IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
WESLEY KEVIN HOSECLAW,
Defendant-Appellant.

Jackson County Circuit Court
16CR12255; A162239

Benjamin M. Bloom, Judge.

Argued and submitted June 7, 2018.

Erin J. Snyder Severe, Deputy Public Defender, argued the cause for appellant. Also on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Rebecca M. Auten, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and James, Judge, and Schuman, Senior Judge.

LAGESEN, P. J.

Reversed.

LAGESEN, P. J.

Defendant, a registered sex offender, was convicted of violating ORS 163A.040(1)(d) (2015), *amended by* Or Laws 2017, ch 418, § 1,[1] which provides that a person commits the crime of failure to report as a sex offender if the person "moves to a new residence and fails to report the move and the person's new address." The state's theory was that defendant's release from the Jackson County Jail had triggered his obligation to report a change of residence within 10 days under ORS 163A.010(3)(a)(B) (requiring a sex offender to report "[w]ithin 10 days of a change of residence"). And, based on the fact that defendant subsequently reported an address that was not a "real" address—that is, he reported an address that was not an assigned street number according to Jackson County records—the state charged defendant with a felony for violating ORS 163A.040(1)(d) (2015). The court found him guilty after a bench trial, and it sentenced him to 10 months in prison and two years of post-prison supervision.

On appeal, defendant argues that the state failed to prove that his reporting obligation under ORS 163A.010(3)(a)(B) was triggered, because the jail was not his "residence" and the state failed to prove that he otherwise acquired a new residence. In light of our decision in *State v. Lafountain*, 299 Or App 311, ___ P3d ___ (2019), also decided this date, in which we held that a jail is not an inmate's "residence" within the meaning of ORS 163A.010(3)(a)(B) and ORS 163A.040(1)(d) (2015), we agree with defendant and reverse his conviction.

BACKGROUND

In March 2016, Jackson County Sheriff's Deputy McKay responded to a report of a trespass in Gold Hill, Oregon, where he encountered and arrested defendant. McKay was aware that defendant was registered as a sex offender and that he had last reported his address, in December 2015, as 1256 Oak Street in Ashland. While he

[1] The 2017 amendments apply to conduct occurring on or after the effective date of the amendments and, therefore, do not apply in this case.

had defendant in custody, McKay asked him whether he was still residing at that address. Defendant said that he was.

McKay then attempted to confirm that defendant was actually residing at 1256 Oak Street. First, he contacted police dispatch and asked that an Ashland police officer confirm "whether that was a good or bad address, and whether there was an actual address." Officer Rosas, from the Ashland Police Department, responded to the request and drove north on Oak Street toward Eagle Mill Road, looking on both sides of the road for that address. Rosas believed that "1256 should have been on the east side of the road," but all he found there was "fields and blackberry bushes, [but] didn't find any driveways or anything like that." Rosas did not get out of his vehicle, but from the road he did not see any indication, such as tents or sleeping bags, that someone had been staying in that area.

In addition to sending an officer to the address, McKay also checked Google Maps and Jackson County records to determine whether 1256 Oak Street was a valid address. He concluded from that search that 1256 Oak Street was a fictitious address.

Defendant was subsequently charged with one count of failure to report as a sex offender under ORS 163A.040 (1)(d) (2015), based on the allegation that he had failed to report within "10 days of a change of address." Because the state charged defendant's providing of a "fictitious address" as a violation of that subsection rather than as a violation of ORS 163A.040(1)(f) for failing "to provide complete and accurate information," and defendant's underlying sex offense was a felony, he faced a Class C felony conviction for failing to report. *See* ORS 163A.040(3)(b) (providing that failure to report as a sex offender is a Class C felony rather than a misdemeanor if the person violates "[s]ubsection (1)(b), (c), (d) or (g) of this section and the crime for which the person is required to report is a felony").

Defendant waived his right to a jury, and the case was tried to the court. The state's theory at trial was that defendant's release from jail, sometime before December 2015, had triggered an obligation to report a change of

address, and that, although defendant had reported an address of "1256 Oak Street" within 10 days of his release, that address "just doesn't exist." In other words, the state's theory was that defendant had "provided *an* address within 10 days, he just did not provide *his* address within 10 days. And so, therefore, he would be guilty of the Failure to Register." (Emphases added.)

In support of that theory, the state offered a packet of forms that reflected defendant's previous reporting history. Those forms showed that defendant had reported two "residential addresses" between his initial registration in early 2013 and a "change of residence" report filed in August 2015: 1291 Oak Street in Ashland and the Jackson County Jail in Medford. In the last of the forms, an "annual" report dated December 2015, defendant reported the address underlying the charge in this case: 1256 Oak Street. The state did not endeavor to prove where defendant was living if not that address; rather, it simply undertook to prove that 1256 Oak Street was not an actual place and therefore could not have been his residence.

Defendant, meanwhile, essentially conceded that 1256 Oak Street was not a "real address" for purposes of Jackson County records, but he argued that it provided a sufficient approximation of where he was living. According to defendant, after release from jail he had returned to the same place that he had listed on earlier registration forms: a campsite on rural property with an address of 1291 Oak Street, near Bear Creek, which ran across that property. According to defendant's testimony, he was living with the property owner's permission on the "cusp" between 1291 Oak Street and a neighboring lot, 1256 Eagle Mill Road, and he put "1256 Oak Street" on the form.

In advancing their competing theories as to whether "1256 Oak Street" met defendant's reporting obligation, the parties operated from a shared understanding of the general geography of the area. Both parties relied on two maps of the area that the state introduced. One was a map from the Jackson County Geographic Information Services (GIS) showing various tax lots along Oak Street, which at some point becomes Eagle Mill Road. Notations on that exhibit

reflect that tax lots 400 and 402 have an address of 1291 Oak Street; the lot next to them on the same side of the road, tax lot 300, has an address of 1256 Eagle Mill Road. That is, the exhibit reflects a 1291 Oak Street and a 1256 Eagle Mill Road next to one another, but not a property with an address of 1256 Oak Street.

The second map was a printout from an online Google Maps search. That printout shows the location generated by Google Maps for the address 1256 Oak Street. The location marker is just south of where Oak Street crosses Bear Creek; McKay testified that the marker "puts a point that you could actually, I guess, you could walk and stand at that point on the road," and agreed that "if 1256 was in existence that's pretty much at the bridge over Bear Creek." When compared to the GIS map, the location identified for 1256 Oak Street on Google Maps appears to be approximately 700 feet to the east of the address where defendant had previously registered, 1291 Oak Street.

Relying on the Google Maps location, defendant argued that "there is no requirement in the sex offender registration requirement that it must be a real address," because "with modern technology we know exactly where to go to find that address if we need to go there." He argued that the location from Google Maps for 1256 Oak Street "is within 700 feet of where [defendant] has been registering forever. There is no evidence that [he] moved away from that area."

The trial court rejected defendant's argument and agreed with the state that defendant had violated the statute by providing a fictitious address. The court ruled:

> "So, I find you failed to register because there was no 1256 Oak Street. And I believe it is totally conceivable to give an address as 'off of this address' or 'near this address' as long as it provides the requisite information. Giving a wrong address does not satisfy the duty to report.
>
> "And so I am going to find that you failed—based on the evidence presented that you failed to report as a sex offender within 10 days of a change of address."

At that point, defense counsel sought clarification of the ruling and had the following exchange with the court:

> "[COUNSEL]: If we could clarify, Your Honor? That it—is it a wrong address or a non-existent address?
>
> "THE COURT: It's a non-existent address.
>
> "[COUNSEL]: Okay. Because your wording was 'wrong address.'
>
> "THE COURT: Oh, yeah. I apologize—
>
> "[COUNSEL]: Okay.
>
> "THE COURT: —it's not—it's a non-existent address."

The court then entered a judgment convicting defendant of a felony under ORS 163A.040(1)(d) (2015) and sentencing him to 10 months in jail and two years of post-prison supervision.

ANALYSIS

On appeal, defendant advances two assignments of error, both directed at the legal sufficiency of the evidence to convict him. In his first assignment, he argues, as he did below, that ORS 163A.040(1)(d) (2015) does not require a sex offender to report a recognized street number to comply with the statutory obligation, so long as the address provides a sufficient approximation of the location of the sex offender's residence. In his second assignment, he argues that the state failed to prove that his reporting obligation was actually triggered, because his release from jail was not a change of residence within the meaning of the statute, and the state did not otherwise prove that he moved to a new residence for purposes of ORS 163A.040(1)(d) (2015). That second argument is not one that defendant raised below, as the state points out. However, in light of our decision in *Lafountain*, we conclude that the trial court plainly erred in convicting defendant on the theory that he had a "change of residence" when he left the jail. *State v. Jury*, 185 Or App 132, 136, 57 P3d 970 (2002), *rev den*, 335 Or 504 (2003) (explaining that the court determines whether error is plain based on the law as it exists at the time the appeal is decided, and not as it existed at the time of the ruling being

reviewed). We therefore reverse his conviction on that basis and do not reach his first assignment of error.

Because defendant's second assignment of error was not preserved, we analyze that assignment under the strictures of plain-error review.[2] *See State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990) (describing the test for plain-error review). That is, we may review the claim of error only if (1) it is an error of law; (2) it is apparent, that is, "the legal point is obvious, not reasonably in dispute"; and (3) it appears on the face of the record, meaning that the court "need not go outside the record or choose between competing inferences to find it, and the facts that comprise the error are irrefutable." *Id.*

Defendant's claim of error satisfies all three requirements in this case. As for the first requirement, the question whether defendant's obligation to report a "change of residence" was triggered when he was released from jail turns on the meaning of a statute, which presents a question of law.

As for the second requirement, the answer to that legal question is no longer reasonably in dispute. In *Lafountain*, we addressed the same question that defendant raises here: whether the term "residence" in ORS 163A.010(3)(a)(B) and ORS 163A.040(1)(d) (2015) includes a jail where the defendant was being held. After examining the statutory text, context, and legislative history, we concluded that it does not. *Lafountain*, 299 Or App at ___ (holding that the legislature did not intend a place of involuntary incarceration to be a "residence" for purposes of the crime of failure to report under ORS 163A.040(1)(d) (2015)) (slip op at 22-23).

Third, we need not go outside the record or choose between competing inferences to find the error, and the facts that comprise it are irrefutable. It is indisputable on

[2] Defendant believed his claim of error to have been preserved, and he did not request plain-error review. Although we ordinarily do not undertake plain-error review in the absence of an explicit request, this is the rare situation, like in *State v. Tilden*, 252 Or App 581, 589, 288 P3d 567 (2012), where defendant's brief, in light of subsequent case law, has nonetheless satisfied the requisites of ORAP 5.45 regarding a claim of error apparent on the record.

this record that the state's prosecution of defendant was premised *exclusively* on its view that defendant had failed to provide a new address after moving from the jail, and there is no suggestion that defendant had a residence somewhere other than where he had been camping before he went to jail. In fact, the parties (and the trial court) appeared to be operating on the assumption that defendant was still camping on the same property where he had been before going to jail, but that the address for that location was not what he reported on the registration form. The court even acknowledged its assumption and that there was nothing in the record to suggest that defendant had actually moved from that campsite. The court observed that "the record is unclear whether he moved from that address or not. But, given the close proximity to the fictional address and the 1291 address *I'm assuming, without any basis to assume, that he did not move from that address*." (Emphasis added.)

We further conclude that, in light of the gravity of the error and the ends of justice, it is appropriate for us to exercise our discretion to correct it. As described above, the crux of the state's case was that defendant had provided a "fictitious" address on his registration form. But rather than charge defendant with failing to "provide complete and accurate information" under ORS 163A.040(1)(f), which would have been a misdemeanor, the state relied on an incorrect legal theory—that defendant had failed to report a move from jail to a new residence—that resulted in a felony conviction. Under those circumstances, it is appropriate for us to correct the error. *See State v. Inloes*, 239 Or App 49, 54-55, 243 P3d 862 (2010) (correcting plain error based on the defendant's challenge to the sufficiency of the evidence given the gravity of the error and intervening change in the law).

Reversed.