STATE OF MINNESOTA
IN COURT OF APPEALS
A11-772

State of Minnesota,
Respondent,

vs.

Robin Kimberly Magee,
Appellant.

Filed April 16, 2012
Affirmed
Cleary, Judge
Dissenting, Klaphake, Judge

Ramsey County District Court
File No. 62-CR-09-15147

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Helen R. Brosnahan, Assistant County Attorney, Hastings, Minnesota (for respondent)

Jill Clark, Jill Clark, LLC, Golden Valley, Minnesota; and

Bradford S. Delapena, Bradford Delapena, Ltd., St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and Cleary, Judge.

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

CLEARY, Judge

On appeal from convictions of four counts of gross misdemeanor failure to file tax return in violation of Minn. Stat. § 289A.63, subd. 1(a) (2010), appellant argues that the prosecutor lacked jurisdiction to prosecute gross misdemeanors; the statute of limitations barred prosecution of the offenses; she was prejudiced by amendment of the complaint; the jury instructions failed to properly instruct the jury; the evidence was insufficient to sustain the jury verdicts; and the statute under which she was convicted is unconstitutional. We affirm.

FACTS

Appellant Robin Magee resided in St. Paul at all times relevant to this case and was employed by Hamline University as a law professor. Appellant was paid monthly by the university, and state taxes were withheld from her paychecks.

An individual residing in Minnesota is required to file a Minnesota income-tax return with the Minnesota Department of Revenue (department) for every year that his or her gross income exceeds the minimum income threshold. Appellant's annual gross income exceeded the minimum thresholds for all years relevant to this case. The Minnesota income-tax return is required to be filed on April 15 following the year covered by the return.

If a taxpayer does not file a Minnesota income-tax return on time, the department typically sends a notice requesting the missing return and indicating that a substitute return, known as a commissioner-filed return (CFR), will be prepared if a tax return is not

received. Pursuant to Minn. Stat. § 270C.33, subd. 3 (2010), the department can use any information available to prepare a CFR for a taxpayer who is required to file a return but has failed to do so. The department is not required to prepare a CFR; preparation of a return by the department does not negate the taxpayer's obligation to file his or her own tax return and does not preclude criminal penalties for not filing a return. The department does not act as a tax-return preparer. After a CFR is prepared, and the taxpayer receives notice that it has been prepared, the taxpayer has one year to file his or her own tax return, or the amount stated in the CFR becomes the taxpayer's official tax liability for that particular year.

Appellant did not file Minnesota income-tax returns on time for tax years 1991–1997. Records for those tax years go beyond the department's retention requirements, so there is no indication as to whether CFRs were prepared for those years. Appellant also did not file income-tax returns on time for tax years 1998–2003. CFRs were prepared for each of those years, and appellant subsequently filed tax returns for each year. The department's records show that numerous contacts were made with appellant concerning her tax returns and tax liabilities for those years.

Appellant did not file Minnesota income-tax returns on time for tax years 2004–2007; however, CFRs were not prepared for those years. In September 2008, Jeffrey Slater, a criminal investigator with the department's Criminal Investigation Division, began investigating appellant's failure to file tax returns for tax years 2004–2007. In October 2008, Investigator Slater met with appellant to discuss her missing tax returns. Investigator Slater told appellant that he was conducting a criminal investigation of

appellant's repeated failure to timely file Minnesota income-tax returns. Appellant acknowledged during the meeting that she had not filed her 2004, 2006, or 2007 returns. Appellant also acknowledged that she understood she was required to file and stated that she was trying to file, that she wanted to file, that it was her goal to file, and that she intended to file tax returns for those years. She claimed that she did not have the paperwork she needed to file the returns. Appellant maintained that she had filed her 2005 income-tax return by mail, but she was unable to provide any proof or receipt of the mailing and did not have a copy of the purported 2005 return.

Appellant filed her 2004 and 2005 Minnesota income-tax returns in January 2009. She filed her 2006 return in February 2009. As of the first day of trial in this matter, appellant had not yet filed her 2007 return.

In September 2009, the state filed a complaint charging appellant with four counts of felony failure to file tax return, four counts of felony failure to pay tax, and three counts of felony filing a false or fraudulent tax return. The complaint was signed by Helen Brosnahan, an Assistant Dakota County Attorney appointed to act as Special Assistant Ramsey County Attorney in this matter. Appellant pleaded not guilty to all counts.

On December 6, 2010, the state filed an amended complaint adding four counts of gross misdemeanor failure to file tax return and four counts of gross misdemeanor failure to pay tax to the existing felony counts. The amended complaint was signed by Attorney Brosnahan as Special Assistant Ramsey County Attorney. On December 28, 2010,

Attorney Brosnahan was appointed Special Assistant St. Paul City Attorney for the purpose of handling the gross misdemeanor charges.

At the beginning of the jury trial in district court on February 7, 2011, the state orally dismissed all of the charges against appellant except for the four counts of gross misdemeanor failure to file tax return for tax years 2004–2007, in violation of Minn. Stat. § 289A.63, subd. 1(a).

When the jury instructions were being assembled by the parties and the court after the presentation of witnesses, appellant requested that an instruction on the defense of estoppel be included. The district court denied this request over appellant's objection but allowed appellant to argue the defense during her closing argument. The jury returned guilty verdicts on all four counts of gross misdemeanor failure to file tax return.

At sentencing, appellant moved the court for an order vacating the verdicts, an acquittal, a dismissal, or a new trial. The district court denied appellant's motions and proceeded with sentencing. This appeal followed.

D E C I S I O N

I. Any lack of jurisdiction of Attorney Brosnahan to prosecute the gross misdemeanors was remedied before trial, did not prejudice appellant, and does not entitle appellant to a new trial.

Appellant argues that Attorney Brosnahan lacked jurisdiction to prosecute the gross misdemeanor charges. An issue of jurisdiction is a question of law that is reviewed de novo. *Minn. Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 842 (Minn. 1999).

The original complaint filed by Special Assistant Ramsey County Attorney Brosnahan in September 2009 charged eleven felonies. On December 6, 2010, Attorney Brosnahan amended the complaint to add eight gross misdemeanor charges, signing the amended complaint as a Special Assistant Ramsey County Attorney. On December 28, 2010, Attorney Brosnahan was appointed Special Assistant St. Paul City Attorney.

Any inability of Attorney Brosnahan to prosecute the gross misdemeanors was remedied prior to dismissal of the felony charges and well before trial. Appellant was in no way prejudiced by the fact that authority to prosecute the gross misdemeanors was granted after the amended complaint was served; she was not rendered unable to defend herself; and she is not entitled to a new trial due to this issue. *See, e.g.*, *State v. Abbott*, 356 N.W.2d 677, 679 (Minn. 1984) (denying defendant's request for a new trial where the prosecuting attorney was not properly appointed an assistant county attorney and stating that, "[E]ven if the prosecutor's appointment was technically defective, the defect did not prejudice defendant or deprive him of a fair trial."); *State v. Ali*, 752 N.W.2d 98, 108 (Minn. App. 2008) (holding that the defendant must show prejudice to be entitled to a new trial where the prosecuting attorney's license to practice law was on restricted status when the attorney signed the complaint and tried the case), *review denied* (Minn. May 27, 2009). *State v. Persons* is distinguishable from this case. 528 N.W.2d 278 (Minn. App. 1995) (reversing a conviction of violation of a harassment restraining order because the case had been prosecuted by a city attorney for a city other than where the offense occurred). This case involves an appointment issue, not a jurisdiction issue, and that appointment issue was remedied well before trial. At the time the trial commenced,

Attorney Brosnahan had authority to proceed. In *Persons*, the conviction was obtained by a prosecutor who did not have authority to proceed at trial. *Abbott*, rather than *Persons*, governs.

II. Prosecution of the gross misdemeanors was not barred by the statute of limitations.

Appellant claims that the state lacked authority to prosecute the gross misdemeanors because the statute of limitations had run. The construction and applicability of a statute of limitations are questions of law subject to de novo review. *Benigni v. Cnty. of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

Appellant was convicted under Minn. Stat. § 289A.63, subd. 1(a). Subdivision 9 of that statute is entitled "Statute of limitations" and states, "Notwithstanding section 628.26, or any other provision of the criminal laws of this state, an indictment may be found and filed, or a complaint filed, upon a criminal offense named in . . . this section, in the proper court within six years after the offense is committed." *Id.* at subd. 9 (2010). Prosecution of the gross misdemeanors was not time-barred under this six-year statute of limitations. The date of offense for each charge is the date on which the tax return was due but was not filed, April 15 following the year covered by the return. The date of offense for the earliest charge against appellant, failure to file a 2004 tax return, was April 15, 2005, and a six-year statute of limitations gave the state until April 15, 2011, to file a complaint alleging this offense. The amended complaint adding the four counts of gross misdemeanor failure to file tax return was filed on December 6, 2010. Therefore,

appellant's argument that the statute of limitations had run on the gross misdemeanors is without merit.

III. The district court did not abuse its discretion by allowing amendment of the complaint.

Appellant argues that amendment of the original complaint to add the gross misdemeanor charges denied her due process and caused her prejudice because new offenses were charged, the nature of the case changed, and she was unprepared for trial. "Under Minn. R. Crim. P. 3.04, subd. 2, the trial court is relatively free to permit amendments to charge additional offenses before trial is commenced, provided the trial court allows continuances where needed." *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

Appellant was originally charged with four counts of felony failure to file tax return under the second clause of Minn. Stat. § 289A.63, subd. 1(a) ("A person required to file a return, report, or other document, who willfully attempts in any matter to evade or defeat a tax by failing to file it when required, is guilty of a felony."). These felony charges and the added gross misdemeanor charges involved the same alleged behavior by appellant (failure to file her Minnesota income-tax returns) for the same time period (2004–2007), and the alleged facts underlying the felony and gross misdemeanor charges were the same. Amendment of the complaint two months prior to trial did not deprive

appellant of the opportunity to prepare her defense or cause her prejudice, and the district court did not abuse its discretion by allowing the amendment.

IV. The jury instructions did not fail to properly instruct the jury.

Appellant argues that the jury instructions were faulty and did not properly instruct the jury. A trial court has significant discretion to craft jury instructions, although instructions may not materially misstate the law. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000); *State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). A court's decision to refuse a requested instruction is reviewed under an abuse-of-discretion standard, and the focus of the reviewing court's analysis is on whether the decision resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

A. The district court did not abuse its discretion in crafting the jury instructions regarding the elements of the offenses.

Appellant claims that the instructions failed to properly instruct the jury on the elements of the offenses. Appellant was convicted of four counts of gross misdemeanor failure to file tax return, in violation of Minn. Stat. § 289A.63, subd. 1(a). The first clause of subdivision 1(a) states, "A person required to file a return, report, or other document with the commissioner, who knowingly, rather than accidentally, inadvertently, or negligently, fails to file it when required, is guilty of a gross misdemeanor."

The district court instructed the jury on the elements of the offense for tax year 2004 as follows:

> Minnesota statutes provide that a person who is required to file a return, report or other document with the commissioner, who knowingly, rather than accidentally, inadvertently or negligently fails to file such a return, report or other document when required is guilty of a crime.
>
> The elements of failure to file a tax return in Count one are first, the defendant was required to file a tax return for the year 2004.
>
> Second. The defendant failed to file such a tax return as required.
>
> Third. The defendant's failure to file was done knowingly rather than accidentally, inadvertently or negligently.
>
> And fourth. The defendant's failure to file occurred in Ramsey County, Minnesota.
>
> If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proved beyond a reasonable doubt, the defendant is not guilty.

The district court went on to repeat those same elements for counts two through four for tax years 2005–2007. The court then stated, "'To know' requires only that the actor believes that the specified fact exists."

Appellant contends that the instructions should have stated that the jury was required to find that appellant knew she was required to file, that she knew when she was required to file, and that she knew she had failed to file when required. However, the language used in the jury instructions to describe the elements of the offenses precisely mirrors the language in the statute describing the crime. *See generally State v. Vang*, 774 N.W.2d 566, 582 (Minn. 2009) (recommending that aiding-and-abetting instruction

mirror statutory language). In fact, the jury instruction language was suggested by appellant in her proposed jury instructions submitted to the district court. The statute applies the mens rea of "knowingly" to failure to file when required. The district court did not abuse its discretion in instructing the jury on the elements of gross misdemeanor failure to file tax return.

B. The district court did not abuse its discretion by refusing to include an estoppel instruction.

Appellant argues that the district court erred by not including an estoppel instruction in the jury instructions because she had relied on the department to file tax returns on her behalf. "Equitable estoppel is a discretionary matter with the trial court, and it is not freely applied against the government." *Shetka v. Aitkin Cnty.*, 541 N.W.2d 349, 353 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). A party seeking to establish equitable estoppel against a government entity must show: (1) wrongful conduct on the part of an authorized government agent; (2) that the party seeking equitable relief reasonably relied on the wrongful conduct; (3) that the party incurred a unique expenditure in reliance on the wrongful conduct; and (4) that the balance of the equities weighs in favor of estoppel. *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011). The government may be estopped "if justice requires," but to estop a government agency "some element of fault or wrongful conduct must be shown." *Brown v. Minn. Dep't of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985). Wrongful conduct is not established by simple inadvertence, mistake, or imperfect conduct; it requires some degree of malfeasance. *Sarpal*, 797 N.W.2d at 25. *See, e.g.*, *Mesaba Aviation Div. of*

Halvorson of Duluth, Inc. v. Cnty. of Itasca, 258 N.W.2d 877 (Minn. 1977) (holding that a taxpayer had not established sufficient equity to estop the county from collecting a property tax even though the county auditor had, apparently mistakenly, indicated in a letter that no tax would be due).

Here, appellant did not establish that she was entitled to an estoppel instruction. First, there was no conduct on the part of the government that was wrongful. Although the department prepared CFRs for appellant for several years prior to 2004, pursuant to Minn. R. 8160.0620, subp. 2 (2009), preparation of a CFR does not negate a taxpayer's obligation to file his or her own tax return. Second, appellant could not have reasonably believed she was not required to file Minnesota income-tax returns. The department contacted appellant numerous times concerning her returns, and she acknowledged during the meeting with Investigator Slater that she was required to file returns and wanted to file them. The district court did not abuse its discretion by refusing to include an estoppel instruction.

V. The evidence presented at trial was sufficient to sustain the jury's guilty verdicts.

Appellant contends that the evidence presented at trial was insufficient to support the jury's guilty verdicts. When the sufficiency of the evidence is challenged, review on appeal "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "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). "If the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that defendant was proven guilty of the offense charged, a reviewing court will not disturb its verdict." *State v. Norgaard*, 272 Minn. 48, 52, 136 N.W.2d 628, 632 (1965).

Appellant argues that the evidence was insufficient for the jury to find that the offenses occurred in Ramsey County. However, Investigator Slater testified that the department's records indicate that appellant lives in St. Paul, and copies of appellant's late Minnesota tax returns for tax years 2004–2006, containing a St. Paul address, were entered as exhibits.

Appellant contends that the evidence presented at trial was insufficient to show when returns are required to be filed. However, Investigator Slater testified as to the minimum gross income thresholds for filing for tax years 2004–2007, and testified that a tax return is required to be filed on April 15 following the year covered by the return.

Appellant claims that the evidence was insufficient to prove that she knew she was required to file and when she was required to file tax returns. However, the jury heard testimony that appellant had been contacted by the department concerning her missing returns. Investigator Slater also testified that, during his meeting with appellant, she acknowledged that she had not filed her 2004, 2006, or 2007 returns, and that she understood she was required to file them, wanted to file them, and was trying to file them. While appellant told Investigator Slater that she had filed her 2005 tax return,

appellant was unable to provide proof of this, and the jury could have reasonably disbelieved appellant's statement to the investigator. Looking at the evidence presented at trial as a whole, when viewed in a light most favorable to the convictions, the evidence was sufficient to allow the jury to reasonably find appellant guilty of the gross misdemeanors.

VI. Appellant's argument that Minn. Stat. § 289A.63, subd. 1(a), is unconstitutional due to vagueness and overbreadth is without merit.

Appellant contends that Minn. Stat. § 289A.63, subd. 1(a), is unconstitutional because portions of it are vague and overbroad. A statute's constitutionality is a question of law which is reviewed de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). A court's "power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). Every law is "presumed to be constitutional" and "will not be declared unconstitutional unless its invalidity appears clearly or unless it is shown beyond a reasonable doubt that it violates some constitutional provision." *Grobe v. Oak Ctr. Creamery Co.*, 262 Minn. 60, 61, 113 N.W.2d 458, 459 (1962).

A statute which provides the bases of a criminal prosecution "must meet due process standards of definiteness under both the United States Constitution and the Minnesota Constitution." *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985). "The void-for-vagueness doctrine requires that 'a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *State v.*

Bussmann, 741 N.W.2d 79, 83 (Minn. 2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983)). For a statute to be declared unconstitutional due to overbreadth, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 2918 (1973). A statute that is "flexible and reasonably broad" will be upheld if it is clear what the statute, as a whole, prohibits. *State, City of Minneapolis v. Reha*, 483 N.W.2d 688, 691 (Minn. 1992).

Appellant argues that Minn. Stat. § 289A.63, subd. 1(a), is vague because it does not specify who is required to file or the date on which filing is required. However, another portion of the chapter does describe who is required to file by making reference to the federal tax code. *See* Minn. Stat. § 289A.08, subd. 1(a) (2010) ("A taxpayer must file a return for each taxable year the taxpayer is required to file a return under section 6012 of the Internal Revenue Code . . . ."). The chapter also states when tax returns must be filed. *See* Minn. Stat. § 289A.18, subd. 1(1) (2010) ("[R]eturns made on the basis of the calendar year must be filed on April 15 following the close of the calendar year . . . .").

Appellant also argues that the statute's use of the language "return, report, or other document" is overbroad. However, the Minnesota Commissioner of Revenue determines the content and format of a general Minnesota individual income-tax return, and this form is readily available. *See* Minn. Stat. § 270C.30 (2010) ("The commissioner shall prescribe the content and format of all returns . . . ."). Minn. Stat. § 289A.63, subd. 1(a), is not unconstitutional simply because that portion of the statute does not contain all of

the information a taxpayer needs to assess his or her duty to file state income-tax returns or the deadline for doing so. Appellant has not overcome the presumption that the statute is constitutional.

Affirmed.

KLAPHAKE, Judge (dissenting)

I respectfully dissent because the charges upon which appellant stands convicted were brought without lawful charging authority.

Not everyone can bring a criminal prosecution. The person prosecuting a case in Minnesota must be lawfully authorized by Minnesota law to do so. Under Minn. Stat. § 388.051, subd. 1(c) (2010), the Ramsey County Attorney has authority to "prosecute felonies . . . and to the extent prescribed by law, gross misdemeanors[.]" The gross misdemeanors against appellant were not only *not* prescribed by law for prosecution by the county attorney, but were specifically delegated to another charging authority, the City of St. Paul. Minn. Stat. § 484.87, subd. 2 (2010), specifies that for the prosecuting attorneys of Ramsey County, "the attorney of the municipality in which the violation is alleged to have occurred has charge of the prosecution of all violations of the state laws, including violations which are gross misdemeanors[.]"

Here, the Dakota County Attorney's Office, in the person of Helen R. Brosnahan, was appointed as "Special Assistant Ramsey County Attorney" and in that capacity signed the amended criminal complaint charging appellant with four gross misdemeanor charges that resulted in guilty verdicts. Helen R. Brosnahan signed the amended complaint as "Special Assistant Ramsey County Attorney," indicating her authorization to prosecute the offenses charged against appellant.

The complaint was defective for several reasons. Brosnahan did not sign the complaint as a St. Paul city attorney as required by Minn. Stat. § 484.87, subd. 2. In fact, she could not have because she had no such authority when she signed the complaint.

These defects were *jurisdictional*, because the prosecution was not brought by the prosecutor for the jurisdiction in which the offense occurred, and any attempt to prosecute appellant "became a nullity" that appellant could not waive. *State v. Persons*, 528 N.W.2d 278, 280 (Minn. App. 1995). This result is consistent with Minn. R. Crim. P. 2.02, which mandates that a complaint "shall not be filed" unless it is signed by "the prosecuting attorney authorized to prosecute the offense charged." Thus, the district court erroneously denied appellant's motion for acquittal at the close of the state's case.