkins’s residence and had not updated his registration thereafter. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). We consider circumstantial evidence as reliable as direct evidence. *Turner*, 103 Wn. App. at 520. And we do not review credibility determinations. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

The statute in effect at the time Davidson was arrested provided that he was required to update his registration: (1) within 72 hours if he changed his residence within the county, (2) within 24 hours if he moved out of the county, (3) or within 48 hours after he ceased to have a fixed residence. Former RCW 9A.44.130 (2006).

The date of Davidson's arrest was July 22, 2009. When he was arrested, he said he was homeless. Atkins testified that Davidson had lived at his registered address beginning on June 5, 2009 and lasting only for a week. And contrary to Davidson's testimony, he saw no signs that Davidson had been staying in the backyard. The trial court determined that Davidson was not credible. We will not disturb that determination on appeal.

Davidson also challenges the trial court's conclusion that even if he had been staying in Atkins's backyard, he still would have violated his sex offender registration requirements. He relies on *State v. Stratton*, 130 Wn. App. 760, 765, 124 P.3d (2005). Stratton had moved out of the house at his registered address and into his car parked in the driveway of the house, but did not change his registration. We concluded that he had not violated his registration requirements because law enforcement could still contact him by mail, telephone or in person in the evenings at his registered address. In contrast, Davidson did not receive mail at Atkins's house, did not have access to a telephone there, and would not have been available for contact at the house because Atkins believed he had moved away. The trial court did not err in distinguishing *Stratton*.

Next, Davidson argues that his sentence of 33 months' confinement and 36 months' community custody exceeds the statutory maximum sentence of 60 months for his failure to register. But his sentence contains a provision that forbids the extending the combination of his confinement and community custody beyond the statutory maximum. As such, it complies with *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 672-73, 211 P.3d 1023 (2009). Davidson argues *Brooks* is distinguishable because his sentence, unlike that in *Brooks*, provides a definite term for his community custody. But his sentence, like that in *Brooks*, allows for the possibility of a sentence of less than the statutory maximum because of the possibility for earned early release

from confinement. *Brooks* is not distinguishable.

In his SAG, Davidson claims that the trial court erred in admitting photographs of Atkins's backyard, that the State engaged in prosecutorial misconduct by offering them and that his counsel was ineffective in not objecting to them. The photographs showed the backyard from the perspective that Atkins would have had while watering his plants in the morning. They were admissible and no prosecutorial misconduct or ineffective assistance of counsel occurred. Davidson makes similar claims regarding letters. But there is no indication in the record that any letters were offered or admitted.

Davidson claims that his arrest was illegal because he did not resemble the suspicious person for whom Officers Lorberau and Butts were looking. But the record is insufficient to examine such a claim. He also claims that his arrest was illegal because he was not advised of his constitutional rights when first contacted. But the officers were not required to advise him of his rights until they arrested him for giving a false identity.

Davidson claims that his trial counsel was ineffective for advising him to waive a jury and by not calling any witnesses. But valid tactical decisions cannot constitute ineffective assistance of counsel. *State v. Israel*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1013 (2003). And he presents no indication of any defense witnesses who would have had relevant testimony to give.

Finally, Davidson claims that the prosecutor engaged in misconduct by discussing his case with another trial attorney without the judge or his counsel being present in the courtroom. But he does not show how such a discussion, assuming it occurred, constitutes misconduct.

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Finding no errors, we affirm Davidson's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Armstrong, P.J.

Quinn-Brintnall, J.