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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	No. 44633
Plaintiff-Respondent,	)	
	)	Kootenai County Case No.
v.	)	CR-2015-20847
	)	
JOSEPH ROMAN RUBIO,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI**

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**HONORABLE CYNTHIA K.C. MEYER  
District Judge**

---

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## STATEMENT OF THE CASE

### Nature Of The Case

Joseph Roman Rubio appeals from the judgment of the district court, entered upon the jury verdict finding him guilty of Filing a False Instrument, a felony.

On appeal Rubio argues the state did not present sufficient evidence at the preliminary hearing, the district court erred by denying his Rule 29 motion at trial, and the district court incorrectly instructed the jury.

### Statement Of The Facts And Course Of The Proceedings

Rubio was convicted of DUI, and, as part of his probation, he was ordered to perform 56 hours of community service. (See R., pp. 9-15.) In November of 2015, Rubio started performing community service at St. Vincent de Paul. (7/18/16 Vol. I Tr., p. 121, Ls. 1-7.<sup>1</sup>) To keep track of community service hours, the St. Vincent de Paul employees initial the probationer's community service timecard and stamp it with a special stamp. (7/18/16 Vol. I Tr., p. 115, L. 23 – p. 117, L. 3.) The probationer then gives the community service timecard to the court clerk, where it is docketed and filed in the court file. (7/18/16 Vol. I Tr., p. 88, L. 14 – p. 89, L. 7, p. 109, Ls. 1-11, p. 112, Ls. 8-16.)

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<sup>1</sup> The jury trial transcript for 7/18/16 is divided into two volumes. The first volume, transcribing the morning proceedings, is labeled "TRANSCRIPT ON APPEAL" and is designated "7/18/16 Vol. I." The second volume, transcribing the afternoon proceedings is labeled "TRIAL PROCEEDINGS" and is designated "7/18/16 Vol. II."

When Rubio started performing his community service, Lacey Lovejoy was the community service coordinator for St. Vincent de Paul. (7/18/16 Vol. I Tr., p. 113, L. 15 – p. 114, L. 11.) Rubio twice jokingly asked Ms. Lovejoy to put extra hours on his community service timecard and asked if he could have a friend put extra hours on his card. (7/18/16 Vol. I Tr. p., 121, Ls. 1-19.) Ms. Lovejoy said “no.” (Id.)

Rubio turned in his timecard to a district court clerk at the Kootenai County community service desk. (7/18/16 Vol. I Tr., p. 89, L. 8 – p. 92, L. 6; Ex. 2.) The district court clerks called St. Vincent de Paul to verify Rubio’s timecard was correct. (7/18/16 Vol. I Tr., p. 93, L. 23 – p. 97, L. 23.) The district court clerks were unable to verify all of the hours indicated on Rubio’s community service timecard. (Id.)

The dates on Rubio’s community service timecard were not in chronological order. (7/18/16 Vol. II Tr., p. 8, Ls. 9-15; Ex. 2.) Rubio’s timecard also had the initials “JM”, “DL” and “PL” but no one with those initials was employed at St. Vincent de Paul. (7/18/16 Vol. II Tr., p. 9, Ls. 11-25.) Rubio’s timecard also had an entry for November 7, a date on which St. Vincent de Paul was closed. (7/18/16 Vol. II Tr., p. 12, Ls. 14-22.) The November 7 entry also had the initials “MM”, but the St. Vincent de Paul employee with the initials “MM” was not working on that day. (7/18/16 Vol. II Tr., p. 12, L. 23 – p. 13, L. 19.) The stamp used on Rubio’s timecard was stolen from the St. Vincent de Paul office. (7/18/16 Vol. II Tr., p. 10, Ls. 2-25.)

