

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 11, 2014

v

TIMOTHY ANDREW PICKETT,

Defendant-Appellant.

No. 317464
Livingston Circuit Court
LC No. 12-20573-FH

Before: MURRAY, C.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of failing to timely register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*¹ For the reasons provided below, we affirm.

I. BASIC FACTS

Defendant previously was convicted of second-degree criminal sexual conduct, MCL 750.520c (person under 13), and was required to register under the SORA. The SORA required defendant to update his residence or domicile information “immediately” after changing or vacating his residence or domicile.² MCL 28.725(1)(a). The SORA, in turn, defined “immediately” as occurring within three business days. MCL 28.722(g).

While on parole from his prior CSC conviction, defendant was prohibited from living where any minors lived. During this time, defendant lived with his parents in Brownstown, Michigan and worked in Detroit. Defendant had a girlfriend at the time, Melissa Loveday, with whom they had a child together. Melissa lived in Fenton, Michigan with her six children, one of

¹ Defendant also was charged with accosting a minor for immoral purposes, MCL 750.145a, but the jury found him not guilty of that count.

² At the time defendant received his CSC conviction, the SORA required one to update his residency information within 10 days after changing his residence. However, the SORA was amended, and effective July 1, 2011, the requirement was changed to “immediately.” 2011 PA 17.

which was defendant's child, and her mother. Defendant's parole ended on January 24, 2012, which was a Tuesday. Defendant and Melissa had planned that after defendant was finished with his parole, defendant would move in with her. In preparation of this happening, there was evidence that Melissa purchased a new bed set and had started to move some household items into a barn in order to make room for some of defendant's own belongings.

At trial, Melissa testified that defendant spent the night at her home on January 24 and 25, 2012, and "believe[d]" that he spent the night on January 26, as well. Additionally, Melissa agreed that it was "conceivable" that defendant also stayed over the weekend. According to Melissa, defendant only had a few belongings with him—furniture and larger personal effects were brought later, around February 9. When asked how many nights defendant had spent at the Fenton home between January 24 and February 9, she replied that it was two to three nights per week. Melissa explained that defendant only stayed two or three nights per week because of defendant working in Detroit.

Defendant's father, James Pickett, testified that between January 24 and February 9, defendant stayed at the Brownstown home mostly. James explained that defendant would stay "[m]ostly on the weekends" at the Fenton home because it was too far for him to drive into Detroit for work during the week. James explained that he helped move some of defendant's items to the Fenton house during this time, and according to him, defendant finally moved out on February 9.

What brought this case to the attention of the police were the allegations raised by one of Melissa's daughters, K, who alleged that defendant on the night of Saturday, January 28, asked if he could touch her leg and if he could put his hands down her pants.³ During the investigation of these allegations, Michigan State Trooper Matthew Keller interviewed defendant. According to Keller, when asked where defendant lived, defendant replied that "as of January 24th, 2012, he had moved" into the Fenton home. With the thrust of the investigation being the allegations of accosting a minor, Keller did not ask any follow up questions regarding defendant's residency.

On February 8, 2012, defendant updated his address on file with the Secretary of State to be the Fenton address. Two days later, on February 10, 2012, defendant updated the information in the sex offender registry to reflect the Fenton address as well.

After a jury trial, the jury acquitted defendant of accosting a minor for immoral purposes but found defendant guilty of failing to comply with the SORA. The trial court sentenced defendant, as a habitual second offender, to a prison term of 14 months to six years. Defendant's appeal followed.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

³ This conduct constituted the basis for the charge of accosting a minor for immoral purposes, MCL 750.145a. But as previously noted, the jury acquitted defendant of this charge.

Defendant first argues that there was insufficient evidence to sustain his conviction of failing to comply with the SORA.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether “any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007) (quotation marks omitted). “All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime.” *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (citations omitted).

Defendant was convicted of violating MCL 28.725(1)(a) of the SORA, which provides as follows:

(1) An individual required to be registered under this act who is a resident of this state shall report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately after any of the following occur:

(a) The individual changes or vacates his or her residence or domicile.

The SORA defines “immediately” as taking place within three business days. MCL 28.722(g). “Residence” is defined as the “place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, . . . that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act.” MCL 28.722(p). Pursuant to MCL 28.729(1), one who “willfully violates” the SORA is guilty of a felony.

Thus, in order to be convicted of failing to comply with these provisions, the prosecution must have proven that (1) defendant was an individual required to register under the SORA, (2) was a resident of the state, and (3) knowingly failed to comply with the requirements of the SORA.

Defendant raises no argument related to the “willfulness” element and instead argues that there was insufficient evidence for a jury to find that he had changed his residence on January 24, 2012. Defendant claims that the only evidence to support such a finding is his purported statement to Keller that he “moved in” on that day and that this evidence alone is insufficient to support his conviction because the statement itself is susceptible to numerous meanings. Defendant argues that the statement could have meant that he only “began the process” of moving in on that date. But because Keller did not follow up with any other questions on this matter, its meaning was never fully developed.

