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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LOUIS BYRD et al., Defendants and Appellants.	B244162 (Los Angeles County Super. Ct. No. TA090186)

APPEAL from judgments of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant, Louis Byrd.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant, Fernando Pedroza.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Linda C. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Louis Byrd (Byrd) and Fernando Pedroza (Pedroza), appeal their convictions, following a jury trial, for misappropriation of public money with excessive taking enhancements (more than $65,000 [both defendants] and more than $200,000 [Byrd only]). (Pen. Code, §§ 424(a)(1), 12022.6, subd. (a)(1) & (2).)[1] The trial court sentenced both defendants to state prison for terms of four years.

The judgments are affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Lynwood is a "general law" city (Gov. Code, § 34102) whose powers include " ' "only those . . . expressly conferred upon it by the Legislature, together with such powers as are 'necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation.' The powers of such a city are strictly construed, so that 'any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation.' [Citation.]" [Citations.]' " (*G. L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1092; accord, *City of Orange v. San Diego County Employees Retirement Assn.* (2002) 103 Cal.App.4th 45, 52.)

The Lynwood City Council consists of a mayor, a mayor pro tem and three council members, all of whom hold part-time positions. The mayor and the mayor pro tem are selected from among the council members. A city manager, who is appointed by the city council, oversees day-to-day operations of the city. Lynwood also employs a city attorney. Byrd was a member of the Lynwood City Council for 15 years, from 1992 until 2007. During that time, he served terms as both mayor and mayor pro tem. Pedroza was a Lynwood City Council member for six years, from 2002 until 2007, during which time he also served terms as mayor and mayor pro tem.

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[1] All further statutory references will be to the Penal Code, unless otherwise indicated.

Government Code section 36516, subdivision (a), establishes the maximum salary that city council members in a general law city may receive. The maximum salary is principally based on the city's population, although that amount can be adjusted in five-percent increments by the city council, or more drastically by the electorate.[2] Based on Lynwood's size, and adding the incremental adjustments over the years, its city council members were legally entitled to receive a salary of $804.07 per month.

Lynwood City Council members are also the sole members of several other governmental agencies, including the Lynwood Redevelopment Agency (LRA), the Lynwood Public Finance Authority (LPFA), and the Lynwood Information, Inc. (LII). Meetings for these agencies were generally held during regular city council meetings. In December 1998, the LPFA and LII both passed resolutions asking the city council to compensate their members $450 per meeting for sitting on these agencies because of the "expanded scope of [their] responsibilities." Although the Lynwood City Council never granted these requests, the city council members were nevertheless each paid $450 every time they met as either the LPFA or the LII.[3] As to the LRA, the city council members

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[2] Government Code section 36516, subdivision (a)(4), provides: "The salary of council members may be increased beyond the amount provided in this subdivision by an ordinance or by an amendment to an ordinance, but the amount of the increase shall not exceed an amount equal to 5 percent for each calendar year from the operative date of the last adjustment of the salary in effect when the ordinance or amendment is enacted. No ordinance shall be enacted or amended to provide automatic future increases in salary."

Subdivision (b) of Government Code section 36516 provides: "Notwithstanding subdivision (a), at any municipal election, the question of whether city council members shall receive a salary for services, and the amount of that salary, may be submitted to the electors. If a majority of the electors voting at the election favor it, all of the council members shall receive the salary specified in the election call. The salary of council members may be increased beyond the amount provided in this section or decreased below the amount in the same manner."

[3] Actually, only the LPFA resolution asked for each member of the agency to be compensated in the amount of $450. The LII resolution merely asked the city council to compensate "the governing body" $450 per meeting. However, as will be explained, *post*, although the Lynwood City Council never officially granted either of these requests,

received $30 for every LRA meeting they attended, up to a maximum of four LRA meetings per month, as prescribed by state law.

In addition to this compensation, Lynwood City Council members received several monthly allowances: $300 for attending up to four meetings per month of an enumerated list of municipal organizations (e.g., the county sanitation district), a $500 automobile allowance, and an electronic media allowance.

