NUMBER 13-16-00079-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JOHN CHAMBERS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 103rd District Court of Cameron County, Texas.

MEMORANDUM OPINION ON REMAND

Before Chief Justice Contreras and Justices Rodriguez[1] and Longoria
Memorandum Opinion on Remand by Chief Justice Contreras

This case is on remand from the Texas Court of Criminal Appeals. Appellant John Chambers, the former police chief of the small community of Indian Lake in Cameron County, was charged with fourteen counts of tampering with governmental records with

[1] The Honorable Nelda V. Rodriguez, former Justice of this Court, was a member of the panel at the time this case was submitted but did not participate in this decision because her term of office expired on December 31, 2018.

intent to defraud or harm, each a state jail felony. *See* TEX. PENAL CODE ANN. § 37.10(c)(1). Trial evidence established that, in January 2015, appellant was advised by a Texas Commission on Law Enforcement (TCOLE) agent that firearms qualifications records for several Indian Lake reserve officers were missing. Appellant then instructed a subordinate officer to create records falsely stating that fourteen reserve officers had passed a firearms training course using appellant's pistol. Appellant was found guilty on all counts—one for each of the falsified documents—and he was sentenced to concurrent two-year prison terms, probated for five years.

In 2017, we affirmed the conviction, concluding that: (1) the documents appellant directed to be falsified were "governmental records" under the broad statutory definition; (2) appellant was not entitled to a jury charge instruction on local government code § 341.012, which authorizes a municipality to establish a reserve police force; and (3) the evidence was sufficient to show that appellant acted with the "intent to defraud or harm" the State, despite the fact there was no allegation or proof that he deprived the State of a pecuniary or property interest. *Chambers v. State*, 523 S.W.3d 681, 685–91 (Tex. App.—Corpus Christi–Edinburg 2017), *aff'd in part & rev'd in part*, 580 S.W.3d 149 (Tex. Crim. App. 2019). As part of his first issue, appellant contended that a broad interpretation of "governmental records" would lead to an absurd result because "[i]t would include virtually any piece of paper with information kept at a police department." 523 S.W.3d at 687. We disagreed, in part because the statutory defense provided in § 37.10(f) "serves as a safety valve that would generally prevent conviction in cases where the record at issue . . . is insignificant or otherwise unrelated to the entity's governmental function." *Id.* at 687–88.

The Texas Court of Criminal Appeals affirmed our judgment with respect to

appellant's first and second issues. *See* 580 S.W.3d at 157–58 (agreeing that the documents were "governmental records" and noting that appellant was not harmed by the lack of a jury instruction on local government code § 341.012). However, the Court reversed as to appellant's third issue, concluding that the evidence was insufficient to show appellant acted with the "intent to defraud or harm" because "it was legally impossible for TCOLE to be defrauded by Appellant's deceit and for Appellant to intend to defraud TCOLE through his deceit." *Id.* at 157 ("If the government has no authority to fine the defendant, then it is legally impossible for the defendant to 'defraud' the government out of an opportunity to fine him—even if the defendant believes the government has that authority.").[2] Moreover, the Court held that our sufficiency analysis was "incomplete" because we did not address appellant's argument, made for the first time in his reply brief,[3] that the evidence was insufficient to overcome his statutory

[2] The court of criminal appeals held that, to establish an "intent to defraud or harm," "the State must prove that the government has the legal authority to require the keeping of records in order to show that it is legally possible to defraud the government by filing a false record." *Chambers v. State*, 580 S.W.3d 149, 160 (Tex. Crim. App. 2019). Otherwise, the doctrine of legal impossibility would preclude a finding of "intent to defraud or harm." *Id.* (citing *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995) ("Legal impossibility has been described as existing where the act if completed would not be a crime, although what the actor intends to accomplish would be a crime.")).

We note that, although appellant argued in this Court that the documents at issue were not "governmental documents" because they were not required to be kept by law, he never argued to this Court that it is legally impossible to "inten[d] to defraud or harm" the State for that reason. *See Wilson v. State*, 311 S.W.3d 452, 457 n.14 (Tex. Crim. App. 2010) (quoting *Tallant v. State*, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987) (plurality op.)) (noting that, with certain exceptions not applicable here, "[a]n appellant may not expect [the court of criminal appeals] to consider a ground for review that does not implicate a determination by the court of appeals of a point of error presented to that court in orderly and timely fashion"). In his third issue, appellant assumed *arguendo* that the State had the "regulatory power to require [him] to . . . keep firearms records for his appointed reservists . . . ." Appellant then strictly limited his intent argument to the notion that, even assuming the State had the legal authority to require the documents, an "intent to defraud or harm" must still include the intent to deprive the State of a pecuniary or property interest.

The decision of the court of criminal appeals is binding on this Court. *See Ex parte Hartfield*, 442 S.W.3d 805, 817 (Tex. App.—Corpus Christi–Edinburg 2014, pet. ref'd); *see also* TEX. CONST. art. V, § 5(a).

[3] The Court stated that, though "new issues raised in a reply brief should not be considered," appellant's argument regarding the insufficiency of the evidence to overcome his § 37.10(f) defense "was not a new issue"—instead, it was "related to the arguments in his original brief." *Chambers*, 580 S.W.3d at 161 ("Appellant's sufficiency claim in his reply brief was part and parcel of the statutory interpretation issue he raised in his initial brief.").

defense under penal code § 37.10(f). 580 S.W.3d at 156–61. The Court remanded the case to us to consider that argument. *Id.* at 161–62. Per our request, the parties have filed supplemental briefs addressing that argument. We reverse and remand.

I. Standard of Review and Applicable Law

In reviewing sufficiency of the evidence to support a conviction, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

We measure sufficiency by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Villareal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009).

A hypothetically correct charge in this case would instruct the jury to find appellant

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In his initial brief on appeal, appellant argued that the evidence was insufficient to support his conviction for two limited and very specific reasons: (1) the false documents were not "governmental records" because they were not "required to be kept by law"; and (2) the State failed to prove that he had the intent to deprive the State of a pecuniary or property interest. *See Chambers v. State*, 523 S.W.3d 681, 686 (Tex. App.—Corpus Christi–Edinburg 2017), ***aff'd in part & rev'd in part***, 580 S.W.3d at 149. Appellant did not argue in his initial brief, implicitly or explicitly, that the evidence was insufficient to support the jury's rejection of his § 37.10(f) defense. He did not cite § 37.10(f) or its language anywhere in his brief. He did not cite penal code § 2.03, generally concerning defenses to prosecution, nor did he cite any authority regarding the proper standard for reviewing a verdict that rejects such a defense. Appellant's initial brief did not "argue[] that the evidence is insufficient to show that the records were kept for a governmental purpose," 580 S.W.3d at 161—rather, it argued only that the evidence is insufficient to show that the records were "required to be kept by law." Appellant then raised a completely different sufficiency challenge for the first time in his reply brief.

guilty if, as a principal or a party, he "knowingly ma[de] a false entry in . . . a governmental record." TEX. PENAL CODE ANN. § 37.10(a)(1). Penal code § 37.10(f) states: "It is a defense to prosecution under [§ 37.10(a)(1)] that the false entry or false information could have no effect on the government's purpose for requiring the governmental record." *Id.* § 37.10(f). This is not an affirmative defense but rather a "defense to prosecution" as defined in § 2.03 of the penal code. *See id.* § 2.03(a). Thus, a hypothetically correct charge would also instruct the jury to acquit if it had a "reasonable doubt on the issue" of whether the § 37.10(f) defense applies. *See id.* § 2.03(d).[4]

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[4] The actual jury charge in this case, as to the § 37.10(f) defense, differed from the hypothetically correct charge in at least three material respects. First, it instructed: "It is a defense to a prosecution under this offense that the false entry or false information could have no effect on the government's purpose for *having* the governmental record" (emphasis added). The statute refers to the government's purpose for "requiring" the record at issue—not its purpose for "having" the record. *See* TEX. PENAL CODE ANN. § 37.10(f).

The second and third differences appeared in each of the fourteen application paragraphs. Those paragraphs stated:

> Now, if you find from the evidence beyond a reasonable doubt that in Cameron County, Texas, on or about January 13, 2015, the defendant, JOHN CHAMBERS, did then and there, acting alone or as a party as that term has been previously defined, with intent to defraud or harm another, namely, the STATE OF TEXAS, knowingly make a false entry in a governmental record, to wit: firearms qualifications record, said false entry being the name [of the reserve officer], date of qualifying, weapon used, and the weapon serial number, then you will find the defendant guilty as charged in [count number] of the indictment.
>
> Unless you so believe from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."
>
> If you do find from the evidence beyond a reasonable doubt that on or about the 13th day of January, 2015, in Cameron County, Texas, the Defendant John Chambers did then and there make a false entry in a government record to wit: the name [of the reserve officer], date of qualifying, weapon used, and weapon serial number, *but you further find from the evidence that the false entry, if any, could have no effect on the government's purpose for requiring the governmental record, if any*, then you will acquit the defendant and say by your verdict "Not Guilty."

