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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0231**

State of Minnesota,
Respondent,

vs.

Jeremy Shane Zimmermann,
Appellant.

**Filed March 4, 2019
Affirmed in part, reversed in part, and remanded
Florey, Judge**

Scott County District Court
File No. 70-CR-15-23903

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

Ronald Hovevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Schellhas, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant Jeremy Shane Zimmermann asks this court to reverse his two felony convictions for failing to register as a predatory offender in violation of Minn. Stat. § 243.166 (2014). We affirm in part, reverse in part, and remand.

FACTS

Appellant is required by law to register as a predatory offender. In December 2011, he was convicted of violating his registration requirements. After serving time for the conviction of failure to register, as well as two additional unrelated convictions, appellant was released from prison in October 2015. Shortly after appellant was released from prison, he changed his registered primary address from a residence in St. Paul to “Homeless” in St. Paul. However, in early December 2015, officers suspected appellant was staying with friends or family at an unregistered Shakopee address in Scott County.

Officers’ investigation of appellant’s whereabouts led them to speak with appellant’s girlfriend and mother, both Shakopee residents. Appellant’s girlfriend, T.A.B., reported to Detective Jim Blatzheim of the Shakopee Police Department that she resided in Shakopee, and that, since the time appellant had been released from prison in October 2015, he had been staying overnight at her house a couple of days per week. T.A.B. stated that she told appellant she believed he was required to register in Scott County. She also reported to Detective Blatzheim that appellant had his mail delivered to her house, and she provided the detective with samples of mail addressed to appellant at T.A.B.’s Shakopee

address. Detective Blatzheim later discovered that appellant's listed address on his driver's license was T.A.B.'s residence.

Appellant's mother, S.J.S., denied that appellant lived at her residence, but reported to Detective Blatzheim that he occasionally spent the night at her place sleeping on an air mattress. She reported that the last time he stayed the night was the prior weekend, and that he also "stay[ed] at his girlfriend's."

On December 17, 2015, officers located appellant at a workforce center in Shakopee and placed him under arrest for violating his registration requirements. The Scott County Attorney's Office charged appellant with two felony counts of violating Minn. Stat. § 243.166, subd. 5(a), Predatory Offender—Knowingly Violates Registration or Intentionally Provides False Information.

In February 2016, appellant pleaded guilty to count one, and, shortly thereafter, moved the district court to withdraw his plea. The district court denied his motion. In a separate appeal before this court, we reversed and remanded. *Zimmerman v. State*, No. A16-1261, 2017 WL 475953 (Minn. App. Feb. 6, 2017).

In May 2017, appellant appeared back before the district court to address the status and schedule of his case going forward in light of his plea withdrawal. At the hearing, appellant discharged his public defender and elected to represent himself. During subsequent hearings before the district court, appellant requested, and the court denied, the appointment of advisory counsel. Leading up to trial, appellant continuously wavered between wanting to be represented and wanting to represent himself. Appellant ultimately

chose to represent himself, and the district court found that appellant's waiver of representation by counsel was knowing, intelligent, and voluntary.

While appellant was in custody leading up to his trial, he made several calls to T.A.B. during which he tried to persuade her to lie under oath:

Appellant: I need, I need your loyalty here and I need you to have my back, but, if they call you in [to] testify, all you have to say is, you know, I didn't, I didn't spend the night. I mean, it's just that simple, you know? Yeah, I visited you twice a week, but I didn't spend the night, you know? Because, if you say that, I'm gonna go, you know? I'm gonna get fried

. . . .

T.A.B.: I mean, I'm not gonna lie, so—I'm not gonna say, you know, I mean, you weren't living here, but yes, you were staying here, so, and you know that. And I'm not gonna lie about it. So—

. . . .

T.A.B.: I already told them that you were here and staying. If you would've f-cking told me what was going on to begin with, I could've said something different. But I f-ck, I told them the truth. I didn't know what the f-ck was going on.

. . . .

Appellant: I know, it's just simple that I didn't spend the night. It's okay if I came over there and stayed—

T.A.B.: Yeah, you did, too, you f—

. . . .

Appellant: I just need you to be on my team, you know. I know that I did stuff that, you know, that, you know, what it's gonna come down to is if I spent the night, it's gonna end up f-cking me. So, I

mean, you just have, stop, I stopped by during the night a couple of times, you know? Hello?

. . . .

Appellant: You could just say that I, you could just say that I stopped, stopped by a couple of times during the night, but I never spent the night or slept over at your house, you know? That's the thing. It's gonna, because otherwise, it's gonna f-ck me

In September 2017, a jury trial was held. Several officers, as well as appellant's case manager, testified to appellant's registration requirements as a predatory offender, and the state offered into evidence appellant's signed and initialed acknowledgements of his obligation to register. St. Paul Police Officer Lynette Cherry testified that, shortly after appellant was released from prison, he changed his registered address as homeless in St. Paul, and maintained that this was his primary address up until he was arrested. Officer Cherry testified:

I asked [appellant] if there was any other location that he would be, especially during the hours of nighttime when you were—when you are sleeping that he was staying, any other intersections, places, things like that that he was staying during the week or in the upcoming days for that week. And he said no. He was staying every night [in his vehicle] at the Walmart parking lot in St. Paul.

Because Officer Cherry suspected that appellant was staying at his girlfriend's or mother's residence in Shakopee, she testified that she had suggested to him that he register those addresses:

I had asked [appellant] if he wanted to register or write down on his homeless check-ins any address he was staying at in Shakopee, you know, just to be compliant. And he said no. He was only going to be staying at the Walmart parking lot.

Detective Blatzheim also testified at trial. He testified to what T.A.B. and S.J.S. had reported to him, that appellant's listed address on his driver's license was T.A.B.'s residence in Shakopee and that appellant had never registered with the Shakopee Police Department.

T.A.B. also testified. She testified that she resided in Shakopee and that, from the time appellant was released from prison in October 2015 until he was arrested in December 2015, appellant "would come and stay" at her residence approximately "two, three times a week." She explained that he would "come at night and stay until the next morning," and that, at times, he would "stay consecutive nights." She testified that appellant received mail at her residence in Shakopee, and that he kept "[c]lothes, papers, [and a] few boxes of stuff" there. During T.A.B.'s testimony, the state offered into evidence two pieces of appellant's mail addressed to T.A.B.'s home. T.A.B. testified that she had suggested to appellant that he register in Scott County.

The state also offered into evidence audio recordings of appellant's phone calls to T.A.B. in which he asked T.A.B. to testify that he did not spend the night at her residence. T.A.B. testified that she believed appellant made those calls "[t]o try to get [her] to lie and say that he didn't stay at [her] house when he did." Appellant called several witnesses of his own and also testified in his own defense.

Before jury deliberation, appellant requested that the district court use a dictionary definition of "stay," which indicated an individual stays somewhere if he "remain[s] in a fixed location for an extended period of time." Appellant argued, "I mean, my whole argument is that, yeah, I did visit. But I was only over there for a few hours." The district

court denied appellant's request, stating that it would instruct the jury that "[i]f [it] [has] not defined a word or phrase, [the jury] should apply the common, ordinary meaning of that word or phrase." Appellant was found guilty of both counts of violating his registration requirements.

In appellant's presentence investigation (PSI) report, probation recommended that appellant be sentenced to 43 months. The PSI noted appellant's "lengthy criminal history including 20 prior felony convictions as well as numerous misdemeanors." It also stated: "Since [appellant] was previously released from prison as a risk level three, a 10 year period of conditional release applies."¹

The district court sentenced appellant to 39 months' imprisonment for count one and imposed a 10-year conditional-release term. The district court did not formally adjudicate appellant on count two. Appellant objected to the district court's imposition of the 10-year conditional-release term, explaining that he was actually a level-two offender and offered to show the district court paperwork confirming this to be true.² The district court rejected appellant's contention and imposed the 10-year conditional-release term.

This appeal follows.

¹ Minn. Stat. § 243.166, subd. 5a, mandates the court to impose a 10-year conditional-release term for violations committed by level-three offenders.

² Appellant's End of Confinement Review (ECRC) Risk Assessment Report, dated May 20, 2010, recommended appellant receive a risk-level three, however, the report assigned appellant a risk-level two.

DECISION

I. The district court did not abuse its discretion by rejecting appellant's requested jury instruction on the definition of "staying."

Appellant argues that the district court abused its discretion by denying his request for a jury instruction defining the term, "staying." He contends that the term was "an essential element of the crime of failure to register," and because the term is "subject to many meanings," the jury instructions misled the jury and caused it to "speculate" on the meaning of the element.

Before trial, appellant requested that the district court use a dictionary definition of stay, explaining that "the definition of stay says that you remain in a fixed location for an extended period of time." The district court denied appellant's request, explaining that the term, "stay," is "used in everyday life" and "not so complicated that we need [a] definition[] for [it]." The court told appellant, "I'm not going to prohibit you from telling the jurors what at least you think those terms mean." Accordingly, the court instructed the jury, "If I've not defined a word or a phrase, you should apply the common, ordinary meaning of that word or phrase."

"The district court enjoys considerable latitude in selecting jury instructions, including the specific language of those instructions." *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). "The decision to give a requested jury instruction lies in the discretion of the trial court and will not be reversed absent an abuse of that discretion." *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005). Appellate courts "review the jury instructions as a whole to determine whether the instructions accurately state the law in a

manner that can be understood by the jury.” *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). The appellant bears the burden of demonstrating that the district court abused its discretion, and in order to be granted a new trial, the appellant must show that the abuse was prejudicial to the outcome of the case. *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997). A district court abuses its discretion “if the jury instructions confuse, mislead, or materially misstate the law.” *State v. Onyelobi*, 879 N.W.2d 334, 353 (Minn. 2016) (quotation omitted).

In the case before us, the district court did not abuse its discretion. Instructing the jury to “apply the common, ordinary meaning” of “stay” does not confuse, mislead, or materially misstate the law. While a juror may interpret “stay” to mean “visit,” rather than “remain in a fixed location for an extended period of time,” appellant’s case manager as well as Detective Blatzheim both testified that even a routine or regular “visit” may trigger an offender’s obligation to register. Further, appellant’s own understanding that “stay,” in the context of the registration statute, means occasionally spending the night, rather than “remain[ing] in a fixed location for an extended period of time,” was clearly demonstrated by the content of his witness tampering calls to T.A.B. Appellant is not entitled to a new trial on this claim.

II. There was sufficient evidence for the jury to find appellant guilty of both counts of failure to register as a predatory offender.

A. The state proved beyond a reasonable doubt that appellant was “staying” in Scott County.

Appellant argues that his two felony convictions³ for failure to register must be reversed because the state presented insufficient evidence to prove that he was “staying” in Scott County. He contends that the plain language of Minn. Stat. § 243.166, subd. 3a(c), requires offenders to register only in jurisdictions where they have established a continuing presence for 24 hours. According to appellant, he was not required to register in Scott County because “the evidence showed that while he spent the night at [T.A.B.’s] residence,” he was always there for less than 24 hours.

In addressing a sufficiency-of-the-evidence claim, we must determine “whether a jury could reasonably conclude that the defendant was guilty of the offense charged.” *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002). “We will view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict.” *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted).

³ We note that, while the jury found appellant guilty of both counts, the district court expressly stated at sentencing that it would not formally adjudicate or sentence appellant on count two. Thus, while we need not address whether there was sufficient evidence for the jury to find appellant guilty of count two, we nevertheless do so for completeness. See *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (“We need not decide whether the evidence also was sufficient to support convictions on the other two counts . . . because defendant was not sentenced for either of them and the prosecutor concedes that defendant was never formally adjudicated of these two counts.”).