Jane Ngo was a supervising investigative auditor for the Los Angeles District Attorney's Office. In May 2004, she participated in the execution of a search warrant at Lynwood City Hall during which 46 boxes of materials were seized. Ngo examined this material, which consisted of thousands of documents, over a period of six months to a year. Based on this material, she prepared a series of charts detailing payments made to the defendants by the City of Lynwood. For example, People's exhibit 125, entitled "Byrd, L. Meeting and Conference, Multiple Per Diem Requests for the Same Day," set forth 100 instances between March 1997 and October 2003 in which Byrd submitted, and was paid for, multiple per diem requests for the same travel day. People's exhibit 126, "Pedroza, F. Meeting and Conference, Multiple Per Diem Requests for the Same Day," set forth 15 similar instances for Pedroza which occurred between May 2002 and November 2003.

Ngo prepared People's exhibits 131 and 132, which showed occasions on which the defendants had used their city-issued credit cards on the same day that they were paid a per diem. People's exhibits 133 and 134 showed, more specifically, times for which Byrd and Pedroza had received per diem payments for restaurant meals that had also been charged to their city credit cards. The records showed Byrd had done this 42 times between February 1998 and March 2003, and Pedroza had done it 10 times between February 2002 and March 2003.

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payments were subsequently made *to each member of both agencies* in the amount of $450 for each meeting attended.

Ngo's analysis showed that from 1999 through 2007, Byrd had been paid a total base salary (based on his authorized monthly salary of $804.07) of approximately $83,600. During that same period of time, Byrd had been paid an additional $166,500 for attending LII meetings, and another $166,250 for attending LPFA meetings. From 2002 through 2007, Pedroza had been paid a base salary of approximately $56,285. During that same period of time, Pedroza had been paid an additional $74,700 for attending LII meetings and $73,000 for attending LPFA meetings.

Gilbert Miranda was an investigator with the Los Angeles District Attorney's Office working in the Public Integrity Unit. Miranda testified he examined all the Lynwood City Council minutes from December 1998 through 2003, and could not find any documentation showing the city council had ever granted the requests to pay council members $450 for attending LII and LPFA meetings. Miranda prepared charts documenting the number and length of LII and LPFA meetings the defendants had been paid to attend. During 1999 Byrd attended 84 LII and LPFA meetings, of which 36 lasted for 10 minutes or less, and 31 lasted five minutes or less. In 2004, Pedroza attended 53 LII and LPFA meetings, of which 32 lasted 10 minutes or less, and 25 lasted five minutes or less. In 2002, Byrd and Pedroza attended 94 LII and LPFA meetings, of which 56 lasted 10 minutes or less, 38 lasted two minutes or less, and 19 lasted one minute or less.

Arturo Reyes, who served on the Lynwood City Council between 1997 and 2003, had originally been charged as a defendant in this case. He pled guilty to felony grand theft and was awaiting sentencing at the time of trial. Reyes testified the LPFA, LRA and LII meetings were conducted in the following manner. The mayor would open the regular Lynwood City Council meeting and the city clerk would take roll call. At a certain point, the mayor would recess the city council meeting and immediately convene, one after the other, the LPFA, LRA and LII meetings. After completing the business of these three agencies, the mayor would reconvene the regular city council meeting.

Reyes testified that in May 2002 he traveled to Guadalajara, Mexico, for a conference of sister cities. Byrd, Pedroza and city manager Faustin Gonzales also

attended. Reyes testified Pedroza invited him to come to a strip club to which he had also taken Byrd and Gonzales. Pedroza told Reyes that he and Gonzales had been entertained by two women in a private room and engaged in sex acts. Byrd told Reyes that he had also gone to this club with Pedroza. Reyes testified that he subsequently overheard Pedroza and Gonzales discussing how to pay for their bill at the club, and deciding to claim they had been entertaining sister city delegations. Gonzales apparently paid the bill of about $1,700 on his city-issued credit card.

2. *Defense evidence.*

Neither Pedroza nor Byrd testified in their own defense, although they each put on a defense witness and entered defense exhibits into evidence.

CONTENTIONS

1. The defendants' convictions must be reversed because the prosecution relied on, and the jury was instructed on, invalid legal theories.

2. The trial court misinstructed the jury regarding the mental element of section 424 (misappropriation of public monies).

DISCUSSION

1. *The jury was not instructed on any invalid theories.*

Defendants contend the jury was presented with both valid and invalid theories of guilt and, because it cannot be determined if the jury ultimately relied on an invalid theory, their convictions must be reversed. There is no merit to this claim.

a. *Legal principles.*

The defendants were each convicted on one count of violating section 424, subdivision (a) 1, which provides: "Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who . . . [¶] . . . [w]ithout authority of law, appropriates the same, or any portion thereof, to his or her own use . . . [¶] . . . [¶] [i]s punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state."