(Emphasis added.) The words "if any" are not in the statute and we are aware of no other authority supporting their inclusion in the charge. *See id.* And the application paragraphs failed to instruct the jurors that they must acquit if they had a *reasonable doubt* about the § 37.10(f) defense—instead, contrary to the statute, it stated only that the jurors must acquit if they "find from the evidence" that the defense is true. *See id.* § 2.03(d) ("If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.").

The defects in the application paragraphs redounded to the advantage of the prosecution. The inclusion of the words "if any" meant that the jury had to reject the § 37.10(f) defense if it found that the government did not "requir[e]" or had no "purpose for requiring" the records at issue. The omission of

For this type of defense, a defendant bears the burden of production, which requires the production of some evidence that supports the particular defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003) (citing *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991)). Once the defendant produces such evidence, the State then bears the burden of persuasion to disprove the raised defense. *Id.*; *see* TEX. PENAL CODE ANN. § 2.03(d). The burden of persuasion is not one that requires the production of evidence; rather, it requires only that the State prove its case beyond a reasonable doubt. *Zuliani*, 97 S.W.3d at 594. When a jury finds the defendant guilty, there is an implicit finding against the defensive theory. *Id.* In reviewing the sufficiency of the evidence when a jury has rejected a defense to prosecution, in addition to considering the essential elements of the offense, we must determine, after viewing all the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found against the appellant on the defensive issue beyond a reasonable doubt. *Saxton*, 804 S.W.2d at 914.

II. ANALYSIS

In remanding to us, the court of criminal appeals observed that "[t]he meaning of the phrase 'government's purpose for requiring the governmental record' is unclear in the context of the statute." 580 S.W.3d at 156–61. In construing a statute, we give effect to the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended. *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016). In determining plain meaning, we

reasonable doubt language meant that the jury could acquit based on the § 37.10(f) defense only if it "f[ou]nd [the elements of the defense] from the evidence" and not if there was mere reasonable doubt about the defense. *See id.* Appellant has not argued—either in his initial brief, his reply brief, his motion for rehearing, his brief before the court of criminal appeals, or his supplemental brief—that the jury charge contained reversible error.

consult dictionary definitions, apply rules of grammar, and consider words in context. *Id.* We presume that every word in a statute has been used for a purpose and each word, clause, and sentence should be given effect if reasonably possible. *Id.* at 902–03.

Again, the § 37.10(f) defense applies if "the false entry or false information could have no effect on the government's purpose for requiring the governmental record." TEX. PENAL CODE ANN. § 37.10(f). The plain language of § 37.10(f) seems to assume the existence of two facts: (1) that the government "requir[ed]" the record at issue; and (2) that the government had a "purpose" for requiring the record. *See id.* These facts are not essential elements of the offense which the State must allege or prove. *See id.* § 37.10(a); *Chambers*, 580 S.W.3d at 156 ("Under the plain text of the statute, the purpose is relevant to the defense to prosecution, not an element of the offense."). But if appellant met his burden to produce evidence supporting these facts and the other elements of the § 37.10(f) defense, then he would be entitled to an instruction on the defense, and the State's burden would include proving beyond a reasonable doubt that the defense is untrue. *See Zuliani*, 97 S.W.3d at 594.

We assume but do not decide that appellant met his initial burden to produce evidence supporting the § 37.10(f) defense and warranting an instruction thereon. Nevertheless, we conclude the State also met its burden to overcome the defense beyond a reasonable doubt.

"Require" is defined in part as "to demand as necessary or essential; have a compelling need for." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/require (last visited Apr. 6, 2020). "Purpose" means "something set up as an object or end to be attained." *Id.*, https://www.merriam-webster.com/dictionary/purpose (last visited Apr. 6, 2020).

The Texas Court of Criminal Appeals held that TCOLE did not have the legal "right or duty" to "require" the firearms qualifications records at issue here. *Chambers*, 580 S.W.3d at 158–60. But Chambers acknowledged receiving a report from TCOLE stating that his reserve officers' firearms qualification records were deficient; giving him ten days to correct the deficiency; and threatening to impose disciplinary action or a $1,000 daily fine if he did not timely correct the deficiency. *See Chambers*, 523 S.W.3d at 685 n.2. Chambers then corrected the supposed deficiency by directing the submission of falsified records. Based upon this evidence, which we view in the light most favorable to the prosecution, a rational juror could have concluded beyond a reasonable doubt that TCOLE, through its agent, actually "required" the records, even though it technically lacked legal authority to do so. *See Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008) ("Because the jury is the sole judge of a witness's credibility, and the weight to be given the testimony, it may choose to believe some testimony and disbelieve other testimony."). A rational juror could have also concluded beyond a reasonable doubt that the TCOLE agent required the documents for the specific "purpose" of causing the Indian Lake Police Department to satisfy documentation requirements which he (incorrectly) believed were legally applicable to reserve police officers.

As noted, the court of criminal appeals held that, because TCOLE had no legal authority to require the documents at issue, it could not have possibly been defrauded or harmed by Chambers' falsification of those documents. *Chambers*, 580 S.W.3d at 149. Thus, pursuant to the legal impossibility doctrine, appellant could not have formed the "intent to defraud or harm." *See id.* But the legal impossibility doctrine has been traditionally applied only in the context of attempt crimes and to evaluate intent. *See id.* at 158 n.43; *Lawhorn v. State*, 898 S.W.2d 886, 892 (Tex. Crim. App. 1995) ("Although

impossibility is generally applied in the context of attempt crimes, it has also been raised and considered in the context of 'intent' crimes."). The issue discussed here concerns neither attempt nor intent. Thus, the legal impossibility doctrine does not apply, and the fact that TCOLE did not have the legal authority to "require" the documents at issue does not mean that the State could not have disproved the § 37.10(f) defense beyond a reasonable doubt.

Finally, a rational juror could have concluded beyond a reasonable doubt that the false records "could have" had an effect on the agent's "purpose" for "requiring" those records. In particular, the jury could have concluded that submission of the false records induced the agent to refrain from taking disciplinary action or imposing fines against appellant and his police department. A rational juror could have made this finding even if it was aware that TCOLE had no legal authority to take such action.

Accordingly, the evidence was sufficient to support the jury's implicit rejection of appellant's § 37.10(f) defense. We overrule the issue presented on remand.

III. CONCLUSION

The Texas Court of Criminal Appeals has concluded that the evidence was legally insufficient to support a finding that appellant acted with the "intent to defraud or harm." *Chambers*, 580 S.W.3d at 160. The other elements of the charged offense are supported by sufficient evidence or are not challenged on appeal. Accordingly, the trial court's judgment should be reformed to reflect a conviction on fourteen counts of Class A misdemeanor tampering with governmental records. *See* TEX. PENAL CODE ANN. § 37.10(c)(1); *Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014) (stating that an appellate court is "required" to reform a judgment to reflect conviction on a lesser-included offense if: (1) in the course of convicting appellant of the greater offense, the jury

must have necessarily found every element necessary to convict appellant on the lesser-included offense; and (2) there is sufficient evidence to support conviction on the lesser-included offense).

We reverse the trial court's judgment and remand for a new punishment hearing, for entry of judgment as set forth above, and for further proceedings consistent with this opinion.

DORI CONTRERAS
Chief Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
9th day of April, 2020.

THE THIRTEENTH COURT OF APPEALS

13-16-00079-CR

John Chambers
v.
The State of Texas

On Appeal from the
103rd District Court of Cameron County, Texas
Trial Court Cause No. 2015-DCR-268-D

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be reversed and the cause remanded to the trial court. The Court orders the judgment of the trial court REVERSED and REMANDED for further proceedings in accordance with its opinion.

We further order this decision certified below for observance.

April 9, 2020

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

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9/16/2020 **COA No. 13-16-00079-CR**
CHAMBERS, JOHN **Tr. Ct. No. 2015-DCR-268-D** **PD-0451-20**

On this day, the Appellant's petition for discretionary review has been refused. JUDGE YEARY AND JUDGE SLAUGHTER WOULD GRANT

Deana Williamson, Clerk

CHAD VAN BRUNT
310 SOUTH SAINT MARY'S STREET
SUITE 1840
SAN ANTONIO, TX 78205
* DELIVERED VIA E-MAIL *

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10/28/2020
CHAMBERS, JOHN **Tr. Ct. No. 2015-DCR-268-D** **PD-0451-20**

On this day, the Appellant's motion for rehearing has been denied.
JUDGE YEARY AND JUDGE SLAUGHTER WOULD GRANT

Deana Williamson, Clerk

CHAD VAN BRUNT
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0771-17

JOHN CHAMBERS, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS CAMERON COUNTY

NEWELL, J., delivered the opinion of the Court in which KELLER, P.J., and HERVEY, RICHARDSON, KEEL AND WALKER, JJ., joined. SLAUGHTER, J., filed a dissenting opinion in which YEARY, J., joined. KEASLER, J., dissented.

