IN THE SUPREME COURT OF IOWA

No. 16–0900

Filed February 2, 2018

STATE OF IOWA,

Appellee,

vs.

JAMES MICHAEL COLEMAN,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

The defendant challenges his conviction for failure to comply with the sex offender registry. **CONVICTION AFFIRMED, SENTENCE VACATED, AND CASE REMANDED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Louis S. Sloven, Assistant Attorney General, for appellee.

ZAGER, Justice.

A defendant convicted of failure to comply with the sex offender registry under Iowa Code sections 692A.104 and 692A.105 (2015) appeals his conviction. The defendant argues the district court incorrectly interpreted Iowa Code section 692A.105. The district court read the statute's five-business-day period for notification to require an offender to make this notification within five business days of changing to temporary lodgings. The defendant claims the statute requires the offender to make notification within five business days of being away from the offender's registered principal place of residence for more than five days. The defendant claims the district court therefore incorrectly instructed the jury on the applicable law. He also maintains that he was denied a fair trial due to prosecutorial misconduct and was denied effective assistance of counsel. Finally, he alleges the district court erred in assessing appellate attorney fees against him without determining his reasonable ability to pay them. For the reasons set forth below, we affirm the conviction. However, we vacate the sentence and remand to the district court for resentencing consistent with this opinion.

I. Background Facts and Proceedings.

In August 2015, James Coleman was a registered sex offender in Black Hawk County. Coleman listed his principal place of residence as his parents' home in Waterloo where he lived with his parents and an adult sister. As a registered sex offender, Coleman was required to provide information and notify the sheriff within five business days of certain triggering events defined in the statute. Coleman was also

subject to electronic GPS monitoring with an ankle bracelet[1] and had curfew obligations as conditions of his probation. On August 15, the battery of Coleman's ankle bracelet was running low, and his probation officer, Todd Harrington, contacted Coleman and spoke with him to resolve the issue. Harrington could not recall whether he called Coleman at the landline belonging to Coleman's parents or another phone number. Harrington was reassigned soon after, and Mark Blatz replaced him as Coleman's probation officer.

On August 25, Blatz tried and failed to make contact with Coleman through the landline telephone. Blatz left Coleman a telephone message. Blatz tried calling Coleman again the next day and was still unable to reach him. After failing to reach Coleman over the phone, Blatz went to Coleman's registered place of residence on August 26 and spoke with Coleman's father, Michael Coleman (Michael). Michael told Blatz that Coleman was not present. Blatz then contacted law enforcement for help tracking Coleman down.

On August 27, Sergeant Steve Peterson and DCI Agent Jack Liao went to Coleman's residence and spoke with Michael. Michael told the officers that he had been out-of-state with his wife for about a week, and he had not seen Coleman since he returned on August 16 or 17. At trial, Michael clarified during his testimony that it was August 17. Michael told the officers that it was "very abnormal for [Coleman] to be gone for so long without having any communication with his [father]." There were voicemails left on the answering machine in Michael's house for Coleman, and Michael allowed officers to listen to them. One of the

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[1]The district court excluded at trial all references to Coleman's GPS or electronic monitoring, and the only references of this probation condition made in the jury's presence referred to it simply as "monitoring."

messages was for Coleman from a woman who indicated she was waiting for Coleman at Motel 6.

The officers then went to Motel 6 in Waterloo looking for Coleman or the woman who had left the message. The officers divided their search for Coleman with Peterson speaking with motel management to identify the woman from the message, while Liao talked with other people in the motel. Liao spoke with a motel employee who indicated that Coleman had stopped by Motel 6 on the previous day—August 26—and ended up staying in the motel employee's room at the motel. The officers found Coleman in the employee's motel room, along with the charger for his GPS monitor that had been missing from his house. When the officers asked Coleman about where he had been, Coleman told them he had just returned from the Cedar Rapids area. Between August 17 and August 27, Coleman never met with the sex offender registrar of the Black Hawk County sheriff's office to provide any notification regarding his location. The officers arrested Coleman for probation violation and added an additional charge for a sex offender registry violation later that day.

On August 28, Coleman asked to speak with Peterson and Liao while he was in jail. Coleman told the officers that his disappearance was not voluntary and that people who were trying to collect a debt they believed Coleman owed them had taken him against his will to locations in Cedar Rapids, Hiawatha, and Marion. The conversation between the officers and Coleman never specified when Coleman was gone or if the disappearance was for a continuous period. The officers were unable to corroborate any part of Coleman's story.

On October 5, the State charged Coleman with a violation of Iowa Code sections 692A.104 and 692A.105 for his failure to comply with the sex offender registry. The State alleged that the registration violation was

a second offense that resulted in enhancement to a class “D” felony under Iowa Code section 692A.111, and it later amended the charge to add a habitual offender enhancement under Iowa Code sections 902.8 and 902.9. The underlying registry violation was severed for trial purposes from the enhancement proceedings.

On March 10, 2016, a jury convicted Coleman of failure to comply with the sex offender registry requirements under Iowa Code sections 692A.104 and 692A.105. On March 21, Coleman stipulated to the second offense and habitual offender enhancements pursuant to a plea agreement. Coleman’s sentence in the pending case was to run concurrent with the sentence imposed in a separately pending probation violation matter. The district court accepted Coleman’s stipulation, and it later imposed judgment against Coleman for second offense failure to comply with the sex offender registry, a class “D” felony, committed as a habitual offender, in violation of Iowa Code sections 692A.104, 692A.105, 692A.111, 902.8, and 902.9. The district court imposed an indeterminate term of incarceration not to exceed fifteen years with a mandatory minimum of three years in prison. The district court suspended this sentence and placed Coleman on probation with the special condition that he reside at a residential treatment facility for one year or until he achieved the maximum benefits of treatment. Though the district court ordered Coleman to pay court costs, it found he was not reasonably able to reimburse the State for court-appointed attorney fees. Later, the district court revoked Coleman’s suspended sentence and imposed the original sentence. The district court also found Coleman was not reasonably able to pay the court-appointed attorney fees and expenses connected to his probation revocation matter. Coleman timely filed a notice of appeal, and we retained the appeal.

II. Standard of Review.

"We review sufficiency-of-the-evidence challenges for corrections of errors at law." *State v. Schlitter*, 881 N.W.2d 380, 388 (Iowa 2016). Our standard of review for rulings on questions of statutory interpretation is also for correction of errors at law. *State v. Iowa Dist. Ct.*, 889 N.W.2d 467, 470 (Iowa 2017). We likewise review challenges to jury instructions for correction of errors at law. *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010). "We do not consider an erroneous jury instruction in isolation, but look at the jury instructions as a whole." *State v. Murray*, 796 N.W.2d 907, 908 (Iowa 2011).

We review claims of ineffective assistance of counsel de novo. *Schlitter*, 881 N.W.2d at 388. Our standard of review for constitutional issues is also de novo. *State v. Dudley*, 766 N.W.2d 606, 612 (Iowa 2009). We review a district court's decision on claims of prosecutorial misconduct for abuse of discretion, which occurs when "a court acts on grounds clearly untenable or to an extent clearly unreasonable." *State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011) (quoting *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006)). Further, "[o]ur review of a restitution order is for correction of errors at law." *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004).

III. Analysis.

Coleman presents a number of challenges on direct appeal. First, Coleman claims the evidence was insufficient to establish that he failed to notify the sheriff "within five business days" under Iowa Code section 692A.105. More specifically, Coleman disputes the interpretation of Iowa Code section 692A.105 that the State presented to the jury requiring an offender to notify the sheriff within five business days of changing to temporary lodgings. Coleman proposes that the statute should be read

to require notification within five business days after the sex offender has already been away from his or her principal residence for more than five days. Second, Coleman argues the marshaling instructions presented to the jury did not convey the applicable law. Third, he maintains he was denied a fair trial due to prosecutorial misconduct. Fourth, Coleman presents a variety of ineffective-assistance-of-counsel claims based on his trial counsel's decision not to object to certain prosecutorial statements, as well as counsel's decisions not to challenge certain jury instructions, the vagueness of the statute, and certain aspects of Coleman's stipulations to the sentencing enhancements. Finally, Coleman alleges that the sentencing court erred when its sentencing order stated Coleman would be assessed the cost of the court-appointed appellate attorney fees unless he filed a request for a hearing on his reasonable ability to pay court-appointed appellate attorney fees within thirty days of the issuance of procedendo following the appeal. We will consider each issue in turn.