Our Supreme Court recently analyzed section 424 in *Stark v. Superior Court* (2011) 52 Cal.4th 368, explaining: "As the statutory language provides, it is not simply appropriation of public money, or the failure to transfer or disburse public funds,[4] that is criminalized. Criminal liability attaches when those particular actions or omissions are contrary to laws governing the handling of public money. Unlike many statutory provisions, *these provisions make the presence or absence of legal authority part of the definition of the offense*. The People must prove that legal authority was present or absent." (*Id*. at pp. 395-396, italics added.)

Because of this, "[s]ection 424 . . . is an unusual statute, in which the definition of some of the offenses incorporates a legal element derived from other *noncriminal* legal provisions. . . . [¶] The 'law' applicable to the acts and omissions in these provisions of section 424 is the *authorizing* law, which is extraneous to the penal statute. Liability under section 424 arises when the officer or custodian, bound by these authorizing laws, acts without authority [citation] or fails to act as required. [Citation.] [¶] As we have explained, presence or absence of legal authorization is an essential element of each of the offenses at issue. It is also a 'fact' about which the defendant must have knowledge in order to act with wrongful intent. Thus, the People must prove, as a matter of fact, *both* that legal authority was present or absent, *and* that the defendant knew of its presence or absence. [¶] The People do not have to prove that the defendant knew chapter and verse of the nonpenal law. It is sufficient that the defendant knew generally that a nonpenal law required or prohibited his conduct. As with any mental state, the People may prove this knowledge by reference to the facts and circumstances of the case." (*Stark v. Superior Court, supra*, 52 Cal.4th at pp. 397-398, fn. omitted.)

Stark also stated: "As section 424(a) 1 is worded, '[r]ather than prohibiting specifically enumerated behavior, it *prohibits any behavior which has not been*

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[4] Subdivision (a) 7 of section 424, for instance, pertains to someone who "[w]illfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him or her under any duty imposed by law so to pay over the same."

previously approved by statute or ordinance.' [Citation.] Depending on the circumstances, it may be that no lawful authority sanctioned the defendant's actions, or that the defendant's action was expressly prohibited by particular lawful authority." (*Stark v. Superior Court*, *supra*, 52 Cal.4th at 397, fn. 9, italics added.)

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69-71.)" (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

b. *Discussion*.

(1) *Necessary travel and per diem reimbursement.*

Byrd concedes that what he calls the prosecution's "primary theory," i.e., that the defendants could not lawfully be paid $450 for attending LII and LPFA meetings, was legally valid. (As will be discussed, *post*, Pedroza does not make the same concession.) However, Byrd contends the prosecution additionally relied on at least two other legally invalid theories: (a) that any reimbursement to city council members for travel expenses was illegal "because travel of any kind is not 'necessary' to the performance of duties by a city council person," and (b) that Lynwood's per diem reimbursement scheme "was facially illegal because state law allows cities to reimburse officials and employees only for expenses 'actually' incurred."[5] Pedroza joins these contentions.

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[5] In footnotes, Byrd asserts there were additional legally invalid theories put forth by the prosecution (e.g., "receiving more than one per diem reimbursement for a single day, travel that lacked prior approval of the City Council, and receiving reimbursement for the expense of attending political and educational events"), but he states that he declines to address them because the two contentions fully presented here are sufficient to reverse his conviction. Byrd has thereby forfeited these other contentions because the failure to properly develop an argument is fatal on appeal. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived."].)

(a) *Necessary travel.*

Byrd contends that at trial the prosecution set forth a theory asserting the defendants were not legally entitled to "receive any reimbursement for travel expenses, either actual or 'per diem,' because members of a city council do not need to travel in order to perform their function." He argues the trial court acceded to this invalid theory by telling the jury that to be properly reimbursable a travel expense had to be "necessary." Byrd points in particular to the following jury instruction: "The phrase, 'in the performance of official duties,' means that the purpose for which a council member attends an event must have a direct connection with the fulfillment of his or her official duties as a council member. That such attendance [might] be beneficial to the city which the council member serves is not sufficient to establish that it constitutes performance of official duties. [¶] 'Necessary' refers to an expense which reasonably must be incurred in order to perform an official duty." Byrd also points to a jury instruction that said: "An expenditure of public monies is permitted only where it appears that the welfare of the community and its inhabitants is involved and benefit results to the public. The benefit to the public must be direct and plainly substantial."