Can a person commit a crime if he falsifies a governmental record the government was not required by law to keep? Yes. A record kept by the government for information is still a governmental record even if the government was not required to keep it. However, if the government has no legal authority to require the record, a person cannot defraud or harm

the government by tampering with the record. Does this also mean that the falsification of the record in this case had no effect on the government's purpose for requiring the record? That is unclear. We must remand the case to the court of appeals to consider that question because it was raised below but left unanswered.

In this case, the Texas Commission on Law Enforcement audited the Indian Lake Police Department and found what it believed to be deficiencies in firearms-proficiency records for several volunteer reserve officers. To cure the deficiencies, Appellant, then-Police Chief John Chambers, directed a subordinate to falsify the records. The jury found Appellant guilty of 14 courts of tampering with a governmental record with the intent to defraud or harm.

On discretionary review, Appellant challenges the denial of a requested jury instruction on whether the records were required to be kept and the sufficiency of the evidence to show his intent to defraud or harm the government. He also asserts that the court of appeals did not address his argument about the sufficiency of the evidence to overcome a statutory defense that applies when the falsification of the record has no effect on the governmental purpose for the record. We hold that (1) Appellant was not harmed by the denial of the requested jury instruction;

(2) the evidence was insufficient to show intent to defraud or harm; and (3) the court of appeals should be given the opportunity to address his argument about the sufficiency of the evidence to overcome his statutory defense. We reverse and remand the case for the court of appeals to evaluate Appellant's statutory defense.

Background

Appellant was the chief of the Indian Lake Police Department ("the Department") with a single paid subordinate, Alfredo Avalos. The Department had 20 to 30 reserve police officers, who were unpaid volunteers with active peace-officer licenses. In January 2015, the Texas Commission on Law Enforcement ("TCOLE") audited the Department's records. Derry Minor, TCOLE's field agent, discovered that the Department did not have valid firearms-proficiency records for at least eight reserve officers. He notified the Department of the alleged deficiency and gave the Department seven business days to correct the situation.

Appellant directed Avalos to handle the problem. According to Avalos, Appellant handed him a list of reserve officers and copies of old

firearms-proficiency forms that had some information "whited out."[1] Avalos testified that Appellant told him to fill in the forms with the names on the list, to fill in a specific day as the qualifying date, and to list Appellant's firearm as the qualifying weapon, along with that firearm's serial number. According to Avalos and TCOLE investigator Jason Wayne Hufstetler, Avalos consulted with TCOLE about Appellant's instructions. TCOLE told Avalos to comply with the instructions and document the events.[2]

The State charged Appellant with 14 counts of tampering with a governmental record with intent to defraud or harm. Each count corresponded to a firearms-proficiency form for a reserve officer.[3] The intent-to-defraud-or-harm element elevated the offenses from Class A misdemeanors to state jail felonies. Multiple reserve officers testified to various discrepancies within the firearms-proficiency forms.

Appellant argued at trial that the false records were not

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[1] The firearm-proficiency evaluator's signature and Appellant's signature were not "whited out." Additionally, the word "pass" was circled in one instance.

[2] Avalos testified that he was guaranteed immunity for his actions.

[3] Each count alleged that Appellant did, "with intent to defraud or harm another, namely, the State of Texas, knowingly make a false entry in a governmental record, to wit: firearms qualification record, said false entry being the name [of the officer], . . . date of qualifying, weapon used and the weapon serial number."

governmental records because the reserve officers were not employees who were required to undergo a firearms-proficiency qualification. Defense counsel questioned Agent Minor about this subject, but Agent Minor would not agree with counsel's interpretation of the law. Agent Minor did acknowledge that volunteer reserve officers were unpaid and were "appointed" rather than "employed." Based on this testimony, Appellant sought a jury instruction on § 341.012 of the Local Government Code. Specifically, Appellant argued:

> Section 341.012 establishes that a police department can have non-licensed peace officers serve a[t] the discretion of the police chief, and that they can carry firearms despite being non-licensed by [TCOLE]. The Statute further establishes that the *municipality* governs the standards and qualifications of reserves, not [TCOLE]. Thus, if the jury finds that the individuals listed in each count of the indictment were appointed reserves, [it] would need to be instructed that the firearms qualification information at issue was not information required to be kept by the government. Because the evidence adduced at trial supports such a finding, the jury should be so instructed in the charge.

The trial court did not agree with Appellant's interpretation of the law and denied the instruction because records kept by the Department were still governmental records even if TCOLE could not legally require the Department to keep them.[4] The jury found Appellant guilty on all 14

[4] Section 341.012 of the Local Government Code states, in relevant part:

counts in the indictment.[5]

Appellant argued on appeal that the evidence was insufficient to support his conviction. He asserted that the firearms-proficiency records at issue were not governmental records because TCOLE could not legally require the Department to keep them. This claim was intertwined with Appellant's argument that the evidence was insufficient to disprove his statutory defense in § 37.10(f) of the Texas Penal Code. That defense

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> (a) The governing body of a municipality may provide for the establishment of a police reserve force.
>
> (b) The governing body shall establish qualifications and standards of training for members of the reserve force.
>
> (c) The governing body may limit the size of the reserve force.
>
> (d) The chief of police shall appoint the members of the reserve force. Members serve at the chief's discretion.
>
> (e) The chief of police may call the reserve force into service at any time the chief considers it necessary to have additional officers to preserve the peace and enforce the law.
>
> (f) A member of a reserve force who is not a peace officer as described by Article 2.12, Code of Criminal Procedure, may act as a peace officer only during the actual discharge of official duties.
>
> (g) An appointment to the reserve force must be approved by the governing body before the person appointed may carry a weapon or otherwise act as a peace officer. On approval of the appointment of a member who is not a peace officer as described by Article 2.12, Code of Criminal Procedure, the person appointed may carry a weapon only when authorized to do so by the chief of police and only when discharging official duties as a peace officer. . . .

[5] The trial court sentenced him to two years' confinement in state jail, probated for five years, and assessed a $200 fine for each count. The suspended sentences of confinement were set to run concurrently, but the fines were cumulated, for a total of $2,800.

states: "It is a defense to prosecution under Subsection (a)(1), (a)(2), or (a)(5) that the false entry or false information could have no effect on the government's purpose for requiring the governmental record."[6] Appellant raised another sufficiency challenge, arguing that the evidence was insufficient to support the elevating element of intent to defraud or harm. He also challenged the trial court's denial of his requested jury instruction. The court of appeals rejected all of Appellant's claims and affirmed the trial court's judgment.[7]

Appellant Was Not Harmed by the Lack of a "Required By Law" Jury Instruction

Appellant argues that the trial court erred by rejecting his requested jury instruction on the law regarding reserve officers (specifically, the instruction on Texas Local Government Code § 341.012). Error in the jury charge is subject to a harmless-error analysis.[8] If the appellant timely objected at trial to the jury-charge error, the reviewing court will reverse upon a showing of "some harm" to the appellant.[9] This means

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[6] TEX. PENAL CODE § 37.10(f).

[7] *Chambers v. State*, 523 S.W.3d 681 (Tex. App.—Corpus Christi-Edinburg 2017).

[8] *See Barron v. State*, 353 S.W.3d 879, 883 (Tex. Crim. App. 2011).

[9] *Mendez v. State*, 545 S.W.3d 548, 552 (Tex. Crim. App. 2018) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)).

that "the presence of *any* harm, regardless of degree, . . . is sufficient to require a reversal."[10] If the appellant did not timely object, the court will reverse upon a showing of "egregious harm," which occurs when the error created such harm that the appellant was deprived of a fair and impartial trial.[11] Under both harm standards, the appellant must have suffered some actual—rather than merely theoretical—harm.[12] Here, assuming without deciding that Appellant properly preserved his claim and that the trial court erred in denying Appellant's requested instruction, we conclude that any error was harmless because Appellant did not even suffer "some harm."

Appellant argues that he was harmed by this jury-charge error because it "went to the core of [his] defense": "that the volunteer reserve officers . . . were not subject to TCOLE regulation and therefore, the firearm qualification documents . . . failed to fall within the definition of 'government[al] record.'"[13] Appellant asserts that a document is a governmental record only if it is required by law to be kept or, at the very

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[10] *Airline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986).

[11] *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

[12] *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

[13] App. Br. 28.

least, is kept for a government purpose.[14] Because, in Appellant's view, the forms were not required by law to be kept or in fact kept for a government purpose, they were not governmental records. He asserts, therefore, that he was harmed by the absence of this instruction. To determine whether Appellant was harmed, we must determine whether the documents at issue were governmental records regardless of whether TCOLE could legally require the Department to keep them.

