STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1520

State of Minnesota,
Respondent,

vs.

Richard James Kellogg,
Appellant.

Filed October 17, 2011
Affirmed
Stauber, Judge

Chisago County District Court
File No. 13CR091733

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janet Reiter, Chisago County Attorney, Jessica L. Stott, Assistant County Attorney, Center City, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Ross, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant Richard James Kellogg challenges his conviction of failing to register as a predatory offender, arguing that (1) he would have accepted the state's plea offer had

his attorney accurately advised him of his presumptive sentence; (2) the state failed to prove beyond a reasonable doubt that he knowingly failed to register his address; (3) hearsay testimony was improperly admitted when the prosecutor wrongfully elicited evidence about where appellant was living; and (4) the district court abused its discretion by denying appellant's motion for a downward departure. We affirm.

FACTS

At all times relevant to this appeal, appellant was required to register as a predatory offender. On August 27, 2009, Deputy Michelle LaLonde of the Chisago County Sheriff's Department went to appellant's last-known address to conduct an annual compliance check. Deputy LaLonde learned that appellant was no longer living at the address. She then referred the matter to an investigator at the police department.

Through its investigation, the state learned that appellant had been issued a driver's license in Texas on November 25, 2008, which had been renewed on July 31, 2009, listing a Texas address for appellant. Appellant admitted that he moved to Texas in the summer of 2008, and when he applied for a renewal license in Texas, he listed a Texas address as his primary address.

Appellant was subsequently arrested and charged with predatory offender registration violation under Minn. Stat. § 243.166, subd. 5(a) (2008). Before the trial, the state offered appellant a sentence of 90 days in jail in exchange for a guilty plea. Both the prosecutor and the defense attorney acted under the belief that appellant's presumptive sentence, if convicted, would be one year and one day. Appellant rejected the plea offer and was later convicted at trial. After the completion of the presentence

investigation, defense counsel learned that appellant had an additional criminal-history point added because the prior conviction was a sex offense, making the presumptive sentence 18 months. The district court denied appellant's motion for a downward dispositional departure and sentenced appellant to a term of 18 months.

Appellant filed his appeal, and we stayed the appeal to allow the initiation of postconviction proceedings before the district court. The postconviction court found that defense counsel's failure to properly advise appellant as to his presumptive prison term constituted ineffective assistance of counsel, but that appellant had not shown a reasonable likelihood that he would have accepted the plea offer had he been properly advised. We dissolved the stay and allowed appellant to address both direct appeal issues and issues from the postconviction proceeding in this appeal.

D E C I S I O N

I.

We review a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). This standard requires an appellate court to review the postconviction court's factual findings for sufficiency of the supporting evidence. *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010). But the issue of whether those facts support an appellant's claim of ineffective assistance of counsel is a legal question, which is reviewed de novo. *State v. Blom*, 682 N.W.2d 578, 623 (Minn. 2004).

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Claims of ineffective assistance of counsel are analyzed under the test set

forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Rhodes*, 657 N.W.2d at 842. A party alleging ineffective assistance of counsel must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that—but for counsel's error—the result would have been different. *Id.* A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (*Leake III*) (quotation omitted). The failure of either prong is dispositive of the claim, and we need not review both prongs if one is determinative. *Id.*

In order to demonstrate the prejudice that the *Strickland* test requires, appellant must show that there is a "reasonable likelihood [that] the plea bargain would have been accepted had [he] been properly advised" of his presumptive sentence. *See Leake v. State*, 737 N.W.2d 531, 540 (Minn. 2007) (*Leake II*). Appellant "must present some credible, non-conclusory evidence that he would have pled guilty had he been properly advised." *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995).

The postconviction court concluded that appellant failed to meet this burden, finding that appellant rejected the state's offer because he was not willing to accept any jail time out of fear of losing his job and wife, as well as appellant maintaining his innocence throughout the trial. Both of these findings are supported by the record, and support the postconviction court's legal conclusion that appellant failed to demonstrate the prejudice required under *Strickland*.

The only evidence presented by appellant that he would have pleaded guilty had he been properly advised, and was therefore prejudiced by his trial counsel's failure to

properly advise him, was his own testimony that he "believe[d]" that knowing his actual presumptive sentence was 18 months would have made a difference in terms of the plea agreement. But this testimony was not found credible by the postconviction court, and we will not disturb that credibility determination. *See Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006) ("[T]he postconviction court is in a unique position to assess witness credibility, and we must therefore give the postconviction court considerable deference in this regard.").

Appellant failed to present credible evidence that he would have accepted the plea offer had he known that he was facing an 18-month sentence if convicted. Therefore, he has not met his burden on the second prong of the *Strickland* test, and the district court did not abuse its discretion by denying appellant's postconviction motion. Because this prong is dispositive, we do not address the district court's conclusion that appellant's trial counsel rendered ineffective assistance. *See Leake III*, 767 N.W.2d at 10.

II.

Appellant also argues that his conviction must be vacated because the state failed to prove beyond a reasonable doubt that appellant knowingly failed to register. He asserts that his failure to register was due to not having proper information or being "genuinely confused" by the registration requirements and that he was "not hiding."

When determining whether a conviction is supported by sufficient evidence, an appellate court engages in a "painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426,

430 (Minn. 1989). We must "assum[e] the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

The evidence that appellant failed to register as a predatory offender included: (1) a police officer's testimony that she visited appellant's last-known address on August 27, 2009, and discovered that appellant was not living at the residence; (2) appellant's driver's license, which listed a Texas address that had been originally issued in November 2008, was most recently updated on July 31, 2009, and had an expiration date of August 1, 2010; (3) appellant's admission at trial that he listed a Texas address as his primary residence on July 1, 2009, when renewing his driver's license; (4) appellant's original registration form that included a duty-to-register section outlining appellant's duty to notify Minnesota of a new primary address; (5) eight Annual Verification Forms completed by appellant, with appellant's initials next to each specifically enumerated registration requirement; and (6) 22 Change of Information Forms completed by appellant between his first required registration and the date of the offense. The state therefore presented evidence demonstrating beyond a reasonable doubt that appellant was aware of his registration responsibilities.

While appellant claims on appeal that he "rebutted that he knowingly failed to register," the jury disregarded this claim. The standard of review of insufficient-evidence claims is deferential to the fact finder. *See Moore*, 438 N.W.2d at 108 (noting that a reviewing court must "assum[e] the jury believed the state's witnesses and disbelieved any evidence to the contrary"). When the evidence is viewed in the light most favorable

to the verdict, the state presented sufficient evidence that appellant knowingly failed to register.

III.

During Deputy LaLonde's testimony, she was asked by the state: "What did [appellant's mother] indicate to you as to whether [appellant] was residing [at his last-known address] or not?" Deputy LaLonde responded that appellant's mother told her that appellant had not been at the residence for approximately five years; had not lived at the residence; and she did not know his last-known address, but possibly it was in Wisconsin. Following an off-the-record discussion, the district court instructed the jury as follows:

> Ladies and gentlemen, there is an objection to a question earlier regarding what [appellant's mother] said to the Deputy. You are not to consider that answer, what [appellant's mother] said as to the truth of what was said. You are only to consider how that affected what the Investigator did next in her investigation.

Appellant argues on appeal that the prosecutor committed misconduct by intentionally eliciting the hearsay testimony, the district court erred by admitting the testimony, and the curative instruction was insufficient to remedy the error. Appellant argues that the plain-error standard of review applies. But as noted by the district court, appellant objected to the testimony. As such, the plain-error standard is inappropriate. *See State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (noting that plain-error standard of review is appropriate when there is no objection to the alleged error at trial). We therefore consider whether the district court abused its discretion in admitting the limited

evidence. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (describing standard of review for objected-to evidentiary rulings).

The state suggests that the challenged testimony was admissible—and the district court therefore acted within its discretion—because it was not offered for the truth of what was said, but to provide a context for the police investigation of appellant. A prosecutor is permitted to introduce evidence to provide context for an investigation. *State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998); *State v. Czech*, 343 N.W.2d 854, 856–57 (Minn. 1984). In both cases, the district court permitted the prosecutor to introduce evidence that referred to other bad acts by the defendant, in order to explain why police had focused on the particular defendant and to provide a context for their investigative activities. But "a police officer testifying in a criminal case *may not*, under the guise of explaining how [the] investigation focused on defendant, relate hearsay statements of others." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002) (emphasis added) (quotations omitted). Because the challenged testimony here related appellant's mother's hearsay statement to Deputy LaLonde, the context-of-investigation doctrine does not render the evidence admissible. The district court therefore abused its discretion by admitting the testimony.