A. Interpretation of Iowa Code Section 692A.105.

Iowa Code section 692A.105 states,

> In addition to the registration provisions specified in section 692A.104, a sex offender, within five business days of a change, shall also appear in person to notify the sheriff of the county of principal residence, of any location in which the offender is staying when away from the principal residence of the offender for more than five days, by identifying the location and the period of time the offender is staying in such location.

Iowa Code § 692A.105. At trial, Coleman and the State presented competing theories to the jury regarding the time within which an offender must make a notification of his absence from his principal place of residence for more than five days under Iowa Code section 692A.105. The State claimed the triggering event for the notification requirement

occurs when the offender changes to temporary lodgings. On the other hand, Coleman argued the triggering event for the notification requirement occurs only after the offender has been away from the principal residence for more than five days. Thus, Coleman reasoned, the offender has five business days within which to notify the sheriff beginning on the sixth day of the offender's absence. Under Coleman's statutory interpretation, the evidence presented at trial would be insufficient to establish Coleman committed the registry violation at issue. Therefore, in order for us to determine whether the State provided sufficient evidence to sustain the jury verdict against Coleman, we must interpret Iowa Code section 692A.105 to resolve the conflicting theories of its meaning. *State v. Showens*, 845 N.W.2d 436, 441 (Iowa 2014).

The first step in our statutory interpretation analysis is to determine whether the statute is ambiguous. *Iowa Dist. Ct.*, 889 N.W.2d at 471. We need not look any further than the plain language of the statute when the language is unambiguous. *Id.* However, "if reasonable minds could differ or be uncertain as to the meaning of the statute" based on the context of the statute, the statute is ambiguous and requires us to rely on principles of statutory construction to resolve the ambiguity. *Id.* at 471–72 (quoting *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015)). The dispositive language in the statute is the meaning of "within five business days of a change." The legislature defines "change" within the context of the statute governing the sex offender registry requirements as "to add, begin, or terminate." Iowa Code § 692A.101(5). "When the legislature has defined words in a statute—that is, when the legislature has opted to 'act as its own lexicographer'—those definitions bind us." *In re J.C.*, 857

N.W.2d 495, 500 (Iowa 2014) (quoting *State v. Fischer*, 785 N.W.2d 697, 702 (Iowa 2010)).

Based on the legislature's definition of "change," one possible interpretation of the statute—and the position the State presented—is that "change" is synonymous with "began." Under this interpretation, Coleman was required to notify the sheriff within five business days of when he began to stay at a location away from his principal residence. However, this is not the only reasonable interpretation. As Coleman noted, "change" could also be synonymous with "add" or "terminate." In that case, the statute would require that within five business days of the beginning, addition, or termination of a triggering event—namely, the offender's absence from the principal residence––the offender would be required to notify the sheriff of any location in which he or she is staying when he or she has been away from the principal residence for more than five days.

Since both interpretations are reasonable, the statute is ambiguous. Consequently, we must rely on our tools for construing ambiguous statutes to determine what Iowa Code section 692A.105 means by "within five business days of a change." *See Iowa Dist. Ct.*, 889 N.W.2d at 472. "When we interpret a criminal statute, our goal 'is to ascertain legislative intent in order, if possible, to give it effect.' " *State v. Finders*, 743 N.W.2d 546, 548 (Iowa 2008) (quoting *State v. Conley*, 222 N.W.2d 501, 502 (Iowa 1974)). Additionally, although we adhere to the rule of lenity in criminal cases, criminal statutes still "must be construed reasonably and in such a way as to not defeat their plain purpose." *State v. Hagen*, 840 N.W.2d 140, 146 (Iowa 2013) (quoting *State v. Peck*, 539 N.W.2d 170, 173 (Iowa 1995)).

"[T]he purpose of the registry is protection of the health and safety of individuals, and particularly children, from individuals who, by virtue of probation, parole, or other release, have been given access to members of the public." *State v. Iowa Dist. Ct.*, 843 N.W.2d 76, 81 (Iowa 2014). Iowa Code chapter 692A provides a variety of mechanisms to ensure this protection. For example, section 692A.124 provides for electronic tracking and monitoring if necessary based upon a risk assessment of the offender's background and other safety factors. *See* Iowa Code § 692A.124(1)–(2). Iowa Code section 692A.121(13) entitles Iowans who subscribe to a notification system to receive changes to any sex offender registration in a geographic area of their choice. *See id.* § 692A.121(13). Similarly, Iowa Code section 692A.118(11) mandates the state to "make a reasonable effort to ascertain the whereabouts of the offender" when there is reason to believe the offender has fled from the principal residence or changed residence to an unknown location. *See id.* § 692A.118(11). Likewise, chapter 692A allows Coleman's original victim and other members of the public to contact the county sheriff's office and request relevant information from the registry about Coleman, which encompasses his "[t]emporary lodging information, including the dates when residing at the temporary lodging." *Id.* § 692A.121(5)(*b*)(3).

We agree with the State that these sections demonstrate the legislature's intent to provide consistent monitoring of registered sex offenders. It would be inconsistent with the purpose of the statute and the legislative intent if we were to interpret section 692A.105 so that Coleman would only have to make notification of temporary lodging after being absent from the principal residence for more than five days. This would clearly hinder law enforcement's ability to monitor registered sex offenders in order to protect society from them. As we have previously

held, statutes "must be construed reasonably and in such a way as to not defeat their plain purpose." *Peck*, 539 N.W.2d at 173. In this case, the State's interpretation of Iowa Code section 692A.105, that requires a registered sex offender to make notification of his absence when he changes his location from his principal residence, reasonably construes the statute in a way that is consistent with the legislature's purpose and intent. To hold otherwise would be to defeat the statute's plain purpose, which we cannot do. *See id.*

Further, "[w]e read statutes as a whole rather than looking at words and phrases in isolation." *Iowa Ins. Inst.*, 867 N.W.2d at 72. A review of Iowa Code chapter 692A as a whole reveals that it is replete with sections that require an offender to report relevant information to the local sheriff's office "within five business days" of a notification-triggering event, thereby giving Coleman fair warning of the meaning of "within five business days" under Iowa Code section 692A.105. For example, an offender must register "within five business days of being required to register." Iowa Code § 692A.104(1). An offender also must appear in person to notify the local sheriff's office "within five business days of changing a residence." *Id.* § 692A.104(2). Under Iowa Code section 692A.104(3), an offender must notify the local sheriff's office through a notification method of the office's choosing "within five business days of a change in relevant information." *Id.* § 692A.104(3). The legislature has defined "relevant information" to incorporate "[t]emporary lodging information, including dates when residing in temporary lodging." *Id.* § 692A.101(23)(*a*)(18).

Thus, if we look at chapter 692A in context to interpret section 692A.105 *in pari materia*, or "by reference to other similar statutes or other statutes related to the same subject matter," *State v. Nail*, 743

N.W.2d 535, 540 (Iowa 2007), the meaning of "within five days" in section 692A.105 is fairly ascertainable and aligns with the State's interpretation. While section 692A.105 is poorly written, the meaning of "within five business days" can be fully understood by referencing the other sections of Iowa Code chapter 692A which consistently use the same "within five business days" language as in section 692A.105. No other required change in the sex offender's "relevant information" under chapter 692A provides the offender with a grace period before triggering the notification requirement. As a registered sex offender, Coleman was required to abide by these other provisions of Iowa Code chapter 692A that consistently used the same "within five business days" language to mean within five business days of a notification-triggering event. The statutory provision provided him with fair notice of his obligation under Iowa Code section 692A.105 to provide notification of his change to temporary lodgings within five business days of that change. If we were to interpret the meaning of "within five business days" differently in section 692A.105 to incorporate the grace period that Coleman proposes, we would be creating an asymmetrical law that is inconsistent with the way the statute uses that terminology throughout the registration and notification provisions in chapter 692A. *See id.* at 541 ("Through [the *in pari materia*] interpretation, we necessarily operate on the objective assumption that the legislature strives to create a symmetrical and harmonious system of laws.").