When interpreting a statute, we give effect to the plain meaning of the statute's language, unless the statute is ambiguous or the plain meaning leads to absurd results.[15] To determine plain meaning, we use rules of grammar and usage.[16] We presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible.[17]

Appellant's first argument that a document qualifies as a governmental record only if it is "required by law" to be kept is

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[14] *Id.* at 17.

[15] *Liverman v. State*, 470 S.W.3d 831, 835–36 (Tex. Crim. App. 2015); *see also Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) ("[I]f the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning.").

[16] *Liverman*, 470 S.W.3d at 836.

[17] *Id.*

inconsistent with the statutory text. The Penal Code contains a list of definitions of "governmental record," only two of which are at issue here:

> (A) anything belonging to, received by, or kept by government for information, including a court record;
>
> (B) anything required by law to be kept by others for information of government.[18]

Subsection (B) of the governmental-record definition requires the document to be "required by law." Subsection (A), however, does not. Reading that limitation into Subsection (A) would render the phrase "required by law" in Subsection (B) meaningless.[19] Thus, we reject Appellant's argument that there must be a showing that a particular governmental record was "required by law" before it can constitute a governmental record. The firearms-proficiency records in this case were both "received by" and "kept by" the government. Thus, they were still governmental records regardless of whether TCOLE could require the Department to keep them.

Regarding Appellant's alternative argument—that the document

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[18] TEX. PENAL CODE § 37.01(2).

[19] *See Liverman*, 470 S.W.3d at 836 ("[W]e presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible."); *see also State ex rel. Wice v. Fifth Jud. Dist. Ct. App.*, ___ S.W.3d ___, 2018 WL 6072183, at *6 (Tex. Crim. App. 2018) (rejecting one possible interpretation because it would render certain statutory requirements meaningless).

must, at the very least, be kept for a government purpose to constitute a governmental record—he relies on a defense in the tampering statute. That defense states: "It is a defense to prosecution under Subsection (a)(1), (a)(2), or (a)(5) that the false entry or false information could have no effect on the government's purpose for requiring the governmental record."[20] Appellant essentially interprets the defense as imposing a "purpose" requirement in the governmental-record definition.

A general rule of statutory interpretation is that the expression of one thing implies the exclusion of other, unexpressed things.[21] The tampering statute provides six ways to commit the offense.[22] In the statutory defense, however, the Legislature expressly mentioned only three of the six, specifically, Subsections (a)(1), (a)(2), and (a)(5). The express statement of those three subsections implies that the statutory defense does not apply to Subsections (a)(3), (a)(4), and (a)(6). In other words, Subsections (a)(3), (a)(4), and (a)(6) are implicitly excluded. Accepting Appellant's interpretation would inappropriately

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[20] TEX. PENAL CODE § 37.10(f). A defense to prosecution is labeled by the phrase: "It is a defense to prosecution...." TEX. PENAL CODE § 2.03(a).

[21] *State v. Hill*, 499 S.W.3d 853, 866 n.29 (Tex. Crim. App. 2016); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 107 (2012) ("The expression of one thing implies the exclusion of others (*expressio unis est exclusio alterius*).").

[22] TEX. PENAL CODE § 37.10(a).

extend the statutory defense to those excluded subsections despite the Legislature's express limitation. We reject Appellant's argument that a document must, at the very least, be kept for a government purpose to constitute a governmental record. Under the plain text of the statute, the purpose is relevant to the defense to prosecution, not an element of the offense.

In sum, Appellant's interpretation of the definition of "governmental record" conflicts with the statute's plain language. The firearms-proficiency records for the reserve officers were governmental records even without a showing that the Department was "required by law" to keep them. Consequently, the absence of an instruction on the issue of whether the Department was required by law to keep the records did not harm Appellant because it would have had no effect on the jury's determination that the firearms-proficiency records were governmental records.

Sufficiency of the Evidence

Appellant also argues that the evidence is insufficient to establish that he acted with an "intent to defraud or harm." When reviewing the sufficiency of the evidence, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational finder of fact

could have found the essential elements of the offense beyond a reasonable doubt."[23] Sometimes that is simply a matter of reviewing the record to determine whether there is sufficient evidence to establish a particular element of an offense. Sometimes that requires us to determine the meaning of the statute under which the defendant was prosecuted.[24] In other words, we ask if the defendant's conduct actually constitutes an offense under the statute.[25] Like all statutory interpretation questions, this is a question of law that we review *de novo*.[26] Here, Appellant's sufficiency challenge requires us to determine the meaning of the phrase "intent to defraud" as it is used within the applicable statute.

Defining "Intent to Defraud"

Tampering with a governmental record is a state jail felony if "the actor's intent [was] to defraud or harm another."[27] Without that intent, the offense is a Class A misdemeanor.[28] Appellant asserts that, even if

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[23] *Liverman*, 470 S.W.3d at 835–36.

[24] *Id.* at 836.

[25] *Id.*

[26] *Id.*

[27] TEX. PENAL CODE § 37.10(c)(1).

[28] *Id.* This, of course, assumes the absence of other elevating elements.

the records at issue are governmental records, it was legally impossible for him to defraud or harm TCOLE because TCOLE had no authority to require the keeping of the records in the first place.[29] Therefore, Appellant argues, the evidence is insufficient to show an intent to defraud or harm TCOLE. We agree.

The Penal Code defines "harm" as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested."[30] "Defraud," however, is not statutorily defined. The court of appeals applied the following definition of "defraud": "to cause another to rely upon the falsity of a representation, such that the other person is induced to act or is induced to refrain from acting."[31] The court also noted that an intent to defraud does not require an intent to deprive the government of money or property.[32] Thus, according to the court, intent to defraud could be proven by evidence that Appellant intend to cause TCOLE to rely upon a false representation to act (or refrain from acting). But that definition is

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[29] App. Br. 21, 31.

[30] TEX. PENAL CODE § 1.07(a)(25).

[31] *Chambers*, 523 S.W.3d at 690.

[32] *Id.* (citing *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

too broad.

We agree that an intent to defraud does not require an intent to deprive the government of money or property; but something more is required than simply an intent to cause the government entity to rely upon a false representation to act (or refrain from acting). When determining a statute's plain meaning, we may consult dictionary definitions.[33]

Here, dictionary definitions of "defraud" indicate that the dishonest means must cause an injury or loss by withholding a possession, right, or interest. For example, Webster's New World College Dictionary defines "defraud" as: "to take away or hold back property, rights, etc. from by fraud."[34] Likewise, American Heritage Dictionary defines "defraud" as "to take something from by fraud" and defines "fraud" as "[a] deception practiced in order to induce another to give up possession of property or surrender a right."[35] Other dictionaries provide similar definitions.[36]

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[33] *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016).

[34] *Defraud*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (5th ed. 2014).

[35] *Defraud* and *Fraud*, AMERICAN HERITAGE DICTIONARY (5th ed. 2016).

[36] *Defraud*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3rd ed. 2002) ("[T]o take or withhold from (one) some possession, right, or interest by calculated misstatement or perversion of truth, trickery, or other deception."); *Defraud*, DICTIONARY OF LEGAL TERMS (4th ed. 2008) ("[T]o deprive a person of property or interest, estate or right by fraud or deceit."); *Intent to defraud*, BLACK'S LAW DICTIONARY (6th ed. 1994) ("[A]n intention to

These definitions line up with the common general meaning of "defraud." So, in the context of this statute: To be defrauded, the government must have a right or duty to act (or refrain from acting) on the matter intended to be affected by the deceit.[37]

Holding otherwise would create, as Appellant argues, a legal impossibility. A legal impossibility exists where the defendant intends to do something that would not constitute a crime (or at least the crime charged).[38] In other words, the defendant may intend to commit a crime, not because he intends to do something the criminal law prohibits, but because he is ignorant of the law.[39]

For example, a defendant may intend to prevent the government from taking a certain action against him—say, fining him. If the government has no authority to fine the defendant, then it is legally impossible for the defendant to "defraud" the government out of an opportunity to fine him—even if the defendant believes the government

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deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power.").

[37] Of course, this definition is in addition to defrauding by causing pecuniary or property loss or some other cognizable loss.

[38] *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995). In that case, we also noted that legal impossibility exists "where the act if completed would not be a crime, although what the actor intends to accomplish would be a crime." *Id.*

[39] *Id.* at 892.

has that authority.[40] The defendant could accomplish everything he intends to do, but "the resulting end would still not be a crime, or at least the crime charged."[41] And "what is not criminal may not be turned into a crime after the fact by characterizing [the] acts as an attempt,"[42] or, in this case, an intent.[43]

We conclude that intent to defraud a government entity requires not only an intent to cause the entity to rely upon a false representation to act (or refrain from acting) on a certain matter, but also that the government has the right or duty to act on that matter. The question then becomes whether TCOLE had the right or duty to require the firearm-proficiency records for the licensed reserve officers. It did not.

