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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 JERED JOSIAH WILSON,)
)
 Defendant-Appellant.)

NO. 39073
Dist. Ct. No. CR-2009-758,
CR-2010-1314
Gem County

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF GEM**

**HONORABLE JUNEAL C. KERRICK
District Judge**

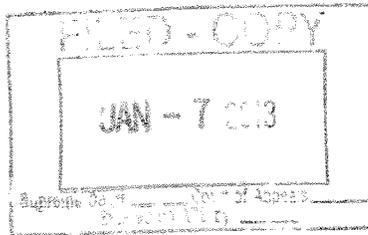
**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

**SARAH E. TOMPKINS
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712**



**ATTORNEY FOR
DEFENDANT-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Jered Josiah Wilson appeals from his convictions for lewd conduct with a child and failure to register as a sex offender.

Statement Of The Facts And Course Of The Proceedings

The state charged Wilson with one count of failure to notify the sex offender registry of a change of address and one count of failure to complete annual sex offender registration in one case, and two counts of lewd conduct with a child in another. (R., vol. I, pp. 183-84; vol. II, pp. 314-15.) The cases were consolidated for trial. (R., vol. I, p. 111; vol. II, p. 343.)

At trial, Wilson moved for judgment of acquittal. (Trial Tr., p. 368, L. 24 – p. 371, L. 1.¹) The trial court reserved ruling on whether the evidence supported the state's charge that Wilson failed to complete annual sex offender registration. (Trial Tr., p. 373, L. 17 – p. 374, L. 5.) The jury convicted Wilson on all counts after the trial. (R., vol. II, pp. 254-55; vol. III, pp. 485-86.)

After the trial the parties briefed the reserved portion of the motion for judgment of acquittal regarding annual registration and the court denied the motion. (R., vol. II, pp. 261-67.) The court thereafter sentenced Wilson to concurrent terms of ten years fixed on both sex offender registration violations and life with ten years fixed, also concurrent, on both counts of lewd conduct with a child. (R., vol. II, pp. 275-76; vol. III, pp. 496-97.) Although the register of

¹ The trial transcript also contains the hearing on a motion in limine, a telephonic status conference, and the sentencing.

actions indicates "Appealed to the Supreme Court" within 42 days of the entry of judgment (R., vol. I, pp. 34, 37), no timely notice of appeal is in the appellate record.

ISSUES

Wilson states the issues on appeal as:

1. Did the district court err when it denied Mr. Wilson's motion for judgment of acquittal pursuant to Idaho Criminal Rule 29?
2. Assuming *arguendo*, that there was a sufficient factual dispute as to whether Mr. Wilson needed to register annually in Gem County, did the district court err when it failed to properly instruct the jury?
3. Was there substantial competent evidence to support Mr. Wilson's conviction for lewd conduct because the State failed to provide evidence of manual-genital contact?

(Appellant's brief, p. 7.)

The state rephrases the issues as:

1. No notice of appeal time-stamped by the clerk of the district court appears in the appellate record. Must this appeal be dismissed because Wilson has failed to invoke the appellate jurisdiction of this Court?
2. Wilson's claims of insufficient evidence and jury instruction error related to his conviction for failure to register annually are premised upon the state having some duty to prove that the sex offender registrant is still residing in the county of his last registration. No such element is in the applicable statute. Are Wilson's claims of insufficient evidence and jury instruction error without merit?
3. The primary evidence of where Wilson touched the victim was her gesture to where he touched her. Is Wilson's argument that a gesture is insufficient evidence that the touching was to the genitals without merit?

ARGUMENT

I.

Wilson Has Failed To Invoke The Appellate Jurisdiction Of This Court

A. Introduction

Wilson asserts he “timely appealed from the Judgment and Commitment order.” (Appellant’s brief, p. 6.) As support for this claim he cites to the registers of actions containing the entry “Appealed to the Supreme Court” for August 3, 2011 (29 days after entry of judgment) and to an Amended Notice of Appeal filed 59 days after the judgment. (Appellant’s brief, p. 6 (citing “R., pp. 34, 37, 502”).) Because no notice of appeal bearing a date stamp within 42 days of entry of judgment is in the record before this Court, Wilson has failed to invoke its jurisdiction and the appeal must be dismissed.