If the claim involves the question of whether the appellant's conduct satisfies the statutory definition of an offense, we are presented with a question of statutory interpretation. *See State v. Colvin*, 645 N.W.2d 449, 451-52 (Minn. 2002); *see also State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013). "The interpretation of the predatory sex-offender registration statute, like interpretation of all statutes, is a question of law which we review de novo." *In re Welfare of J.R.Z.*, 648 N.W.2d 241, 247 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Minn. Stat. § 243.166, subd. 3a(c), provides:

A person who lacks a primary address shall register with the law enforcement authority that has jurisdiction in the area where the person is staying within 24 hours after entering the jurisdiction. Each time a person who lacks a primary address moves to a new jurisdiction without acquiring a new primary address, the person shall register with the law enforcement authority that has jurisdiction in the area where the person is staying within 24 hours after entering the jurisdiction.

The elements of appellant's failure-to-register offense are that (1) he is a person required to register as a predatory offender; (2) he knowingly violated any of the requirements to register; (3) the time period during which he was required to register has not elapsed; and (4) his act or failure to act took place in Scott County during the time period in question. *See* Minn. Stat. § 243.166.

On appeal, appellant concedes that, during the time period in question, "[he] was required to register." For the second element, the state was required to prove that appellant knowingly violated the requirement that, if he lacked a primary address, he had to "register

with the law enforcement authority that has jurisdiction in the area where [he] is staying within 24 hours after entering the jurisdiction.” Minn. Stat. § 243.166, subd. 3a(c).

Viewing the evidence in the light most favorable to the jury’s verdict, we conclude there was sufficient evidence to permit the jurors to find appellant guilty of failing to register in Scott County within 24 hours of entering the jurisdiction. At trial, the state’s witnesses testified that the registration requirements were explained to appellant, that appellant acknowledged his understanding of those requirements, and that appellant was encouraged, both by Officer Cherry and by T.A.B., to register in Shakopee. T.A.B. testified that, following appellant’s release from prison, he would spend the night at her home two to three nights a week, and that appellant had his mail delivered to, and kept some of his belongings at, her residence. Furthermore, the content of appellant’s jail calls to T.A.B. demonstrate that appellant knew that spending the night at her home in Shakopee violated his registration requirements.

We have previously rejected appellant’s argument that “staying,” in subdivision 3a(c), means “a continuing presence for 24 hours.” In *State v. Pederson*, No. A14-1849, 2015 WL 5089026, at *3 (Minn. App. Aug. 31, 2015), *review denied* (Minn. Oct. 28, 2015), we concluded:

[T]his interpretation defeats the primary purpose of the predatory-offender-registration statute, which is “to create a sexual-offender registry to assist law enforcement with investigations.” *State v. Ulrich*, 829 N.W.2d 429, 430 (Minn. App. 2013). Under this interpretation, persons required to register could escape from ever having to register by moving to a different jurisdiction every 23 hours. This type of loophole was not the legislature’s intention. See Minn. Stat. § 645.16

(2014) (stating that the objective of statutory interpretation is to “ascertain and effectuate the intention of the legislature”).

We conclude that the state proved beyond a reasonable doubt that appellant was “staying” in Scott County and failed to register pursuant to Minn. Stat. § 243.166, subd. 3a(c).

B. The state proved beyond a reasonable doubt that appellant was required to register a “secondary address” in Scott County.

Appellant argues that count two must be reversed because the state presented insufficient evidence that he was required to register a secondary address. He contends that “[t]he plain language of the registration statute is clear—the existence of a secondary address is conditioned on . . . having a primary address.” According to appellant, because he was homeless, he did not have a primary address, and consequently, “there is [no] ‘secondary address’ that requires registration.”

We conclude that there was sufficient evidence to permit the jurors to find appellant guilty of failing to register a secondary address. Minn. Stat. § 243.166, subd. 4a(a)(2), provides that a person required to register as a predatory offender must “provide to the corrections agent or law enforcement authority . . . all of the person’s secondary addresses in Minnesota, including all addresses used for residential or recreational purposes.” Minn. Stat. § 243.166, subd. 1a(i), defines a “secondary address” as “the mailing address of any place where the person regularly or occasionally stays overnight when not staying at the person’s primary address.”

The statute defines “primary address” as “the mailing address of the person’s dwelling” or “the physical location of the dwelling described with as much specificity as

possible.” Minn. Stat. § 243.166, subd. 1a(g). We acknowledge that the statutory definition of “dwelling” uses the word, “building.” Minn. Stat. § 243.166, subd. 1a(c) (“‘Dwelling’ means the building where the person lives under a formal or informal agreement to do so.”). However, the fact that appellant was living out of his car in a St. Paul parking lot several days a week—rather than in a house, apartment, trailer, or some other type of building—should not permit him to bypass the registration requirements of a predatory offender.⁴ Indeed, Officer Cherry and appellant’s case manager both testified at trial that, regardless of whether or not the offender is registered as homeless, the offender is still required to register any secondary addresses. To permit otherwise would, no doubt, undermine the purpose of the registration statute, which is “to keep law enforcement informed as to a predatory offender’s whereabouts.” *Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002); *see also State v. LaFountain*, 901 N.W.2d 441, 450 (Minn. App. 2017) (“The Minnesota Supreme Court has emphasized that the registration statute reflects a policy that society has the right to know the location of predatory offenders, not in order to punish them, but to protect the public.”), *review denied* (Minn. Oct. 25, 2017); *State v. Ulrich*, 829 N.W.2d 429, 430 (Minn. App. 2013) (“The primary purpose of section 243.166 is to create a sexual-offender registry to assist law enforcement with investigations.”).

⁴ In a recent case, we affirmed the defendant’s conviction for failing to update his primary address as living out of his vehicle in a new jurisdiction. *State v. Pugh*, No. A17-0598, 2018 WL 1787959 (Minn. App. Apr. 16, 2018).

III. The district court did not abuse its discretion by denying appellant's request for substitute counsel.

Appellant argues that he is entitled to a new trial because the district court abused its discretion by summarily denying his requests for a different attorney. A district court's decision of whether to appoint substitute counsel is reviewed under an abuse-of-discretion standard. *State v. Clark*, 722 N.W.2d 460, 461 (Minn. 2006); *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). Criminal defendants have a constitutional right to counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. However, an indigent defendant does not have an "unbridled right to be represented by counsel of his own choosing." *State v. Fagerstrom*, 176 N.W.2d 261, 264 (Minn. 1970).

"When a defendant raises complaints about the effectiveness of appointed counsel's representation and requests substitute counsel, the district court must grant such a request only if exceptional circumstances exist and the demand is timely and reasonably made." *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013) (quotation omitted). Exceptional circumstances "are those that affect a court-appointed attorney's ability or competence to represent the client." *Gillam*, 629 N.W.2d at 449. "When the defendant voices serious allegations of inadequate representation, the district court should conduct a searching inquiry before determining whether the defendant's complaints warrant the appointment of substitute counsel." *Munt*, 831 N.W.2d at 586 (quotations omitted). The district court's "decision is to be based on the facts and circumstances surrounding the request." *Fagerstrom*, 176 N.W.2d at 264.

In the case before us, the district court did not abuse its discretion by denying appellant's request for substitute counsel. Although appellant argues that he was entitled to a "searching inquiry" by the district court, the allegations about his court-appointed attorney that he presents on appeal are similar concerns that he voiced before the district court. Our review of the record indicates that appellant voiced these concerns to the district court in several different hearings, and none of appellant's frustrations with his attorney constituted "serious allegations." *Munt*, 831 N.W.2d at 586. Indeed, what appellant's frustration boiled down to was his inability to control his attorney's trial strategy. In a discussion between the district court and appellant regarding his frustrations with his counsel, the court explained:

I do not allow, nor does any other judge in Scott County, allow PD shopping. And I know what your thoughts are about feeding them. But they are responsible for their own license. So they can [sic] have somebody in their ear telling them what to do the whole time. But you are not trained in the law. And so they are going to do it their way. You may like it. You may hate it. You may think they're ineffective. You may think they don't care about you. They might not ask the questions that you want them to ask because they know they're not allowed to or it doesn't help them form a strategy. They're not going to simply be a puppet for you

While the district court did not abuse its discretion by denying appellant's request for substitute counsel, the court made some inappropriate remarks, stating, for example:

Would you like [counsel] to remain as your lawyer here today? . . . If the answer is no, I'm going to discharge the public defender's office. And once you lose the public defender's office, I'm not reinstating her. I'm not putting a new public defender in. We're done, period.
. . . .

[Appellant], my question to you was whether or not you want to make a decision today whether to fire your lawyer indicating that if you do that, we're never coming back from that. Okay. I'm not going to reappoint her. We're done. And then your choices are hire your own lawyer or represent yourself through the pendency of trial.

It “is not an accurate statement of the law” to inform a criminal defendant that “he c[an]not have a different public defender under any circumstances.” *State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). However, based on the record as a whole—which demonstrates that the district court provided appellant numerous opportunities to expand on the reasons he wanted a different attorney and that the court gave much attention to and consideration of appellant’s voiced concerns—we conclude that the district court’s denial of substitute counsel was not an abuse of discretion.

IV. The district court improperly imposed a 10-year conditional-release term, and therefore, appellant’s case should be remanded.

Appellant argues that his 10-year conditional-release term “is unauthorized by law and must be vacated.” He contends that the proper remedy is to vacate the term because “subjecting [him] to a resentencing trial at which the state would be allowed to prove to a jury the fact necessary to support imposition of the 10-year conditional release term would violate the prohibition against double jeopardy.”

In *State v. Her*, the supreme court held that a district court may not impose a 10-year conditional-release term for a conviction of failing to register as a predatory offender absent a jury’s finding or the defendant’s admission that he was a level-three offender at the time of the violation. 862 N.W.2d 692, 693 (Minn. 2015). The supreme court stated that it was leaving it to the district court to determine the proper remedy on remand. *Id.* at

700-01 n.4 (citing *Hankerson v. State*, 723 N.W.2d 232 (Minn. 2006) and *State v. Jones*, 659 N.W.2d 748 (Minn. 2003)).

In *Hankerson*, the supreme court explained that the Double Jeopardy Clause of the United States Constitution “protects criminal defendants from three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.” 723 N.W.2d at 236-37 (quotation omitted). The *Hankerson* court explained, “a second prosecution can occur only after jeopardy from the first prosecution has terminated.” *Id.* at 237 (quotation marks omitted). “[J]eopardy does not terminate unless the fact finder affirmatively rejects the existence of aggravating factors in a manner that can fairly be called an ‘acquittal’ on those factors.” *Id.*

While we agree with appellant that the district court improperly imposed a 10-year term of conditional release, we reject appellant’s argument that the proper remedy is to vacate the term. Appellant argues that “the state presented insufficient evidence” to support the district court’s imposition of a 10-year conditional-release term. However, based on the record, it appears that the state presented *no* evidence on this point, presumably because the district court indicated that appellant’s level-three status would be “put to a jury *after* a verdict on the elements.” (Emphasis added.)

Because the record is absent of any indication that the jury “affirmatively reject[ed]” evidence regarding appellant’s risk-level status—again, presumably because the state was not given the opportunity to present such evidence—we conclude that remanding the case to the district court would not subject appellant to a “second prosecution.” *Hankerson*, 723

N.W.2d at 237. As such, we remand the case to the district court for further proceedings consistent with this decision. On remand, the district court may empanel a sentencing jury to determine whether appellant was a level-three predatory offender when he committed the offense, or the district court may obtain appellant's express waiver of a sentencing jury.

Affirmed in part, reversed in part, and remanded.