TCOLE Did Not Have the Right or Duty to Require the Records

The relevant firearms-proficiency provisions in the Occupations Code state:

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[40] To be clear, the situation here is not one of factual impossibility. "Factual impossibility is generally regarded as existing where, due to a physical or factual condition unknown to the actor, the attempted crime could not be completed." *Id.* at 891. The impossibility here does not arise from a "factual condition." Instead, the impossibility arises purely from the reach of the law.

[41] *Id.* at 892.

[42] 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5(a)(3) (3d ed. 2018).

[43] *Lawhorn*, 898 S.W.2d at 892 ("Although impossibility is generally applied in the context of attempt crimes, it has also been raised and considered in the context of 'intent' crimes. . . . Moreover, this Court has historically recognized, for purposes of pleading, that 'attempt' may be used in place of 'intent.'").

> (a) An agency that employs one or more peace officers shall designate a firearms proficiency officer and require each *peace officer* the agency *employs* to demonstrate weapons proficiency to the firearms proficiency officer at least annually. The agency shall maintain records of the weapons proficiency of the agency's *peace officers*.
>
> . . .
>
> (c) [TCOLE][44] by rule shall define weapons proficiency for purposes of this section.[45]

According to its plain language, this statute applies only to "peace officers" who are "employed." "Peace officer" is statutorily defined as "a person elected, employed, or appointed as a peace officer under Article 2.12, Code of Criminal Procedure, or other law."[46] Article 2.12 includes "peace officers" who are "reserve municipal police officers who hold a permanent peace officer license issued under Chapter 1701, Occupations Code."[47] Thus, licensed reserve officers—like the reserve officers here—are "peace officers."[48] The question then becomes whether the

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[44] TEX. OCC. CODE § 1701.001(1) ("'Commission' means the Texas Commission on Law Enforcement.").

[45] TEX. OCC. CODE § 1701.355 (emphasis added).

[46] TEX. OCC. CODE § 1701.001(4).

[47] TEX. CODE CRIM. PROC. art. 2.12(3).

[48] According to the definition of "officer," it may appear that an officer cannot be both a "peace officer" and "reserve law enforcement officer." "Officer" is defined as: "a peace officer *or* reserve law enforcement officer." TEX. OCC. CODE § 1701.001(3) (emphasis added). Statutory context, however, overcomes the ordinary, disjunctive meaning of "or" in that definition. Looking at Article 2.12, the Legislature clearly intended for there to be overlap

reserve officers here were "employed." They were not.

The definition of "reserve law enforcement officer" in the Occupations Code directs us to § 341.012 of the Local Government Code.[49] That Local Government Code provision states, in relevant part: "The governing body of a municipality may provide for the establishment of a police reserve force. . . . The chief of police shall *appoint* the members of the reserve force."[50] Thus, according to the plain language, reserve officers are appointed rather than employed.

To be sure, the Legislature used "or" when defining "peace officer": "a person elected, employed, *or* appointed . . . ."[51] TCOLE did the same.[52] Almost always, the use of "or" is disjunctive—that is, it creates alternatives, and "the words it connects are to 'be given separate

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between "peace officer" and "reserve law enforcement officer." The Legislature did not intend for the two to be mutually exclusive.

[49] TEX. OCC. CODE § 1701.001(6) ("'Reserve law enforcement officer' means a person designated as a reserve law enforcement officer under Section 85.004, 86.012, or 341.012, Local Government Code, or Section 60.0775, Water Code.").

[50] TEX. LOCAL GOV'T CODE § 341.012(a), (d).

[51] TEX. OCC. CODE § 1701.001(4) (emphasis added).

[52] 37 TEX. ADMIN. CODE § 211.1(a)(44) (2014) ("Peace officer—A person elected, employed, or appointed as a peace officer under the provisions of the Texas Occupations Code, § 1701.001.").

meanings.'"[53] Here, nothing indicates that the Legislature intended something other than that ordinary meaning. Thus, elected, employed, and appointed have separate meanings. Here, the reserve officers were appointed rather than employed, and the firearms-proficiency statute does not apply to them. TCOLE did not have the right or duty to require the records, and the records were not required by law to be kept.

Just to clarify, in addressing Appellant's jury charge claim, we held that the firearms-proficiency records constitute governmental records regardless of whether they were required by law. That is because the applicable definition of governmental record only requires proof that the records were received or kept by the government for information—not that the government was required by law to receive or keep them. With regard to Appellant's claim that there was insufficient evidence to establish an intent to defraud or harm, we hold that the State must prove that the government has the legal authority to require the keeping of records in order to show that it is legally possible to defraud the government by filing a false record.

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[53] *United States v. Woods*, 571 U.S. 31, 45 (2013); *cf. Huffman v. State*, 267 S.W.3d 902, 904, 909 (Tex. Crim. App. 2008) (stating that a jury charge using "or" charged the violations of the statute in the disjunctive, creating an allegation in the alternative); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives.").

In this case, it was legally impossible for TCOLE to be defrauded by Appellant's deceit and for Appellant to intend to defraud TCOLE through his deceit. There is also no evidence to show intent to defraud by causing pecuniary or property loss or some other cognizable loss or to show intent to harm by causing a loss, disadvantage, or injury to another. Consequently, the evidence is insufficient to support the intent-to-defraud-or-harm element. We sustain this ground for review.

The Court of Appeals' Sufficiency Analysis is Incomplete

Appellant argued to the court of appeals that the records were not governmental records because they were not required by law to be kept or, at the very least, were not actually kept for a government purpose. In Appellant's reply brief, he clarified that argument, asserting that the State was also required to disprove his statutory defense. As mentioned previously, the statutory defense states: "It is a defense to prosecution under Subsection (a)(1), (a)(2), or (a)(5) that the false entry or false information could have no effect on the government's purpose for requiring the governmental record."[54] The court of appeals stated in a footnote that Appellant did not raise a sufficiency claim regarding the

[54] TEX. PENAL CODE § 37.10(f).

rejection of the statutory defense.[55]

Rather than address Appellant's complaint as part of his initial sufficiency challenge, the court of appeals discussed the existence of the statutory defense to undercut Appellant's argument that a broad interpretation of "governmental record" would lead to an absurd result.[56] In effect, as part of its interpretation of the statute, the court of appeals acknowledged that the governmental purpose of the records is treated as a defensive issue, but then it did not address Appellant's argument that the State's evidence was insufficient to overcome that defensive issue.

On discretionary review, Appellant again combines the issue of the statutory defense with his argument regarding the governmental-record definition. He specifically complains that, even if we hold that this is an issue about a statutory defense rather than the governmental-record definition, the evidence is still legally insufficient.[57] Further, Appellant argues that the court of appeals' opinion did not comply with Rule 47.1 of the Texas Rules of Appellate Procedure, which requires the court of

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[55] *See Chambers*, 525 S.W.3d at 688 n.4.

[56] *Id.* at 687 ("It is also noteworthy that section 37.10 provides for a defense to tampering with [a] governmental record in cases where 'the false entry or false information could have no effect on the government's purpose for requiring the governmental record.'").

[57] App. Br. 20.

appeals to address every issue raised and necessary to a final disposition on appeal.[58] He specifically asks this Court to reverse the court of appeals' judgment and remand this case to the court of appeals to fully address Appellant's statutory-defense arguments.[59]

Though we have never specifically addressed when courts of appeals should address arguments raised by an appellant in a reply brief, several courts of appeals have. Generally, an appellant may not raise a new issue in a reply brief because Rule 38.3 allows courts of appeals to decide the matter prior to receiving the reply brief.[60] But courts of appeals can consider arguments and authorities in a reply brief that are related to the arguments in the original brief.[61] We agree with the courts of appeals that new issues raised in a reply brief should not be considered. However, Appellant's argument in his reply brief was not a new issue; it

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[58] *Id.* at 21; *see also* TEX. R. APP. 47.1.

[59] App. Br. 24.

[60] *See, e.g., Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App.—Houston [1st Dist.] 2000, pet ref'd.); *State v. Vavro*, 259 S.W.3d 377, 379-80 (Tex. App.—Dallas 2008, no pet.).

[61] *See, e.g., McAlester Fuel Co. v. Smith Intern., Inc.*, 257 S.W.3d 732, 737 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (addressing assertions in reply brief "that can be construed to expound on [Appellant's] second issue presented in its opening brief or that reply to issues fully briefed by Appellee"); *Benge v. Harris*, No. 07-13-00064-CV, 2013 WL 4528885, at *1 (Tex. App.—Amarillo Aug. 20, 2013, no pet.) (not designated for publication) ("Accordingly, our analysis is limited to those issues and arguments raised in the original brief and those in the reply brief which are related to the original arguments.").

was related to the arguments in his original brief.

This is not a case in which the defendant raises a completely independent issue on appeal in a reply brief. Neither is it a case where the defendant raises a completely different sufficiency challenge for the first time in a reply brief. Instead, Appellant's sufficiency claim in his reply brief was part and parcel of the statutory interpretation issue he raised in his initial brief. Appellant has consistently argued that the evidence is insufficient to show that the records were kept for a governmental purpose, and part of that sufficiency claim is based on how the statute should be interpreted. Having determined that the governmental purpose of the record can be a requirement when considered as part of a statutory defense rather than as an element of the offense, the court of appeals should have considered Appellant's responsive argument in his pre-submission reply brief that the evidence is legally insufficient to overcome his statutory defense.[62]

We are unaware of any of our cases interpreting this statutory defense. The meaning of the phrase "government's purpose for requiring the governmental record" is unclear in the context of the statute. Our

[62] TEX. R. APP. 47.1

resolution of the issue (if any should even be necessary after a remand) would benefit from a carefully wrought decision from the court of appeals.[63] Thus, we remand the case for the court of appeals to evaluate the meaning of "government's purpose for requiring the governmental record" in § 37.10(f) and, based on its determined meaning, consider whether the evidence was sufficient to overcome the statutory defense.

Conclusion

We affirm the court of appeals regarding Appellant's complaint about the § 341.012 jury instruction. We hold that Appellant was not harmed by the absence of that jury instruction. We further hold that the evidence was insufficient to support the intent-to-defraud-or-harm element and reverse the court of appeals' determination that the evidence was sufficient. However, we reverse and remand the case to the court of appeals to evaluate the sufficiency of the evidence to overcome Appellant's statutory defense under § 37.10(f).

Filed: June 26, 2019

Publish

[63] *McClintock v. State*, 444 S.W.3d 15, 21 (Tex. Crim. App. 2014).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0771-17

JOHN CHAMBERS, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS CAMERON COUNTY

SLAUGHTER, J., filed a dissenting opinion in which YEARY, J., joined.

DISSENTING OPINION

I agree with the Court that the evidence is insufficient to support the intent-to-defraud-or-harm element. I also agree with the Court that the court of appeals failed to address the issue raised on appeal of whether the evidence was sufficient to overcome the statutory defense. I disagree, however, with remanding the case and would instead render a judgment of acquittal for Appellant because I find that the evidence is insufficient on the element of "governmental record."

In its opinion, the Court effectively decides that the reserve officers' firearms-proficiency records are "governmental records" as a matter of law. In doing so, the Court implicitly creates a bright-line rule that all documents possessed by the government are "received by" or "kept by" the government "for information." *See* TEX. PENAL CODE § 37.01(2)(A). This is not a matter for the Court to decide. This is a question of fact for the jury to decide. The fact issue boils down to whether these records were received or kept by the government "for information." *Id.* "For information" indicates that there is a usefulness or a reason for the government to want or need the records. This issue is debatable and thus raises a fact question that can only be properly resolved by the jury. Here, the jury, by its verdict, implicitly found that the firearms-proficiency records were governmental records. Thus, the Court's job is to determine whether: (a) the jury charge provided the proper instructions and law for a jury to decide that issue, and (b) the evidence was sufficient for the jury to find that the firearms-proficiency records were governmental records. The answer to both questions is "no." Therefore, I would reverse the court of appeals and render an acquittal for the Appellant on the sufficiency issue.

Background Facts and Procedural History

Appellant was the chief of police for the Indian Lake Police Department. Following an audit, the Texas Commission on Law Enforcement ("TCOLE") informed Appellant that the department was missing firearms-proficiency training forms for several unpaid reserve officers. TCOLE told Appellant these were required documents and threatened that if he did

not submit them to the agency within seven days, he would face various penalties. Appellant instructed his subordinate, Alfredo Avalos, to fill out the forms using a date Appellant selected, along with the make, model, and serial number of Appellant's own firearm. Avalos reported this to TCOLE. TCOLE instructed Avalos to do what Appellant told him to do and Avalos would receive immunity.

Appellant was charged with and convicted of fourteen counts of tampering with a governmental record under Texas Penal Code Section 37.10(a)(1), which makes it an offense to "knowingly make[] a false entry in, or false alteration of, a governmental record." The Penal Code provides multiple definitions for what constitutes a "governmental record," but only two of those definitions are relevant to this case: (1) "anything belonging to, received by, or kept by government for information, including a court record," or (2) "anything required by law to be kept by others for information of government." TEX. PENAL CODE § 37.01(2)(A), (B).[1] The tampering statute also includes a statutory defense, which provides that "[i]t is a defense to prosecution under Subsection (a)(1) . . . that the false entry or false information could have no effect on the government's purpose for requiring the governmental record." *Id.* § 37.10(f).[2]

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[1] The remaining subsections (2)(C) through (2)(F) contain additional possible definitions for governmental record that are not implicated here. TEX. PENAL CODE § 37.01(2). The jury in this case received instructions on the definitions for governmental record provided in Subsections (2)(A) and (2)(B) of Section 37.01, and so I limit my analysis to only those definitions.

[2] Although the jury did receive an instruction on the statutory defense, the court's charge did not precisely track the statutory language. Instead, the jury was instructed, "It is a defense to a prosecution under this offense that the false entry or false information could have no effect on the

At trial, the State repeatedly stressed its position that the firearms-proficiency records were legally *required* to be kept by the police department to comply with TCOLE regulations. Thus, the State appeared to take the position that the documents fell within the definition of governmental records applicable to "anything required by law to be kept by others for information of government." *Id.* § 37.01(2)(B).[3] The State asserted that, pursuant to TCOLE regulations as codified in the Texas Administrative Code,[4] the police department was required by law to create and keep firearms-proficiency records for all unpaid reserve officers.[5] It further asserted that Appellant was guilty of tampering because he had entered in the wrong date of testing, firearm used, and serial number of the firearm used on the firearms-proficiency records of the fourteen reserve officers.[6]

On direct appeal from his convictions, Appellant complained that the evidence was insufficient to show that the records at issue satisfied either of the relevant definitions for a governmental record. *See* TEX. PENAL CODE § 37.01(2)(A), (B). He also complained that the

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government's purpose for *having* the governmental record." *See* Clerk's Record, at 176 (emphasis added).

[3] *See* 13 R.R. 7-11, 15, 33.

[4] *See* TEX. ADMIN. CODE § 218.9.

[5] *See* 13 R.R. 9-11. For example, during its closing argument, the State argued to the jury that TCOLE has "the power to make these rules. And they made the rules and they said that each agency must have firearms qualification forms. Whether you are a reserve officer, a part-time, full-time, everybody is required to have these forms in their file." *Id.* at 9-10 (emphasis added).

[6] *See* 13 R.R. 14, 33.

trial court erred by denying his request for a jury instruction on the provisions of Local Government Code Section 341.012,[7] which would have informed the jury that the police chief and municipality, not TCOLE, had authority over unpaid reserve officers such that the records at issue were not required by law. *Chambers v. State*, 523 S.W.3d 681, 688 (Tex. App.—Corpus Christi 2017). Finally, Appellant argued that even if these were governmental records, the statutory defense applied because the "false information could have no effect on the government's purpose for requiring the governmental record." *See* TEX. PENAL CODE § 37.10(f). The court of appeals rejected all of Appellant's arguments and upheld his convictions.

Discussion

I. The evidence is insufficient on the governmental-record element.

While the statute contains multiple definitions of "governmental record," only two of those definitions are implicated here. Texas Penal Code Section 37.01(2)(A) provides that

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[7] The statute provides:

> The governing body of a municipality may provide for the establishment of a police reserve force. The governing body shall establish qualifications and standards of training for members of the reserve force. . . . The chief of police shall appoint the members of the reserve force. Members serve at the chief's discretion. . . . An appointment to the reserve force must be approved by the governing body before the person appointed may carry a weapon or otherwise act as a peace officer. . . . Reserve police officers may act only in a supplementary capacity to the regular police force and may not assume the full-time duties of regular police officers.

TEX. LOCAL GOV'T CODE § 341.012(a), (b), (d), (g), (h) (internal numbering omitted).

a governmental record is "anything belonging to, received by, or kept by government for information[.]" Section 37.01(2)(B) provides that it is "anything required by law to be kept by others for information of government." Based on the relevant provisions in the Occupations Code and the Local Government Code, the Court finds that the firearms-proficiency records were not "required by law" and do not meet the definition of "governmental record" under Section 37.01(2)(B).

Instead, the Court focuses on the definition in Section 37.01(2)(A). The Court finds that because these firearms-proficiency documents were "received by" and "kept by" TCOLE, a governmental agency, they satisfy the definition of "governmental record" as a matter of law. But whether these records are useful to TCOLE or whether TCOLE has an informational need for the records is a fact issue for the jury.[8] It is not an issue for the Court to decide as a matter of law. By the jury's verdict convicting Appellant, the jury implicitly

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[8] Neither this Court nor the Texas Supreme Court has expressly considered whether the designation of something as a governmental record is a question of fact or a question of law. Courts of appeals have found that whether a document is a governmental record is a fact issue for the jury. *See, e.g.*, *Hernandez v. State*, No. 14-17-00643-CR, 2019 WL 1966866, at *4 (Tex. App.—Houston [14th Dist.] May 2, 2019) ("We conclude that the trial evidence would allow a rational trier of fact to find beyond a reasonable doubt that the Offense Report was a governmental record when appellant made the false entry in it."); *James v. State*, No. 12-05-00410-CR, 2007 WL 949619, at *2 (Tex. App.—Tyler Mar. 30, 2007, pet. ref'd) (mem. op., not designated for publication) (addressing the issue of whether the evidence was sufficient "to support the jury's finding that the marriage licence application in question was a governmental record"). I support this approach by the courts of appeals because whether a document meets one of the statutory definitions of "governmental record" involves a factual determination.

found that these documents were "governmental records." Thus, the question becomes whether the evidence supports that finding. It does not.

The Court's "governmental record" analysis focused on the fact that the firearms-proficiency records were "received" by and "kept" by TCOLE. It, however, glosses over the "for information" part of the statutory definition. To meet the definition of "governmental record," the records must be received by or kept by the government "for information." TEX. PENAL CODE § 37.01(2)(A). Thus, as argued by Appellant, there must be a demonstrated governmental purpose for receiving or keeping such records. One does not receive or keep records "for information" unless the information is useful to the governmental agency that receives or keeps it. In this case, TCOLE had no use for the information in the reserve officers' firearms-proficiency records because TCOLE has no involvement with and no authority over reserve officers.

The Texas Occupations Code contains the provisions that apply to TCOLE-regulated peace officers. Under the Code, TCOLE is tasked with establishing the qualifications and training requirements for every "peace officer." But under the Code, "peace officer" is defined separately from a "reserve law enforcement officer." TEX. OCC. CODE § 1701.001(4), (6). A "reserve law enforcement officer" is a person designated as such under Section 341.012 of the Local Government Code. The Occupations Code "does not limit the powers or duties of a municipality or county" unless expressly stated under the Code. *Id.* § 1701.003. Section 1701.355 requires weapons-proficiency exams and exam records for each

peace officer an agency "employs." Reserve officers are appointed by the police chief and are not "employ[ed]" by the agency. TEX. LOC. GOV'T CODE § 341.012.

Texas Local Government Code Section 341.012 provides that municipalities make the decision of whether to have reserve officers and what qualifications and training are required—not TCOLE. The police chief makes the hiring and supervisory decisions regarding those reserve officers:

> The governing body of a municipality may provide for the establishment of a police reserve force. The governing body shall establish qualifications and standards of training for members of the reserve force. . . . The chief of police shall appoint the members of the reserve force. Members serve at the chief's discretion.

TEX. LOC. GOV'T CODE § 341.012 (internal numbering omitted). Reserve officers are only subject to TCOLE regulation and authority when they "assume the full-time duties of regular police officers." *Id.* § 341.012(h).

At trial, the evidence presented demonstrated various reasons why firearms-proficiency records were useful to TCOLE. Such evidence would be sufficient to show why firearms-proficiency records of "peace officers" would be kept by TCOLE "for information." But it is not sufficient to show why "reserve law enforcement officers" firearms-proficiency records would be useful to TCOLE since TCOLE has no authority to train, supervise, or regulate reserve officers. TEX. LOC. GOV'T CODE § 341.012. In fact, a reserve officer does not have to be licensed as a peace officer. *Id.* § 341.012(g). Further, whether a reserve officer is even allowed to carry a gun is the sole discretionary decision of the police chief. *Id.*

An argument could be made that the Indian Lake Police Department ("the Department"), a governmental agency, kept the records "for information." But there was no evidence of that. Appellant, as the police chief, created the records solely to appease TCOLE. Had TCOLE not demanded these records, they never would have been created. Appellant and Avalos were the only two paid employees of the Department. Both of them knew that these documents contained false information. By the time a new police chief was hired, it was public knowledge that these documents contained false information. Thus, the documents were useless to the Department and it did not keep these documents "for information." Moreover, the evidence at trial revealed that when Appellant left the Department, the documents at issue could no longer be found within the Department.[9] Accordingly, the evidence is insufficient to find that these reserve officers' firearms-proficiency documents were "governmental records" kept "for information."

II. Appellant was harmed by the trial court's refusal of his requested jury instructions.

Appellant requested that the Court provide the jury with the statutory definition of "reserve peace officer" and the statute specifying that only the police chief and municipality have authority over reserve peace officers. The trial court refused these instructions. The Court holds that Appellant suffered no harm by the trial court's refusal to include his

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[9] TCOLE representative, Derry Minor, testified that in March 2015, shortly after Appellant resigned, "There was [sic] some digital files that [the Department] were keeping when Chief Chambers was there that was [sic] on an external hard drive, and it was gone, and they did not know where it went." 11 R.R. 212.

requested jury instructions. The Court reasons that because it finds that the firearms-proficiency documents were governmental records as a matter of law, the instructions would have had no effect on the jury's determination that the firearms-proficiency records were governmental records. The Court also reasons that Appellant's argument that TCOLE had no purpose for the false information goes solely to the statutory defense and not to the element of "governmental record."

As discussed above, it is improper for this Court to find that the firearms-proficiency records were governmental records as a matter of law. The jury must decide this issue. Thus, the jury charge must provide the jury with the information it needs to reach that decision. *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012) ("The purpose of the trial judge's jury charge is to instruct the jurors on all of the law that is applicable to the case.").

At trial, the State focused almost exclusively on the "governmental record" definition in Section 37.01(2)(B), emphasizing that TCOLE "required" the documents. The jury was ultimately charged with both definitions under Section 37.01(2)(A) and (2)(B), but given the State's emphasis on the documents being "required," including in the State's closing argument, it is reasonable to assume that the jury relied on that definition. I believe that it is clear on appeal that these firearms-proficiency records were not "required" and without question do not meet the definition of "governmental record" under 37.01(2)(B). It appears that the jury did not understand that the firearms-proficiency records did not meet the

37.01(2)(B) definition. This lack of understanding would have come from the fact that the jury was not provided with the statutory provisions requested by Appellant that would have clarified this matter.

Even if the jury had relied on the definition of "governmental record" under 37.01(2)(A), the jury had to find that the government received or kept the records "for information." As discussed above, "for information" requires that there be a usefulness or purpose for the record. Had the jury been given the requested instructions, the jury would have known that: (1) a reserve officer does not need to be a licenced police officer and is not an employed police officer subject to TCOLE authority; and (2) only a police chief and the municipality have any authority over a reserve officer. As argued by the Appellant in both the trial court and on appeal, this goes directly to the issue of whether TCOLE had a usefulness or purpose for the reserve officers' firearms-proficiency records. The issues involved are based upon obscure and nuanced statutory interplay. To understand the relationship and authority structure, a jury needs the relevant statutory provisions. Without these instructions, a jury would not fully understand the difference between a "peace officer" and a "reserve officer" and would not understand that TCOLE has no authority over reserve officers. These issues are important factors for the jury to understand and weigh in determining whether TCOLE received or kept the records "for information." Even the TCOLE representative who testified did not understand the statutory limitations on TCOLE's authority. How is a jury supposed to understand the law applicable in this case without the

statutory wording? Because the requested instructions were essential to the jury's understanding of the applicable law and go to an element of the offense, Appellant was harmed by the exclusion of the requested instructions. If acquittal were not already mandated by the insufficient evidence, I would remand this case for a new trial.

Conclusion

Chambers's actions in this case certainly indicate laziness, taking shortcuts, and deceit. But to be convicted of tampering with a governmental record under Section 37.10(a)(1), Chambers had to "knowingly make[] a false entry in, or false alteration of, a governmental record." Two statutory definitions of "governmental record" were provided to the jury: (1) "anything belonging to, received by, or kept by government for information, including a court record," and (2) "anything required by law to be kept by others for information of government." *Id.* § 37.01(2)(A), (B). The records at issue were firearms-proficiency records of "reserve peace officers" who by statute are under the sole supervisory authority of the chief of police. TCOLE has no authority to train, supervise or regulate these reserve officers. Thus, TCOLE could neither "require[]" these records under 37.01(2)(B), nor would it keep such documents "for information" under 37.01(2)(A). Thus, I would find the evidence in this case legally insufficient to prove that the documents are "governmental record[s]" and reverse the court of appeals and render an acquittal for Appellant.