Despite the legislature's ambiguous language in Iowa Code section 692A.105, we are convinced that based on the purpose of Iowa's sex offender registry, the legislative intent of chapter 692A governing that registry, and the context of section 692A.105 by reference to the other provisions in chapter 692A, the legislature intended for registered sex

offenders to provide notification of a change to temporary lodgings within five business days of that change. Under this interpretation, "we give the statute a reasonable, contextual interpretation that is workable, promotes symmetry, and which therefore best manifests legislative intent" in accord with our goal to give effect to the legislative intent when we interpret criminal statutes. *Id.* at 543; *see also Finders*, 743 N.W.2d at 549. Coleman argues the State's evidence is insufficient even under this interpretation because the State did not present evidence that he left his principal residence with an intent to be away for more than five days. However, section 692A.105 does not require the State to show the offender's specific intent to be away from his principal residence for more than five days. Accordingly, the State was not required to present evidence that Coleman left with an intention to be away from his principal residence for more than five days. The evidence is sufficient to show Coleman failed to comply with section 692A.105. Therefore, we affirm Coleman's conviction for failure to comply with the sex offender registry under Iowa Code sections 692A.104 and 692A.105.

B. Challenge to the Marshaling Instruction. Coleman argues the district court failed to properly instruct the jury regarding the applicable law. The marshaling instruction at issue laid out the two elements of failure to comply with the sex offender registry. Coleman objected to the instruction's phrasing of the second element on the ground that it merely recited the statutory language of Iowa Code section 692A.105, which Coleman asserted did not adequately instruct the jury on the proper way to determine when the five-business-day period should commence. The challenged portion of the marshaling instruction required the State to prove that

> [o]n or about August 15, 2015, through August 27, 2015, the defendant failed to appear in person and notify the Black Hawk County sheriff within five business days of any location in which the offender is staying when away from the principal place of residence of the offender for more than five days, and identifying the location and the period of time the offender is staying in such location.

"Jury instructions 'must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide.' " *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 892 (Iowa 2015) (quoting *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997)). Errors in jury instructions merit reversal when prejudice results. *Id.* "Prejudice occurs and reversal is required if jury instructions have misled the jury[ ] or if the district court materially misstates the law." *Id.* Given our interpretation of Iowa Code section 692A.105, that an offender must notify the sheriff of a change in location within five business days of changing to temporary lodgings, the jury instructions adequately conveyed the applicable law to give jurors a clear understanding of the issues it needed to decide. Therefore, we affirm the district court's use of these jury instructions.

C. Prosecutorial Misconduct. Coleman claims his due process right to a fair trial was violated because of prosecutorial misconduct based on a number of the prosecutor's statements at trial. However, only two of these challenges to alleged improper prosecutorial statements were objected to at trial and, the parties agree, were preserved on appeal. Consequently, his claims regarding other prosecutorial statements can only be examined under our analysis for ineffective assistance of counsel. We first examine the statements in which Coleman preserved error.

During closing argument, the prosecutor told the jury, "I understand the defense, they want to—to blow a lot of smoke around the law, make it as fuzzy as possible" and "the defense will hide behind [a]

cloud of assumption." Coleman's counsel objected to these statements at the time they were made, and the district court then told the prosecutor to keep his arguments to the statutes at issue.

In order to establish a due process claim based on prosecutorial misconduct, Coleman must demonstrate both that prosecutorial misconduct occurred and that the prosecutorial misconduct resulted in prejudice that denied the defendant a fair trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). In our legal system,

> "[p]rosecutorial misconduct" . . . describes conduct by the government that violates a defendant's rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical requirement.

ABA House of Delegates, Recommendation 100B, at 1 (2010), http://www.americanbar.org/content/dam/aba/directories/policy/2010_am_100b.pdf. In the past, we have found prosecutorial misconduct includes, but is not limited to,

> questioning witnesses about others' deceit, distorting testimony, making unsupported statements during closing argument, stating the defendant lied during testimony, diverting the jury from deciding the case based on the evidence, [and] making other inflammatory or prejudicial statements about the defendant.

Schlitter, 881 N.W.2d at 393; *see also State v. Musser*, 721 N.W.2d 734, 754–55 (Iowa 2006); *State v. Carey*, 709 N.W.2d 547, 552 (Iowa 2006); *Graves*, 668 N.W.2d at 870–71.

We have also previously warned against conflating prosecutorial misconduct with prosecutorial error. *See Schlitter*, 881 N.W.2d at 393–94. While prosecutorial misconduct involves either the prosecutor's reckless disregard of a duty to comply with the applicable legal standard or obligation, or a prosecutor's intentional statements in violation of an

obvious obligation, standard, or applicable rule, prosecutorial error is based on human error or the exercise of poor judgment. *Id.* Specifically, the prosecutor "owes a duty to the defendant as well as to the public. The prosecutor's duty to the accused is to 'assure the defendant a fair trial' by complying with 'the requirements of due process throughout the trial.' " *Graves*, 668 N.W.2d at 870 (citations omitted) (quoting *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002)). Since Coleman claims prosecutorial misconduct instead of prosecutorial error, he must show the prosecutor acted with reckless disregard of this duty or intentionally made statements in violation of an obvious obligation, legal standard, or applicable rule that went beyond an exercise of poor judgment. *See Schlitter*, 881 N.W.2d at 393–94. Nevertheless, Coleman need not show the prosecutor acted in bad faith. *Graves*, 668 N.W.2d at 869.

We reject Coleman's claims of prosecutorial misconduct with regard to the prosecutor's isolated comments of "the defense, they want to—to blow a lot of smoke around the law, make it as fuzzy as possible" and "the defense will hide behind [a] cloud of assumption." Coleman reasons these statements were inflammatory characterizations that maligned and denigrated the defense, which are considered prosecutorial misconduct under our holding in *Graves*. Specifically, Coleman cites *Graves* for the proposition that a "prosecutor should not denigrate a defense as a sham or smoke screen." However, this mischaracterizes our holding in *Graves*.

In *Graves*, we reversed the defendant's conviction and remanded the case for a retrial based on prosecutorial misconduct where the prosecutor attacked the credibility and character of the defendant by making multiple statements about the defendant being a liar. *See id.* at 879–80 ("In rebuttal, the prosecutor mounted a full attack on the

credibility and character of the defendant. He referred to 'the problem of Mr. Graves coming into Court and lying like he did.' He made five additional references to the defendant's lying and one statement that Graves 'was not telling the truth.' . . . Thus, the objectionable comments by the prosecutor were not isolated, but rather reflected a pattern of misconduct."). Instead of holding that it was prosecutorial misconduct for the prosecutor to refer to defense counsel's argument as a "smoke screen" as Coleman contends, we simply listed that comment as one of a number of comments the prosecutor made in his rebuttal argument that exacerbated the situation. *Id.* at 880.

Nevertheless, it is not prosecutorial misconduct for the prosecutor to make statements aimed at the theory of the defense as the prosecutor did in this case. *See, e.g., United States v. Ruiz*, 710 F.3d 1077, 1086 (9th Cir. 2013) ("[T]he prosecutor's characterization of the defense's case as 'smoke and mirrors' was not misconduct. The prosecutor's comments were directed to 'the strength of the defense on the merits,' and did not amount to an *ad hominem* attack on defense counsel." (quoting *United States v. Nobari*, 574 F.3d 1065, 1079 (9th Cir. 2009))); *United States v. Bernard*, 299 F.3d 467, 487–88 (5th Cir. 2002) (holding the prosecutor's comment that defense counsel was trying "to get someone on this jury to follow down a rabbit trail and take a red herring and somehow say, 'Oh, I've got doubt[,]' [n]ot based on facts, but based purely on conjecture and speculation" did not amount to prosecutorial misconduct because it attacked the strength of the defendant's case on the merits).

Rather than making denigrating or inflammatory comments of a personal nature aimed at defense counsel, the prosecutor in this case was summarizing the defendant's theory of the case, which we previously noted made multiple references to assumptions and attempted to cast

doubt about the timeline of the case. Accordingly, these statements did not amount to alleged prosecutorial misconduct because they were made to attack the defense's theory of the case rather than defense counsel personally.

Nevertheless, even if those statements did amount to prosecutorial misconduct, Coleman fails to demonstrate that such misconduct resulted in prejudice that denied him a fair trial. As summarized in *Graves*, prosecutorial misconduct will not normally rise to the level of a due process violation when it occurs in isolation. *Graves*, 668 N.W.2d at 880. But when prosecutorial misconduct is considered in light of improper cross-examination and arguments, as it was in *Graves*, such misconduct can compromise the fairness of the trial. *Id.* In *Graves*, the misconduct related to a critical issue and was a central theme of the prosecution, rather than an isolated incident. *Id.* at 880–81. This case is not like *Graves* in any legitimate sense that would demonstrate a due process violation occurred. Here, there were no personal credibility attacks by the prosecutor, no prosecutorial efforts to inflame the jury, and no attempt by the prosecutor to have the jury improperly depend on whether the jury believed the officer lied. *Id.* at 879–81.

In determining whether misconduct is so prejudicial as to warrant a new trial, we examine the following:

> (1) The severity and pervasiveness of misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; (5) the extent to which the defense invited the misconduct.

State v. Boggs, 741 N.W.2d 492, 508–09 (Iowa 2007). Generally, we find prejudice where the prosecutor has demonstrated a persistent effort to

present prejudicial information to the jury. *State v. Neiderbach*, 837 N.W.2d 180, 210 (Iowa 2013).

Our examination of those elements in this case demonstrates the lack of prejudice any alleged prosecutorial misconduct had on the outcome of the case. As we noted previously, any prosecutorial misconduct that occurred was isolated, not severe or pervasive. Aside from the few isolated comments at issue, the prosecutor provided the jury with professional legal arguments that sought to apply the law to the facts of the case. Unlike the misconduct in *Graves*, the alleged prosecutorial misconduct in this case did not become a central theme of the prosecution. As a whole, the prosecutor stuck to the evidence, facts, and legal arguments while presenting the case to the jury.

The most important factor in our determination of whether any prosecutorial misconduct rose to the level of prejudice to demonstrate a due process violation is the strength of the State's evidence. *Boggs*, 741 N.W.2d at 508–09. Here, the jury received the case at 11:00 a.m. and returned a verdict on the same day a few minutes after 1:00 p.m. The State presented compelling evidence against Coleman to demonstrate that he violated Iowa Code section 692A.105 by failing to make notification of his location change within five business days of his move from his primary residence to temporary lodgings. The evidence showed that Coleman had been away from his primary residence for more than a week without notifying the Black Hawk County sheriff's office about his location change. The evidence showed Coleman's father told the police that he had not seen Coleman in more than a week, and the officers were unable to corroborate any part of Coleman's story about his prolonged absence. Given the strong evidence the State presented against Coleman, as well as the isolated nature of the alleged prosecutorial

misconduct, Coleman failed to show the necessary prejudice to demonstrate that his due process rights were violated. He is not entitled to a new trial.

D. Ineffective Assistance of Counsel. Coleman asserts a number of ineffective-assistance-of-counsel claims. The United States Constitution and the Iowa Constitution both entitle criminal defendants to effective assistance of counsel. U.S. Const. amend. VI; Iowa Const. art. I, § 10. Ineffective-assistance claims "require a showing by a preponderance of the evidence both that counsel failed an essential duty and that the failure resulted in prejudice." *Schlitter*, 881 N.W.2d at 388. If the defendant fails to establish the first prong, we need not address the second prong regarding prejudice. *Nguyen v. State*, 878 N.W.2d 744, 754 (Iowa 2016). Counsel fails an essential duty when he or she "perform[s] below the standard demanded of a reasonably competent attorney." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Given the difficulties in crafting a trial strategy, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Nguyen*, 878 N.W.2d at 752 (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984)).

Additionally, a counsel's failure to perform an essential duty results in prejudice when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ledezma*, 626 N.W.2d at 143 (quoting *Strickland*, 466 U.S. at 690–91, 104 S. Ct. at 2066). "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

(quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). This requires the defendant to demonstrate that, "absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* (quoting *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068).

1. *Failure to object to alleged prosecutorial misconduct.* The parties agree Coleman only preserved error with regard to his claims of prosecutorial misconduct analyzed in Part C above. He asks us to analyze the other statements he claims amount to prosecutorial misconduct under our ineffective-assistance-of-counsel analysis on the grounds that his trial counsel should have objected to these statements. Since these claims were not preserved on appeal, the record before us may be insufficient to address these ineffective-assistance claims because "[c]ounsel may, indeed, have had good reason for each step he took or failed to take." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Unless the incompetency "is so glaring that we are justified in saying so upon an examination of the record[,] . . . we should be slow to do so on what amounts to an ex parte hearing." *Id.* Otherwise, such claims should be reserved for postconviction relief, where counsel can have his or her day in court to respond to the defendant's charges. *Id.* We address each of these allegations in turn and ultimately conclude that Coleman has failed to establish the ineffective assistance of counsel warranting a new trial.

a. Coleman's claim that the prosecutor diverted the jury from deciding the case solely on the evidence. Coleman claims the following statements amounted to prosecutorial misconduct for which his trial counsel was ineffective for failing to object. He claims the following statements improperly diverted the jury from deciding the case solely on the evidence by presenting issues beyond his legal culpability: First,

> I sat and listened to defense counsel state that you should reward the defendant with an acquittal because it is possible that he came home. Because it's possible that he came home within this time that he was away, and therefore you should award him with an acquittal because of that reason.

Second,

> And you know, justice is not about doing the—the easy thing. Justice is about doing the right thing. That's why 12 of you have been called to decide. The 12 of you have more collective wisdom than anyone else in this courtroom. That's why the law puts the most important powers in your hand. The power to do justice. The power to do what is right.

In *Musser*, the prosecutor uttered a similar line to the jury in his opening statement, saying, "At the end of the trial, I will have the opportunity to come back and stand here before you and ask you to find the Defendant guilty . . . because it is the right thing to do." 721 N.W.2d at 755. We found this statement amounted to prosecutorial misconduct because it improperly diverted the jury away from its obligation to decide the case based on the evidence by injecting issues that went beyond legal culpability. *Id.* at 756. In doing so, we noted, "[W]hether a finding of guilt is 'the right thing to do' in an abstract sense is not the issue, yet that is what the prosecutor implied." *Id.* Nevertheless, we found the defendant was not denied a fair trial based on the entire record because the state presented strong evidence, the comments did not speak to a central issue, and the statements were isolated. *Id.* That is similarly the case here.

Here, the crux of the prosecutor's statements was that the possibility that Coleman came home—which the defense reiterated as a theory of defense—was not enough to create reasonable doubt regarding his failure to register. The prosecutor's statement about the power of the jury to do justice does not amount to prosecutorial misconduct because it was merely restating the jury instructions, which told the jury "[their]

sole duty [was] to find the truth and do justice." Likewise, telling the jury that they had the power "to do what is right," which is comparable to the statement in *Musser* and arguably prosecutorial misconduct, still would not rise to the level of prejudice so as to deny the defendant a fair trial. An examination of the entire record shows the State presented strong evidence against Coleman, the comment was isolated, and the comment did not speak to a central issue of the case. *See id.* at 756 (holding the strength of the state's evidence and the isolated and extraneous nature of the comment precluded a finding that defendant was denied a fair trial due to prosecutorial misconduct). Overall, even if the comments at issue amounted to prosecutorial misconduct, they were not severe and pervasive as to represent a persistent effort on the part of the prosecutor to present prejudicial information to the jury. As a result, there is nothing to suggest the decision of Coleman's counsel not to object to these statements from the prosecutor was "so glaring that we are justified in saying so upon an examination of the record" or that the decision not to object resulted in prejudice. *Coil*, 264 N.W.2d at 296. Therefore, we find no basis on which to hold Coleman was denied the effective assistance of counsel based on his counsel's decision not to object to the aforementioned prosecutorial statements.

b. Coleman's claim that the prosecutor relied on facts outside the record and misstated the evidence. During closing, the prosecutor told the jury,

> You did not hear any evidence that the time that the defendant was missing from his residence, his principal residence, that he was going back home all of those nights or all of those days, and that since his father sleeps at 7 o'clock in the night, no one managed to see him. Unless you forget his—his mother lives in this house that you've been told and this—there's a sister, a younger sister.

