STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1721

State of Minnesota,
Respondent,

vs.

James Edward Norman,
Appellant.

Filed September 17, 2012
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Freeborn County District Court
File No. 24-CR-10-1664

Lori Swanson, Attorney General, Jennifer Coates, Assistant Attorney General, St. Paul, Minnesota; and

Craig S. Nelson, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Wright, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges his convictions of permitting false claims against the government, theft by swindle, and misconduct of a public officer. Appellant argues that the evidence was insufficient to support his convictions of permitting false claims and theft by swindle; that the state failed to allege an offense of misconduct of a public officer under Minn. Stat. § 609.43(2) (2008); and that the prosecutor committed misconduct during closing argument. We affirm appellant's convictions of permitting false claims against the government and theft by swindle. But we reverse appellant's conviction of misconduct of a public officer and remand for the district court to vacate the conviction.

FACTS

This case arises from appellant James Edward Norman's misuse of a city credit card issued to him in his capacity as city manager for Albert Lea. Norman was charged by amended complaint with six counts of permitting false claims against the government, one count of theft by swindle, and one count of misconduct of a public officer. The case was tried to a jury.

According to the evidence presented at trial, Norman began working as city manager on a part-time basis in April 2010 and transitioned to full-time employment in May. The city issued Norman a U.S. Bank credit card in May. Rhonda Moen, the city's finance director, provided the credit card to Norman and discussed the terms of the user agreement. Moen also advised Norman that she was very particular about providing receipts and that the city credit card contained the city logo on the front to make it easy to

identify. Norman signed the user's agreement on May 3. The user's agreement states, in relevant part:

> 1. I understand the card is for company-approved purchases only and I agree not to charge personal purchases.
>
> 2. Improper use of this card can be considered misappropriation of city funds. This may result in disciplinary action up to and including termination of employment.
>
> . . . .
>
> 6. All charges will be billed directly to and paid by the City. The bank cannot accept any monies from me directly; therefore any personal charges bill[ed] to the City could be considered misappropriation of funds.
>
> 7. As the card is company property, I understand that I may be periodically required to comply with internal control procedures designed to protect city assets. This may include being asked to produce the card to validate its existence and account number. I may also be asked to produce receipts and statements to audit its use.
>
> . . . .
>
> 10. I understand that all charges to my card must be supported by detailed receipts. Any charges that I can not provide substantiation for will be my responsibility.

After receiving the credit card, Norman made the following charges, which are at issue in this case: (1) $19.23 for batteries at Wal-Mart, (2) $7.99 for feminine hygiene products at Shopko, (3) $31.57 for an aquarium, trail mix, and cat litter at Wal-Mart, (4) $973.01 for a refrigerator at Home Depot, (5) $59.99 for women's shoes at Herberger's, and (6) $64.51 for residential waste-removal services. Norman made additional charges for gasoline, lodging, groceries, and long-distance calls. Norman

made all of the charges in May and early June. Norman charged a total of $2,741.88 on the card during the first billing cycle.

Moen became aware of the charges on June 29, when she received Norman's credit card statement along with a personal check from Norman in the amount of $2,162.55. The city paid the credit card statement to U.S. Bank via electronic transfer from the city's checking account the same day.

Moen requested an expense report from Norman detailing the items for which he did not provide reimbursement. Norman provided the requested expense voucher. After reviewing the expense voucher, Moen determined that Norman still owed the city $64.16. She sent an e-mail to Norman on July 16 asking for a check in the amount of $64.16. In the e-mail, Moen stated: "I was told that you were confused the first month that you had the card and used it for several personal purchases. Hopefully you have now learned to differentiate your city credit card from your personal credit card."

Norman responded to Moen's e-mail on July 19. In his e-mail response, Norman stated that he would provide the check for $64.16. He also stated: "As to the use of the card for personal uses, it was not about being confused about different credit cards, it was about being in terrible financial shape when I began here in Albert Lea. . . . I actually have been attempting to clear up all my debt through that federal stimulus legislation that negotiates my credit card debt . . . so I do not have credit." Norman paid the $64.16 the same day. Moen contacted the city attorney and reported Norman's personal use of the city credit card to the state auditor's office.

After Moen informed Norman that a report was being made to the state auditor, Norman sent Moen an e-mail dated July 22 stating:

> After full review [of] your complaint and I now realize that no improper activity took place, because no personal purchases were made. All purchases made were directly related or indirectly related to moving, relocation and supplemental housing that are covered under Section 14 of my Employment Agreement; therefore they are not "personal purchases."

Norman had signed an employment agreement with the city of Albert Lea on March 31, 2010. Section 14 of the employment agreement, entitled "Moving and Relocation Expenses," provides:

> For purposes of accepting moving and relocation expenses, Mr. Norman agrees to establish residence within the corporate boundaries of the City, within two months of employment, and thereafter to maintain residence within the corporate boundaries of the local government.
>
> City shall reimburse up to $5,000 for the expenses of moving Mr. Norman and his family and personal property from St. Paul to Albert Lea. Said moving expenses include packing, moving, storage costs, unpacking, and insurance charges.
>
> Items also included in the $5,000 allowance include lodging and meal expenses for his family in route from St. Paul to Albert Lea. Mileage costs for moving two personal automobiles shall be reimbursed at the current IRS allowable rate.
>
> City shall pay Mr. Norman an interim housing supplement of $500 per month for a period [of] 2 months, or until a permanent residence is established, whichever event occurs first.

The city decided to investigate the matter, and the police interviewed Norman on August 3, 2010. During the interview, Norman initially maintained that all of his charges were related to moving and relocation expenses. He later admitted that some of the items–such as women's shoes and Always Maxipads–were not such expenses. Norman explained that at times, he had accidently used the city-issued credit card because it looked similar to his personal Wells Fargo debit card. He also explained, specifically with regard to the purchase of the refrigerator, that he thought it could be justified as a moving and relocation expense. Norman also stated that he believed that once the billing statement was in, he could simply reimburse the city for the charge if there was a question.

Following the interview, the police contacted Wells Fargo and determined that Norman did not have an active debit card with that bank during the time he made the charges in question. During a follow-up interview, Norman explained that he thought he did have the Wells Fargo debit card at the time the purchases were made but he must have been referring to his previous U.S. Bank debit card. The police never followed up to determine if Norman had a U.S. Bank debit card at the time of the purchases in question.

After the state presented its case at trial, Norman moved for a judgment of acquittal on all counts. The district court denied the motion. Norman did not testify. The jury returned a verdict of not guilty on one count of permitting false claims against the government and verdicts of guilty on the remaining seven counts. The district court entered judgments of conviction on the seven counts and stayed imposition of sentence

on one count of permitting false claims against the government. Norman appeals his convictions.

D E C I S I O N

On appeal, Norman argues that (1) the evidence was insufficient to support his convictions of permitting false claims against the government, (2) the evidence was insufficient to support his conviction of theft by swindle, (3) the state failed to allege an offense of misconduct of a public officer under Minn. Stat. § 609.43(2), and (4) the prosecutor committed misconduct during closing argument. Norman also raises a number of issues in his pro se supplemental brief. We address each of Norman's arguments in turn.

I.

Norman argues that the evidence was insufficient[1] to support his convictions of permitting false claims against the government. Specifically, Norman argues that he did not "allow" the claims and that the claims were not "false" under the meaning of Minn. Stat. § 609.455 (2008).

In considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing

[1] Norman's actual argument is that "the guilty verdicts . . . must be reversed because [he] did not allow false claims against the city of Albert Lea." Norman asserts that his "conduct did not implicate Sec. 609.455 because he did not 'allow' claims to be made against Albert Lea, and the claims were not 'false.'" We construe this argument as a challenge to the sufficiency of the evidence.

court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Minn. Stat. § 609.455 provides that

> [a] public officer or employee who audits, allows, or pays any claim or demand made upon the state or subdivision thereof or other governmental instrumentality within the state which the public officer or employee knows is false or fraudulent in whole or in part, may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minn. Stat. § 609.455.

Norman argues that a public official only "allows" a claim within the meaning of section 609.455 "by conduct that affirmatively authorizes the claim for payment." Norman further argues that he did not allow or authorize a claim to be made upon the city because he submitted a personal check as reimbursement for his purchases.

We need not define the term "allow" under Minn. Stat. § 609.455 because Norman's argument fails under his proposed definition. There is evidence in the record that Norman used the city's credit card to charge the personal goods and services in question. There is also evidence in the record that Norman received and signed the credit-card user's agreement stating that "[a]ll charges will be billed directly to and paid by the City." Furthermore, there is evidence that the city did in fact pay for Norman's

charges. Because charges on the credit card were billed to the city, the charges constituted a claim for payment on the city. By making the charges on the credit card with knowledge that the charges would be billed to and paid by the city, Norman "affirmatively authorized" the claim.

Norman argues that because he reimbursed the city for the charges, he did not allow the claim within the meaning of the statute. But Norman fails to explain how an after-the-fact reimbursement negates his earlier allowance of a claim on the city. In sum, the evidence was sufficient for the jury to find that Norman allowed a claim upon the city by using the city-issued credit card.

Norman next argues that the claims were not "false" within the meaning of section 609.455. Norman argues that decisions by the supreme court establish that a false claim is one that "was falsified or not true." He further argues that his claims were not "false" because they "were for real transactions involving actual goods and services." We therefore consider whether a claim for actual purchases falls under the definition of "false" within the meaning of Minn. Stat. § 609.455. This is an issue of statutory interpretation subject to de novo review. *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996). The object of statutory interpretation is to ascertain and effectuate legislative intent. Minn. Stat. § 645.16 (2008). "[W]ords and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition." Minn. Stat. § 645.08 (2008).

Section 609.455 does not define the word "false." Norman cites several cases addressing earlier statutes from which § 609.455 was derived in support of his proposition that real transactions are not included within the meaning of a "false" claim. Some of the cases to which Norman cites involve entirely fictitious claims. *See, e.g.*, *State v. Bourne*, 86 Minn. 426, 427, 90 N.W. 1105, 1106 (1902) (defendant "knowingly audited a fictitious claim against the county in favor of one A. W. Rowley by making out in the form and similitude of a good and genuine redemption warrant an order on the county treasurer when no real claim existed in fact.") However, Norman does not cite any case in which the meaning of "false" is at issue.

One case that Norman cites, however, is instructive. In *State v. Sabatini*, the defendant was convicted of "willfully, knowingly and feloniously auditing and allowing a false claim against [a] town." 171 Minn. 137, 137-38, 213 N.W. 552, 553 (1927). The false claim involved $479.61 for material that the defendant had used to remodel his private home. *Id*. The defendant submitted the bill for the material to the town as a claim for material furnished to the town. *Id*. The issue was whether the district court erred in permitting the prosecution to present evidence that the defendant had audited and allowed other false claims against the town. *Id*. The supreme court stated in dictum that the "evidence to prove that defendant had knowingly and fraudulently audited and allowed the false claim charged in the indictment is ample." *Id*. Thus, the supreme court, in the context of a precursor statute that was in effect in 1927, implicitly endorsed a definition of false claim that included the submission of a bill for an actual purchase to a town for payment under a false pretext.

We observe that the meaning of "false" implicitly endorsed in *Sabatini* is consistent with the common usage of the word "false." *See* Minn. Stat. § 645.08(1) (providing that terms are construed according to common usage in the absence of a statutory definition); *see also The American Heritage College Dictionary* 501 (4th ed. 2007) (defining "false" as "intentionally deceptive"). The claims at issue here involve the actual purchase of goods and services for personal use, which were billed to the city on a credit card approved only for city-related purchases. We have no difficulty concluding that these claims are "false" under section 609.455.

Because there was sufficient evidence for a jury to find that Norman allowed claims against the city and that the claims were "false" under the meaning of Minn. Stat. § 609.455, the evidence sustains his convictions for permitting false claims against government.

II.

Norman argues that the evidence is insufficient[2] to support his conviction for theft by swindle. Specifically, Norman argues that he did not have intent to deprive the city of money, and that his conduct did not constitute a swindle.

Minn. Stat. § 609.52, subd. 2 (2008), provides in pertinent part:

> Whoever does any of the following commits theft and may be sentenced as provided in subdivision 3:
>
> . . . .

[2] We once again construe Norman's argument as a challenge to the sufficiency of the evidence. His actual argument is that "the state failed to establish beyond a reasonable doubt that [he] committed a theft by swindle because it did not prove that [he] intended to deprive the city of any money or that his conduct constituted a swindle."

> (4) by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person; or
>
> (5) intentionally commits any of the acts listed in this subdivision but with intent to exercise temporary control only and:
>
> (i) the control exercised manifests an indifference to the rights of the owner or the restoration of the property to the owner.

Minn. Stat. § 609.52, subd. 2(4), (5)(i). Swindling "requires a showing of affirmative fraudulent or deceitful behavior." *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). "A crime of theft by temporary control is complete upon the taking and does not require an intent to permanently deprive." *State v. Franklin*, 692 N.W.2d 82, 86 (Minn. App. 2005), *review denied* (Minn. Apr. 19, 2005).

Norman argues that his conduct was not a swindle because he did not obtain the credit card through fraudulent or deceitful behavior and, at the time he used the credit card, he did not misrepresent anything or obtain property or services by deceit. This argument is not persuasive. There is sufficient evidence in the record for the jury to have concluded that Norman engaged in deceitful behavior by using the city-issued credit card –limited by the user's agreement to "company-approved purchases"–to make purchases for personal use.

Norman also argues that there is no evidence that he intended to deprive the city of money because he fully reimbursed the city. This argument is also unpersuasive. First, the state was not required to prove "an intent to permanently deprive." *Id.* Second, Norman exercised temporary control over the city's available credit when he purchased

personal property using the city's credit in violation of the user's agreement, and in doing so, he manifested an indifference to the rights of the city. Whether or not he eventually reimbursed the city is irrelevant. Third, the jury heard conflicting evidence on the issue of intent. Specifically, Norman told the police that he confused his city-issued credit card with his personal debit card. He also told the police that he believed his purchases were justified under his employment agreement. But Norman also sent an e-mail stating that he used the city's card because he was in "terrible financial shape" and did not have personal credit of his own. Which version of events to believe was within the exclusive province of the jury. *See State v. Colbert*, 716 N.W.2d 647, 653 (Minn. 2006) (explaining that the jury is the exclusive judge of credibility and is free to reject a witness's testimony). In sum, there is sufficient evidence in the record for the jury to have concluded that Norman intended to deprive the city of its property.

Because the evidence was sufficient to find that Norman's conduct constituted a swindle and that he intended to exercise temporary control over city property with indifference to the rights of the city, the evidence sustains his conviction for theft by swindle.

III.

Norman argues that his conviction of misconduct of a public officer must be reversed because the acts alleged—specifically, that Norman charged items for his personal use on a city credit card—do not constitute acts "in excess of his lawful authority" within the meaning of Minn. Stat. § 609.43(2). Norman did not raise this argument before the district court. This court will generally not consider matters not

argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But appellate courts have discretion to address issues as justice requires and may review an issue affecting the ruling from which the appeal is taken. Minn. R. Civ. App. P. 103.04. Because Norman's challenge has merit and goes to the propriety of his gross-misdemeanor criminal conviction, we conclude that the interests of justice weigh in favor of considering the issue.

Construction of a criminal statute is a question of law that we review de novo. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). A statute must be construed according to its plain language, but if it is ambiguous, the intent of the legislature controls. Minn. Stat. § 645.16.

The amended complaint charged Norman under Minn. Stat. § 609.43(2) as follows:

> On or about May 28, 2010, within the County of Freeborn, defendant, a public officer or employee, in the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity; to wit: the defendant charged items for his personal use, such as gas, lodging, food, garbage disposal services, a refrigerator, long distance calling cards, feminine hygiene products, women's shoes, and household items to the City of Albert Lea on a city credit card.

Section 609.43(2) provides that a public officer, acting in his official capacity, who "does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity," is guilty of a gross misdemeanor. Minn. Stat. § 609.43(2). The Minnesota Supreme Court has held that the term "lawful authority," as used in section 609.43(2), is determined by state statutes that define or describe a public

official's authority. *State v. Serstock*, 402 N.W.2d 514, 517 (Minn. 1987). The legislature has promulgated several statutes that define the general authority of various public officials, including police officers. *See, e.g.*, Minn. Stat. §§ 419.05 (describing duties of police civil service commission members), .06 (providing rules for police departments) (2008). But when a count of an indictment fails to allege a violation of a "statutory limit" on a defendant's authority, dismissal of that count for failure to state an offense under section 609.43(2) is appropriate. *Serstock*, 402 N.W.2d at 517.

Here, the state did not allege a violation of a statutory limit on appellant's authority. Rather, the state alleged theft. Although theft is prohibited by statute, specifically Minn. Stat. § 609.52, subd. 2, it is not a statute that specifically defines or describes a public official's authority as required under *Serstock*. Accordingly, the state did not allege an act "in excess of his lawful authority" within the meaning of Minn. Stat. § 609.43(2). We therefore conclude that the amended complaint failed to allege an actionable offense under section 609.43(2), and we reverse Norman's conviction for misconduct of a public officer. We also remand for the district court to vacate Norman's conviction.

IV.

Norman argues that his convictions should be reversed because the prosecutor committed misconduct by arguing in closing that Norman should be held accountable as a public official. Norman did not object to the state's closing argument.

This court reviews claims of prosecutorial misconduct based on an unobjected-to argument under a modified plain-error standard. Minn. R. Crim. P. 31.02; *State v.*

Ramey, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial misconduct, an appellant must demonstrate that the prosecutor's argument was erroneous and the error was plain. *Id.* at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.* Substantial rights are affected if the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741.

A prosecutor's argument may include remarks regarding accountability but "should not emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving [the] defendant guilty beyond a reasonable doubt." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985).

In this case, the prosecutor opened her argument by stating:

> Trust. Accountability. That's what this case is about. Trust [that] our public officials will put the interest of the citizens they serve ahead of their own interests. Accountability when they don't, when they put their interests over the public.

The prosecutor repeated the trust-and-accountability theme later in her argument and concluded the argument by saying:

> Again, an educated man, twenty years experience in government, receives in black and white, in writing. He is told, as well, when he signs the user card agreement. The Finance Director goes over it with him. He knows what he can and can't do with the credit card. He uses that credit card for his own personal use because of bad finances.
>
> It's unfortunate that anyone has bad finances. It happens today, but what is wrong and what is criminal is when you use your official capacity to pay for things that you can't pay

> for on your own and you make that government entity then responsible for it. It's misconduct. It's criminal. Trust was broken. Accountability must be held.

Even if we assume, for the sake of argument, that the prosecutor erred by making these remarks, the state has met its burden of proving that the error did not affect Norman's substantial rights. Error is prejudicial and affects substantial rights if there is a "reasonable likelihood" that it had a significant effect on the jury's verdicts. *Griller*, 583 N.W.2d at 741 (quotation omitted). As outlined above, there was sufficient evidence to convict Norman of the charges. And the challenged remarks constitute a small portion of a long closing argument that focused primarily on the evidence presented at trial and how the evidence demonstrated that Norman's actions constituted criminal acts under the applicable statutes. It is not likely that the remarks had a significant effect on the jury's verdicts. Norman therefore was not prejudiced by the alleged error in the prosecutor's closing argument. *See State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990) (concluding that a new trial was not warranted in part because the improper "remarks were isolated and not representative of the closing argument when reviewed in its entirety"). In sum, Norman is not entitled to relief on this claim.

V.

Norman's pro se brief asserts a number of purported errors, including that (1) his actions did not amount to a crime, (2) the district court erred in not allowing evidence of the usual custom and procedure in the city of Albert Lea that allowed for supervisors to reimburse the city for non-allowable charges, (3) the prosecutor made an improper closing argument and deprived him of a fair trial, and (4) the district court erred by

limiting the information the jury could hear about the city's request to have the criminal charges dismissed. Some of these issues are argued in Norman's primary brief and are addressed above. As to the remaining issues, Norman does not cite any legal authority as support for his claims of error.

An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted). Because we discern no obvious prejudicial error, the issues in Norman's pro se brief are waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that claims in a pro se supplemental brief are waived if the brief contains no argument or citation to legal authority supporting the claims).

Affirmed in part, reversed in part, and remanded.