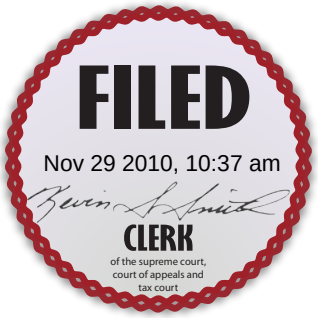

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IN THE
COURT OF APPEALS OF INDIANA

CODY LEWELLEN and CODY DALLAS,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 80A05-1005-CT-330
	)	
BRANDON CESSNA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPTON CIRCUIT COURT
The Honorable Thomas R. Lett, Judge
The Honorable Laura M. Clouser, Judge Pro Tempore
Cause No. 80C01-0905-CT-215

November 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Cody Lewellen appeals the denial of his Ind. Trial Rule 60(B) motion to set aside judgment by default in a personal injury action filed by Brandon Cessna. Lewellen presents as the sole issue on appeal the question of whether the Tipton Circuit Court had personal jurisdiction over him when he was not served with process pursuant to Ind. Trial Rule 4.3, the rule applicable to service upon incarcerated individuals.

We affirm.

On May 26, 2009, Cessna filed suit against Cody Dallas and Lewellen for injuries sustained during a physical attack in Bloomington on September 29, 2007. Prior to the initiation of this lawsuit, Lewellen had pleaded guilty to the felony battery of Cessna and served a period of time in jail.

Cessna sent a copy of the summons and complaint via certified mail to Lewellen's last known address, which was Lewellen's father's home in Elwood. The complaint and summons were received and signed for by Lewellen's stepmother on June 1, 2009. When Lewellen did not respond to the complaint, Cessna filed a motion for entry of default judgment against him on June 29, which the trial court granted.

In the ensuing proceedings against co-defendant Dallas, Lewellen's deposition was taken at Cessna's attorney's office on October 14, 2009. During the deposition, Lewellen plainly acknowledged that he was a co-defendant in the civil lawsuit filed by Cessna and provided no indication of a prior lack of notice. Further, Lewellen testified regarding the amount of time he had spent incarcerated since the altercation in September 2007. Specifically, aside from the one day spent in jail immediately following his arrest, Lewellen testified that he spent only twenty-eight days in jail sometime during the months of January

and February 2009.[1]

Following the deposition, Lewellen sought the representation of counsel, who entered an appearance on his behalf on November 24, 2009, nearly six weeks after the deposition. Thereafter, on December 4, Lewellen filed a motion to set aside the default judgment, claiming that he was incarcerated at the Boone County Jail at the time service via certified mail was delivered to the home of his father.[2] Lewellen argued that the default judgment was void for lack of personal jurisdiction because he was never properly served pursuant to T.R. 4.3.

Cessna subsequently requested a hearing on Lewellen's motion to set aside the default judgment, specifically directing the court to Lewellen's deposition testimony indicating that he was incarcerated only during the months of January and February 2009. The matter was set for hearing on January 21, 2010. Following the hearing, the trial court denied Lewellen's motion to set aside the default judgment by order dated February 18, 2010, and directed the parties to coordinate a date for the damages trial. Lewellen timely filed a motion to correct

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[1] After Lewellen indicated that he had spent twenty-eight days in jail following his conviction in January 2009, the following colloquy occurred between Cessna's counsel and Lewellen:

> Q: And, from [the time you bonded out] in 2007 until your sentence in 2009, you're telling me that you spent 28 days in jail, sometime during the month [sic] of January and February of 2009?
>
> A: Yes.
>
> Q: And, that amount of time was all the time you've spent in jail?
>
> A: Yes, Sir.

Appellee's Appendix at 15-16.

[2] The motion alleged specifically that Lewellen was incarcerated from February 15 through July 16, 2009, for the underlying criminal conviction.

error, which was summarily denied on April 12, 2010. Lewellen now appeals.

On appeal, Lewellen properly observes that T.R. 4.3 sets forth the manner in which incarcerated individuals are to be served with process. The rule provides:

> Service of summons upon a person who is imprisoned or restrained in an institution shall be made by delivering or mailing a copy of the summons and complaint to the official in charge of the institution. It shall be the duty of said official to immediately deliver the summons and complaint to the person being served and allow him to make provisions for adequate representation by counsel. The official shall indicate upon the return whether the person has received the summons and been allowed an opportunity to retain counsel.

T.R. 4.3. Lewellen argues that because he was not served in accordance with this rule the trial court never acquired personal jurisdiction over him and, therefore, the default judgment is void as a matter of law. *See King v. United Leasing, Inc*., 765 N.E.2d 1287, 1290 (Ind. Ct. App. 2002) ("[i]f service of process is inadequate, the trial court does not acquire personal jurisdiction over a party, and any default judgment rendered without personal jurisdiction is void").

Lewellen's appellate argument hinges on his claim that he was "at all times relevant to these proceedings, incarcerated at the Boone County jail." *Appellant's Brief* at 12. We observe, however, that the record before us is devoid of evidence, whether documentary or testimonial, establishing that Lewellen was incarcerated at the time of service of process.[3] In addition to this lack of evidence regarding his alleged incarceration, Cessna presented direct

[3] Neither the unverified pleadings filed by Lewellen nor counsel's unsworn commentary at the hearing constitute evidence. *See Wabash Smelting, Inc. v. Murphy*, 186 N.E.2d 586, 590 (Ind. Ct. App. 1962) ("[a]s unsworn statements, they are of no avail at all. As unverified pleadings, they constitute no proof of the facts they allege…. Self-serving statements or declarations by the party or his attorney not under oath cannot constitute any evidence of the facts they allege"). Further, Lewellen's counsel acknowledged at the hearing, "I don't have evidence of that right now with me but I'd be happy to gather that and submit it to the Court".

evidence to the contrary – under-oath testimony from Lewellen's own deposition – that in fact Lewellen was not incarcerated. In light of the record before us, we are constrained to find Lewellen's arguments regarding the application of T.R. 4.3 misplaced.[4] Therefore, we affirm the denial of his motion to set aside judgment by default and his related motion to correct error.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.

Transcript at 13. At no time following the hearing, however, did counsel supplement the record with evidence to this effect.

[4] Recognizing that his appeal might be unsuccessful due to lack of evidence, Lewellen asserts a new ground for reversal in his reply brief. *See Appellant's Reply Brief* at 1 ("[e]ven if Appellant Lewellen's claims of lack of jurisdiction fail because there is no record of whether [he] was in jail at the time service was attempted, service still fails because Lewellen's step mother who signed for the registered mail is not Lewellen's agent"). It is well established, however, that "grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived". *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005). Waiver notwithstanding, we observe that his argument fails because there is "nothing in the trial rules requiring that the individual to whom service of process is mailed be the one who signs the return receipts in order for service to be effective." *Precision Erecting, Inc. v. Wokurka*, 638 N.E.2d 472, 474 (Ind. Ct. App. 1994), *trans. denied*. *See also Marshall v. Erie Ins. Exchange*, 923 N.E.2d 18, 22 (Ind. Ct. App. 2010) ("service by mail is effective even if someone other than the intended recipient ultimately signs the return receipt"), *aff'd on reh'g*, 930 N.E.2d 628. Further, the record reveals that Lewellen did not assert any lack of notice when he was asked about his party status at the deposition, and he did not enter an appearance in the lawsuit until six weeks after said deposition.