Coleman claims the portion of the statement mentioning his mother and sister improperly suggested they did not see him in the house although neither side presented testimony from Coleman's mother or sister. Further, when a State's witness wanted to testify that no one in the family had seen Coleman, Coleman's hearsay objection was sustained and the jury was told to "disregard any testimony that was referring to anybody else in the family."

"It is improper to argue on matters stricken from the record." *State v. Mayes*, 286 N.W.2d 387, 392 (Iowa 1979). However, "[a] prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify." *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986) (quoting *United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir. 1984)). In this case, the prosecution was referencing the absence of evidence supporting Coleman's theory that he could have reentered the principal residence within the time period at issue by accurately pointing out Coleman did not present evidence as to whether his mother or sister had seen him. Since Coleman's case rested on whether or not he had returned to his principal residence, Coleman logically would want to present testimony from witnesses who could support his claim that he returned home, including his mother and sister because they lived in the home. Consequently, the prosecutor's statement referencing this lack of testimony did not amount to prosecutorial misconduct. Therefore, Coleman's trial counsel did not fail to perform an essential duty in deciding not to object to the statements at issue, and Coleman was not denied a fair trial because of the prosecutor's statements or his counsel's decision not to object to those statements.

In addition to Coleman's claim that the prosecutor improperly relied on facts outside the record, Coleman also maintains that his trial counsel was ineffective for failing to object to certain statements the prosecutor made that misstated facts in the record during the prosecution's rebuttal at closing. This challenge involves two statements: First,

> There's no assumption when Todd Harrington told you that he was having problems monitoring this Defendant's compliance. It's where this stems from. There's no assumption in this, hey, I am having a problem with him. I even call him to say, hey, I need to find where you're meant to be. There's no assumption in that. Telling us about assumptions. What else can be clearer than that? You have a monitoring compliance, stay within the area of your monitoring compliance. There was no assumption with that.

Second,

> The only corroborated testimony is we can't find him. We're trying to track him, stay where you need to be, we're trying to monitor you. The only testimony you heard is that he fails his monitoring because they can't find him where he needs to be.

Coleman argues these statements misrepresented Harrington's testimony because Harrington only testified that he could not confirm Coleman's whereabouts on August 15 due to a problem with his monitoring, not that he tried and was unable to locate Coleman at his principal residence. We disagree based on a closer analysis of these statements and the context in which they were made.

"In closing arguments, counsel is allowed some latitude. Counsel may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented. However, counsel has no right to create evidence or to misstate the facts." *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993) (citations omitted). Here, the prosecutor's statement that Harrington was having problems monitoring Coleman and

that Coleman failed compliance had a factual basis. During Coleman's redirect examination of Harrington, Coleman's counsel asked Harrington, "[W]hen you say he was out of compliance, was that he was failing compliance of you being able to locate him at where he was meant to be?" To which Harrington responded, "Yeah, that—that would be accurate. Yes, that's correct." Thus, the prosecutor was within his latitude to argue during closing that Coleman was having problems with his monitoring based on Harrington's testimony.

The rest of the second challenged statement also does not constitute prosecutorial misconduct. The portion of the prosecutor's closing from which Coleman extracted this challenged statement provides,

> [T]here's no testimony that you heard in this entire trial that the Defendant was living at that period of time in question on the [registered place of residence.] There's absolutely zero testimony to support that he was living there. The only testimony you've heard which is corroborated, not only by himself, but by other participants, is that he wasn't. The only corroborated testimony is we can't find him. We're trying to track him, stay where you need to be, we're trying to monitor you. The only testimony you heard is that he fails his monitoring because they can't find him where he needs to be.

Although Harrington did not search for Coleman beyond attempting to reach him on the telephone, the State's evidence demonstrated to the jury that others did look for him while he was absent from his principal place of residence. Consequently, these statements are based on fact rather than mere distortion, and the prosecution was allowed to summarize the testimony of all of the witnesses and argue to the jury that no one was able to locate Coleman during the time period at issue. Because these statements do not amount to prosecutorial misconduct,

Coleman's claim that his counsel was ineffective in failing to object to them fails for lack of merit.

2. *Challenging jury instructions.* Coleman maintains trial counsel was ineffective in failing to request an instruction informing the jury how to compute time properly under Iowa Code section 4.1(34). Alternatively, Coleman argues trial counsel was ineffective in failing to request the jury be instructed that the term "day" for purposes of the statutory time period at issue must be a twenty-four-hour period if Iowa Code section 4.1(34) does not apply. If "day" must mean a twenty-four-hour period, then Coleman contends trial counsel was ineffective in failing to request the jury be instructed that if the more-than-five-day period occurs in the middle of a business day that business day is excluded for purposes of calculating the five-business-day notification period because "business day" means a whole day rather than a partial day. We need not address Coleman's alternative arguments because the State agrees with Coleman that Iowa Code section 4.1(34) is the applicable provision governing the computation of time under section 692A.105. However, before we can examine Coleman's claims of ineffective assistance of counsel with regard to specific jury instructions, we must first examine whether the instructions in question adequately conveyed the applicable law.

As we noted previously, errors in jury instructions merit reversal when prejudice results. *Rivera*, 865 N.W.2d at 892. "Prejudice occurs and reversal is required if jury instructions have misled the jury[ ] or if the district court materially misstates the law." *Id.* Additionally, "[f]ailure of defense counsel to take proper steps regarding instructions may under some circumstances not rise to the level of ineffective assistance of counsel." *State v. Goff*, 342 N.W.2d 830, 838 (Iowa 1983). We have held that "not every right to insist that a particular instruction

be given need be availed of by counsel in order to satisfy the standard of normal competency." *State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983). Rather, breach "must be determined with regard to the theory of defense which is being employed in the case." *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990).

In order to convict Coleman of a violation of Iowa Code section 692A.105, the jury had to be able to compute time to determine whether Coleman failed to notify the sheriff's office within the five-business-day period. In relevant part, Iowa Code section 4.1(34) governs the computation of time in construing statutes and states, "[I]n computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday." Iowa Code § 4.1(34). Coleman contends his trial counsel was ineffective in failing to request an instruction informing the jury of this statutory time-calculation rule because the jury was then not informed that "the first day shall be excluded" in its calculation of the five-business-day notification period. We disagree based on the theory of defense that Coleman's counsel employed at trial.

During his closing argument, Coleman's counsel argued that the statute only required Coleman to make notification within five business days after being away from his principal residence for more than five days. Counsel also suggested the officers in Coleman's case did not thoroughly investigate the length of time Coleman was absent from his principal place of residence, claiming they made "an early determination" and then ignored evidence that would suggest they were wrong about the time of Coleman's absence in order to confirm their bias against Coleman. Finally, Coleman's counsel argued this was a case based on

assumptions rather than facts, and he asked the jury to consider whether a more thorough investigation would have revealed Coleman had returned to his house between August 17 and 27. Specifically, he asked the jury to consider why the law enforcement officers who went to his home on August 27 did not enter Coleman's bedroom at his principal residence to check for damp towels or shoes in the closet with fresh mud on them—items that would have been helpful to determine if Coleman had been back in the house recently. Thus, Coleman's counsel asked the jury to speculate about a variety of dates in which Coleman could have left and returned to the home, based on the State's evidence and potential flaws in law enforcement's investigation. He also argued for an alternative interpretation as to the meaning of "within five days" under section 692A.105.

