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AT \_\_\_\_\_ O'clock \_\_\_\_ M  
CLERK, DISTRICT COURT

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Deputy

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

**STATE OF IDAHO,** )  
 )  
 ) *Plaintiff,* )  
 )  
 )  
 vs. )  
 )  
 ) **MICHAEL G. LONG,** )  
 )  
 )  
 ) *Defendant.* )  
 \_\_\_\_\_ )

Case No. **CR 2007 27856**

**MEMORANDUM DECISION AND  
ORDER ON APPEAL**

**I. INTRODUCTION AND BACKGROUND.**

This is an appeal from a decision of Magistrate Judge Eugene Marano dismissing criminal charges of misdemeanor trespassing upon a defense motion pursuant to I.C.R. 29, citing insufficient evidence by the prosecution. Tr. p. 219, Ll. 13-19. The undisputed facts of the case indicate that, on November 24, 2007, Officer Overman of the Idaho Department of Fish and Game cited the defendant, Michael G. Long, for trespassing to hunt, in violation of IC § 36-1603(a), and unlawful possession of wildlife, a misdemeanor defined by § 36-502(b).

During the trial, Officer Overman testified that on November 27, 2007, he and another officer were conducting a simulated wildlife operation within the Wallace Forest. Tr. p. 31, Ll. 2-12. Officer Overman testified that he heard shots fired in the area. Knowing that the area was posted private property or archery only, the officers went to the location

where they heard the shots. Tr. p. 44, L. 13 – p. 45, L. 12. Once there, they made contact with Long, who, for no apparent reason, was crouching in the bushes with a rifle and a dead whitetail buck. Tr. p. 47, L. 9 – p. 48, L. 9. Behind him was a “No Hunting” sign, which was visible from his location and from the road. Tr. p. 48, L. 14 – p. 56, L. 12. Long testified that he did not know the landowner, Richard Froelich. Froelich testified he had not given Long permission to hunt on his property. Tr. p. 140, LI. 16-17.

After the completion of the evidentiary portion of the trial, Judge Marano granted Long’s motion for judgment of acquittal pursuant to Idaho Criminal Rule 29(a). Judge Marano reasoned that a “No Hunting” sign is not a “notice of like meaning” to a “No Trespassing” sign because “trespassing means you can’t go on the property, period, for any reason.” Judge Marano further posited that a “notice of like meaning” would be a notice which stated, “Don’t come on this property” or “Come on this property and you’ll get shot.” Tr. p. 218, LI. 13-17. Since Judge Marano found Long did not violate the trespassing statute, Judge Marano found Long obviously did not violate the taking a game animal unlawfully statute. Tr. p. 219, LI. 17-19.

The State appeals, asserting that Judge Marano improperly interpreted I.C. § 36-1603(a) when he concluded that a “No Hunting” sign is not a “notice of like meaning” to a “No Trespassing” sign when the alleged trespasser is hunting.

At the conclusion of the oral argument on appeal, this Court ruled that Judge Marano’s interpretation would have applied to I.C. § 18-7008, the trespass statute, but because I.C. § 36-1603(a) is concerned only with hunting, this Court had a different interpretation. This Court stated on the record that interpreting I.C. § 36-1603(a), “No Hunting” is a “notice of like meaning” as compared to a “No Trespassing” sign.

However, at oral argument, this Court asked counsel for the State to explain how a violation of I.C. § 36-1603 is a crime. In rebuttal argument, the State argued I.C. § 36-1402(d)(5) is what makes a violation of I.C. § 36-1603 a crime. However, I.C. § 36-1402(d)(5) merely states you can have your hunting license revoked for “Trespassing in violation of warning signs or failing to depart the real property of another after notification as set forth in section 36-1603, Idaho Code.” At that point, this Court was convinced no crime had occurred, and Judge Marano’s granting of Long’s I.C.R. 29 motion must be upheld, although for different reasons.

As this Court was preparing this Memorandum Decision, this Court came across I.C. § 36-1401(b).

## **II. STANDARD OF REVIEW.**

A trial court must deny an I.C.R. 29 motion if “the evidence is sufficient to sustain a conviction of the offense or offenses charged.” *State v. Huggins*, 103 Idaho 422, 426, 648 P.2d 1135, 1139 (1982), affirmed in part, modified in part on other grounds, 105 Idaho 43, 665 P.2d 1053 (1983). Courts must weigh the sufficiency of the evidence, asking “whether there was substantial evidence upon which a trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Hoyle*, 140 Idaho 679, 684 99 P.3d. 1069, 1074 (2004). The reviewing court must take all reasonable inferences on appeal in favor of the prosecution. *State v. Kuzmichev*, 132 Idaho 536, 545, 976 P.2d 462, 471 (1999). Additionally, “review of a denial of a motion for judgment of acquittal requires the appellate court to independently consider the evidence in the record. . . .” *Id.* We must, therefore, independently examine the evidence to determine whether the trial judge properly applied the law to the facts in granting this motion.

### III. ANALYSIS.

To survive an I.C.R. 29 motion, the prosecution must introduce evidence, which a trier of fact could reasonably believe, on each of the essential elements of the offense.

Idaho Code § 36-1603(a) reads:

**36- 1603. TRESPASSING ON CULTIVATED LANDS OR IN VIOLATION OF WARNING SIGNS -- POSTING OF PUBLIC LANDS.**

(a) No person shall enter the real property of another and shoot any weapon or enter such property for the purposes of hunting, retrieving wildlife, fishing or trapping, without the permission of the owner or person in charge of the property, which property is either cultivated or posted with legible "No Trespassing" signs, is posted with a minimum of one hundred (100) square inches of fluorescent orange paint except that when metal fence posts are used, the entire post must be painted fluorescent orange, or other notices of like meaning, placed in a conspicuous manner on or near all boundaries at intervals of not less than one (1) sign, paint area or notice per six hundred sixty (660) feet provided that where the geographical configuration of the real property is such that entry can reasonably be made only at certain points of access, such property is posted sufficiently for all purposes of this subsection if said signs, paint areas or notices are posted at such points of access. For the purposes of this section, "cultivated" shall mean soil that is being or has been prepared by loosening or breaking up for the raising of crops, or used for the raising of crops, or artificially irrigated pasturage. No person shall fail to depart immediately from the real property of another after being notified in writing or orally by the owner of the real property or the owner's authorized agent.

The text of I.C. § 36-1603(a) is somewhat difficult to parse, but, based on a textual analysis of the text of I.C. § 36-1603(a), the prosecution must introduce reasonable proof that the defendant:

- A - entered the real property of another;
- B - shot any weapon or entered the property for the purposes of hunting, retrieving wildlife, fishing or trapping;
- C - without the permission of the owner or person in charge of the property; **and**
- D - the property was either:
  - cultivated; or
  - posted on or near all boundaries in a conspicuous manner with no less than one of the following signs or paint areas per 660 feet, or where entry to the property can only be made at certain points of access, at such points of access:

- legible “No Trespassing” signs;
- a minimum of one hundred square inches of fluorescent orange paint, except when metal fence posts are used, in which case the metal post must be painted entirely fluorescent orange;
- or other notices of like meaning, placed in a conspicuous manner.

See I.C. § 36-1603(a). There appears to be no real question on the sufficiency of the State’s evidence on each of these elements except the last, the method and manner in which the property was posted. The record indicates that there was a “No Hunting” sign within the immediate vicinity of where the officers contacted the defendant. However, Judge Marano granted the motion, ruling that “[t]respassing means you can’t go on the property, period, for any reason.” Tr. p. 215, Ll. 19-20. Thus, Judge Marano found a “No Hunting” sign was not a “notice of like meaning” compared to a “No Trespassing” sign.

The primary issue raised by the appellant is whether or not a “No Hunting” sign is a “notice of like meaning” to a “No Trespassing” sign when the alleged trespasser is hunting. Appellant’s Brief, 3. In arguing this issue, the State claims that the trial court’s interpretation of “No Trespassing” is erroneously narrow, and to support this contention they cite various definitions of trespass provided by other sections of the Idaho Code, the common law, and it’s everyday usage.

The Plain Meaning rule, the first canon of textual construction, states that, unless the plain meaning of a statute is “palpably absurd, the courts must assume that the legislature meant what it said. Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect.” *State Dept. of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 153, 595 P.2d 299, 302 (1979); *See Cowan v. Bd. of Comm’rs*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006). This was the rule upon which Judge Marano hung his interpretation of the statute here when he ruled that “other notices of like meaning . . .

must say no trespassing or mean the same as – or be like no trespassing. But [here the sign says] no hunting. There’s a huge difference between hunting and trespassing.” Tr. p. 215, Ll. 3-5. While Judge Marano interpreted the text of the statute literally, the State argues that the signs are of like meaning because they are both notices of exclusion, with trespassing being more restrictive than, but inclusive of, hunting. This Court is not bound by Judge Marano’s interpretation of that statute.

Idaho Code § 18-7008 is Idaho’s “Trespass” statute. Under that statute, one can commit a trespass, a misdemeanor, in several ways, one of which is by:

Entering without permission of the owner or the owner's agent, upon the real property of another person which real property is posted with "No Trespassing" signs, is posted with a minimum of one hundred (100) square inches of fluorescent orange paint except that when metal fence posts are used, the entire post must be painted fluorescent orange, or other notices of like meaning, spaced at intervals of not less than one (1) sign, paint area or notice per six hundred sixty (660) feet along such real property; provided that where the geographical configuration of the real property is such that entry can reasonably be made only at certain points of access, such property is posted sufficiently for all purposes of this section if said signs, paint or notices are posted at such points of access;

Idaho Code § 18-7008(9). It appears that since the language of I.C. § 36-1603(a) is identical to that found in I.C. § 18-7008(9), save for the addition of the “cultivated” land clause (not at issue in the present case), the Idaho Legislature may have copied and pasted its way into the “Trespassing on cultivated lands or in violation of warning signs – posting of public lands” found in I.C. § 36-1603(a). Since I.C. § 18-7008(9) defines what is a trespass (ie., how to “close off” your land from the public), and I.C. § 36-1603(a) is part of three other statutes which encourage landowners to open up their recreational land to the public, one might expect to see a problem with this cut and paste approach to the legislative creation of I.C. § 36-1603(a).

This Court finds Judge Marano's interpretation that "No Hunting" is not a "notice of like meaning" as compared to a "No Trespassing" sign applies perfectly to I.C. § 18-7008. That is because I.C. § 18-7008 is a statute making it a crime when one is on another's land and that other landowner has appropriately closed off pursuant to certain very specific signage methods. Under that *trespass statute*, "No Hunting" is not the same as "No Trespassing."

However, the purpose of I.C. § 36-1603(a) is specifically to *allow hunting*, unless a landowner utilizes very specific signage methods. Under that statute, the purpose of which is *to encourage hunting*, a "No Hunting" sign is "a notice of like meaning" compared to a "No Trespassing" sign. Given the express purpose of the statute, "No Hunting" is even more direct and specific than "No Trespassing." Thus, this Court finds that interpreting I.C. § 36-1603(a), "No Hunting" is a "notice of like meaning" as compared to a "No Trespassing" sign. As noted by the State, this Court should take into consideration the reason for the law, that is, the object and the purpose of the law should be analyzed, as well as the legislative intention in its enactment. Appellant's Brief, p. 6, citing *State v. Thompson*, 130 Idaho 819, 822, 948 P.2d 174, 177 (Ct.App. 1997). The purpose of I.C. § 36-1603(a) is to allow hunting as a default position and still allow a landowner to prohibit hunting if certain signage is placed. If the purpose of the statute is to allow hunting generally yet also allow a landowner to prohibit *hunting*, then why wouldn't a "No Hunting" sign be a "notice of like meaning" as compared to the statutorily enumerated "No Trespassing" sign? The State touched on this concept when it argued that within the context of the rest of Chapter 16 (I.C. § 36-1601 *et. seq.*), entitled "Recreational Trespass--Landholder Liability Limited," a "No Hunting" sign should be sufficient to indicate that recreational users are still allowed on

the property, but those recreational users are not allowed to use the land for the recreational purpose of hunting. Appellant's Brief, pp. 6-8.

At oral argument, because this Court had not been cited to any other authority, this Court felt the bigger issue was that nowhere in I.C. § 36-1603 is it made a crime to hunt on land that is posted. Long was charged with "Trespassing" under "I.C. § 36-1603(a)". Complaint, p. 1. Nothing in I.C. § 36-1603 states it is a crime to do anything. At oral argument, the Court asked counsel for the State to identify how a violation of I.C. § 36-1603 is a crime. In rebuttal argument, the State argued I.C. § 36-1402(d)(5) is what makes a violation of I.C. § 36-1603 a crime. However, I.C. § 36-1402(d)(5) merely states you can have your hunting license revoked for "Trespassing in violation of warning signs or failing to depart the real property of another after notification as set forth in section 36-1603, Idaho Code." Because counsel for the State could not point to any other statute other than I.C. § 36-1402(b)(5), this Court was convinced at the end of oral argument that a violation of I.C. § 36-1603(a), which was what the State charged, was not a crime. That being the case, this Court at oral argument felt Judge Marano properly granted Long's I.C.R. 29 motion, but for the wrong reason. The I.C.R. 29 Motion should have been granted because I.C. § 36-1603(a) does not state a crime.

However, upon preparing this memorandum decision, this Court discovered I.C. § 36-1401. Specifically, I.C. § 36-1401(b) reads:

Misdemeanors. Any person who pleads guilty to, is found guilty or is convicted of a violation of the provisions of this title or rules or proclamations promulgated pursuant thereto, or orders of the commission, except where an offense is expressly declared to be an infraction or felony, shall be guilty of a misdemeanor.

This title refers to title 36 of the Idaho Code. Idaho Code § 36-1603(a) is part of title 36.

Thus, a violation of I.C. § 36-1603(a) is a misdemeanor.

This Court is aware this is a different conclusion than that which was reached in

open court at the conclusion of oral argument. While there is indication that in criminal cases, what is said in open court controls over a written order (*State v. Phillips*, 99 Idaho 354, 359, 581 P.2d 1173, 1178 (1978), Bistline, J. dissenting, citing *Henley v. Heritage*, 337 F.2d 847, 848 (5<sup>th</sup> Cir. 1964), such does not hold true in the civil arena. A court, while it still retains jurisdiction over the cause in which the order was made, may, for sufficient cause shown, amend, correct, resettle, modify, or vacate, as the case may be, an order previously made. *J. J. Case Co. v. McDonald*, 76 Idaho 223, 232, 280 P.2d 1070, 1075 (1955); *State v. Swain*, *State v. Goldsmith*, 267 Or. 527, 531, 517 P.2d 684, 686 (Or. 1973) unanimous *en banc* decision (A judge may change his mind concerning the proper disposition between the time of a hearing and his final action which takes place when he signs the order disposing of the matter); cited with approval in *State v. Jacobs*, 200 Or.App. 665, 672, 117 P.3d 290, 295 (Or.App. 2005); *State ex rel. Kaufman v. Sakaib*, 207 W.Va. 662, 671, 535 S.E.2d 727, 736 (Sup.Ct.App.W.Va. 2000) (Always, the law favors written orders...it is clear that were a circuit court's written order conflicts with its oral statement, the written order controls);

#### **IV. CONCLUSION AND ORDER.**

Based upon the reasons set forth above, the decision of Judge Marano granting Long's I.C.R. 29 motion is reversed because I.C. § 36-1603(a) does state a crime and because this Court finds the purpose of I.C. § 36-1603(a) is *to encourage hunting*, a "No Hunting" sign *is* "a notice of like meaning" compared to a "No Trespassing" sign. This matter is remanded to Magistrate Division for any further action.

DATED this 24<sup>th</sup> day of June, 2009.

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JOHN T. MITCHELL District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of June, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Starr Kelso  
Deputy Prosecuting Attorney - Linda Johnstone

Honorable Eugene A. Marano  
Honorable Rob Caldwell

**CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY**

BY: \_\_\_\_\_  
Deputy