We disagree with defendant’s argument. His statement to Keller was that he had “moved in” as of January 24, 2012. The phrase “moved” or “moved in,” as used in the statement, is commonly understood as reflecting a change of residence. Further, the use of the past-tense verb “moved” supports the conclusion that the move was, in fact, completed. Thus, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for the jury to

find beyond a reasonable doubt that defendant changed his residence more than three days before he updated his registration information on February 10, 2012.

Defendant relies on other conflicting evidence, such as defendant's father, James, testifying that defendant did not move out until February 9. But, for our analysis, all evidentiary conflicts are to be resolved in favor of the prosecution. *Wilkins*, 267 Mich App at 738. Moreover, when James provided this testimony, it was not in the context of the statutory definition of "residence." James simply could have meant that after February 9, defendant spent zero nights in the Brownstown home and that is why he considered February 9 to be the date defendant officially moved out. But this personal, subjective criterion is not relevant to how "residence" is defined in the SORA. Furthermore, James also testified that even as of trial in March 2013,⁴ defendant still had not moved all of his personal belongings out of the Brownstown home. This fact is significant because, even under defendant's view, he successfully was able to change his residence without having all of his personal belongings.

Even if defendant is considered as having two residences at this time—the Fenton home and the Brownstown home—the statute clarifies that the place where he "resides the greater part of the time shall be his or her official residence for the purposes of this act." MCL 28.722(p). Although there was some testimony that defendant stayed at the Brownstown home "most of the time" between January 24 and February 9, the jury could have discounted that evidence because there was contradictory evidence. Melissa testified that defendant had stayed the night of Tuesday January 24, Wednesday January 25, Thursday January 26, and "conceivably" that weekend. James testified that during this period, defendant usually stayed the weekends in Fenton. In fact, with the alleged incident with K happening that Saturday night, the jury reasonably could have inferred defendant "actually" spent the nights that weekend, resulting in five nights in a row, starting with January 24. Thus, with defendant residing "the greater part of the time" at the Fenton house after January 24, the jury reasonably could conclude that defendant had, in fact, changed his residence as of January 24 with the rest of his personal effects planned to follow sometime later. Accordingly, there was sufficient evidence to support defendant's conviction.

B. PROSECUTORIAL MISCONDUCT

Defendant next argues that he was denied a fair trial as a result of several comments by the prosecutor. Because there were no objections to the comments, the issue is unpreserved, and we review it for plain error affecting substantial rights. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Consequently, reversal is only warranted if any prejudice from the comment could not have been alleviated by a curative instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

⁴ We note that defendant was arrested "quite a few weeks" after the alleged incident with K and that he was in jail for the year leading up to trial. But, in any event, it demonstrates that weeks had passed with defendant living in Fenton but of no need to move all of his belongings.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Claims of prosecutorial misconduct are reviewed on a case by case basis, with the prosecutor's remarks evaluated in context. *Id.* at 64.

On appeal, defendant claims that the prosecutor misstated the evidence on two occasions during closing arguments. Although a prosecutor is free to argue the evidence and all reasonable inferences from the evidence, a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Defendant takes exception to comments the prosecutor made in relation to testimony provided by Melissa and James.

The first comments concern the prosecutor's recounting of Melissa's testimony regarding when defendant spent the night. During closing argument, the prosecutor stated,

[Defendant] moved in on the 24th. How do you know it? Because he said so, and because Melissa Loveday also said so. I asked her how many days did he spend the night. Well, he spent the night [of] the . . . 24th, and the 25th, and the 26th. That's Tuesday, Wednesday, Thursday, and the weekend, Friday, Saturday, Sunday. That takes us to the 29th.

Further, the prosecutor also stated,

And it's important to note [defense counsel] never asked [Melissa] dates. . . .

Sometimes the questions [asked] aren't as important as the questions that aren't asked. And that's why when I stand up, and I asked her specific dates, she does answer, "Yes, he stayed there on the 24th, and the 25th, and the 26th, and the following weekend." And I asked her specifically, because he was living there by then.

Defendant is correct in that the prosecutor technically mischaracterized Melissa's testimony. The prosecutor claimed that Melissa stated that defendant stayed the night that first weekend after January 24, 2012. But her testimony was not so definite. Regarding the weekend, Melissa was asked, "All right, so is it conceivable that he would have stayed the night over the weekend then as well, as you said?" Her reply was, "Yes." Thus, Melissa did not fully testify that defendant actually stayed the nights that first weekend but only acknowledged that it was "conceivable." As a result, the prosecutor mischaracterized her testimony.

However, such a mischaracterization did not deprive defendant of a fair trial. First, we stress that the prosecutor was allowed to argue that defendant did, in fact, stay the night that weekend. That is a reasonable inference given (1) Melissa's testimony that it was "conceivable" that defendant did stay, (2) James's testimony that during this period, defendant stayed the night at Fenton most of the time over the weekend, and (3) the fact that the alleged incident with K happened that Saturday night in Fenton. Therefore, while the argument would have been proper, it was not proper to state that Melissa stated with certainty that defendant did spend the night. Such a slight distinction fails to establish that defendant was deprived of a fair trial. Second,

under these circumstances, a curative instruction would have been sufficient to alleviate any prejudice, and defendant is not entitled to any relief on this issue.