Based on the theory of defense being employed in this case, which was an attempt to cast doubt in the jury's mind about the time Coleman was gone, and the meaning of "within five days," Coleman was not prejudiced by his counsel's decision not to ask for the instruction on section 4.1(34). For Coleman's counsel's decision to result in any prejudice, the jury would have incorrectly needed to assume that Coleman's first day away from his primary residence was included in his five-business-day deadline to notify the sheriff and that Coleman's absence did not actually begin until August 20, despite the fact that all of the evidence presented at trial showed Coleman was absent from August 17 at the latest. Therefore, Coleman cannot show that his counsel was ineffective for not requesting the instruction on section 4.1(34).

3. *Constitutional challenge to Iowa Code section 692A.105.* Coleman claims his trial counsel's failure to challenge Iowa Code section

692A.105 as unconstitutionally vague constitutes ineffective assistance of counsel. Although the statute is ambiguous, it is understandable based on the greater context of chapter 692A. For example, other provisions in chapter 692A use the same “within five business days” language to require notification within five business days of a notification-triggering event. Moreover, the statute’s notification requirement within five business days of a change to temporary lodgings aligns with the purpose of the sex offender registry to protect “the health and safety of individuals, and particularly children, from individuals who, by virtue of probation, parole, or other release, have been given access to members of the public.” *Iowa Dist. Ct.*, 843 N.W.2d at 81. It also comports with the numerous provisions throughout chapter 692A that seek to ensure this protection by tracking the whereabouts of sex offenders and notifying Iowans who subscribe to the state’s notification system of changes in the sex offender’s registration. *See, e.g.*, Iowa Code § 692A.118(11); *id.* § 692A.121(13). Because section 692A.105 is understandable based on this context, it is not unconstitutionally vague. Consequently, Coleman cannot show that his trial counsel failed to perform an essential duty in declining to challenge the statute under the void-for-vagueness doctrine or that this decision not to challenge the statute on these grounds resulted in prejudice as required to demonstrate ineffective assistance of counsel.

4. *Stipulations to the second offense and habitual offender enhancements.* Coleman alleges that his trial counsel was ineffective for failing to challenge his stipulations to the second offense and habitual offender enhancements. This is based on the fact that the record did not establish he had counsel or validly waived counsel on the prior convictions, rendering the stipulations unsupported by a factual basis.

When a defendant is subject to an enhanced sentence due to prior convictions, the state must prove these prior convictions beyond a reasonable doubt. *State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005). Further, Iowa Rule of Criminal Procedure 2.19(9) provides offenders subject to a sentencing enhancement based on prior convictions with

> the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel. If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted. Other objections shall be heard and determined by the court, and these other objections shall be asserted prior to trial of the substantive offense in the manner presented in rule 2.11.

Iowa R. Crim. P. 2.19(9).

As a preliminary matter, we see no reason for treating a second offense enhancement under Iowa Code section 692A.111 different from our rules governing the habitual offender enhancement given that both enhancements result from the defendant's admission to prior convictions, thereby leading to increased sentences. When the offender affirms the prior convictions to stipulate to a sentencing enhancement and does not object to them on the grounds that the offender did not receive representation and did not waive counsel, "the court must engage in [a] colloquy to ensure the affirmation is voluntary and intelligent, including an understanding of the rights associated with the trial." *State v. Harrington*, 893 N.W.2d 36, 47 (Iowa 2017). The scope of this colloquy is comparable to the colloquy required under Iowa Rule of Criminal Procedure 2.8(2) governing guilty pleas, which we modeled our rules governing the habitual offender colloquy after because a "defendant's admission of prior . . . convictions which provide the predicate for sentencing [enhancements] is so closely analogous to a plea of guilty."

State v. Brady, 442 N.W.2d 57, 58 (Iowa 1989). In *Harrington*, we relied on the rules set forth in rule 2.8(2) "to identify . . . the specific areas that must be a part of a habitual offender colloquy to support an admission." 893 N.W.2d at 45. Just as a court may not accept a guilty plea without determining whether it has a factual basis, the court's colloquy for habitual offenders and second offense offenders under Iowa Code section 692A.111 "must also make sure a factual basis exists to support the admission of prior convictions." *Id.* at 45–46. In doing so, "[t]he court must inform the offender that these prior felony convictions are only valid if obtained when the offender was represented by counsel or knowingly and voluntarily waived the right to counsel." *Id.* at 45.

Nonetheless, "the state is not required to prove the prior convictions were entered with counsel if the offender does not first raise the claim." *Id.* at 46. Thus, any objection to the use of prior convictions on the grounds that the offender lacked and did not waive counsel acts as an affirmative defense and must be brought prior to the second trial regarding the offender's identity in the prior convictions if the defendant denies being the offender in the prior convictions. *Id.* at 47. Moreover, "[i]f the records do not disclose if the defendant was represented by counsel or waived counsel, or show the defendant was represented or waived counsel, then the offender has the burden to introduce some evidence to support the claim." *Id.* at 48. Accordingly, the State did not have to establish that Coleman was represented by counsel or waived counsel in the prior convictions because Coleman's counsel never raised that claim during Coleman's stipulation to the prior offense.

Nevertheless, the State acknowledges that there needs to be a better record on this issue to establish whether Coleman was represented by or waived counsel during his prior convictions. The

district court did not inform Coleman that his prior convictions "needed to have been obtained when he was represented by, or waived the right to, counsel." *Id.* at 47. Coleman's trial counsel was the appropriate party to raise that claim. Instead of doing so, Coleman and his trial counsel affirmed that there were no "defenses other than general denial that could affect the outcome," which would include any claim that Coleman was not represented by counsel in his prior convictions. Consequently, Coleman waived his claim that the State did not establish he had or waived representation on the prior convictions, and nothing in the record establishes the validity of this defense.

Ultimately, we cannot conclude Coleman knowingly and voluntarily stipulated to his prior convictions since he was not informed of his constitutional rights and the consequences of his stipulation. If Coleman did not have counsel for each of his prior convictions and did not waive counsel, then his trial counsel's failure to raise the issue of his representation for his prior convictions would have affected his ability to make an intelligent and voluntary decision to stipulate to the prior convictions. *See Castro v. State*, 795 N.W.2d 789, 793 (Iowa 2011) ("The component of the claim involving the voluntariness of the plea is largely tied to the prejudice element of all ineffective-assistance-of-counsel claims. This element means criminal defendants who seek postconviction relief after pleading guilty must establish the guilty plea would not have been entered but for the breach of duty by counsel." (Citation omitted.)). However, if Coleman was represented by counsel in each of his prior convictions, trial counsel's decision not to raise the challenge would have had no impact on Coleman's stipulation decision. Ultimately, Coleman's stipulations to the second offense and habitual offender enhancements are meaningless without this factual basis

establishing whether he was represented by counsel for his prior convictions. The State concedes this, and the parties agree that the case should be remanded to establish a factual basis on this sentencing issue. We therefore vacate the sentence imposed that included the sentencing enhancements and remand for further stipulation proceedings to allow the State to establish the appropriate factual basis and for resentencing.

E. Assessment of Attorney's Fees. Coleman contends that the sentencing court erred when it assessed the entirety of his appellate attorney fees against him unless he filed a request for a hearing regarding his reasonable ability to pay them within thirty days of the issuance of procedendo following his appeal. Specifically, the court's sentencing order stated,

> The Defendant is advised that if he/she qualifies for court appointed appellate counsel then he/she can be assessed the cost of the court appointed appellate attorney when a claim for such fees is presented to the clerk of court following the appeal. The Defendant is further advised that he/she may request a hearing on his/her reasonable ability to pay court appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. *If the defendant does not file a request for a hearing on the issue of his/her reasonable ability to pay court appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the Defendant.*

(Emphasis added.)

