ORIGINAL

20070248

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	Supreme Court No. 20070248
Plaintiff and Appellee,	)	
	)	District Court No. 18-06-K-02832
vs.	)	
	)	
Steven Lennard Johnson,	)	
	)	
Defendant and Appellant.	)	

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAR 13 2009

STATE OF NORTH DAKOTA

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JOEL D. MEDD, PRESIDING.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Issues iii

Statement of the Case .... ¶5

Statement of the Facts .... ¶6

Argument .... ¶13

I. The district court did not err when it excluded jury instructions .... ¶13

II. The State's Attorney did not impermissibly comment on the Defendant's failure to testify .... ¶21

III. The district court did not abuse its discretion when it denied the Defendant's Motion for a New Trial .... ¶24

IV. Sufficient evidence was presented to convict the Defendant of Failure to Register as a Sex Offender .... ¶29

Conclusion .... ¶32

TABLE OF AUTHORITIES

Paragraph

NORTH DAKOTA STATE CASES

Erickson v. Brown, 2008 ND 57, 747 N.W.2d 34 20

State v. Fasching, 461 N.W.2d 102 (N.D. 1990) 29

State v. Jackson, 2005 ND 137, 701 N.W.2d 887 31

State v. Lang, 378 N.W.2d 205, 208 (N.D. 1985)....................18

State v. Lemons, 2004 ND 44, 675 N.W.2d 148 ....24, 26

State v. Olander, 1998 ND 50, 575 N.W.2d 658 ....13, 14, 15, 16, 17

State v. Scutchings, 2009 ND 8, 759 N.W.2d 729 ....22, 23

State v. Stockert, 2004 ND 146, 684 N.W.2d 605 ....17, 19

NORTH DAKOTA STATUTES AND RULES

N.D.C.C. § 12.1-05-09 18

N.D.C.C. § 12.1-32-15 ....5, 31

N.D.R. Evid. 403 27

STATEMENT OF ISSUES

[¶1] I. **Whether the District Court Erred When it Excluded Jury Instructions.**

[¶2] II. **Whether the State's Attorney Impermissibly Commented on the Defendant's Failure to Testify.**

[¶3] III. **Whether the District Court Abused its Discretion When it Denied the Defendant's Motion for a New Trial.**

[¶4] IV. **Whether Sufficient Evidence was Presented to Convict the Defendant of Failure to Register as a Sex Offender.**

STATEMENT OF THE CASE

[¶5] On September 19, 2006, the State file an Information charging Steven Lennard Johnson (hereinafter "Johnson") with Failure to Register as a Sex Offender in violation of N.D.C.C. § 12.1-32-15. Appellant's App. at 7. On September 20, 2006 the State filed an Amended Information. Id. at 8. A jury trial was held before the Honorable Joel D. Medd, Judge of the District Court, Northeast Central Judicial District, on January 23, 2007. Trial Tr., p. 1, Jan. 23, 2007. Johnson was convicted of Failure to Register as a Sex Offender. Appellant's App. at 49, 70. On February 2, 2007, Johnson filed a Motion for New Trial. Id. at 63. This motion was denied by Judge Medd on March 23, 2007. Id. at 61. Johnson filed a timely Notice of Appeal from the Criminal Judgment. Id. at 73.

FACTS

[¶6] Johnson was released from the North Dakota State Penitentiary in July of 2005 and subsequently moved to Grand Forks. Trial Tr., p. 169, Jan. 23, 2007. Due to his prior conviction for Gross Sexual Imposition, Johnson was required to register as a sex offender. Id. at 170. On July 11, 2005, Johnson completed a North Dakota Offender Registration Form. Appellant's App. at 32. Detective Duane Simon of the Grand Forks Police Department met with Johnson when he filled out the registration form. Trial Tr., p. 116, Jan. 23, 2007. Det. Simon works on cases involving sex offenders and is familiar with the process and procedures for registration of sex offenders. Id. at 113. Det. Simon testified that, as a matter of procedure, he speaks with any registering person and makes an advisement that the individual must notify the Police Department if he or she "change[s] addresses, work places, or whatever." Id. at 119. At the initial registration, Johnson wrote "NA" in the employer name and address box on the registration form, indicating that he was unemployed at the time. Appellant's App. at. 32.

[¶7] Johnson became employed at LM Glasfiber in Grand Forks on August 1, 2005. Id. at 31; Trial Tr., p. 110, Jan. 23, 2007. Mr. Johnson filed a Change of Name/Address/School Enrollment/Employment Form on August 23, 2005 updating his employment information to reflect his employment at LM Glasfiber. Appellant's App. at 34. Tricia Weber, the Human Resources Generalist for LM Glasfiber, testified that on September 2, 2005, Mr. Johnson was fired from LM Glasfiber and on October 18, 2005, his employment file was inactivated. Trial Tr., p. 107-08, 110, Jan. 23, 2007. Master Police Officer Derrik Zimmel of the Grand Forks Police Department testified that

Johnson did not notify the Grand Forks Police Department of this change in employment address within ten days after it occurred. Id. at 147.

[¶8] Before the trial began on January 23, 2007, Judge Medd discovered that the Defendant's Requested Jury Instructions were not in his file. Id. at 25. Larry Richards, Johnson's advising attorney, told the Court that during the first break he would check at his office to find a copy of the proposed jury instructions. Id. at 25. Mr. Richards also indicated that Johnson's proposed instructions "did not differ a lot from what the State proposed." Id. at 25-26. Mr. Richards and Johnson had a discussion off the record, then Mr. Richards informed the Court that Johnson had no objection to the jury instructions as prepared by the Court. Id. at 26-27. When the trial resumed after the lunch break, the jury instructions were discussed again and Johnson raised no objections. Id. at 123-24.

[¶9] After the close of the State's case in chief, Judge Medd informed the parties that he would not be including the following pattern jury instructions: Direct and Circumstantial Evidence, Proof of Fact by Testimony of a Single Witness, Matters of Common Knowledge and Science, Impeachment, Presumption, Defendant Acting As His Own Attorney, and Number of Witnesses. Id. at 194-96. Johnson objected to the failure to include the instructions on Direct and Circumstantial Evidence and Number of Witnesses. Id. at 196.

[¶10] Judge Medd again asked after the close of the Defendant's case in chief if there were any issues related to the jury instructions. Id. at 211. Both Johnson and Mr. Richards responded that there were none. Id. The Defendant's Requested Jury Instructions, which had been filed with the Court on January 16, 2007, included instructions on the affirmative defense of Mistake of Law and the Affirmative Defense

Burden of Proof. Appellant's App. at 9, 13, 14. Neither Johnson nor Mr. Richards objected to the failure to include these instructions. Trial Tr., *passim*, Jan. 23, 2007.

[¶11] During the State's rebuttal argument, Grand Forks County State's Attorney Peter D. Welte read from the Proof of Intent jury instruction. Id. at 241; Appellant's App. at 43. The transcript reads:

> Proof of intent. You may consider, ladies and gentlemen, any statement made or acted on or omitted by the Defendant and all facts and circumstances in evidence which indicates the Defendant's state of mind. You'll have to read that slower when you go back there.
>
> But when you do that, knowing that this is about accountability and responsibility, you'll consider the testimony, you'll consider the evidence, you'll consider the exhibits. You'll determine that as far as the intent is concerned that this is a gross deviation from acceptable standards of conduct and that the Defendant should be found guilty. Thank you.

Trial Tr., p. 241-42, Jan. 23, 2007. Judge Medd had previously read the instruction to the jury as follows:

> Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any evidence. Indeed, it can rarely be established by any other means. You simply cannot look into the head or mind of another person, but you may infer the Defendant's intent from all the surrounding circumstances.
>
> You may consider any statements made or act done or omitted by the Defendant and all facts and circumstances in evidence which indicate the Defendant's state of mind.

Id. at 219. Judge Medd also instructed the jury, "If counsel have made any statements as to the law which are not supported by these instructions, you should disregard those statements." Id. at 220. The jurors had copies of the jury instructions with which to follow along during the reading of the instructions by Judge Medd and during the State's

rebuttal argument. Id. at 213. The jurors were also allowed to take their copies of the instructions with them into their deliberation. Id.

[¶12] After deliberating, the jury found Johnson guilty of Failure to Register as a Sex Offender. Appellant's App. at 49. Johnson filed a Motion for New Trial on February 2, 2007. Id. at 63. This motion was denied on March 23, 2007, and a Criminal Judgment was filed on August 21, 2007. Id. at 61, 70. Johnson appeals from this Criminal Judgment. Id. at 73.

LAW AND ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IT EXCLUDED JURY INSTRUCTIONS.

[¶13] Johnson failed to object on the record to the District Court Judge's failure to include instructions on Mistake of Law and the Affirmative Defense Burden of Proof and should be barred from raising the issue on appeal. The North Dakota Supreme Court has stated, "An attorney's failure to object at trial to instructions, when given the opportunity, operates as a waiver of the right to complain on appeal of instructions that either were or were not given." State v. Olander, 1998 ND 50, ¶ 10, 575 N.W.2d 658, 662 (quoting State v. McNair, 491 N.W.2d 397, 399 (N.D. 1992)). To preserve a challenge to a jury instruction, an attorney must object specifically to the contested instruction, regardless of whether an instruction has been proposed on the same issue. Id. (citing McNair, 491 N.W.2d at 399). Because Johnson did not object to the failure to include his proposed instructions, the district court did not err by failing to include them, and Johnson's conviction should be affirmed.

[¶14] Under N.D.R.Crim.P. 30(c), if the court gives counsel an opportunity to object to proposed instructions, the Defendant must inform the court which omissions of instructions he or she finds objectionable, then only the omissions so designated are considered objected. Id. ¶ 9, 575 N.W.2d at 661-62. In Olander the Defendant submitted a list of proposed instructions and a pretrial brief with an attached copy of the North Dakota Supreme Court case State v. McIntyre. Id. ¶ 8, 575 N.W.2d at 661. The North Dakota Supreme Court stated:

> [W]hen the trial court asked for exceptions to its proposed instructions during a charging conference, Olander did not object to the court's failure to instruct the jury that the State had the burden of proving beyond a reasonable doubt he did not act in self-defense and went on to hold that "...Olander failed to adequately preserve this issue for review under N.D.R.Crim.P. 30(c), and our inquiry is therefore limited under N.D.R.Crim.P. 52(b) to whether the court's failure to instruct the jury on this issue was obvious error affecting substantial rights."

Id ¶ 11, 575 N.W.2d at 662. The Court went on to explain the obvious error standard under Rule 52(b). Id. ¶ 12.

[¶15] The Olander Court explained that the North Dakota Supreme Court "exercise[s its] power to notice obvious error cautiously and only in exceptional circumstances where the accused has suffered serious injustice." Id. (citing State v. Keller, 550 N.W.2d 411, 412 (N.D. 1996); State v. Woehlhoff, 540 N.W.2d 162, 164 (N.D. 1995); McNair, 491 N.W.2d at 399). The Court must examine the entire record and assess the probable prejudicial effect of the alleged error in light of all the evidence. Id. (citing Woehlhoff, 540 N.W.2d at 165). This Court has noted that obvious error is rarely noticed under N.D.R.Crim.P. 52(b). Id.

[¶16] When determining whether obvious error has occurred, the North Dakota Supreme Court uses the United States Supreme Court's framework as laid out in United States v. Olano. Id. ¶ 13, 575 N.W.2d 663 (citing United States v. Olano, 507 U.S. 725 (1993)). Under that test, the accused must show that (1) error occurred (2) that is plain, and (3) affects substantial rights. Id. (citing Olano, 507 U.S. at 732-35). An error is "plain" if it is a "clear deviation from an applicable legal rule under current law." Id. (citing Johnson v. United States, 520 U.S. 461 (1997)). To "affect substantial rights," the error "must have been prejudicial, or affected the outcome of the proceedings." Id.

(citing Olano, 507 U.S. at 734-35). The error should be corrected if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. ¶ 16 (citing Olano, 507 U.S. at 736). In Olander, the North Dakota Supreme Court applied the Olano framework to the district court's failure to instruct the jury on the State's burden of proof on the nonexistence of self-defense. Id. ¶ 18, 575 N.W.2d at 664. The Court determined that the failure to provide the instruction affected the Defendant's substantial rights and reversed the Defendant's conviction and remanded for a new trial. Id. ¶ 28, 575 N.W.2d at 666.

[¶17] Olander properly details the law to be applied in this case, but it is factually inapposite. Olander dealt with a defense, the nonexistence of which was an element of the offense. Id. ¶ 20, 575 N.W.2d at 664 (citing N.D.C.C. § 12.1-01-03(1)(e); State v. White, 390 N.W.2d 43, 45 n.1 (N.D. 1986)). This case concerns an affirmative defense which the Defendant must prove by a preponderance of the evidence. Id. (citing N.D.C.C. § 12.1-01-03(2)). The failure to instruct the jury on an affirmative defense is obvious error if there is evidence to support the defense. State v. Stockert, 2004 ND 146, ¶ 10, 684 N.W.2d 605, 609 (citing State v. Hersch, 445 N.W.2d 626, 634 (N.D. 1989)). There is no evidence to support the affirmative defense of Mistake of Law in this case. Thus, failing to include the instruction was not error and Johnson's conviction should be affirmed.

[¶18] The affirmative defense of Mistake of Law is explained in N.D.C.C. § 12.1-05-09:

> Except as otherwise expressly provided, a persons good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:

1. A statute or other enactment.

2. A judicial decision, opinion, order, or judgment.

3. An administrative order or grant of permission.

4. An official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the crime.

N.D.C.C. § 12.1-05-09. Johnson is claiming to have acted upon his conversations with different law enforcement officials when he failed to register his new employment status. However, in State v. Lang, This Court provided commentary on the rule on which N.D.C.C. 12.1-05-09 was modeled. State v. Lang, 378 N.W.2d 205, 208 (N.D. 1985). The Court referred to the official commentaries of the drafters of the Federal Criminal Code:

> Section 610 . . . provides a defense (unless a law expressly provides otherwise) for a person *(a) who has taken affirmative steps to assure himself that conduct in which he proposes to engage will not violate the law* and (b) who, as a result of having taken such steps and in reliance on whatever information he may already have had, believes reasonably and firmly that the conduct will not violate the law. Such a person should not incur criminal liability. With respect to the law, his conduct is not culpable, within the framework of a system of definite positive laws. He has done all that can reasonably be expected to conform his conduct to the law. There is no room for deterrence in such circumstances without either imposing on persons an unreasonable burden to study the law or, in effect, limiting their conduct more broadly than the criminal law intends to do.

Id. (citing Comment on Mistake: §§ 304 and 610, Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, P. 139 (1970))(emphasis in original). This comment shows that the Affirmative Defense of Mistake of Law requires that the offender take affirmative steps to assure that the conduct he proposes to engage

will not violate the law. The Defendant cannot rely on his own self-selected belief. Id. at 209.

[¶19] Johnson presented no evidence that he relied on a specific statement of law or official interpretation of the statute. He is merely arguing that he did not believe an offender was required to change his registration upon leaving a job. There was no evidence presented that when he was fired from LM Glasfiber that he made any effort to contact Parole Officer Christy Thelen, Off. Zimmel, or Det. Simon to inquire whether he was required to change his registration. There is no evidence that he attempted to contact anyone regarding the possibility of updating his registration. Therefore, because he did not take any affirmative steps to assure himself that his conduct was not violating the law, he should not be afforded the protection of the Mistake of Law instruction. Even when the evidence is viewed in the light most favorable to the Defendant, there is no evidence on which the jury could base a finding of Mistake of Law. See Stockert, 2004 ND 146, ¶ 10, 684 N.W.2d at 609 (explaining that when determining whether an affirmative defense should have been provided, an appellate court views the evidence in the light most favorable to the Defendant). Thus, Johnson's conviction should be affirmed.

[¶20] Johnson also argues there were additional errors in excluding jury instructions. In his brief, Johnson states that exception was taken at trial to the instruction of Proof of Fact by Single Witness. Appellant's Brief at 11-12. However, this is incorrect. Richards at trial stated his objection to the failure to include only two instructions, Number of Witnesses and Direct and Circumstantial Evidence, but Proof of Fact by a Single Witness was not discussed. Trial Tr., p. 196, Jan. 23, 2007. The North Dakota Supreme Court has stated, "Jury instructions must fairly inform the jury of the

applicable law." Erickson v. Brown, 2008 ND 57, ¶ 46, 747 N.W.2d 34, 50 (citing Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 413 (N.D. 1994)). The Court looks at the jury instructions as a whole and determines that they are sufficient if they correctly advise the jury of the law, even if some specific instructions may be erroneous or insufficient. Id. (citing Crowston, 521 N.W.2d at 413). In this case, Judge Medd concluded that the concepts underlying the Number of Witnesses and Direct and Circumstantial Evidence instructions were well within the jurors' understanding, rendering the instructions unnecessary. Trial Tr., p 194, 196, Jan. 23, 2007. Judge Medd determined that these instructions did not add anything and excluded them. Id. When viewing the jury instructions as a whole, the instructions correctly advised the jury of the law. Johnson does not contend that the jury was provided any incorrect or erroneous instructions. Because the instructions correctly advised the jury of the law, the Defendant's conviction should be affirmed.

II. THE STATE'S ATTORNEY DID NOT IMPERMISSIBLY COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY

[¶21] During the State's rebuttal argument, the State's Attorney was reading the Proof of Intent jury instruction. Trial Tr., p. 241-42, Jan. 23, 2007. He was not referring to Johnson's failure to testify. This is the same Proof of Intent jury instruction that Judge Medd had read to the jurors earlier. Id. at 219. In addition, the jurors were given copies of this jury instruction to review during the closing arguments and during their deliberation. Id. at 213. The State's Attorney told the jury, "You'll have to read that slower when you go back there," indicating that they should review the instruction for themselves in deliberations. Id. at 241. Any slip of the tongue by the State's Attorney

would not have been perceived by the jury to be a reference to Johnson's failure to testify. Thus, Johnson's conviction should be affirmed.

[¶22] The North Dakota Supreme Court discussed this issue recently in State v. Scutchings. In Scutchings, the Court explained that "[i]t is a fundamental principle of constitutional law that a prosecutor may not comment on a defendant's failure to testify in a criminal case." State v. Scutchings, 2009 ND 8, ¶ 9, 759 N.W.2d 729 (citing Griffin v. California, 380 U.S. 609, 614 (1965); State v. Myers, 2006 ND 242, ¶ 7, 724 N.W.2d 168; State v. His Chase, 531 N.W.2d 271, 273 (N.D. 1995); State v. Flohr, 310 N.W.2d 735, 736 (N.D. 1981)). This applies to direct and indirect comments. Id. (citing Hovey v. Ayers, 458 F.3d 892, 912 (9th Cir. 2006); United States v. Gardner, 396 F.3d 987, 989 (8th Cir. 2005); United States v. Moore, 917 F.2d 215, 224 (6th Cir. 1990)). Commenting on the Defendant's failure to testify is a violation of the Fifth and Fourteenth Amendments, thus the North Dakota Supreme Court reviews such violations de novo. Id. (citing Myers, 2006 ND 242, ¶ 7, 724 N.W.2d 168). The Court went on to explain the test it uses to determine whether a comment impermissibly referred to the Defendant's failure to testify.

[¶23] The Court stated in Scutchings that an impermissible encroachment on a Defendant's right to not testify occurs if "the language used [was] manifestly intended to be, or was . . . of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Id. ¶ 10 (citing State v. Skjonsby, 319 N.W.2d 764, 787 (N.D. 1982)). When applying this test, the Court views the comments in context. Id. (citing Skjonsby, 319 N.W.2d 787). When viewed in context, the State's Attorney's rebuttal argument did not refer to Johnson's failure to testify. The

State's Attorney indicated to the jury that he was reading the Proof of Intent jury instruction. Trial Tr., p. 241, Jan. 23, 2007. The jurors had been read this instruction previously and had copies of the instruction in front of them during the closing arguments. Id. at 213, 219. The jurors had been made familiar with the language of the instruction, and a slip of the tongue by the State's Attorney would not reasonably be interpreted as a comment on Johnson's failure to testify. In addition, the jury had also been instructed to ignore any statements by counsel or the Court that conflicted with the jury instructions. Id. at 220. It is possible, also, that the State's Attorney's comment was wrongly transcribed. The phrase "statement made or act done or omitted" sounds very similar to "statement made or acted on or omitted." Id. at 213, 241. The State's Attorney may have read the instruction correctly, but was misquoted by the court reporter. In any event, the State's Attorney's comment was not manifestly intended to be, nor was it of such a character that it would naturally and necessarily take it to be a comment on Johnson's failure to testify. Thus, Johnson's conviction should be affirmed.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL

[¶24] The district court correctly denied Defendant's motion for a new trial based on two of the Defendant's witnesses being unavailable to testify. The North Dakota Supreme Court reviews a trial court's decision on a motion for a new trial under an abuse of discretion standard. State v. Lemons, 2004 ND 44, ¶ 18, 675 N.W.2d 148, 153 (citing State v. Sievers, 543 N.W.2d 491, 494 (N.D.1996)). The Court will not reverse a trial court's denial of a motion for a new trial absent an abuse of discretion, which occurs when a court "acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or

misapplies the law." Id. (citing State v. Stoppleworth, 2003 ND 137, ¶ 6, 667 N.W.2d 586; Sievers, 543 N.W.2d at 494). Because the district court did not abuse its discretion, Johnson's conviction should be affirmed.

[¶25] Johnson asserted that he should be granted a new trial because he could not produce two of his witnesses, Virgil Hufford and Dan Miller. Appellant's App. at 57. These individuals are registered sex offenders that would have testified that they were never required to update their registration when leaving employment. Id. at 58. Another registered sex offender, Milton Webb, testified similarly at trial. Id.; Trial Tr., p. 198-99, Jan. 23, 2007. In its Memorandum Decision and Order Denying Defendant's Motion to for [sic] a New Trial, the District Court properly held that Johnson was not prejudiced by not being able to produce the testimony of Mr. Hufford and Mr. Miller. Appellant's App. at 61. The District Court cited Lemons in which the North Dakota Supreme Court handled a similar situation. Id. at 57 (citing Lemons, 2004 ND 44, ¶ 23, 675 N.W.2d 148).

[¶26] In Lemons, a material witness for the defense was unavailable due to no fault of either party. Lemons, 2004 ND 44, ¶ 23, 675 N.W.2d 148, 154. The Defendant made a motion for a new trial, which was denied by the district court. Id. The North Dakota Supreme Court held that this was not an abuse of discretion because the witness's testimony would not have corroborated the Defendant's testimony or exonerate the Defendant. Id. Similarly in this case, the witnesses' testimony would not have exonerated Johnson. Their testimony would have been no different than Mr. Webb's testimony, which the jury did not believe exonerated Johnson. Appellant's App. at 58. In addition, the witnesses' testimony would have been used to advance Johnson's

erroneous interpretation of N.D.C.C. § 12.1-32-15. The District Court explained that according to State v. Jackson, a registered sex offender is required to notify law enforcement within ten days of changing his or her employment address. Id. at 59 (citing State v. Jackson, 2005 ND 137, ¶¶ 9-10, 701 N.W.2d 887). Johnson failed to show prejudice because the witnesses' testimony would not have exonerated him under the interpretation of N.D.C.C. § 12.1-32-15 established in Jackson. Id. at 60.

[¶27] In addition, although the District Court did not cite N.D.R. Evid. 403, a court is allowed to exclude evidence when its probative value is substantially outweighed by needless presentation of cumulative evidence. N.D.R. Evid. 403. The testimony of Mr. Hufford and Mr. Miller would have been identical to the testimony of Mr. Webb. Appellant's App. at 58. This would have been needless presentation of cumulative evidence, and the testimony could have been excluded even if the witnesses were available. N.D.R. Evid. 403. The district court did not abuse its discretion when it denied Johnson's Motion for a New Trial. Thus, Johnson's conviction should be affirmed.

[¶28] Johnson also asserts in his brief that the State should have known that Mr. Miller had been arrested and was in custody in the Grand Forks County Correctional Center. Appellant's Brief at 16-17. It is not the State's responsibility to keep track of all of the inmates at the Correctional Center, nor is it the State's responsibility to produce the Defendant's witnesses. The District Court did not abuse its discretion when it denied Johnson's Motion for a New Trial, thus Johnson's conviction should be affirmed.

IV. SUFFICIENT EVIDENCE WAS PRESENTED TO CONVICT THE DEFENDANT OF FAILURE TO REGISTER AS A SEX OFFENDER

[¶29] When reviewing a conviction for sufficiency of the evidence, the Court does not resolve conflicts in the evidence or weigh the credibility of witnesses. State v. Fasching, 461 N.W.2d 102, 103 (N.D. 1990) (citing City of Mandan v. Thompson, 453 N.W.2d 827 (N.D. 1990)). To overturn a conviction, the Defendant must show that the evidence, when viewed in a light most favorable to the verdict, permits no reasonable inference of guilt. Id. at 102-03 (citing State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988)). Because the evidence presented by the State permitted a reasonable inference of Johnson's guilt, his conviction should be affirmed.

[¶30] In the present case the State presented the testimony of four witnesses: Tricia Weber, Human Resources Generalist at LM Glasfiber; Detective Duane Simon; Master Police Officer Derrik Zimmel; and Christy Thelen, a parole officer with the North Dakota Department of Corrections. Ms. Weber testified that Johnson's employment had been terminated on September 2, 2005 and his employment file was officially closed on October 18, 2005. Trial Tr., p. 110, Jan. 23, 2007. Detective Simon testified that in his role as a Detective he works on cases involving sex offenders and is familiar with the process and procedure for registering sex offenders. Id. at 113. Detective Simon also testified that he met with Johnson to complete his initial registration at the Grand Forks Police Department. Id. at 115. He testified that he went through the requirements of registration with Johnson. Id. at 117. Off. Zimmel testified that Johnson did not update his registration within ten days of the end of his employment at LM Glasfiber. Id. at 147.

Johnson's parole officer, Ms. Thelen, testified that Johnson never indicated to her that he did not understand the registration requirements. Id. at 171.

[¶31] N.D.C.C. § 12.1-32-15 states:

> If an individual required to register pursuant to this section has a change in name, school, or address, that individual shall inform in writing, at least ten days before the change, the law enforcement agency with whom that individual last registered of the individual's new name, school, residence address, or employment address.

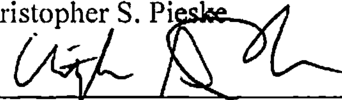
N.D.C.C. § 12.1-32-15(7). The North Dakota Supreme Court held in Jackson that this language requires a registered sex offender to update his or her registration when his or her employment address changes. Jackson, 2005 ND 137, ¶ 10, 701 N.W.2d at 890. The evidence presented by the State permitted a reasonable inference that Johnson did not register with the Police Department within ten days of the change in his employment address. Thus, Johnson's conviction should be affirmed.

CONCLUSION

[¶32] For all the foregoing reasons, the State respectfully requests that this Court affirm Johnson's conviction.

DATED this 13 day of March, 2009.

Christopher S. Pieske



Senior Legal Intern

Peter D. Welte

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Grand Forks County

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	**Supreme Court No. 20070248**
	)	**Grand Forks District Court**
vs.	)	**No. 18-06-K-02832**
	)	
Steven Lennard Johnson,	)	
	)	
Defendant-Appellant.	)	**AFFIDAVIT OF SERVICE**
	)	**BY E-MAIL TRANSMISSION**
	)	

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 13th day of March, 2009, she served via e-mail a true copy of the following document:

BRIEF OF APPELLEE

and that said email was served on the address of:

Benjamin C. Pulkrabek whose said e-mail address is: Pulkrabek@lawyer.com

Arlene Herzog
States Attorney's Office

Subscribed and sworn to before me this 13th day of March, 2009.

Sheri L. Vonasek
Notary Public
Grand Forks County, North Dakota
My Commission Expires: 8/17/2010

ah

Sheri L. Vonasek
Notary Public
State of North Dakota
My Commission Expires Aug. 17, 2010