The state charged Rubio with Filing a False Instrument, I.C. § 18-3203. (R., pp. 26-27.) The magistrate found probable cause and bound the case over. (4/1/16 Tr., p. 58, L. 24 – p. 59, L. 9; R. p. 45.) The state filed an Information. (R., pp. 46-47.) Rubio moved to dismiss the case pursuant to I.C. § 19-815A and I.C.R. 5.1. (R., pp. 67-



73.) The state responded. (R., pp. 74-77.) The district court denied Rubio's motion to dismiss, holding there was sufficient evidence presented to the magistrate at the preliminary hearing. (6/28/16 Tr., p. 22, L. 8 – p. 23, L. 19.) Rubio orally moved for reconsideration on the grounds the state did not prove at the preliminary hearing that the community service timecard met the statutory definition of an "instrument" or that it was required to be filed, registered or recorded. (6/28/16 Tr., p. 24, Ls. 6-16.) The district court denied the motion for reconsideration, holding that the community service timecard met the statutory definition of an "instrument" because Rubio had a duty or liability to perform and report his community service hours. (6/28/16 Tr., p. 24, L. 17 – p. 25, L. 22.)

The case proceeded to jury trial. (R., pp. 107-124.) Kim Hushman, a deputy clerk with the Kootenai County district court, testified at trial. (7/18/16 Vol. I Tr., p. 83, L. 14 – p. 112, L. 21.) Ms. Hushman testified that a timecard becomes part of the probationer's court case file. (7/18/16 Vol. I Tr., p. 88, L. 14 – p. 89, L. 7.)

Q. Okay. And does anything happen with the blue sheet and the timecard once the hours are verified?

A. It's attached to their file because at that time it's – it's docketed when they bring it in and it becomes a part of that file.

Q. And by "file" what do you mean?

A. The case file with all of the documentation from that case.

Q. Okay. So that would be a file with the Court?

A. Yes.

(7/18/16 Vol. I Tr., p. 88, L. 23 – p. 89, L. 7; see also 7/18/16 Vol. I Tr., p. 109, Ls. 1-11, p. 112, Ls. 8-16.) Lacey Lovejoy, the community service coordinator for St. Vincent de

Paul, testified that Rubio twice referred to putting extra hours on his community service timecard. (7/18/16 Vol. I Tr., p. 121, Ls. 1-19.) She testified the stamp used on Rubio's timecard was stolen from the St. Vincent de Paul office. (7/18/16 Vol. II Tr., p. 10, Ls. 2-25.) Ms. Lovejoy also testified regarding the discrepancies on Rubio's timecard, including that the dates on Rubio's timecard were not in chronological order, that the timecard contained incorrect initials, and that it included a time entry for a date that St. Vincent de Paul was closed. (7/18/16 Vol. II Tr., p. 8, L. 9 – p. 9, L. 25, p. 12, L. 14 – p. 13, L. 19; Ex. 2.)

Robert Leedy, Rubio's boss, testified that, on November 9<sup>th</sup>, he carpooled with Rubio, and Rubio worked at his job, not at St. Vincent de Paul, from 9:00 a.m. to 4:00 p.m. (7/18/16 Vol. II, Tr., p. 43, L. 19 – p. 44, L. 12; see Ex. 1.)

After the state rested, Rubio moved pursuant to Idaho Criminal Rule 29 for a judgment of acquittal. (7/18/16 Vol. II Tr., p. 59, L. 2 – p. 61, L. 13, p. 63, L. 12 – p. 64, L. 10.) Rubio argued the state failed to prove the community service timecard was an "instrument," failed to show it was "false or forged," and failed to show it was required to be "filed." (Id.) The state responded that whether the community service timecard was an "instrument," whether the community service desk was a "public office," and whether the card could be "filed, registered or recorded" were legal questions that Judge Mitchell already ruled on. (7/18/16 Vol. II Tr., p. 61, L. 16 – p. 63, L. 10.) The district court denied Rubio's Rule 29 motion. (7/18/16 Vol. II Tr., p. 64, Ls. 11-21.)

Rubio presented evidence. Rubio testified he was "pretty sure" he worked the dates listed on his community service timecard. (7/18/16 Vol. II Tr., p. 72, Ls. 6-25; Ex. 2.) Rubio admitted that, on November 20<sup>th</sup>, he got to St. Vincent de Paul at 9:00 a.m. and

left at 2:00 or 3:00 p.m., but he also admitted that his community service timecard represented he worked 8 hours. (7/18/16 Vol. II Tr., p. 80, L. 1 – p. 81, L. 5.)

Q. Okay. So you say that you worked eight hours on November 20th.

A. Uh-huh.

Q. From 9:00 to about 2:00 or 3:00.

A. Yeah.

Q. And that doesn't equal eight hours; right?

A. (No oral response.)

(7/18/16 Vol. II Tr., p. 80, L. 24 – p. 81, L. 5.)

The jury found Rubio guilty of Filing a False Instrument. (R., p. 156; 7/19/16 Tr., p. 45, L. 15 – p. 46, L. 17.) The district court entered judgment and sentenced Rubio to a term of three years with one and one-half years fixed. (R., pp. 167-169.) The district court retained jurisdiction. (Id.) Rubio timely appealed. (R., pp. 170-174.)

## ISSUES

Rubio states the issues on appeal as:

1. Did the district court err in denying Mr. Rubio's motion to dismiss because a community service timecard is not an instrument that might be filed under any law; therefore, there was no probable cause to believe Mr. Rubio committed the crime of offering a false or forged instrument for record?
2. Did the district court err when it denied Mr. Rubio's Rule 29 motion for judgment of acquittal?
3. Did the district court err by incorrectly instructing the jury and reducing the State's burden of proof to prove all the elements?

(Appellant's brief, p. 9.)

The state rephrases and reorders the issues as:

1. Has Rubio failed to show the appellate court should examine the sufficiency of the evidence presented at the preliminary hearing where Rubio was convicted after a jury trial?
2. The state concedes that the district court improperly instructed the jury regarding the definitions of elements of the crime.
3. Did the state present sufficient evidence upon which a jury, if properly instructed, could find Rubio guilty?

## ARGUMENT

### I.

#### Because Rubio Was Convicted At Trial, The Appellate Court Will Not Examine The Sufficiency Of The Evidence Presented At The Preliminary Hearing

##### A. Introduction

Rubio argues the district court erred when it denied his motion to dismiss the case on the grounds that the state failed at the preliminary hearing to present sufficient evidence on all the elements of the crime. (See Appellant’s brief, pp. 10-18.) Rubio’s argument is misplaced. Rubio was convicted after a trial. This Court does not re-examine the sufficiency of preliminary hearing evidence where the defendant was convicted following a trial.

##### B. Standard Of Review

“When a defendant has been convicted following a fair trial, we will not examine, on appeal, the sufficiency of the evidence presented at a preliminary examination upon which a magistrate determined there was probable cause to bind the defendant-appellant over to district court for trial.” State v. Maylett, 108 Idaho 671, 672, 701 P.2d 291, 292 (Ct. App. 1985) (citing State v. Mitchell, 104 Idaho 493, 660 P.2d 1336, cert. denied, 461 U.S. 934 (1983); State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984)). “Moreover, where at a fair trial the accused is found guilty upon sufficient evidence to sustain the verdict, the judgment will not be overturned for defects in proof at the preliminary hearing.” State v. Streeper, 113 Idaho 662, 664–65, 747 P.2d 71, 73–74 (1987) (citing State v. Walker, 109 Idaho 356, 707 P.2d 467 (Ct. App. 1985); State v. Mitchell, 104 Idaho 493, 660 P.2d 1336 (1983)).

C. This Court Should Not Examine The Sufficiency Of The Preliminary Hearing Evidence Because Rubio Was Convicted After A Trial

Following a preliminary hearing the magistrate found probable cause and bound Rubio's case over to district court. (4/1/16 Tr., p. 58, L. 24 – p. 59, L. 9; R. p. 45.) Rubio moved to dismiss the case pursuant to I.C. § 19-815A and I.C.R. 5.1 on the grounds the magistrate should not have found probable cause at the preliminary hearing that Rubio committed the crime. (R., pp. 67-73.) The district court denied Rubio's motion to dismiss. (6/28/16 Tr., p. 22, L. 8 – p. 23, L. 19.) After a jury trial, the jury found Rubio guilty of Filing a False Instrument and the district court entered judgment. (R., p. 156; 7/19/16 Tr., p. 45, L. 15 – p. 46, L. 17; R., pp. 167-169.) On appeal, Rubio argues the district court erred in denying his motion to dismiss because the state did not present sufficient evidence at the preliminary hearing to establish probable cause. (See Appellant's brief, pp. 10-18 ("There was not substantial evidence upon every element to establish probable cause that Mr. Rubio committed the crime of offering false or forged instrument for record under I.C. § 18-3203[.]" (capitalization altered)). Rubio argues there was insufficient evidence to support the magistrate's probable cause determination because Rubio's actions did not meet his claimed definition of the crime. (See Appellant's brief, pp. 10-18.)

Rubio's argument is misplaced because the appellate court will not examine the sufficiency of the preliminary hearing evidence when the defendant has been convicted at a fair trial. "When a defendant has been convicted following a fair trial, we will not examine, on appeal, the sufficiency of the evidence presented at a preliminary examination upon which a magistrate determined there was probable cause to bind the

defendant-appellant over to district court for trial.” Maylett, 108 Idaho at 672, 701 P.2d at 292 (citations omitted). Therefore, this Court should not consider the sufficiency of preliminary hearing evidence and should instead consider only whether Rubio has met his appellate burden of showing error at trial.

## II.

### The State Concedes The District Court Improperly Instructed The Jury

#### A. Introduction

The district court instructed the jury that a community service timecard is an “instrument,” that the Kootenai County Community Service desk is a “public office,” and that proof of community service may be “filed under the law of the State of Idaho.” (R., pp. 144-146.) Rubio argues these instructions, Instructions Nos. 16, 17, and 18, violated the province of the jury and were incorrect statements of the law. (See Appellant’s brief, pp. 24-29.) The state concedes these instructions were erroneous and that Rubio is entitled to a new trial.

#### B. Standard Of Review

Whether a jury was properly instructed is a question of law over which this Court exercises free review. State v. Severson, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009). “An error in jury instructions only constitutes reversible error when the instruction misled the jury or prejudiced the party challenging the instruction.” Id. (citation omitted). “If the instructions, ‘considered as a whole, fairly and adequately present the issues and state the applicable law, then no error [has been] committed.’” Id. (citations omitted).

C. The District Court Incorrectly Instructed The Jury

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winshop, 397 U.S. 358, 364 (1970). In State v. Yermola, 159 Idaho 785, \_\_\_, 367 P.3d 180, 183-184 (2016), the Idaho Supreme Court held that “jury instructions are not evidence” and do not supplant the state’s obligation to provide proof beyond a reasonable doubt of every element of the crime. The state concedes that Instructions Nos. 16, 17 and 18 were erroneous because they invaded the jury’s function to determine whether the state proved certain elements of the crime.

Consistent with the language of I.C. § 18-3203 the district court instructed the jury that, to find Rubio guilty of filing a false instrument, the state must have proved each of the following elements beyond a reasonable doubt:

1. On or about November 20, 2015,
2. in the County of Kootenai, State of Idaho
3. the defendant, JOSEPH ROMAN RUBIO, knowingly procured or offered,
4. a false and/ or forged instrument,
5. to be filed in any public office within the state,
6. which instrument, if genuine, might be filed, or registered, or recorded under any law of this state, or of the United States.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(R., p. 143; 7/19/16 Tr., p. 8, L. 17- p. 9, L. 9.) The Court then instructed the jury, as a matter of law, regarding three elements of the crime. Specifically, Instruction No. 16 instructed the jury, “Under Idaho law, a community service timecard, when filed in a court case, is an instrument.” (R., p. 144; 7/19/16 Tr., p. 9, Ls. 10-12.) Instruction No.



17 instructed the jury, “Under Idaho law, the Kootenai County community service desk is a public office.” (R., p. 145; 7/19/16 Tr., p. 9, Ls. 13-14.) Instruction No. 18 stated, “Under Idaho law, proof of completion of community service, when such service is done pursuant to a court order, may be filed under the law of the State of Idaho.” (R., p. 146; 7/19/16 Tr., p. 9, Ls. 15-18.) Because these instructions removed factual elements of the crime from the province of the jury and they were erroneous, see Yermola, supra, Rubio is entitled to a new trial.<sup>2</sup>

### III.

#### The State Presented Sufficient Evidence To Sustain The Jury’s Guilty Verdict If The Jury Had Been Properly Instructed

##### A. Introduction

The district court denied Rubio’s Rule 29 motion to dismiss for lack of sufficient evidence. (7/18/16 Vol. II Tr., p. 64, Ls. 11-21.) On appeal Rubio argues the district court erred because the state failed to produce sufficient evidence to prove that Rubio’s community service timecard was an “instrument” for purposes of the statute. (See Appellant’s brief, pp. 19-23.) Contrary to his argument, the state presented sufficient evidence to prove that Rubio’s community service timecard was an “instrument.”

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<sup>2</sup> The state recognizes Rubio has also challenged the sufficiency of the evidence supporting his conviction and that the remedy for any failure of proof could be an acquittal. Because, for the reasons set for in Section III, infra, the state presented evidence upon which a properly instructed jury could find all of the elements of the crime proven beyond a reasonable doubt, the state submits the appropriate remedy for the instructional error is a new trial.

B. Standard Of Review

The trial court may enter a judgment of acquittal pursuant to Idaho Criminal Rule 29 only if the court finds the evidence “insufficient to sustain a conviction of such offense or offenses.” State v. Clark, 161 Idaho 372, 374, 386 P.3d 895, 897 (2016) (citing I.C.R. 29(a)). “In reviewing the denial of a motion for judgment of acquittal, the appellate court must independently consider the evidence in the record and determine whether a reasonable mind could conclude that the defendant’s guilt as to such material evidence of the offense was proven beyond a reasonable doubt.” Id. (quoting State v. Mercer, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006)). The Idaho Supreme Court explained the relevant inquiry:

The relevant inquiry is not whether this Court would find the defendant to be guilty beyond a reasonable doubt, but whether “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

Id. (citing State v. Adamcik, 152 Idaho 445, 460, 272 P.3d 417, 432 (2012); Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Where the defendant presented evidence in defense after denial of the Rule 29 motion, the appellate court will conduct a review of all the evidence presented at trial to determine whether there was sufficient evidence to support the conviction. State v. Chacon, 145 Idaho 814, 818, 186 P.3d 670, 674 (2008) (citing State v. Watson, 99 Idaho 694, 698, 587 P.2d 835, 839 (1978); State v. Henninger, 130 Idaho 638, 640, 945 P.2d 864, 866 (Ct. App. 1997)).

The appellate court exercises free review over the application and construction of statutes. State v. Garner, 161 Idaho 708, 710-711, 390 P.3d 434, 436-437 (2017) (citing State v. Two Jinn, Inc., 148 Idaho 706, 708, 228 P.3d 387, 389 (2010). “When interpreting a statute, the Court begins with an examination of the literal words of the statute.” Id. (quoting State v. Burnight, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999)). “The language of the statute is to be given its plain, obvious and rational meaning.” Id. (quoting Burnight, 132 Idaho at 659, 978 P.2d at 219). “Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction.” Id. (quoting Two Jinn, 148 Idaho at 708, 228 P.3d at 389).

C. The State Presented Sufficient Evidence Upon Which A Properly Instructed Jury Could Have Found Rubio’s Community Service Timecard Was An “Instrument” For Purposes Of I.C. § 18-3203

Idaho Code § 18-3203 defines the crime of filing a false or forged instrument:

**§ 18-3203. Offering false or forged instrument for record.**

Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state, or of the United States, is guilty of a felony.

I.C. § 18-3203.

Rubio does not dispute that there was sufficient evidence to find that he submitted a forged community service timecard to the court clerk for filing in his criminal case file. Indeed, as set forth above, the evidence he did so is overwhelming. Rather, he contends the evidence was insufficient to show “that the community service timecard was an

‘instrument,’ that, ‘if genuine, might have been filed under any law of the State of Idaho or the United States.’” (Appellant’s brief, p. 19.)<sup>3</sup>

Rubio’s argument fails. Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact, properly instructed, could have found that Rubio’s community service timecard was an “instrument,” that, “if genuine, might have been filed under any law of the State of Idaho or the United States.”

The term “instrument” is not defined by I.C. § 18-3203. The term “instrument” is defined in Steel Farms v. Croft & Reed, Inc., 154 Idaho 259, 265, 297 P.3d 222, 228 (2012). (See also 6/28/16 Tr., p. 24, L. 17 – p. 25, L. 12.) On appeal, Rubio adopts the Black’s Law Dictionary definition for the term “instrument” that was used in Steel Farms. (See Appellant’s brief, pp. 27-28.)

Steel Farms involved a real estate dispute regarding the terms of a written lease agreement with an option to purchase. See Steel Farms, 154 Idaho at 261-264, 297 P.3d at 224-227. The district court granted partial summary judgment ruling, in part, that a handwritten interlineation on the lease contract was insufficient to modify the contract

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<sup>3</sup> Rubio also argues the district court did not properly consider all of the elements of the crime when it denied his Rule 29 Motion. (See Appellant’s brief, pp. 20-21 (“Indeed, there is no indication that Judge Simpson applied the proper analysis in deciding the motion.”).) However, the district court’s reasoning regarding the Rule 29 motion is irrelevant on appeal. The appellate court does not review the district court’s application of Rule 29, but instead “independently consider[s] the evidence in the record and determine[s] whether a reasonable mind could conclude that the defendant’s guilt as to such material evidence of the offense was proven beyond a reasonable doubt.” Clark, 161 Idaho at 374, 386 P.3d at 897. The district court’s rationale for denying Rubio’s Rule 29 motion does not matter to this court’s independent consideration of the evidence in the record.

because it did not satisfy the lease’s merger clause. Id. at 265-266, 297 P.3d at 228-229. The lease’s merger clause stated that the lease agreement could only be modified by “an instrument in writing” signed by all of the parties. Id. The issue before the Supreme Court was whether the handwritten interlineation on the original lease contract was sufficient to satisfy the merger clause, or if the merger clause required an instrument that was physically separate from the original. Id. The Court held that the merger clause did not require a separate physical document:

Thus the issue is whether an amendment must appear in an instrument physically separate from the original. We hold that it need not. An instrument is a “written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate.” *Black’s Law Dictionary* 869 (9th ed. 2009). A handwritten interlineation inscribed upon an existing contract appears on a written instrument. Therefore, under the circumstances set forth by the merger clause to which the parties agreed, Mathews’ interlineated amendment could be effective.

Id.

Thus, Steel Farms defines an “instrument” as a “written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate.” Id. The evidence in his case was sufficient to show the community service timecard Rubio forged and submitted to the court clerk for filing in his probationer’s case file met this definition.

Under Idaho law, a court can order a probationer to perform certain tasks. See e.g. I.C. § 19-2601(2) (the district court “may place the defendant on probation under such terms and conditions as it deems necessary and appropriate”). If a probationer fails to complete those tasks, the court can revoke probation and execute the underlying sentence. See e.g. State v. Marks, 116 Idaho 976, 977-978, 783 P.2d 315, 316-317 (1989)

(court can order the suspended sentence to be executed if probationer violates the terms of probation); I.C. § 20-222(2). Rubio was court-ordered pursuant to this legal authority to complete 56 hours of community service. (7/18/16 Vol. II Tr., p. 48, Ls. 8-18, p. 67, Ls. 6-12, p. 74, Ls. 3-24.)

The community service timecard at issue stated that “You **must** bring this card to the Community Service Office every **30 days** to register completed hours. Failure to do so, may be a violation of your probation.” (Ex. 1<sup>4</sup> (capitalization altered) (bold in original).) If the community service timecard is not completed by a certain date repercussions will follow. (7/18/16 Vol. I Tr., p. 110, Ls. 1-6.) His timecard defined Rubio’s duty to complete 56 hours of community service. (See Ex. 3 at 3:57 – 4:01, 5:15-5:20 (Rubio discussing that the number of hours he has to complete is on the timecard).) The state presented evidence that Rubio forged the number of hours he worked on his community service timecard. (See e.g 7/18/16 Vol. I Tr., p. 93, L. 23 – p. 97, L. 23; 7/18/16 Vol. II Tr., p. 8, Ls. 9-15, p. 9, Ls. 11-25, p. 12, L. 23 – p. 13, L. 19, p. 43, L. 19 – p. 44, L. 12; Exs. 1-2). Rubio’s forgery on his timecard, similar to the interlineation in Steel Farms, helped define his rights and liabilities. Specifically, his forgery of the hours worked, helped define Rubio’s right not to have his probation violated. All of this evidence, viewed in the light most favorable to the state, was

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<sup>4</sup> Ms. Hushman testified that Exhibit 1 is a copy of the front side of the community service timecard that were in use when Rubio submitted his timecard. 7/18/16 Vol. I Tr., p. 86, L. 12 – p. 91, L. 12, p. 101, Ls. 3-10; Exs. 1, 2)

sufficient to prove beyond a reasonable doubt that Rubio's timecard was a written legal document that defines rights, duties, entitlements, or liabilities as a probationer and was, thus, an "instrument" for purposes of I.C. § 18-3203.

The state also presented sufficient evidence to prove that Rubio's timecard was an instrument that "might be filed, or registered, or recorded under any law of this state, or of the United States." I.C. § 18-3203. Ms. Hushman, a Kootenai County deputy clerk, testified that probationers are ordered to complete and file community service timecards. (7/18/16 Vol. I Tr., p. 87, L. 2 – p. 89, L. 7, p. 97, Ls. 17-20.) These timecards become part of the probationer's court file. (See id.)

Q. ... Would the timecard have ended up in the court file in which the community service was ordered to be completed?

A. Yes.

Q. And would the blue sheet also have ended up there?

A. It's a docketed document so, yes.

Q. Could you explain to the jury what docketed means?

A. When we take an item in, in the top right-hand corner there's a stamp where we date and time stamp it and we sign it and it becomes part of the official record of that file.

(7/18/16 Vol. I Tr., p. 97, L. 15 – p. 98, L. 4; see also p. 109, Ls. 1-15.) Rubio admitted that he filed his community service timecard at the courthouse with community services. (See 7/18/16 Vol. II Tr., p. 81, L. 21 – p. 82, L. 2.) Thus, taking the evidence in a light most favorable to the state, the state presented sufficient evidence upon which a properly instructed jury could find Rubio guilty.

In a different context, Rubio argues filing his timecard with the court pursuant to a probationary order is not filing “under any law” because the district court does not have the power to define crimes. (See Appellant’s brief, pp. 16-18 (citing State v. Herren, 157 Idaho 722, 725-726 n.1, 339 P.3d 1126, 1129-1130 n.1 (2014).) In Herren, the Idaho Supreme Court held that the magistrate court did not have the power in a no contact order to define the parameters of a crime. See Herren, 157 Idaho at 725-726 n.1, 339 P.3d at 1129-1130 n.1. The Court explained:

We invite the Legislature to resolve this dispute. If we were to accept the State’s interpretation of Idaho Code section 18–920, we would be holding that a judge issuing a no contact order has the power to define conduct by a particular individual which would constitute a crime other than contempt. Here, the magistrate court determined that Herren’s crime was committed by knowingly remaining within 100 feet of the protected person. A different protection order might prohibit knowingly coming (as opposed to “remaining”) within 300 feet of the protected person, or 600 feet, or whatever the court deemed appropriate in that particular case. We express doubt that the Legislature intended to delegate the power to promulgate criminal laws to individual judges as courts do not have the power to define crimes.

Id. (citations omitted). Rubio’s reliance on Herren is misplaced. There is no statutory definition of filing “under any law.” “Unless otherwise defined, terms contained in jury instructions must be given their plain, non-technical meanings.” State v. Henry, 138 Idaho 364, 367, 63 P.3d 490, 493 (Ct. App. 2003) (citation omitted). Here, the plain, non-technical meaning of filing “under any law” simply refers to the lawful act of filing a legal document with the court. Idaho state law permits the filing of documents with the court. See e.g. I.C.R. 49, I.R.C.P. 5. Idaho Code § 18-3203 does not require that the instrument be filed pursuant to legal compulsion or a statutory requirement that it *must* be filed; rather, it states that the instrument “might” be filed “under any law of this state.”



I.C. § 18-3203. Thus, unlike the magistrate court in Herren, the district court has not defined any crime. Rubio's timecard was a legal instrument that might be filed under the laws of the State of Idaho. And the state presented evidence that this timecard was filed with the court. The state presented sufficient evidence upon which a properly instructed jury could have found Rubio guilty.

CONCLUSION

The state respectfully requests this Court vacate Rubio's conviction and remand for a new trial.

DATED this 29th day of September, 2017.

/s/ Ted S. Tollefson \_\_\_\_\_  
TED S. TOLLEFSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of September, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

REED P. ANDERSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Ted S. Tollefson  
TED S. TOLLEFSON  
Deputy Attorney General

TST/dd