Coleman argues the last sentence of the sentencing order is unconstitutional because it requires him to affirmatively request a hearing challenging his ability to pay the appellate attorney fees or else they will be imposed in full against him. According to Coleman, this is unauthorized and an abuse of the court's discretion because—statutorily and constitutionally—the district court was required to consider Coleman's ability to pay the fees before ordering them assessed against

him. However, we need not address this issue given our decision to vacate Coleman's sentence and remand for further proceedings regarding his sentencing enhancement. Nonetheless, when the district court assesses any future attorney fees on Coleman's case, it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay. *Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000).

IV. Conclusion.

For the aforementioned reasons, we affirm Coleman's conviction for failure to comply with the sex offender registry. However, we vacate the district court sentence which included the sentencing enhancements. We remand for further sentencing proceedings consistent with this opinion.

CONVICTION AFFIRMED, SENTENCE VACATED, AND CASE REMANDED.

All justices concur except Appel and Hecht, JJ., who concur in part and dissent in part.

#16–0900, *State v. Coleman*

APPEL, Justice (concurring in part and dissenting in part).

I respectfully dissent in regard to the proper interpretation of Iowa Code section 692A.105 (2015), and I specially concur on the question of prosecutorial misconduct.

There is no question that Iowa Code section 692A.105 is ambiguous and subject to different interpretations. Unlike the majority, I conclude that the ambiguity should be construed against the State. Indeed, in *Maxwell v. Iowa Department of Public Safety*, we declared that ambiguities in the penal provisions of Iowa Code chapter 692A should be construed against the state. 903 N.W.2d 179, 183 (Iowa 2017). As a result, following *Maxwell*, we should hold that the obligation to register commences when a person subject to registration has been absent from his or her principal residence for five days.

The statutory language against which we must apply provides, in pertinent part,

> In addition to the registration provisions specified in section 692A.104, a sex offender, *within five business days of a change*, shall also appear in person to notify the sheriff of the county of principal residence, of any location in which the offender is staying *when away from the principal residence of the offender for more than five days*, by identifying the location and the period of time the offender is staying in such location.

Iowa Code § 692A.105 (emphasis added). This section of the Code related to registration of sex offenders was added in 2009. *See* 2009 Iowa Acts ch. 119, § 5 (codified at Iowa Code § 692A.105 (Supp. 2009)).

As is apparent, the statute provides that a sex offender must provide notice to the sheriff within five business days of a "change." Iowa Code § 692A.105 (2015). The interpretive issue is what is a "change"? And, "change" of what, exactly?

The legislature defined "change" in the statute. According to the statute, change means "to add, begin, or terminate." *Id.* § 692.101(5). But this definition provides little assistance. It seems to me a very logical reading of the language of the statute is that a change occurs when the registrant has been away from his principal residence "for more than five days." *See id.* § 692.105. When this event occurs, the registrant then has five days to report the change to the local sheriff.

The State suggests that the language supports an interpretation that the notice requirement is triggered from the first day of absence or from the date of an intention be gone more than five days. This approach has a troublesome subjective feature and is certainly not explicitly embraced by the statutory language.

The majority cites a number of other provisions of Iowa Code chapter 692A. The majority correctly points out that in a number of provisions the legislature has demonstrated the ability to clearly impose a notice requirement within five days that commences at the beginning of a particular occurrence or event. The majority concludes that because these legislative provisions have clear triggers at the beginning of the occurrence or event, the legislature must have intended the same in Iowa Code section 692A.105.

I think the exact opposite conclusion should be drawn from these statutory provisions. The legislature obviously knew how to write notice statutes that trigger at the beginning of a course of conduct but elected not to do so in Iowa Code section 692A.105. The majority assumes that because the legislature used clear language with notices triggered at the beginning of the course of conduct in other sections of Iowa Code chapter 692A, it must have meant the same here. It is at least equally reasonable, and indeed in my view more reasonable, to conclude that

because the legislature did not expressly include an immediate trigger in Iowa Code section 692A.105, it must have meant something different. *See State v. Romer*, 832 N.W.2d 169, 177–78 & n.6 (Iowa 2013) (declining to read an "emotionally dependent" requirement into statute criminalizing student–teacher relationships, where analogous statute criminalizing sexual conduct with patients or clients expressly required emotional dependence, and stating if legislature intended to include term, it could have done so); *see also Gov't of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 638 (9th Cir. 1999) (holding that the court must give effect to the different wording of statute when Congress chose to include a provision in one statute and not include similar wording in a related statute); *Sinclair Mktg. Inc. v. City of Commerce City*, 226 P.3d 1239, 1243 (Colo. App. 2009) (holding that since the legislature included a specific term in other sections of the act, but omitted it from the section in question, that showed the intent for the term to not apply to that section); *Wolverine Power Coop. v. Dep't Envtl. Quality*, 777 N.W.2d 1, 10 (Mich. Ct. App. 2009) ("When the Legislature includes a provision in one statute and omits the provision in a related statute, the Court should construe the omission as intentional and should not include an omitted provision where none exists."); *Foster v. Wash. State Dep't of Ecology*, 362 P.3d 959, 967 (Wash. 2015) (en banc) ("[W]here the legislature includes language in one statute but omits it in another, we must presume that different meanings were intended.").

It would not have been difficult for the legislature to use clear language if it wished to embrace the approach advocated by the State. The majority makes the case well by citing other provisions of the statute. In any event, the language of other state registration requirements demonstrate that state legislatures are fully capable of

crafting statutes expressly along the lines that the State seeks to import into the Iowa statutory language.

For example, under Alabama law, "[i]mmediately before an adult sex offender temporarily leaves his or her county of residence for a period of three or more consecutive days," the registrant must report in person to the sheriff. Ala. Code § 15-20A-15(a) (Westlaw through 2017 Reg. Sess.). The Alabama legislature crafted a notice requirement that unambiguously requires a report *prior* to the extended absence.

The law of Maryland provides a registrant must notify authorities "when the registrant will be absent from the registrant's residence . . . for more than 7 days" and the notification shall be made "prior to . . . commencing the period of absence." Md. Code Ann., Crim. Proc. § 11-705(i) (West, Westlaw through 2017 Reg. Sess.). The Maryland legislature crafted a notice requirement that unambiguously requires a report *prior* to the extended absence.

The law of Illinois provides that if a registrant "intends to establish a residence or employment" outside Illinois, they must report "at least 10 days before establishing that residence or employment." 730 Ill. Comp. Stat. Ann. 150/6 (West, Westlaw through P.A. 100-576 of 2018 Reg. Sess.). The Illinois legislature crafted a notice requirement that unambiguously requires a report *prior* to the extended absence.

The law of North Carolina provides that a registrant must provide notice "within 72 hours after the person *knows or should know* that he or she *will be* working and maintaining a temporary residence" in another county. N.C. Gen. Stat. Ann. § 14-208.8A (West, Westlaw through 2017 Reg. Sess.) (emphasis added). The North Carolina legislature crafted a notice requirement that unambiguously requires a report *prior* to the extended absence, at least under certain circumstances.

The above statutes demonstrate that if the legislature wished to require prior notice, it could easily have done so. When the legislature has not used such express language which requires prior notice based upon subjective intent, we should be cautious about writing in such a new requirement under the banner of "ambiguity."

Citing *State v. Iowa District Court*, the majority points to the broad purpose of the sex offender registry to protect health and safety. 843 N.W.2d 76, 81 (Iowa 2014). But in the hands of the majority, the broad public purpose of the statute may be used to construe all ambiguities in the statute against criminal defendants. Yet, a few months ago in *Maxwell*, 903 N.W.2d at 183, we cited *State v. Reiter*, 601 N.W.2d 372, 373 (Iowa 1999) (per curiam), in narrowly construing a different ambiguity in Iowa Code chapter 692A. In *Maxwell*, we declared "[w]e strictly construe the penal provisions of chapter 692A." 903 N.W.2d at 183. But not today. Apparently, the principle is situational and applies occasionally. That, of course, means the language in *Maxwell* and *Reiter* announce no principle at all but only a salt-and-pepper passage to season an opinion according to judicial taste.

Based on the above reasoning, I conclude that the district court erred in its interpretation of the statute and in its instructions to the jury. Because there is not substantial evidence in the record that the defendant failed to provide notice as required under my narrow interpretation of the statute, I would reverse the judgement of the district court.

II. Prosecutorial Misconduct.

A. Introduction. We have long held that a prosecutor has special responsibilities. *See State v. Tolson*, 248 Iowa 733, 734, 82 N.W.2d 105, 106 (1957) ("[A prosecutor] owes a second duty, of no less importance, to

see that the accused has a fair trial.”). We have favorably cited authorities for the proposition that a prosecutor “is not an advocate in the ordinary meaning of the term.” *State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003) (quoting 63C Am. Jur. 2d *Prosecuting Attorneys* § 1, at 114 (1997)). “[A] prosecutor owes a duty to the defendant as well as to the public.” *Id.* That includes a responsibility not to improperly inflame a jury or seek to convict a defendant based on anything other than fact and law. We have recognized that “[i]t is as much the prosecutor’s duty to see that a person on trial is not deprived of any of his or her statutory or constitutional rights as it is to prosecute the defendant.” *Id.* (quoting 63C Am. Jur. 2d *Prosecuting Attorneys* § 23, at 135–36). Prosecutorial misconduct may deprive the defendant of a fair trial and this amounts to a violation of due process of law. *Id.* at 876.

It is important for courts to be vigilant on the issue of prosecutorial misconduct. As noted by the Supreme Court of Nebraska when reversing a case based on prosecutorial misconduct, “If we treat violations indulgently, we shall soon—in the words of [poet Alexander] Pope—‘first endure, then pity, then embrace.’ ” *State v. Beeder*, 707 N.W.2d 790, 795 (Neb. 2006) (quoting *Pierce v. State*, 113 N.W.2d 333, 341 (Neb. 1962)).

In two important cases, *Graves*, 668 N.W.2d at 880–81, and *State v. Musser*, 721 N.W.2d 734, 754–55 (Iowa 2006), we emphasized the need for prosecutors to keep their arguments to the jury within proper bounds. These seminal cases inform our analysis of the prosecutorial misconduct question in this case.

B. “Blow a Lot of Smoke.” In this case, the prosecutor belittled an argument by the defense, stating (1) “they want to—to blow a lot of smoke around that law, make it as fuzzy as possible”; (2) referring to the

defense argument that Coleman had a key to his residence, said, "That's just the stories to confuse you"; and (3) "the defense will hide behind [a] cloud of assumption." Coleman claims that the prosecutor committed misconduct with these references.

In *Graves*, we held that the prosecutor committed misconduct when he referred to an argument of the defense as a "smoke screen." 668 N.W.2d at 883. In support of this holding, we cited *United States v. Sanchez*, 176 F.3d 1214, 1225 (9th Cir. 1999) for the proposition that a "prosecutor committed misconduct in . . . denigrating the defense as a sham." *Graves*, 668 N.W.2d at 879; *see also State v. McDonald*, 472 A.2d 424, 425–26 (Me. 1984) (holding references to "red herrings" and "smoke screens" "clearly designed to awaken in jury a suspicion that defense[was] merely a subterfuge . . . to evade responsibility" amounted to prosecutorial misconduct requiring vacation of conviction).

I find it impossible to find a substantive distinction between the impermissible "smoke screen" argument in *Graves* and the "blow a lot of smoke" argument in this case. The majority declares that *Graves* does not apply because the prosecutor was merely attacking the defense argument. But that was the very point of *Graves*. In *Graves*, we stated that "the county attorney referred to defense counsel's argument . . . as a 'smoke screen.' " 668 N.W.2d at 879.

Graves is spot on with respect to rejecting fine distinctions in "smoke screen"-type arguments. Our Iowa caselaw does not spin a gossamer distinction between a smoke screen attacking the defense and a smoke screen attacking defense counsel. There is no basis for such a distinction in our law. Any overwritten aspects of the majority, however, are dicta in light of the ruling that there was no prejudice from any misconduct, a conclusion with which I agree.

C. "The Power to Do What Is Right." The prosecutor exhorted the jury by asserting that the jury had "[t]he power to do justice. The power to do what is right." But juries are not roving commissions to "do what is right." Their decision-making must be firmly anchored only in facts shown by the evidence and law as instructed by the court.

In *Musser*, we condemned similar language. In *Musser*, the prosecutor argued that a jury should convict the defendant on the evidence and "because it is the right thing to do." 721 N.W.2d at 755 (emphasis omitted). Similar language was condemned in *Sanchez*, 176 F.3d at 1225, a case which we favorably cited in *Graves*, 668 N.W.2d at 879. In *Sanchez*, the United States Court of Appeals for the Ninth Circuit held that it was improper for the prosecutor to tell the jury that it had "a duty to find the defendant guilty." 176 F.3d at 1225; *see also Impson v. State*, 721 N.E.2d 1275, 1283 (Ind. Ct. App. 2000) (holding prosecutor's request that the jury "do the right thing" was improper). I agree with the majority to the extent that it holds that the above statements were improper under applicable precedents.

D. "No One Managed to See Him." One of the issues in trial was whether it was possible that Coleman had returned to his residence after August 17 and was simply not observed. At trial, when a prosecutor asked a witness whether anyone in the family had seen Coleman during the requisite time period, the defense objected on grounds of hearsay. The district court sustained the objection and admonished the jury to "disregard any testimony that was referring to anybody else in the family."

Nonetheless, at trial during closing arguments, the prosecutor declared that "no one managed to see him" return to the home during the relevant time and next that "his mother lives in this house that you've

been told, and this—there is a sister, a younger sister." The obvious point in the prosecutor's closing argument is that neither his mother nor his sister saw him.

Under our caselaw, however, it is improper for a prosecutor to argue matters stricken from the record. *State v. Mayes*, 286 N.W.2d 387, 392 (Iowa 1979). That is what the prosecutor at least implied in this case. It was improper to do so.

E. Prejudice. Prosecutorial misconduct does not require reversal in the absence of prejudice. *Graves*, 668 N.W.2d at 876–77. The general standard calls for a determination of whether there is "a reasonable probability the prosecutor's misconduct prejudiced, inflamed or misled the juror so as to prompt them to convict the defendant for reasons other than the evidence introduced at trial and the law as contained in the court's instructions." *Id.* at 877.

In order to attempt to inject a degree of discipline into this otherwise unstructured and amorphous determination of prejudice in the context of prosecutorial misconduct, we have developed factors to be considered, including

> (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct.

Id. at 877. There is obviously a hydraulic relationship among the various elements. In a case where the prosecution has truly overwhelming evidence, only severe and pervasive misconduct will result in reversal. In a weaker case involving misconduct directed to the central issues of the case, a lesser showing of severity and pervasiveness may result in reversal.

In this case, the factors point against a showing of prejudice. Coleman has not made a strong showing of the severity and pervasiveness of the misconduct. A review of the entire transcript of closing argument generally reveals a highly professional argument which was directly tied to fact and law. On a few occasions, the prosecutor crossed over the line, but he generally quickly returned to the proper course.

And, the errors were not egregious. For instance, although a generalized claim to "do right" is improper, the prosecutor surrounded this comment with other statements tied to the evidence. And, while the prosecutor may have wrongly suggested that the evidence showed the mother and sister did not observe Coleman enter the residence, it would have been worse to comment on the failure of the mother and sister to testify to the contrary. *See State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986).

The evidence against Coleman based on the instruction given was fairly strong. In that regard, I note that the jury received the case at 11:00 a.m. and returned a verdict at a few minutes after 1:00 p.m. the same day.

On balance, then, I agree with the majority that Coleman has failed to show prejudice in this case. The closing argument contained a couple of errors, but was generally proper. I would not retreat, however, from the substantive holdings in *Graves*, *Musser*, or *Mayes*. I would further observe that while we require a showing of prejudice before a conviction is reversed, our law is not designed to give prosecutors a free bite. We understand that any lawyer in the heat of battle may misstep, but we expect prosecutors to recognize their duty to ensure that defendants

receive a fair trial and that the holdings of *Graves*, *Musser*, and *Mayes* are fully respected.

Hecht, J., joins this concurrence in part and dissent in part.