But contrary to Byrd's argument, these instructions did not direct the jury to convict the defendants merely upon finding they had been reimbursed for travel expenses. Nor did the prosecution invite the jury to find the defendants guilty on the theory that city council members are never entitled to travel expenses. The prosecution did not tell the jury there was no travel event imaginable that could have been necessary to the performance of defendants' official duties. The portions of the People's closing argument that Byrd cites to support this claim demonstrate just the opposite. They show the prosecutor accusing the defendants of essentially having stolen public money by improperly manipulating the city's expense reimbursement process: e.g., receiving multiple per diem reimbursements for the same event; using city-issued credit cards to

pay for restaurant meals that were also covered by per diem reimbursement; and using city-issued credit cards to pay for purely personal expenditures.[6]

Although the prosecution argued that some particular travel events had no discernable direct connection to the official duties of a city council member (e.g., going to a beauty pageant, or attending a conference which another Lynwood City Council member was attending as the official delegate), this legitimately raised an issue for the jury to decide. In *People v. Bradley* (2012) 208 Cal.App.4th 64, several Compton city council members had been convicted of misappropriating public money in violation of section 424. In response to one defendant's assertion that "every one of his challenged expenditures 'had an arguable municipal purpose' and thus the evidence was insufficient to prove he purchased goods or services for personal benefit," *Bradley* held: "*Whether a particular expenditure was a personal rather than a municipal expenditure was a question of fact to be determined by the jury*." (*Id*. at p. 78, italics added; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 874 [defendant's section 424(a) 1 conviction affirmed because jury reasonably concluded his "trip to Washington and Spartanburg was not for the purpose of conducting official business as the Assessor of Orange County but, rather, was for the purpose of rendering private consulting services to Spartanburg County for defendant's personal financial gain"].)

Pursuing an argument that all the travel expenses must have been lawful because other city officials reimbursed him for them,[7] Byrd directs us to *County of Yolo v. Joyce*

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[6] To cite just a few examples, the prosecutor argued to the jury: On a trip to Washington, D.C., "one of [Pedroza's] expenses was Capital Café, $50.81 cents. And you'll see, when you review the evidence, that he was given a $100 per diem for that day to be used for traveling expenses, including meals. And instead he went and charged this on the credit card. [¶] He also had breakfast while he was there, and you can see that it wasn't just breakfast for one person." And: "The municipal cities chart. So there's one in there that will show you just all the double-dipping, where they get the $300, the $100. . . . [W]e line these up for you where it shows multiple per diems per day. Right? Per diem, it's per day. And they're taking two or three. Mr. Byrd had one day where he had five, which is just outstanding." And: "Expenses, actual and necessary. . . . When your expenses are zero, it's not actual."

(1909) 156 Cal. 429, which he characterizes as "the most germane opinion [relating] to this issue." He asserts *Joyce* "gave the term 'necessary' an expansive reading in order to preserve local automony," and that "a necessary expense is simply one which is duly approved by the highest authority in the political subdivision. 'Necessary' is not given a dictionary meaning, but is defined as the 'result of a duly established governmental process.' Presumably, if the highest political authority defines 'necessary' in a way that offends too many people, a recall or electoral challenge is available. The California Supreme Court did not envision 'necessary' as a factual question to be submitted to a jury."

Byrd's reliance on *Joyce* is misplaced. In the first place, the question of "necessary" municipal expenditures was not at issue in the case, which merely held Yolo County had properly paid for a court reporter's services at the direction of the District Attorney even though the trial judge also had the power to authorize payment. As *Joyce* pointed out, it was "*not even seriously claimed that the transcription was not a necessary expense*" and "[t]he only claim [was] that the transcript could only be ordered by the superior court," a contention that *Joyce* rejected. (*County of Yolo v. Joyce, supra*, 156 Cal. at p. 433, italics added.) Moreover, a later Supreme Court case held that *Joyce* does not apply to criminal cases. "Although in civil cases the determination of a board of supervisors that the county has incurred an indebtedness in a reasonable amount for goods or services has been held to be final if the claim shows on its face that the amount is clearly chargeable to the county, and within the jurisdiction of the board to accept or reject (*County of Yolo v. Joyce*, 156 Cal. 429 . . .), this rule has no application in a criminal prosecution of a claimant." (*People v. Knott* (1940) 15 Cal.2d 628, 632.)

The prosecution claim that defendants were improperly reimbursed for unnecessary travel expenses was a legally valid theory.

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[7] Defendants assert that some of the double-billing events were merely bookkeeping mistakes.

(b) *Per diem reimbursement.*

Byrd contends "[t]he prosecution took the position that a per diem reimbursement [scheme] is inherently illegal because it conflicts with statutory language" allowing reimbursement only for "actual expenses." But this is not an argument the prosecution made. Moreover, the jury instructions would not have caused a reasonable juror to believe that any per diem method of reimbursement whatsoever was illegal.

The jury was instructed: "City council members may be reimbursed for actual and necessary expenses incurred in the performance of official duties. Otherwise, reimbursement for expenditures is without authority of law." The instruction went on to say that "[a]n 'actual expense' refers to a specific sum of money which the council member has either paid or [became] legally liable to pay. It must be real and verifiable, as distinguished from potential, possible, hypothetical or nominal."

Byrd argues these instructions meant that *any* " 'per diem' or flat rate method of reimbursement [must therefore be illegal because it] is not tethered to actual expenses, but represents an approximation of what expenses might typically be incurred." We disagree. The first sentence of the instruction is taken directly from Government Code section 36514.5, which provides: "City council members may be reimbursed for actual and necessary expenses incurred in the performance of official duties." This statutory language does not necessarily prohibit a system which limits reimbursements to a flat amount per diem so long as expenses were actually incurred. Defendants do not cite any case law suggesting this statutory language could be reasonably misunderstood as proscribing every kind of per diem reimbursement scheme.

Furthermore, the prosecution's closing argument clearly would have negated that interpretation. The prosecution challenged the defendants' receipt of travel reimbursements only where there had been some overt impropriety, which the prosecutor referred to in closing argument as "multiple per diems; credit cards used for personal reasons; credit cards used when you already had a per diem for food; and just expenses that were purely frivolous and not connected to any official duties."

The prosecutor went on to remind the jury of the kind of expense reimbursements the defendants had received. "I believe this is [exhibit] 124, Mr. Pedroza's meeting and conference. . . . He's gone in San Diego the 19th to the 22nd. He gets paid the whole time. He also puts in for being on the 21st in South Gate and gets $100 for being in South Gate, while he's in San Diego. [¶] He goes from the 26th to the 28th to San Jose. He also books the 26th in Whittier. 26th again in Whittier. Multiple per diems and stipends." And: "Mr. Byrd has sort of the same things going on. He's in San Juan, Puerto Rico, from 6/13 to 6/18, [1998]. Per diems the whole time. 6/17, he's in Hollywood. 6/18 he's in Century City. He's triple billing these days or double billing these dates he's in Puerto Rico."

The prosecution did not claim that all per diem schemes were unlawful.

(2) *Compensation for attending LII and LPFA meetings.*

Unlike Byrd, Pedroza contests the validity of the prosecution theory that defendants' payments for attending LII and LPFA meetings were unlawful. That theory rested on the following series of jury instructions.

The trial court instructed the jurors that in order to find a violation of section 424 they had to find that a defendant "appropriated public money to his . . . own use," and that the defendant "knew, or was criminally negligent in failing to know, that his . . . appropriation was without authority of law." The court defined "authority of law" as "a law of the State of California or a valid law enacted by a city council. A law enacted by a city council is a resolution or an ordinance permitted by state law." The jury was told that "[p]ublic officials are obligated to act in strict compliance with the law and must take reasonable steps to determine the appropriateness of their conduct." A city council member "may only collect compensation . . . as is authorized by law. Without such authorization, compensation cannot be legally paid for services rendered to a city . . . regardless of how beneficial the services performed . . . may be." "State law authorizes the permissible salaries of city council members based on a city's population. State law sets the salaries of city council members for the City of Lynwood based on the population in 1995 at $804.07 per month."

The jury was also instructed that "[a] public financing authority created pursuant to a joint exercise of powers agreement is governed by state law. State law does not authorize any additional compensation for a city council member for serving on the governing body of a financing authority where all of the members of the city council comprise the governing body. Therefore, a city council cannot lawfully provide that city council members may be paid additional compensation in such a situation. [¶] State law does not authorize the payment of additional salary to city council members for serving on the governing body of a non-profit public benefit corporation where all the members of a city council comprise the governing body."

Pedroza argues the $450 payments for attending LII and LPFA meetings had been lawful until 2006 when an amendment to Government Code section 36516 became effective. This amendment, which added subdivision (c) to the present statute, provides in pertinent part: "Unless specifically authorized by another statute, a city council may not enact an ordinance providing for compensation to city council members in excess of that authorized by the procedures described in [this section]. *For purposes of this section, compensation includes payment for service by a city council member on a commission, committee, board, authority, or similar body on which the city council member serves*." (Italics added.)[8]

We agree with Pedroza that the Legislature intended the italicized language to close a gap in the statutory scheme which had apparently encouraged various cities to sidestep lawful salary limits by compensating city council members for sitting on various municipal boards and agencies. A California Bill Analysis of this legislation stated:

"According to the author there is a loophole in current law that allows for unregulated compensation to city council members. . . . [¶] . . . [S]ome city councils

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[8] Pedroza also asserts this amendment never applied to him because by the time it was enacted he was no longer on the city council. However, the record indicates Pedroza remained on the city council until he was recalled in a 2007 election. In any event, resolution of this factual question does not ultimately matter because we agree with the Attorney General that the amendment to Government Code section 36516 did not alter the statute in any way that was relevant to Pedroza's conviction.

have compensated their members with hundreds, or even thousands of dollars per month for serving on a CDC [community development commission]. The author points to the City of Huntington Park, which awards its city council members $1,950 per month for serving on the CDC, as a prime example of this abuse. [¶] [Additionally, t]he author's office has provided . . . information regarding the City of Compton, where council members may receive: [¶] a) $600 per month for serving the council; [¶] b) $1,000 ($1,600 for the Mayor) per month for serving on the Urban Community Development Commission; [¶] c) $1,000 per month for serving on the Public Finance Authority; [¶] d) $1,000 per month for serving on the Housing Development Commission; and [¶] e) $400 per month for serving on the Gaming Commission. [¶] None of these offices have a compensation amount prescribed in statute, and only the Urban Community Development Commission is actually authorized by statute. The remainder are created under the general powers of the city. [¶] . . . The state provides cities with a broad base of authority to exercise powers in order to do the work of the people. However, *the Committee may wish to consider whether paying some council members in excess of $4,500 per month over and above their salaries for the performance of official duties is an abuse* of this authority, especially given the fact that a majority of the council members also have full time jobs outside the city council." (Assem. Com. on Local Government, Rep. on Assem. Bill No. 11 (2005-2006 Reg. Sess.) as amended April 11, 2005, pp. 2-4, italics added.)

But there is a fundamental flaw in Pedroza's argument. The fact this "loophole" was not closed until 2006 does not mean that before then Pedroza was *authorized* to receive $450 every time he attended LII or LPFA meetings. Pedroza's argument ignores how section 424 operates. As *Stark* pointed out, "Liability under section 424 arises when the officer . . . *acts without authority*" and, "[d]epending on the circumstances, *it may be that no lawful authority sanctioned the defendant's actions, or that the defendant's action was expressly prohibited by particular lawful authority*." (*Stark v. Superior Court*, *supra*, 52 Cal.4th, at p. 397 & fn. 9, italics added.) The fact the Legislature enacted Assembly Bill No. 11 to close this loophole by *expressly prohibiting* the kind of excess

compensation Pedroza and Byrd were being paid for attending LII and LPFA meetings is different from there having previously been lawful authority *allowing* these payments.[9] As *Stark* teaches, if "no lawful authority sanctioned the defendant's actions" at the time this form of compensation was received, then the defendant was in violation of section 424 (if the required mental element existed). (See *id*. at p. 397, fn. 9.)

Pedroza argues the Attorney General incorrectly asserts "that payments for serving on these agencies was [*sic*] illegal as Lynwood was a general law city [that] could not legally set up these agencies."

This misstates the People's theory. During closing argument, the prosecutor expressly told the jury: "We're not telling you the LII itself, back when it was created, is illegal." The prosecutor followed that statement by implicitly saying the same thing about the LPFA. What the prosecution did argue to the jury was a different theory: that the defendants had not been *authorized* to receive $450 for attending LII and LPFA meetings. The prosecution noted, for example, that the LII and LPFA founding documents prohibited serving city council members from receiving compensation,[10] and that in any event the Lynwood City Council never authorized the 1998 requests for compensation. On appeal, the Attorney General has argued that Pedroza failed to cite any statute "whereby the Legislature permitted [the defendants] to enhance their

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[9] It is clear that Assembly Bill No. 11 was intended to close this loophole only prospectively, and that it was not intended to retroactively authorize past payments or establish that such compensation had been authorized in the past.

[10] The record shows that the very documents creating the LII and the LPFA provided that there was to be *no* compensation paid to city council members who served on these agencies. LII was created in 1981 as a nonprofit public benefit corporation, and its Articles of Incorporation (at section 4.10) state: "Directors shall receive no compensation or expenses for their services as Directors." The LPFA was created in 1992 as a result of a Joint Exercise of Powers Agreement between the City of Lynwood and the Lynwood Redevelopment Agency. The Agreement states (at section 19): "The persons who serve on the Authority Commission shall not be entitled to compensation." The Agreement also states: " 'Authority Commission' means the governing body of the [LPFA], which shall be the City Council as provided in this Agreement."

compensation by serving on boards such as the LII and LPFA when the only reason they were on such boards was because of their status as a city council member." The legality of the agencies themselves was never in question. Pedroza has simply misconstrued the People's theory. We conclude the prosecution's "lack of lawful authority" theory was valid.

In sum, we conclude the jury was not instructed on any invalid theory.

2. *The jury was not misinstructed on the mental element of section 424.*

The defendants contend their convictions must be reversed because the trial court misinstructed the jury on the mental element required to find there had been a violation of section 424. There is no merit to this claim. The given instructions were derived from settled case law.

Defendants object to an instruction that stated, "Public officials are obligated to act in strict compliance with the law and must take reasonable steps to determine the appropriateness of their conduct. Public officials who are authorized to direct the expenditure of public monies bear a peculiar public responsibility to use or disburse them only in strict compliance with the law. It is a public official's duty to acquaint himself with the facts." Defendants argue this unfairly imposed "an affirmative duty of factual inquiry" on them.

Although challenged by defendants, this language comes almost verbatim from the Supreme Court's decision in *Stark*, which said: "But even in complex situations, public officials and others are nevertheless obligated to act 'in strict compliance with the law.' [Citation.] They are expected to take reasonably necessary steps to determine the appropriateness of their conduct." (*People v. Stark, supra,* 52 Cal.4th at p. 402.) *Stark* noted that " '[t]he safekeeping of public moneys has, from the first, been safeguarded and hedged in by legislation most strict and severe in its exactitudes. It has continuously been the policy of the law that the custodians of public moneys or funds should hold and keep them inviolate and use or disburse them only in strict compliance with the law,' " and that " 'duty requires the person to acquaint himself with the facts.' [Citation.]" (*Id.* at pp. 399, 403.)

Defendants also object to an instruction stating "[c]riminal negligence is measured by what is objectively reasonable for a person in the defendant's position." However, as *Stark* explained: "Section 424 is not limited to public officers. 'Because of the essential public interest served by [section 424] it has been construed very broadly.' [Citation.] It applies to 'every other person' with some control over public funds. (See *People v. Groat* [(1993) 19 Cal.App.4th 1228], at p. 1234 [manager in city's public safety department who had authority to certify her own time record was a person charged with disbursement of public funds]; *People v. Evans* (1980) 112 Cal.App.3d 607 . . . [county aid worker with authority to complete emergency check requisitions for clients was a person charged with disbursement of public money].) Thus, *while the criminal negligence standard remains the same, its application will necessarily be measured by what is objectively reasonable for the particular person in the defendant's position*." (*People v. Stark*, *supra*, 52 Cal.4th at pp. 400-401, italics added.)

Defendants also object to this instruction: "It is sufficient that the defendant knew generally that a law prohibited his conduct. The People do not have to prove that the defendant knew his conduct was a crime. Nor do the People have to prove the defendant intended to defraud the city or the general public." Defendants apparently contend this relieved the prosecution of the burden of proving knowledge or criminal negligence. But, again, this language comes directly from *Stark*, which said "a violation of section 424 'is committed by a public officer when he uses public funds in a manner forbidden by law even though he may have no fraudulent intent when he does so," and, "The People do not have to prove that the defendant knew chapter and verse of the nonpenal law. It is sufficient that the defendant knew generally that a nonpenal law required or prohibited his conduct." (*People v. Stark*, *supra*, 52 Cal.4th at pp. 391, 398.)

Byrd argues "his defense was a lack of knowledge based upon failure of prior city managers and city attorneys to advise him of the requirements of the law, and a good faith belief in authorization arising from the consistent approval of his claims by the city manager." The jury instructions set forth this good faith defense in the following way: "If you find: [¶] No. 1, defendant subjectively believed that his actions were authorized

by law; [¶] and, 2, this belief was objectively reasonable *for a person in the defendant's position* and not the result of criminal negligence, then you must find the defendant not guilty of misappropriation of public funds." (Italics added.) Byrd argues the italicized language wrongly implied "that the prosecutor's burden of proof is diminished or shifted when the defendant is a 'lawmaker.' " Not so. This language merely directs the jury to consider what was reasonable under the circumstances, one of which was the fact that the defendants were city council members.[11]

As *Stark* explained: "A mental state limited solely to actual knowledge is too rigid a formulation in light of the purpose of section 424. The statute applies to public officers and others charged with 'the receipt, safekeeping, transfer, or disbursement' of public funds. [Citation.] Because the Legislature intended that such persons fulfill their obligations 'in strict compliance with the law' [citation], we expect them to be aware of and indeed embrace the duties the law imposes upon them. *It would be antithetical to the intent of the Legislature that those entrusted with control of public funds could evade an actual knowledge requirement by failing to conduct the research that would inform them of their duties, or by failing to seek the advice of persons who could provide that information*. Limiting the requirement to actual knowledge would operate to shield those whose efforts at determining their duties does not comport with the significant public responsibility these individuals bear. [¶] . . . *It would defy the exacting nature of the statute if one could escape criminal liability by claiming lack of subjective knowledge in circumstances that are objectively unreasonable*. Consequently, we agree with the People that we should construe the applicable subdivisions of section 424 to require actual knowledge *or criminal negligence*." (*People v. Stark, supra,* 52 Cal.4th at pp. 399-400, italics added.)

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11 The prosecutor argued to the jury that, as lawmakers, the defendants were aware that lawful authorization was to be found in city ordinances and state law. The prosecutor also pointed out there was no evidence that either defendant had ever sought legal advice regarding their taking of excessive compensation for attending LII and LPFA meetings. (Apparently only Reyes sought legal advice.)

Following this logic in responding to Pedroza's argument he was entitled to assume his greatly increased salary for attending LII and LPFA meetings was lawful because other city council members were receiving the same compensation, the Attorney General aptly points out that Pedroza "cannot simply hide behind the fact that council members were receiving these $450 payments before he was a council member. He had a duty to investigate the legality of these payments because it is not objectively reasonable for a city councilman to believe that he could legally more than double his monthly salary by sitting in a one-minute meeting of the LII and a one-minute meeting of the LPFA, where they merely approved and filed reports prepared by city staff. As the prosecutor pointed out to the jury, appellant Pedroza made more than $100,000 merely through the LII and LPFA meetings."

Byrd argues the trial court was wrong to rely on *Stark*'s definition of section 424's scienter element because *Stark* "concerned a ruling on a pretrial motion and not an error in jury instructions, and so its language concerning mental state is at least partially dictum." Specifically referring to the instruction telling the jury "[i]t is a public official's duty to acquaint himself with the facts," Byrd complains "the trial court gave the jury an instruction that included language drawn from dictum in *Stark*."

As a preliminary matter, Byrd's contention fails because Supreme Court language, even if dictum, is entitled to great weight. (See *People v. Mayo* (1986) 185 Cal.App.3d 389, 395.)

Moreover, Byrd's argument is based on a misreading of *Stark*. Robert Stark was the auditor-controller of Sutter County and he was trying to set aside a grand jury indictment charging him, in part, with having violated section 424. Our Supreme Court granted review to decide, among other issues, whether "a violation of section 424 require[s] intentional violation of a known legal duty or is it a general intent crime?" and "[m]ay a defendant move to set aside an indictment . . . on the ground that grand jurors were misinstructed on the scienter required to establish an element of the charged offense?" (*People v. Stark, supra,* 52 Cal.4th at p. 376.) *Stark* concluded that, where statutory "provisions criminalize acting without authority or failing to act as required by

law or legal duty," the "offenses additionally require that the defendant knew, or was criminally negligent in failing to know, the legal requirements that governed the act or omission." (*Id*. at p. 377.)

Hence, contrary to Byrd's assertion, *Stark* was indeed deciding what mental elements were required to sustain a section 424 conviction. And this is why the Supreme Court subsequently remanded such section 424 cases as *People v. Aldana* (2012) 206 Cal.App.4th 1247, and *People v. Bradley*, *supra*, 208 Cal.App.4th 64, to the appellate court for reconsideration in light of its decision in *Stark*.

In sum, we conclude the trial court did not misinstruct the jury on the proper mental element required to sustain a section 424 conviction.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

KITCHING, J.

ALDRICH, J.