STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0201

State of Minnesota,
Respondent,

vs.

Jesse Lee Nundahl,
Appellant.

Filed February 10, 2014
Affirmed
Ross, Judge

Watonwan County District Court
File No. 83-CR-12-303

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

Stephen J. Lindee, Watonwan County Attorney, St. James, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

ROSS, Judge

Appellant Jesse Nundahl's criminal history requires him to register as a predatory offender. After the state accused him of failing to report his new residence and the

prosecutor at his trial told the jury that proof beyond a reasonable doubt is "not that high of a standard," a jury convicted him of violating the statutory registration requirements. We affirm Nundahl's conviction over his arguments that the state produced insufficient evidence to convict him and that the prosecutor's closing comment about reasonable doubt constituted misconduct. This is because the evidence supports a finding that Nundahl violated the registration requirements and the prosecutor's statement was not improper in its context.

FACTS

Police learned in April 2012 that Nundahl had not been residing at his parents' Madelia house, where Nundahl was registered to live. Police spoke with Nundahl, his wife, his father, his brother, and his boss. Police could not discern from those discussions exactly where Nundahl was residing. The state therefore charged Nundahl under Minnesota Statutes section 243.166, subdivision 5(a) (2012), with knowingly violating his registration requirement as a predatory offender by failing to give written notice of his new residence to his corrections agent.

During Nundahl's trial, the state introduced an October 2011 address-verification form on which Nundahl had listed his parents' address as both his residence and his alternative address. An agent for the Bureau of Criminal Apprehension testified that the October 2011 form was Nundahl's most up-to-date address-verification statement. The state also called Nundahl's father and brother as witnesses. Both acknowledged that they had told police officers that Nundahl rarely stayed at his parents' house, and Nundahl's father testified that Nundahl may have been residing in Mankato with his wife or mother-

in-law or at his workplace. The state called the officers, who testified that they had discussions with Nundahl, his brother, and others. And the jury heard the audio recording of a telephone discussion between one of the officers and Nundahl.

Nundahl moved the district court to acquit him, arguing that the state had failed to present evidence proving that he was not living at the registered residence. The district court denied the motion, deeming Nundahl's father's and brother's statements to the officers to be substantive evidence under the residual hearsay exception. Nundahl called no witnesses.

The prosecutor incorporated a jigsaw-puzzle analogy into his closing argument to explain the standard of proof. He first stated that proof beyond a *reasonable* doubt is not proof beyond *all* doubt, and then added, "Now, if you put a puzzle together and you have five, ten pieces missing, if you can still see what the picture is, that's proof beyond a reasonable doubt. That's all it is. It's not that high of a standard." The defense did not object to this argument, and the jury returned a guilty verdict. Nundahl appeals.

D E C I S I O N

Nundahl asks this court to reverse his conviction on two alternative grounds. He first maintains that the evidence was not sufficient to support the guilty verdict. He next contends that the prosecutor's comment characterizing proof beyond a reasonable doubt as "not that high of a standard" constitutes reversible misconduct. Neither argument leads us to reverse.

Sufficient evidence supports the conviction. When a convicted person questions the sufficiency of the evidence, we examine the record to determine whether the evidence

allows a reasonable jury to find him guilty. *State v. Nelson*, 812 N.W.2d 184, 187 (Minn. App. 2012). We view the evidence in the light most favorable to the conviction and will not disturb the verdict if the jury could reasonably conclude, in light of the presumption of innocence and requirement of proof beyond a reasonable doubt, that the defendant was guilty of the charged offense. *Id.*

Given Nundahl's status as a predatory offender, "at least five days before [he] starts living at a new primary address . . . [he must] give written notice of the new primary address to the assigned corrections agent." Minn. Stat. § 243.166, subd. 3(b) (2012). He must also "provide to the corrections agent . . . all of [his] secondary addresses in Minnesota." *Id*., subd. 4a(a)(2). The state had to prove four elements to establish that Nundahl failed to register as a predatory offender: (1) that he is a person required to register as a predatory offender, (2) that he knowingly violated any registration requirements, (3) that "the time period during which [he] is required to register has not elapsed," and (4) that his failure to register occurred on the date and in the county alleged. *Id*., subd. 5(a); 10 *Minnesota Practice*, CRIMJIG 12.102 (2006). Nundahl stipulated to the first and third elements and does not contest the fourth. We therefore focus only on the second element, which is whether Nundahl violated a registration requirement.

Nundahl argues specifically that the state introduced no evidence that he was not residing where he was registered. The record belies his argument. The jury learned that Nundahl listed only his parents' Madelia address on his most current address-verification form, but that his father and brother told police that Nundahl rarely stayed there and may

have been residing in Mankato. Based on this evidence, the jury reasonably found that Nundahl had resided somewhere other than his registered address and failed to inform law enforcement. Nundahl's argument that his father's and brother's testimony about their discussions with police could be relied on only for impeachment but not substance is unavailing. Both witnesses acknowledged that they had made the specified statements to the officer, and, contrary to Nundahl's assertion, the district court admitted the statements as substantive evidence, not merely as impeachment evidence. The jury was free to rely on those statements as evidence that Nundahl was not living at his parents' home, and the verdict demonstrates that it did so. Nundahl's first argument for reversing his conviction fails.

Nundahl's second argument also fails. Nundahl did not object to the prosecutor's closing statement about the standard of proof, so we review it only for plain error. *See State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). That means we will consider only whether the prosecutor's statement constitutes an error, whether the alleged error was plain, and whether it affected Nundahl's substantial rights. *Id*. at 302. We review the closing argument as a whole. *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008).

We need not decide whether a prosecutor errs by generally characterizing proof beyond a reasonable doubt as a "low" standard instead of a "high" standard. This is because, despite Nundahl's assertion, that broad characterization never occurred here. Looking at the closing argument as a whole, and particularly at the prosecutor's allegedly improper description of the burden of proof, we are satisfied that the prosecutor's

argument is not plainly erroneous. The prosecutor established the context when he first headlined the topic: "I want to talk to you about something called reasonable doubt." He next immediately emphasized that the state must carry the burden of proof and posed a defining question: "Now, it's my obligation . . . to prove that he's guilty beyond a reasonable doubt. So what exactly does reasonable doubt mean?" He then explained "what it is not," saying, "It is not proof beyond all doubt." He explained that proof beyond *all* doubt is unattainable, adding, "that's why the State is not held to that high of a burden." Then he indicated that he would further elaborate on the comparison, saying, "Now, knowing that proof beyond a reasonable doubt is not proof beyond all doubt, what is it?" The prosecutor then read directly from the court's instruction and discussed reasonableness. And finally, he summed up the comparison with a jigsaw puzzle analogy: "Now, if you put a puzzle together and you have five, ten pieces missing, if you can still see what the picture is, that's proof beyond a reasonable doubt. That's all it is. It's not that high of a standard."

Nundahl highlights only the last statement, "It's not that high of a standard," and he maintains that this statement "diluted" the burden and materially misstated the law, requiring a new trial. We think Nundahl misconstrues the closing argument by asserting that "the prosecutor chose to discuss the state's burden of proof . . . and told the jury that proof beyond a reasonable doubt was not that high of a standard." Nundahl is correct that proof beyond a reasonable doubt is the highest standard of proof in American courts. But his observation is irrelevant to the prosecutor's comment here, considered in its context. The prosecutor's challenged comment in context is a comparison between two theoretical

standards of proof—the one that *does not* apply in American courts ("proof beyond *all* doubt") and the one that *does* apply ("proof beyond a *reasonable* doubt"). The prosecutor's two comparative comments accurately qualify the applicable standard as relatively lower than the inapplicable standard: "that's why the State is not held to *that* high of a burden," and "[i]t's not *that* high of a standard." (Emphasis added.) We perceive no misconduct here. Nundahl does not argue that the statement in its setting as a comparison is erroneous, only that the statement, in a vacuum, is erroneous. We do not address the broader argument and hold only that the statement, in its context here as a comparison, is certainly not plain error.

Affirmed.