Defendant also claims that the prosecutor mischaracterized the testimony of James, when he stated during closing argument:

I think [James] did make an honest effort to tell the truth. My opinion doesn't matter. But when you look at his testimony, again look for those limiting natures. And he, where he could have lied, where I would expect those limits to move, he didn't. But he honestly didn't know. He can't offer you anything. . . . He came in, and he told you what he knows, but unfortunately, he doesn't know much. He can't give you dates. He can't give you times. It is what it is. He doesn't add much to the mix.

Defendant asserts that these remarks are patently untrue because James testified that defendant moved out on February 9. While it is true that James did provide a date of February 9 as the day that defendant finally vacated the Brownstown residence, the prosecutor's comments, in context, did not deprive defendant of a fair trial.

When asked the following questions, James was unable to answer with any specificity or knowledge:

Q. Over what period of time did this moving take place?

A. I can't give you exact dates and that, you know.

* * *

Q. And where did [defendant] work during that time [from January 24 to February 9]?

A. I don't know the name of the company

* * *

Q. What my question is though is did he continue to work at this job after he moved to Melissa's, yes or no?

A. Yes.

Q. Okay. For how long? That's all I'm asking is for how long?

A. I don't know.

Therefore, given the instances of James not being able to testify with any knowledge, the prosecutor's argument, when viewed in context, did not deprive defendant of a fair trial. We do not believe that the prosecutor's comments were meant to be taken literally to apply to the entirety of James's testimony. Moreover, like before, a curative instruction would have

alleviated any prejudice injected by the prosecutor's comments. We also note that even without any specific instruction, defense counsel successfully pointed out any potential inaccuracies in the prosecutor's argument by highlighting to the jury the fact that James testified with specific knowledge regarding the February 9 date.⁵

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel. For the reasons provided below, we disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because no evidentiary hearing was held, we review for errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first claims that his trial counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct as described earlier in this opinion. Assuming arguendo that such performance was deficient, defendant still is not entitled to relief because he cannot establish that the outcome of this trial would have been different had any objections been lodged. As previously discussed, any error introduced during the prosecutor's closing argument was not that significant, and any objection merely would have resulted in a cautionary instruction, which would have been cumulative to the instruction actually given by the trial court.

⁵ Further, the jury was provided with the general instruction that it was not to consider the attorneys' statements as evidence and instead to rely on the actual evidence submitted. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Accordingly, defendant cannot establish that, but for counsel's alleged error, the outcome of the trial would have been different, and his claim fails.

Defendant also argues that his counsel was ineffective for failing to object to the admission of evidence that allegedly was in violation of the *corpus delicti* rule.

"In Michigan, it has long been the rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused." *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996); see also *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006). "The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). "In order to establish the corpus delicti of a crime, the prosecution must introduce evidence from which a trier of fact reasonably may find that acts constituting all the essential elements of the crime have been committed and that someone's criminality was responsible for the commission of those acts." *People v Hamp*, 110 Mich App 92, 96-97; 312 NW2d 175 (1981).

Defendant claims that the *corpus delicti* rule was violated because there was no evidence to support his conviction other than his statement to Keller and that, consequently, defense counsel was ineffective by failing to object to the evidence on this basis. Defendant's position is without merit because there was independent evidence introduced at trial that he moved into the Fenton home on January 24, 2012. Specifically, Melissa testified that starting on January 24, defendant spent the night at least three nights in a row, and other evidence allowed the jury to infer that defendant actually spent five nights in a row. Thus, defendant's statement to Keller was not the only evidence used to establish his residence during this time.

Moreover, "the *corpus delicti* rule does not bar admissions of fact that do not amount to a confession of guilt." *People v Schumacher*, 276 Mich App 165, 180-181; 740 NW2d 534 (2007); see also *People v Porter*, 269 Mich 284, 289; 257 NW 705 (1934) ("The rule is confined to confessions.").

If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt, but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission [*Porter*, 269 Mich at 290.]

Here, defendant's statement to Keller that as of January 24, he had moved into the Fenton home is an admission of a fact and not a confession of a crime. The fact that defendant had moved into the Fenton home on January 24 "does not itself show guilt, but needs proof of other facts" in order to establish guilt of the charged crime of failing to comply with the SORA. In addition to when defendant changed his residence, the prosecution had to prove that defendant was required to register under the SORA, that defendant was a resident of the state, and that defendant failed to update his registry within three days of him changing his residence. None of these other facts was implicated in defendant's statement to Keller.

As a result, the *corpus delicti* rule was not violated, and because of that, defense counsel was not ineffective for failing to raise any objections. See *People v Horn*, 279 Mich App 31, 39-

40; 755 NW2d 212 (2008) (stating that defense counsel is not ineffective for failing to raise a futile objection).

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello