**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-0036**

State of Minnesota,
Respondent,

vs.

Robert Michael Montag,
Appellant.

**Filed September 17, 2012**
**Affirmed**
**Hudson, Judge**

Stearns County District Court
File No. 73-CR-11-5719

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

Matthew A. Staehling, St. Cloud City Attorney, Renee N. Courtney, Assistant City Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Denis E. Hynes, Assistant Public Defender, St. Cloud, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

**HUDSON**, Judge

Appellant challenges Minn. Stat. § 609.605, subd. 1(b)(8) (2010) as unconstitutionally vague and overbroad and asserts that the district court erred by misapplying the statute and by determining that probable cause existed for appellant to stand trial. Because we conclude that Minn. Stat. § 609.605, subd. 1(b)(8), is neither unconstitutionally vague nor overbroad and that the district court did not err in its application of the statute or in its probable-cause determination, we affirm.

## FACTS

On June 11, 2011, appellant Robert Montag entered a Coborn's store on Cooper Avenue in St. Cloud. While an employee was bagging his groceries, appellant yelled at the employee to use both hands. The manager then took over bagging appellant's groceries and, when appellant began yelling at her, she reminded appellant that he had previously been warned about yelling at store employees. Appellant continued yelling and threatened her. Appellant left the store but then returned and began yelling again, asking if the manager had called the police. The manager then called the police. That same day, a St. Cloud police officer issued a trespass advisory to appellant stating that the Cooper Avenue Coborn's revoked any permission or license to enter the premises for any purpose and that any entry would "legally constitute as a trespass." The advisory stated that willful trespass is a misdemeanor offense and that the advisory would be effective for one year.

Coborn's then issued a separate trespass notice to appellant, stating that appellant was banned from entering all Coborn's properties for an indefinite period and listing the stores owned by Coborn's, including Holiday. The notice also stated that appellant could do business with the Cash Wise greenhouses to which Coborn's leases space, in accordance with a telephone arrangement between appellant and a Coborn's manager. The notice was sent by certified mail and received by appellant on June 17, 2011. The next day, appellant entered a Holiday store owned by Coborn's and acknowledged to an employee that he had received a trespass notice, which he complained about for several minutes. On June 24, 2011, appellant went to the St. Cloud Police Department and spoke with an officer about entering the Holiday store on June 18. Appellant was shown photos taken from a surveillance camera and confirmed that the photos showed him inside the store. Appellant told the officer that he did not receive the trespass notice until June 18, but the officer informed appellant that Coborn's had received confirmation that appellant signed for the notice on June 17. The officer cited appellant for misdemeanor trespass, in violation of Minn. Stat. § 609.605, subd. 1(b)(8).

Appellant moved to dismiss the charge, arguing that he did not violate the statute because he did not return to the property that generated the trespass notice. In support of his argument, appellant cited *State v. Holiday*, 585 N.W.2d 68 (Minn. App. 1998), in which this court held that a city could not ban a visitor from all public-housing properties. Appellant also raised a probable-cause challenge, asserting that the state failed to establish probable cause as to all of the elements of trespass because he had a good-faith basis to enter the Holiday store. In addition, appellant argued that the Coborn's notice

was invalid because it banned appellant for an indefinite period, which exceeded statutory authority.[1] Finally, appellant challenged Minn. Stat. § 609.605, subd. 1(b)(8), as unconstitutionally vague. The district court distinguished *Holiday* and concluded that it did not apply, that probable cause existed to try appellant for trespass, that the fact that the trespass notice was for an indefinite period did not invalidate the notice because appellant's trespass occurred within one year of the statutory trespass timeframe, and that appellant failed to demonstrate that Minn. Stat. § 609.605, subd. 1(b)(8), was unconstitutionally vague. Accordingly, the district court denied appellant's motion. In a bench trial, the district court found appellant guilty. Appellant was sentenced to 90 days in jail, which was stayed, and a $100 fine.

This appeal follows.

## D E C I S I O N

### I

Appellant argues that the district court erred in determining that appellant failed to show that Minn. Stat. § 609.05, subd. 1(b)(8), is unconstitutionally vague. "Statutes are presumed to be constitutionally valid." *Ruzic v. Comm'r of Pub. Safety*, 455 N.W.2d 89, 91 (Minn. App. 1990), *review denied* (Minn. June 26, 1990). "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.*

[1] Respondent concedes on appeal that its trespass notice, though it stated that it was in effect for an "indefinite period," was enforceable for only one year pursuant to Minn. Stat. § 609.605, subd. 1(b)(8).

*Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quotation omitted). If a person must guess at a statute's meaning, it is void for vagueness. *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001) (quotation omitted).

We must first determine if the statute implicates the First Amendment. If it does not, appellant's vagueness challenge is examined only as to appellant's actual conduct. *State, Dep't of Pub. Safety v. Elk River Ready Mix Co.*, 430 N.W.2d 261, 264 (Minn. App. 1988). The First Amendment, applicable to the states through the Fourteenth Amendment, provides that the government shall "make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment's safeguard of expression on issues of public concern "is a fundamental principle of our constitutional system." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S. Ct. 710, 720 (1964) (quotation omitted). A citizen's right to criticize public officials is an essential protection provided by the First Amendment. *Rosenblatt v. Baer*, 383 U.S. 75, 85, 86 S. Ct. 669, 675–76 (1996). But this protection does not extend to gratuitous criticism of retail employees inside a privately owned store. *See State v. Wicklund*, 589 N.W.2d 793, 797 (Minn. 1999) (stating that a free-speech violation of the First Amendment "must involve some form of government action"). Therefore, appellant's argument does not involve the First Amendment and may only be examined in light of his actual conduct. *See Elk River Ready Mix*, 430 N.W.2d at 264 (stating that appellant must show that a statute lacks specificity as to appellant's behavior, not as to a hypothetical situation).

Minn. Stat. § 609.605, subd. 1(b)(8), states that

> a person is guilty of a misdemeanor if the person intentionally returns to the property of another within one year after being told to leave the property and not to return, if the actor is without claim of right to the property or consent of one with authority to consent.

Appellant asserts that the statute is unconstitutionally vague because it does not provide notice of the conduct that could lead to a ban from all Coborn's stores, in particular notice that criticism of a store employee would cause him to be banned from all Coborn's stores. But the statute states in plain language that a person commits trespass if he or she returns to the property after being told to leave and not to return. *Id.* Here, appellant was notified the day before he entered the Holiday store that he was barred from all Coborn's properties, including Holiday stores in St. Cloud. Therefore, the statutory language describes the prohibited conduct in such a way that ordinary people would understand the conduct prohibited, in addition to prohibiting the specific conduct exhibited by appellant when he entered the Coborn's-owned Holiday store. *See Bussmann*, 741 N.W.2d at 83 (stating that void-for-vagueness doctrine requires that statutes define offense so that "ordinary people can understand what conduct is prohibited") (quotation omitted). The district court did not err in determining that appellant failed to show that Minn. Stat. § 609.605, subd. 1(b)(8), is unconstitutionally vague.

**II**

We next address appellant's argument that the district court erred in determining that appellant failed to show that Minn. Stat. § 609.605, subd. 1(b)(8), is unconstitutionally overbroad. Appellant asserts that the statute is overbroad facially and as applied. But appellant's overbreadth challenges both fail. A statute's overbreadth

may be challenged facially or as applied. Given the potential for voiding an entire statute, the overbreadth doctrine "should be applied only as a last resort." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (quotation omitted). The constitutionality of an ordinance is a question of law, which is reviewed de novo. *State v. Stallman*, 519 N.W.2d 903, 906 (Minn. App. 1994).

*Facial overbreadth*

"A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights." *Machholz*, 574 N.W.2d at 419. A facial overbreadth challenge applies only when the First Amendment is implicated. *Id.* Because we have determined that the statute does not prohibit First Amendment activity, appellant's facial overbreadth challenge fails.

*As-applied overbreadth*

Appellant asserts that Minn. Stat. § 609.605, subd. 1(b)(8), is overbroad as applied because it did not require that appellant engage in intentional illegal behavior. The plain language of the statute states that a person is guilty of misdemeanor trespass if he or she "intentionally . . . returns to the property of another within one year after being told to leave the property and not to return." Minn. Stat. § 609.605, subd. 1(b)(8). Therefore, the statute plainly requires intentional conduct. *See* Minn. Stat. § 645.16 (2010) (stating that if a statute is "clear and free from all ambiguity," its plain meaning controls). As to illegal behavior, the statute clearly specifies the conduct that encompasses a trespass offense: returning to the property within a year after being told to leave. Here, appellant returned to a Coborn's-owned property within one day of receiving notice that he was not

to enter any Coborn's property. Therefore, the statute is not overbroad as applied to appellant.

**III**

Appellant argues that the district court erred by misconstruing the term "property" in Minn. Stat. § 609.605, subd. 1(b)(8), by applying it to multiple Coborn's properties, rather than a single property. We review de novo whether a district court has properly construed the language of a statute. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Minn. Stat. § 609.05, subd. 1(b)(8), states that a person is guilty if he "returns to *the property* of another within one year after being told to leave *the property* and not to return, if the actor is without claim of right to *the property*." (Emphasis added). When interpreting a statute, it must first be determined "whether the statute's language, on its face, is clear or ambiguous." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). If the law is "clear and free from all ambiguity," the plain meaning controls. Minn. Stat. § 645.16; *see also Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995) ("Where the intention of the legislature is clearly manifested by plain unambiguous language . . . no construction is necessary or permitted.").

Appellant asserts that "the property" means only the one property from which appellant was originally banned, which was the Cooper Avenue Coborn's. Respondent argues that "the property" includes multiple business properties and that if the legislature had intended for it to indicate only one singular property, the statute's second reference to "the property" would state "that property" rather than "the property." We are persuaded

that the statute's use of the phrase "the property" encompasses a meaning broader than one, singular property. *See* Minn. Stat. § 645.08(2) (2010) (stating that "the singular includes the plural; and the plural, the singular"); *State v. Indus. Tool & Die Works*, 220 Minn. 591, 604–05, 21 N.W.2d 31, 38–39 (1945) (stating that when legislature enacts statute with words in singular, it does so in recognition of statutory construction canon that singular includes plural).

Appellant argues that interpreting the statutory language to include more than one specific property contradicts *Holiday*, which held that statutory language stating that a person shall not trespass after a demand by the lawful possessor to depart did not allow the city to impose a ban on a convicted felon that restricted him from all city public-housing properties. 585 N.W.2d at 70–71. In *Holiday*, we concluded that a trespasser could not be banned from all city public-housing properties occupied by individual tenants who could not impose such a sweeping ban, even if a private owner and the government may limit access to their own property. 585 N.W.2d at 71. *Holiday* does not apply here. Although the ban imposed on appellant included multiple properties, all of the properties were owned by Coborn's; therefore, the concern in *Holiday* that a ban may be imposed on behalf of various owners who have no say in the matter is not applicable to this case. We conclude that the district court did not err in its interpretation of Minn. Stat. § 609.605, subd. 1(b)(8).

**IV**

In making a probable-cause determination, the district court decides if, given the facts, it is fair and reasonable to require the defendant to stand trial. *State v. Florence*,

306 Minn. 442, 457, 239 N.W.2d 892, 902 (1976). We review a probable-cause determination de novo. *State v. Ortiz*, 626 N.W.2d 445, 448 (Minn. App. 2001), *review denied* (Minn. June 27, 2001). Appellant argues that the district court erred in weighing the evidence and determining at the pretrial hearing that appellant lacked a claim of right as part of its probable-cause determination. Respondent asserts that the district court properly considered whether the state satisfied its burden to show probable cause on the issue of whether appellant was without a claim of right to be at the Holiday store.

A district court may not require a pretrial offer of proof to determine as a matter of law that a defendant has no claim of right to enter another's property because this is a sufficiency question to be decided by the jury. *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984). But whether a defendant is without a claim of right constitutes an element of trespass under Minn. Stat. § 609.605, subd. 1(b)(8), that the state must prove and therefore "present evidence from which it is reasonable to infer that the defendant has no legal claim of right to be on the premises where the trespass is alleged to have occurred." *Id.*; *see also* Minn. Stat. § 609.605, subd. 1(b)(8) (noting that trespass requirement that the actor must be "without claim of right to the property"). The district court determined that probable cause existed on this element because appellant acknowledged receiving the trespass notice, which applied to all Coborn's properties, before entering the Holiday store, in addition to discussing with an employee inside the store that he had been banned from all Coborn's properties. The district court stated that "[f]or these reasons the Court finds it is fair and reasonable for the Defendant to stand trial." The district court did not conclude that appellant in fact had no claim of right, but instead determined that the state

presented evidence from which it was reasonable to infer defendant was without a claim of right. This determination was necessary for the district court to decide that it was fair and reasonable for appellant to proceed to trial. We conclude that the district court did not err in its probable-cause determination.

**Affirmed.**