However, erroneously admitted evidence "does not automatically require reversal of the defendant's conviction and the granting of a new trial." *State v. Courtney*, 696 N.W.2d 73, 79 (Minn. 2005). Because appellant alleges that the error had a constitutional impact, we address the alleged error under the constitutional harmless-error standard—examining whether the verdict was "surely unattributable" to the disputed

evidence. *State v. Vang*, 774 N.W.2d 566, 577 (Minn. 2009) (quoting *Courtney*, 696 N.W.2d at 79–80).

In determining whether a jury verdict was "surely unattributable" to an erroneous admission of evidence, we consider: (1) the manner in which the evidence was presented; (2) whether it was highly persuasive; (3) whether it was used in closing argument; (4) whether it was effectively countered by the defendant; and (5) whether other evidence of guilt was overwhelming. *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005). These considerations suggest that the jury's verdict was unattributable to the erroneously admitted evidence.

First, contrary to appellant's assertion on appeal, whether appellant was living at the Minnesota residence was not contested during the trial. Appellant admitted that he moved to Texas in the summer of 2008, prior to Deputy LaLonde's visit to his last-known registration address, thereby rendering the challenged testimony cumulative. Appellant also admitted that he listed a Texas address as his primary address when he applied for a Texas driver's license renewal. The central issue in the trial, as framed by appellant, was his knowledge of the registration requirements; not where he was living.

Second, the evidence was not referred to by the state in closing argument or in connection with the questioning of any other witnesses.

Third, the district court instructed the jury that it should not consider the evidence for the truth of the matter asserted. In other words, the district court instructed the jury that the challenged testimony should not be used to convict appellant. While appellant asserts that the limiting instruction was insufficient, we presume that juries follow the

instructions of the district court. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). As such, the limiting instruction, while not sufficient to make the evidence admissible, substantially limits the harm caused by the error.

Finally, as discussed above, the state presented a plethora of evidence that appellant failed to register, despite his knowledge of his registration requirements. *See State v. Dillon*, 532 N.W.2d 558, 558 (Minn. 1995) ("As a general rule, the stronger the evidence of guilt, the less likely that any error is prejudicial.").

Because the challenged testimony contained inadmissible hearsay, and the context-of-investigation doctrine does not apply, the district court abused its discretion by admitting the evidence. But, because the verdict is "surely unattributable" to the erroneously admitted evidence, the error is harmless, and reversal is not required.[1]

IV.

A district court's decision "whether to depart from [the] sentencing guidelines rests within the discretion of the [district] court and will not be disturbed absent a clear abuse of that discretion." *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a "rare case" should an appellate court disturb a district court's decision not to depart from the sentencing guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

[1] Given our conclusion that the admission of the statements was not harmful under the stricter harmless-beyond-a-reasonable-doubt standard, it necessarily follows that the evidentiary error is also harmless under the more lenient, non-constitutional standard of whether the erroneously admitted evidence substantially influenced the jury's verdict. *See Vang*, 774 N.W.2d at 578 (conducting similar analysis).

Appellant requested the downward dispositional departure because (1) appellant had been on probation for six years after he was released from prison and had no probation violations prior to the offense at issue and (2) he had experienced no registration problems prior to the charged offense. Appellant compares this case to *State v. Curtiss*, 353 N.W.2d 262 (Minn. App. 1984). In *Curtiss*, the district court denied the defendant's motion for a sentencing departure concluding simply that "there is no justifiable reason to deviate" from the presumptive sentence. 353 N.W.2d at 263. As such, this court reversed and remanded for further consideration noting that "[t]his is not that rare case where we interfere with the exercise of discretion, but a case where the exercise of discretion has not occurred." *Id.* at 264.

Unlike the *Curtiss* case, we are not presented with a situation where the district court failed to exercise its discretion. The district court considered appellant's arguments and letters in favor of departure, as well as the state's arguments against departure. After having "a chance to review the arguments counsel has submitted," the district court concluded that a departure was not warranted. The district court therefore did indeed exercise its discretion by denying appellant's departure motion.

Appellant's argument that the district court failed to exercise its discretion is additionally belied by his argument on appeal. In his brief, appellant outlines the reasons for departure from the presumptive sentence. This part of the brief closely tracks appellant's trial court memorandum in support of his departure motion. In essence, appellant is asking us to reconsider the arguments raised to and considered by the district court on the sentencing-departure issue. Given the broad discretion the district court has

in sentencing issues, it is improper for this court to interfere with the exercise of that discretion, and we decline to do so.

Affirmed.