B. Standard Of Review

“A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate court’s] attention and should be addressed prior to considering the merits of an appeal.” State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

C. The Record Does Not Establish This Court’s Appellate Jurisdiction

An appeal must be physically filed with the clerk of the district court within 42 days of the date stamp of the order appealed from. I.A.R. 14(a). A timely

filed notice of appeal is a prerequisite to appellate jurisdiction. State v. Payan, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct. App. 1996); State v. Fuller, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983). Any appeal based on the filing of a notice filed outside the 42-day filing period must be dismissed. State v. Tucker, 103 Idaho 885, 888, 655 P.2d 92, 95 (Ct. App. 1982). The record before the appellate court must establish its jurisdiction. State v. Mason, 102 Idaho 866, 867, 643 P.2d 78, 79 (1982) (record must “establish the appellate jurisdiction” of the court).

In this case the only notice of appeal in the record bearing the filing stamp of the clerk of the district court was filed on September 2, 2011, 59 days after the entry of judgment. (See R., vol. II, pp. 275 (judgment filed 7/5/2011), 283 (“Amendednotice [sic] of appeal” filed 9/2/2011); vol. III, pp. 496 (judgment filed 7/5/2011), 503 (“Amendednotice [sic] of appeal” filed 9/2/2011).) The appellate record contains no notice of appeal physically filed within 42 days of the judgments from which Wilson appeals. Because the record does not establish the appellate jurisdiction of this Court, this appeal must be dismissed.

II.

Wilson’s Claims That The State Had The Burden Of Proving His Residence To Establish His Failure To Annually Register By Personal Appearance Is Without Merit

A. Introduction

The state charged Wilson with failure to complete his annual sex offender registration. (R., vol. I, pp. 183-84.) At trial, the prosecution presented evidence that Wilson is a sex offender subject to registration, the state mailed the

registration notice to Wilson's last provided address, and that Wilson did not appear to perfect his annual registration. (Trial Tr., p. 174, L. 7 – p. 204, L. 22; p. 213, L. 23 – p. 228, L. 8; p. 229, L. 23 – p. 240, L. 15; State's Exhibits 6-12.) The jury found him guilty of failing to annually register. (R., vol. II, p. 255; vol. III, p. 486.)

On appeal Wilson claims that the evidence was insufficient to show he failed to annually register because he was no longer living in Idaho, or Gem County, at the time of the crime. (Appellant's brief, pp. 8-13.) In the alternative, he argues that the jury instructions were erroneous because they "lowered the state's burden of proof" by creating a presumption of a duty to register in Gem County or "fail[ed] to notify the jury that a person no longer has to annually register in Idaho if they [sic] move to a different state." (Appellant's brief, pp. 13-19 (capitalization altered).) Neither of these arguments has merit because where the sex offender is actually residing at the time for annual registration is not an element of the crime. On the contrary, review of the statute shows it creates the duty to annually register with the sheriff of the county of last registration; in this case, Gem County.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting

this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997); Hart, 112 Idaho at 761, 735 P.2d at 1072.

Whether the jury instructions fairly and adequately present the issues and state the applicable law is a question of law over which this Court exercises free review. State v. Bush, 131 Idaho 22, 32, 951 P.2d 1249, 1259 (1997). When this Court reviews jury instructions, it must first determine whether the instructions as a whole, and not individually, fairly and accurately reflect the applicable law. State v. Row, 131 Idaho 303, 310, 955 P.2d 1082, 1089 (1998). An instruction is not error unless it misled the jury or prejudiced the complaining party. Id.

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004); State v. Dorn, 140 Idaho 404, 405, 94 P.3d 709, 710 (Ct. App. 2004).

C. Whether Wilson Still Resided In Gem County Was Not An Element Of The Charge Of Failure To Perfect His Annual Registration

The objective of statutory interpretation is to give effect to legislative intent. State v. Pina, 149 Idaho 140, 144, 233 P.3d 71, 75 (2010); Robison v. Bateman-Hall, Inc., 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because “the best guide to legislative intent” is the words of the statute, the interpretation of a statute must begin with the literal words of the statute. State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). Where the statutory language is unambiguous, a court does not construe it but simply follows the law as written. McLean v. Maverik Country Stores, Inc., 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). Thus, if the plain language of a statute is capable of only one reasonable interpretation, it is the Court’s duty to give the statute that interpretation. Verska v. St. Alphonsus Regional Medical Center, 151 Idaho 889, ___, 265 P.3d 502, 508-09 (2011) (disavowing cases with language that Court might not give effect to unambiguous language of statute if such was “palpably absurd”).

The applicable statute provided that, after the initial registration with a county sheriff, a sex offender “shall register annually.” I.C. § 18-8307(4)(a) (2006). The annual registration is to be accomplished by the Idaho State Police mailing “an annual, nonforwardable notice of registration to the offender’s last reported address,” I.C. § 18-8307(5)(b) (2006), and the offender then “appear[ing] in person at the office of the sheriff with jurisdiction for the purpose of completing the registration process,” I.C. § 18-8307(5)(c) (2006). In this case, Wilson last registered with the Gem County Sheriff, thus the sheriff with jurisdiction to complete the annual registration was the Gem County Sheriff.

Wilson contends the sheriff with jurisdiction to complete the annual registration was in the county or state where he resided at the time of the mailing to his last address. This argument is meritless when the entirety of the statute is reviewed. The statute requires that the sex offender register within two working days in a county where he has set up new residence. I.C. § 18-8307(4)(a) (2006). “The offender thereafter shall register annually ...” Id. The notice for the annual registration shall be sent “to the offender’s last *reported* address” and is “nonforwardable.” I.C. § 18-8307(5)(b) (2006) (emphasis added). The offender then has five business days from the mailing of the notice to complete the annual registration with the sheriff. I.C. § 18-8307(5)(b) (2006). If the notice is returned, the state police “shall inform the sheriff with whom the offender last registered of the returned notice.” I.C. § 18-8307(5)(d) (2006). Under this statutory scheme, if the defendant moves to another county or another state he must establish a new registration, and the annual registration requirement would trigger from that new registration. Thus, the only sheriff with whom an annual registration may be completed is the same sheriff where the new or annual registration was last completed.

Wilson’s interpretation of the statute, that an offender’s failure to create a new registration imposes upon the state the duty to prove his residence at the time the notice is mailed, is flawed and inconsistent with the plain language that annual registration is a continuation from the last new registration. Because Wilson’s interpretation of the statute is erroneous, his claims that the state failed

to present evidence to support his erroneous interpretation of the statute, or that the jury instructions do not reflect his erroneous view of the statute, are meritless.

III.

Wilson's Claim That The Victim's Gesture At Trial To Where Wilson Touched Her Is Insufficient Evidence Of Manual-Genital Contact Is Without Merit

A. Introduction

The state charged Wilson with lewd conduct with a child for engaging in manual-genital contact with the victim (his daughter) when she was seven or eight years old. (R., vol. II, pp. 314-15.) During the trial the victim testified Wilson touched her in "an inappropriate place." (Trial Tr., p. 329, Ls. 14-22.) She demonstrated where Wilson touched her, and where he had her touch him, by pointing. (Trial Tr., p. 330, Ls. 5-10; p. 332, Ls. 10-21; p. 333, Ls. 7-9.) She responded affirmatively when asked if where she was touched was her "private area." (Trial Tr., p. 331, Ls. 13-16; p. 336, Ls. 3-4.) The touching was on top of, as opposed to under, her underwear. (Trial Tr., p. 331, Ls. 17-21.) The touching followed Wilson unzipping or removing her pants. (Trial Tr., p. 330, Ls. 20-22; p. 331, Ls. 3-7; p. 332, Ls. 3-4; p. 332, Ls. 10-15; p. 333, Ls. 12-19.)

On appeal Wilson contends that because the prosecutor stated that the victim had pointed to her "lap area" the evidence was insufficient to prove Wilson touched her genitals. (Appellant's brief, pp. 21-22 (citing Trial Tr., p. 331, Ls. 13-16; p. 332, Ls. 19-23; p. 333, Ls. 7-11).) This argument fails because the appellate court cannot reinterpret the jury's determination of what the victim's indications meant.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009) (citations omitted). “[S]ubstantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence.” Id. In conducting its review, the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Id. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury’s verdict. Id.

C. The Evidence That Wilson Unzipped Or Removed The Victim’s Pants And Then Touched Her In An Area Demonstrated By Gesture Is Sufficient To Support The Verdict

Lewd conduct on a child includes manual-genital contact. I.C. § 18-1508. As set forth above, the victim testified that Wilson unzipped or removed her pants and touched her on top of her underwear in an “inappropriate” or private place, which she indicated by gesture. This evidence is sufficient to support the jury’s verdict finding Wilson guilty of lewd conduct by touching her genitals. To hold otherwise would be to draw inferences against the verdict based on a physical indication the jury saw and this Court did not. Wilson’s argument that the jury was required to infer from the evidence that the touching did not involve the victim’s genitals is contrary to the applicable standard of appellate review. See

State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997) (Court will not substitute its view of the reasonable inferences to be drawn from the evidence but will instead construe reasonable inferences in favor of upholding the verdict). Drawing reasonable inferences in favor of the jury's verdict, as this Court must, shows that the evidence is sufficient and that Wilson's appellate claim must be denied.

CONCLUSION

The state respectfully requests this Court to affirm the judgments of conviction.

DATED this 7th day of January, 2013.



KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of January 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm