No. 2—09—0919
Order filed March 30, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—2502
DELATWAN HAYNES,	)	Honorable Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: Where police department rules did not constitute "law" within the meaning of section 33—3(a) of the Criminal Code of 1961 (720 ILCS 5/33—3(a) (West 2008)), defendant's convictions for official misconduct were reversed.

Defendant, Delatwan Haynes, appeals his convictions of three counts of official misconduct, 720 ILCS 5/33—3(a) (West 2008). He argues that he was not guilty of official misconduct because the police department rules he allegedly violated are not "law" within the meaning of the official misconduct statute. He also challenges the sufficiency of the evidence with respect to two of the official misconduct convictions. For the following reasons, we reverse.

BACKGROUND

Defendant is a former City of Waukegan police officer. He was indicted on four counts of aggravated criminal sexual assault (720 ILCS 5/12—14(a)(4), (a)(8) (West 2008)), one count of aggravated kidnapping (720 ILCS 5/10—2(a)(6) (West 2008)), one count of aggravated criminal sexual abuse (720 ILCS 5/12—16(a)(6) (West 2008)), and seven counts of official misconduct (720 ILCS 5/33—3(a), (b) (West 2008)).[1] The indictments arose from a series of incidents that occurred during defendant's January 6, 2008, night shift.

Relevant to our analysis are counts 23, 25, and 26. Count 23 alleged that defendant, while acting in his official capacity as a police officer, "recklessly failed to perform any mandatory duty as required by law, in that he violated Waukegan Civil Service Commission Rule of Conduct 13, paragraph 13, [prohibiting] using any city property for private purposes," in violation of 720 ILCS 5/33—3(a) (West 2008). Count 25 alleged that defendant, while acting in his official capacity as a police officer, "recklessly failed to perform any mandatory duty as required by law, in that he failed to comply with the Waukegan Police Department Rules of Conduct, paragraph 15, police personnel shall not leave their district of patrol," in violation of 720 ILCS 5/33—3(a) (West 2008). Count 26 alleged that defendant, while acting in his official capacity as a police officer, "recklessly failed to perform any mandatory duty as required by law, in that he failed to comply with the Waukegan Police Department Rules of Conduct, paragraph 28, police personnel shall not submit any report whatsoever that is false or shall tend to be misleading," in violation of 720 ILCS 5/33—3(a) (West 2008).

[1]Defendant was indicted on thirteen other counts, but the State nol-prossed those counts prior to trial.

A jury trial commenced; we recount the evidence relevant to the issues on appeal. Denise Swinney testified that on January 6, 2008, she and a friend rode in a limousine from her apartment in downtown Waukegan to the west side of Waukegan. Swinney consumed heroin and cocaine that evening. After she declined to buy more drugs, the friend left her near a restaurant on the corner of Glen Flora and Lewis streets in Waukegan. Swinney testified that after making a telephone call on the restaurant pay telephone and unsuccessfully waiting for a taxi cab for 30 to 45 minutes, she started to walk home. As she was walking, defendant pulled up next to her in his squad car and detained her. Swinney testified that defendant conducted a patdown search, during which he pinched and caressed her nipples. Defendant confiscated a crack pipe from her pocket, told her to go home, and then drove away.

Swinney testified that as she was walking home, "a Mexican man walked up to me and asked me could he use my cell phone." At that point, defendant again drove past her in his squad car and said, " 'Oh, hell, no, I am taking you home.' " Swinney testified that she entered the back seat of the squad car. However, rather than take her home, Swinney testified that defendant took her to a deserted location where, while in the squad car, defendant "put his penis in [her] mouth" and "inside [her] vagina" as she cried and said she wanted to go home. He then drove her home. Swinney testified that she returned to the alley the next day and recovered the condom and the condom wrapper that defendant used. A forensic scientist opined that sperm found inside the condom was from defendant. A search of defendant's locker at the police station yielded condoms with lot numbers that matched the condom wrapper.

Defendant testified. He denied touching Swinney during the patdown search. He testified that Swinney suggested that they have sex and that they had consensual intercourse outside of the

squad car in a parking lot at 1725 North Lewis Avenue in Waukegan, after which defendant drove Swinney home. The parking lot at 1725 North Lewis Avenue was outside of the zone to which defendant was assigned that evening.

Defendant testified that shortly after driving Swinney home, at about 3:30 a.m., he was dispatched to assist another police officer with a driving-under-the-influence arrest. At about 3:50 a.m., he transported the prisoner to jail. Defendant's activity report reflected that he finished assisting with the prisoner at 4:00 a.m. However, he did not notify dispatch that he was ready for calls until 4:23 a.m. because he stayed at the police station until then to use the washroom and drink a cup of coffee.

City of Waukegan Police Chief William Biang testified that Waukegan police officers are governed by Waukegan Police Department Rules of Conduct (Department Rules) and Waukegan Civil Service Commission Rules of Conduct (Civil Service Rules). He explained that police officers receive a copy of, and learn about, the rules during their training. Department Rule 15 provides that police personnel shall not leave their district of patrol, and Department Rule 28 provides that police personnel shall not submit any report whatsoever that is false or shall tend to be misleading. Civil Service Rule 13, paragraph 13, prohibits using any city property for private purposes.

The jury convicted defendant of three of the official misconduct counts and acquitted him on the remaining counts.[2] Defendant filed posttrial motions on grounds, *inter alia*, that his convictions were based on administrative infractions, not "law," and that the evidence was insufficient to sustain his convictions. The trial court denied defendant's posttrial motions and

[2]The trial court granted defendant's motion for a directed finding as to one count of official misconduct not at issue.

sentenced defendant to concurrent two-year sentences on each conviction. Defendant timely appealed.

ANALYSIS

Defendant maintains that he is not guilty of official misconduct because the Department Rules and Civil Service Rules are not "law" within the meaning of the official misconduct statute. This presents an issue of statutory interpretation subject to *de novo* review. *People v. Williams*, 239 Ill. 2d 119, 127 (2010). The fundamental objective of statutory construction is to ascertain and give effect to the legislature's intent. *Williams*, 239 Ill. 2d at 127. In doing so, we must presume that the legislature did not intend to produce absurd, inconvenient, or unjust results. *Williams*, 239 Ill. 2d at 127. The language of a statute, given its plain and ordinary meaning, is the best indication of legislative intent. *Williams*, 239 Ill. 2d at 127. A statute is viewed as a whole. *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 268 (2010). Words and phrases, therefore, must be interpreted in light of other relevant provisions of the statute and must not be construed in isolation. *Hubble*, 238 Ill. 2d at 268. Criminal statutes are construed strictly in favor of the accused. *Williams*, 239 Ill. 2d at 127.

Section 33—3 of the Criminal Code of 1961 provides that a public employee commits misconduct when, in the public employee's official capacity, he, *inter alia*, (a) "[i]ntentionally or recklessly fails to perform any mandatory duty as required by law" or (b) "[k]nowingly performs an act which he knows he is forbidden by law to perform." 720 ILCS 5/33—3(a), (b) (West 2008). A conviction under the official misconduct statute is a Class 3 felony. 720 ILCS 5/33—3 (West 2008). Defendant was convicted under subsection (a) for recklessly failing to perform a mandatory duty as required by law by violating the Department Rules and Civil Service Rules that prohibit departure

from a patrol district, submission of false or misleading reports, and use of city property for private purposes. Defendant argues that the rules do not constitute "law" under section 33—3(a). Based upon our supreme court's recent decision in *Williams*, we agree.

In *Williams*, the defendant, a police dispatcher for the Village of Glenwood, was charged with violating section 33—3(b) for knowingly providing confidential police information to a drug dealer in violation of Glenwood police department's rules on the disclosure of confidential information. *Williams*, 239 Ill. 2d at 121. Our supreme court affirmed the appellate court's reversal of the defendant's convictions, holding that the police department rules did not qualify as "law" under the official misconduct statute. *Williams*, 239 Ill. 2d at 133.

The court noted that the term "law" in the official misconduct statute includes a civil or penal statute, a supreme court rule, administrative rules and regulations, or a tenet of a professional code. *Williams*, 239 Ill. 2d at 127. This list is not exhaustive; a "provision may be a 'law' within the meaning of the official misconduct statute even if it does not fit squarely within one of the categories we have previously identified." *Williams*, 239 Ill. 2d at 128.

The State argued in *Williams* that the police department confidentiality rules were "law" because they were enacted as a Village of Glenwood ordinance. In support, the State relied on minutes from a 1985 Village board of trustees meeting and Village ordinances governing the police department. Our supreme court held that these documents did not establish that the confidentiality rules were enacted as an ordinance. *Williams*, 239 Ill. 2d at 128-29. "The minutes only state that the board approved a new 'Policy and Procedures package' presented by one of the trustees. There is no indication of the contents of the 'Policy and Procedures package' or that the confidentiality rules at issue were part of that package." *Williams*, 239 Ill. 2d at 129. Moreover, the minutes did

not indicate that the package was enacted as a Village ordinance; rather, the minutes simply stated that the package was approved. *Williams*, 239 Ill. 2d at 129.

Regarding the ordinances upon which the State relied, our supreme court cited the section entitled "Promulgation of rules and regulations by chief of police." *Williams*, 239 Ill. 2d at 129. This section provided that rules prescribed by the police chief shall be binding on members of the police department when approved by the Village president and board of trustees. *Williams*, 239 Ill. 2d at 129. The court held: "The ordinance suggests that the police chief may have promulgated the confidentiality rules as part of the department rules and regulations, and that the Village could potentially approve them. There is no proof, however, that the rules were actually approved by the Village." *Williams*, 239 Ill. 2d at 129. Accordingly, our supreme court concluded that the State failed to establish that the confidentiality rules were enacted as an ordinance. *Williams*, 239 Ill. 2d at 130.

In determining that the confidentiality rules did not otherwise constitute "law" under the official misconduct statute, our supreme court reasoned that there was no evidence that any formal legislative process was used in adopting the confidentiality rules. *Williams*, 239 Ill. 2d at 132. Indeed, the "evidence does not even establish that the rules were sanctioned or approved by the Village of Glenwood." *Williams*, 239 Ill. 2d at 132. Rather, the confidentiality rules were "prescribed without any formal enactment or informal approval by a governing body." *Williams*, 239 Ill. 2d at 132.

Our supreme court expressed concern over construing the term "law" so broadly that it includes rules "promulgated solely by a person in authority of a governmental department or the administrative staff." *Williams*, 239 Ill. 2d at 132. The court pointed out that the confidentiality

rules "were apparently promulgated under the ordinance allowing the police chief to prescribe rules and regulations covering, among other things, conduct of the members, uniforms and equipment, hours of service, and vacations." *Williams*, 239 Ill. 2d at 132. To hold that the confidentiality rules are "law" would "allow a felony official misconduct prosecution to be based on a violation of rules prescribed solely by the police chief on those matters." *Williams*, 239 Ill. 2d at 132.

Moreover, the court pointed out, the confidentiality rules provided that " '[a]llegations, gossip, hearsay, rumor and anonymous uncorroborated information shall be treated as confidential.' " *Williams*, 239 Ill. 2d at 132. Consideration of the confidentiality rules as "law" would "allow a felony prosecution to be based on the police chief's rules prohibiting disclosure of gossip, hearsay, or rumor. We do not believe the legislature intended the term 'law' to be given such a broad construction." *Williams*, 239 Ill. 2d at 133.

Similarly, here, defendant was convicted of recklessly failing to perform a mandatory duty as required by law by violating the Department Rules and Civil Service Rules that prohibit departure from a patrol district, submission of false or misleading reports, and use of city property for private purposes. The rules do not qualify as "law" under the official misconduct statute. The State introduced the Department Rules as exhibit 42. The heading of the document is "Waukegan Police Department Policy and Procedural Manual," and the subject is "Rules of Conduct." The document is four pages and lists 50 rules of conduct, including a prohibition on departure from a patrol district and submission of false or misleading reports. Police Chief Biang testified that exhibit 42 is the "Waukegan Police Department Rules of Conduct put on with our police manual."

The Civil Service Rules were introduced by the State as exhibit 43. The heading of the document reads: "Rule XIII, Rules of Conduct for Fire Department and Police Department." Forty-

eight rule violations are listed, including use of city property for private purposes. Exhibit 43 includes pages 20 to 23; Police Chief Biang testified that the Civil Service Rules encompass "about a 15—or 20—page document, maybe longer, that has rules that regard conduct, rules that regard promotions, suspension, disciplinary action that can be taken by the commission, has to do with seniority and other things that govern police and fire." Police Chief Biang also testified that the "Waukegan Police Department's personnel, sworn personnel are governed by the Waukegan Civil Service Commission. They have their own set of rules that they established to regulate the conduct and the activities of the Waukegan Police Department, governed by state law and civil service commissions."

Like *Williams*, the record is devoid of evidence that the Department Rules or Civil Service Rules were enacted as ordinances. Moreover, the State failed to establish that the rules otherwise constitute "law" under the official misconduct statute. The State presented no evidence that the rules were enacted, sanctioned, or approved by a governing body.

The State contends *Williams* is distinguishable because it involved subsection (b) of the official misconduct statute, which prohibits public employees from knowingly performing an act known to be forbidden by law to perform, whereas defendant was convicted of violating subsection (a), which prohibits intentional or reckless failure to perform any mandatory duty as required by law. 720 ILCS 5/33—3(a), (b) (West 2008). The court in *People v. Dorrough*, No. 1—09—3200, slip op. at 3 (Ill. App. Ct. Feb. 4, 2011), recently rejected the same argument. There, the defendant, a former police detective, was convicted under subsection (a) of the official misconduct statute for removing evidence from a case he was investigating in violation of police department regulations. *Dorrough*, slip op. at 1. The court reversed the defendant's conviction because, under *Williams*, the

police department regulations were not "law" under the statute. *Dorrough*, slip op. at 2-3. In dismissing the State's argument that *Williams* was distinguishable because it involved subsection (b) of the statute, the court reasoned: "It is a 'general rule of statutory construction that when the same words appear in different parts of the same statute, they should be given the same meaning absent some contextual indication that the legislature intended otherwise.' [Citation.] As no such indication appears here, 'law' necessarily carries the same meaning under both subsections (a) and (b) of the statute." *Dorrough*, slip op. at 3. We agree. There is no basis upon which to interpret "law" differently depending on which subsection is at issue.

The State nevertheless contends that subsection (a)'s use of the term "mandatory duty" requires that the provision "be read together with those sections which impose duties with regard to public officials." In support, the State cites *People v. Thoms*, 50 Ill. App. 3d 398, 402 (1977), and *People v. Campbell*, 3 Ill. App. 3d 984, 991 (1972). *Thoms* and *Campbell* are inapposite; they addressed what constituted a "mandatory duty as required by law" under subsection (a), but the issue in both cases was whether certain *statutory* provisions amounted to a "mandatory duty as required by law." *Thoms*, 50 Ill. App. 3d at 402; *Campbell*, 3 Ill. App. 3d at 989-91. There is no doubt under the current case law that a statutory provision would qualify as a "mandatory duty as required by law." See *Williams*, 239 Ill. 2d at 127 (the term "law" in the official misconduct statute includes a civil or penal statute).

Here, however, the issue is whether the Department Rules and Civil Service Rules (which are not statutes) constitute mandatory duties as required by law. According to the State, these rules "set forth the mandatory duties legally required of Waukegan police officers." In support, the State cites provisions of the Illinois Municipal Code and City of Waukegan Code of Ordinances

authorizing promulgation and enforcement of rules governing police officer conduct: 65 ILCS 5/10—1—5 (West 2008) ("The [civil service] commission shall make rules to carry out the purposes of this Division 1, and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."); 65 ILCS 5/11—1—1, 5/11—1—2 (West 2008) (permitting municipal authorities to pass and enforce all necessary police ordinances); Code of Ordinances, City of Waukegan, Illinois, § 17—2 ("The captains of police, lieutenants, sergeants, detective sergeants and police officers shall be subject to such rules and regulations not inconsistent with the civil service law, as shall be prescribed from time to time by the chief; provided that, before taking effect, such rules and regulations shall have been submitted to and approved by the mayor. A reasonable forfeiture of pay may be imposed for any neglect of duty or misconduct on the part of any member of the department of police."); Code of Ordinances, City of Waukegan, Illinois, § 17—13 ("No member of the police force shall fail to perform any duty required of him by the ordinances of the city, by the chief of police, or by the mayor, or in the discharge of his official duties be guilty of any fraud, extortion, oppression, favoritism or wilful wrong or injustice. In addition to other penalties, the violator may be removed from the department.").

Essentially, the State's theory appears to be that the Department Rules and Civil Service Rules are "law" because Illinois statute and City of Waukegan ordinance authorize the Civil Service Commission and the police chief to prescribe the rules, and police officers are required to follow the rules. The issue under *Williams*, however, is whether any formal legislative process was used in adopting the rules. *Williams*, 239 Ill. 2d at 132. The State failed to present any evidence that the Department Rules and Civil Service Rules were adopted pursuant to such a process. The State

contends that the "chief's rules and regulations must have been submitted for approval." The State does not further elaborate on this point, although it cites § 17—2 of the Code of Ordinances, which refers to rules that the police chief may prescribe and which are effective upon the mayor's approval. Code of Ordinances, City of Waukegan, Illinois, § 17—2. However, the State points to no evidence in the record regarding the method by which any of the rules were enacted, sanctioned, or approved. The record simply lacks *any* evidence about the promulgation of these rules. Our supreme court's concern in *Williams* about construing the term "law" so broadly that it includes rules "promulgated solely by a person in authority of a governmental department or the administrative staff" (*Williams*, 239 Ill. 2d at 132), applies equally here.

Moreover, the Department Rules proscribe conduct such as failing to report timely for duty and participating in "horseplay," and the Civil Service Rules prohibit "[c]owardice," "shirking," "loafing on duty," and failure to keep physically fit. Accepting the Department Rules and Civil Service Rules as "law" would allow a felony prosecution to be based on these rules. As our supreme court reasoned in *Williams* with respect to the confidentiality rules that proscribed disclosure of gossip, hearsay, or rumor, "We do not believe the legislature intended the term 'law' to be given such a broad construction." *Williams*, 239 Ill. 2d at 132-33.

As a final matter, the State contends that Civil Service Rule 13, which prohibits using any city property for private purposes (and was the mandatory duty as required by law charged in Count 23), "follows the language" of article VIII, section 1(a) of the Illinois Constitution, which provides that "[p]ublic funds, property or credit shall be used only for public purposes." Thus, according to the State: "[T]he mandatory duty proscribed under Civil Service Rule 13 is required by the Illinois Constitution. The defendant was required, by law, to abide by the prohibition against using public

property for private use." However, the official misconduct statute requires that the charging instrument specify the law allegedly violated. *Williams*, 239 Ill. 2d at 127; *People v. Grever*, 222 Ill. 2d 321, 335 (2006). The indictment against defendant was *not* based on a violation of the Illinois Constitution. Rather, Count 23 of the indictment alleged that defendant recklessly failed to perform any mandatory duty as required by law while acting in his official capacity as a police officer, in that he violated Civil Service Rule 13. The State provides no authority to support that the purported similarity of the provisions warrants affirmance of defendant's conviction on this count.

We reverse defendant's convictions for official misconduct and enter a judgment of acquittal on each count. See *People v. Olivera*, 164 Ill. 2d 382, 393 (1995) ("The double jeopardy clause forbids a second, or successive, trial for the purpose of affording the prosecution another opportunity to supply evidence it failed to muster in the first proceeding."). We emphasize the same sentiment that our supreme court expressed in *Williams*:

> "[O]ur holding should not be interpreted as an approval of defendant's conduct. The conduct here is certainly troublesome and unjustifiable. We hold that defendant did not commit the offense of official misconduct only because the [Department Rules and Civil Service Rules] at issue here cannot be construed as 'laws' under the statute." *Williams*, 239 Ill. 2d at 133; see also *Grever*, 222 Ill. 2d at 339 ("Our holding today is mandated by the rules of statutory construction. By no means should it be construed as an approval of defendant's actions.").

Defendant also argues that the evidence was insufficient to sustain his convictions for recklessly failing to perform a mandatory duty as required by law by violating the Department Rules

that prohibit departure from a patrol district and submission of false or misleading reports. In light of our disposition, we need not address this argument.

For the foregoing reasons, we reverse defendant's official misconduct convictions and enter a judgment of acquittal.

Reversed.