Filed: June 26, 2019
Publish

THE THIRTEENTH COURT OF APPEALS

13-16-00079-CR

John Chambers
v.
The State of Texas

On appeal from the
103rd District Court of Cameron County, Texas
Trial Cause No. 2015-DCR-268-D

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be AFFIRMED. The Court orders the judgment of the trial court AFFIRMED.

We further order this decision certified below for observance.

May 4, 2017

NUMBER 13-16-00079-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JOHN CHAMBERS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 103rd District Court of Cameron County, Texas.

O P I N I O N

Before Justices Rodriguez, Contreras, and Longoria
Opinion by Justice Contreras

Appellant John Chambers was convicted on fourteen counts of tampering with governmental records with intent to defraud or harm, each a state jail felony. *See* TEX. PENAL CODE ANN. § 37.10(c)(1) (West, Westlaw through 2015 R.S.). He was sentenced to two years in state jail and a $2,800 fine, with the jail sentence suspended and community supervision imposed for five years. On appeal, Chambers argues that the

evidence was insufficient to support the conviction, that the trial court lacked jurisdiction, and that the trial court erred in denying a requested jury instruction. We affirm.

I. BACKGROUND

Chambers served as the chief of police for the small community of Indian Lake in Cameron County.[1] He was the sole paid employee of Indian Lake's police department for most of the year, though during the winter months the department would sometimes employ one other full-time officer. The department also included some twenty to thirty reserve officers appointed by Chambers who were not paid by the department but rather worked other full-time jobs mostly outside of law enforcement. *See* TEX. LOC. GOV'T CODE ANN. § 341.012 (West, Westlaw through 2015 R.S.) (authorizing the establishment of a police reserve force by the governing body of a municipality).

In January 2015, the Texas Commission on Law Enforcement (TCOLE) conducted an audit of Indian Lake's police department. Derry Minor, a TCOLE field agent, administered the audit by examining the department's paperwork regarding, among other things, criminal background checks, firearms qualifications, and medical and psychological testing of the officers. Minor reviewed records for fifteen of the reserve officers and he determined that firearms qualifications records for eight of the reserve officers were missing. Believing that the department was required by law to keep such records, Minor notified Chambers of the deficiency via a preliminary audit report dated January 13, 2015. Chambers signed the report, which stated that he had until January 23, 2015 to correct the deficiency.[2]

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[1] As of the 2010 Census, Indian Lake had a population of 640. U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited May 1, 2017).

[2] The report stated: "If an agency fails to correct the deficiencies by the compliance date, TCOLE may take disciplinary action on the license of the chief administrator and/or assess an administrative penalty

According to trial testimony, Chambers then instructed Alfredo Avalos, the only other full-time officer with the department at the time, to fill out firearms qualifications forms for fourteen different Indian Lake reserve police officers. The forms indicated that each reserve officer had passed a "firearms qualification practical pistol course" on September 20, 2014 using a. 40-caliber Smith & Wesson pistol with a serial number registered as belonging to Chambers.[3] Each of the fourteen named reserve officers testified at trial that they did not, in fact, pass a firearms course on September 20, 2014 using a .40-caliber Smith & Wesson pistol.

Chambers was charged by indictment with fourteen counts of knowingly making false entries in governmental records with the intent to defraud or harm the State of Texas. *See* TEX. PENAL CODE ANN. § 37.10(c)(1). The jury, having been instructed on the law of parties, *see id*. § 7.02 (West, Westlaw through 2015 R.S.), found Chambers guilty on all fourteen counts. This appeal followed.

II. DISCUSSION

A. Governmental Record

By his first issue, Chambers argues that the evidence was insufficient to support the jury's verdicts because the falsified documents in this case were not "governmental records." *See id.* § 37.10(a)(1).

In reviewing sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found

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under Texas Occupations Code 1701.507 of up to one thousand dollars ($1000) per day, per violation."

[3] Avalos contacted a TCOLE investigator prior to filling out the forms. The investigator directed Avalos to follow Chambers' instructions and, according to Avalos, the investigator told him that he would be "given immunity" for doing so.

the essential elements of the crime beyond a reasonable doubt. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A sufficiency review sometimes "involves simply construing the reach of the applicable penal provision in order to decide whether the evidence, even when viewed in the light most favorable to conviction, actually establishes a violation of the law." *DeLay v. State*, 443 S.W.3d 909, 912 (Tex. Crim. App. 2014). "If the evidence establishes precisely what the State has alleged, but the acts that the State has alleged do not constitute a criminal offense under the totality of the circumstances, then that evidence, as a matter of law, cannot support a conviction." *Id*. (citing *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007)).

We measure sufficiency by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would instruct the jury in this case that Chambers is guilty of tampering with governmental records as alleged in the indictment if, as a principal or as a party, he "knowingly ma[de] a false entry in . . . a governmental record." TEX. PENAL CODE ANN. § 37.10(a)(1); *see id*. § 7.02. In accordance with the definition provided in the penal code, the jury was instructed that "governmental record" means "anything belonging to, received by, or kept by government for information" or "anything required by law to be kept by others for information of government." *See id*. § 37.01(2)(A), (B) (West, Westlaw through 2015 R.S.).

Chambers contends specifically that the firearms qualifications forms at issue here are not "governmental records" because they are not legally required to be kept. He notes

that, according to regulations promulgated by TCOLE, a police agency is required to keep firearms qualifications records only for each "peace officer" that it "employs," and he argues that this excludes reserve officers. *See* 37 TEX. ADMIN. CODE § 218.9(a) (West, Westlaw through 42 Tex. Reg. No. 1288) ("Each agency or entity that employs at least one peace officer shall: (1) require each peace officer that it employs to successfully complete the current firearms proficiency requirements at least once each calendar year for each type of firearm carried . . . [and] (3) keep on file and in a format readily accessible to the commission a copy of all records of this proficiency."); *see also* TEX. OCC. CODE ANN. § 1701.001(3), (4), (6) (West, Westlaw through 2015 R.S.) (defining "officer" as "a peace officer or reserve law enforcement officer" and defining the two types of officers differently). Chambers further argues that, under the Texas Local Government Code, the appointment and qualifications of reserve municipal police officers are not governed by TCOLE but instead are under the sole purview of the municipality's police chief. *See* TEX. LOC. GOV'T CODE ANN. § 341.012(g) (stating that a reserve municipal police officer who is not a "peace officer" as defined in code of criminal procedure article 2.12 may carry a weapon "only when authorized to do so by the chief of police and only when discharging official duties as a peace officer"); *see also* TEX. CODE CRIM. PROC. ANN. art. 2.12(3) (West, Westlaw through 2015 R.S.) (defining "peace officer" in part as "those reserve municipal police officers who hold a permanent peace officer license issued under Chapter 1701, Occupations Code").

We need not determine whether the documents at issue here were in fact required to be kept by law because that is not an essential element of the offense. As noted, a "governmental record" may be "anything belonging to, received by, or kept by government

for information." TEX. PENAL CODE ANN. § 37.01(2)(A). "Government" includes the police department of Indian Lake. *See id.* § 1.07(24) (West, Westlaw through 2015 R.S.) ("'Government' means: (A) the state; (B) a county, municipality, or political subdivision of the state; or (C) any branch or agency of the state, a county, municipality, or political subdivision."). Accordingly, the State did not need to prove that the firearms qualifications records were "required by law to be kept"; instead, it needed only to prove that the records "belong[ed] to, [were] received by, or [were] kept" by the police department of Indian Lake "for information." *See id*. § 37.01(2)(A). It is undisputed that Chambers directed the creation of the records in his capacity as chief of police of Indian Lake. Although Chambers argues that the records were not legally required to be kept, he does not dispute that the records, in fact, "belong[ed] to" and were "kept by" the department "for information." Therefore, the records are "governmental records." *See id.*; *see also Magee v. State*, No. 01-02-00578-CR, 2003 WL 22862644, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003, no pet.) (mem. op., not designated for publication) (rejecting appellant's argument that police offense report was not a "governmental record" because "the State did not prove it was required by law to be kept").

Chambers cites three cases where courts have found that a record was not a "governmental record" in the context of a tampering case under penal code section 37.10(a)(1), but we find that those cases are distinguishable. In *Pokladnik v. State*, the appellant, a private citizen, made false entries in affidavits based on a form promulgated by the State Department of Highways and Public Transportation (SDHPT). 876 S.W.2d 525, 527 (Tex. App.—Dallas 1994, no pet.). The Dallas Court of Appeals held that the affidavits were not "governmental records" because they were never submitted to any

governmental entity, including SDHPT. *Id*. at 527 (rejecting the argument that the affidavits "belonged" to SDHPT because the form upon which they were based was prescribed by statute). In *Constructors Unlimited, Inc. v. State*, the First District Court of Appeals held that "Contractor's Estimate" forms were not "governmental records" because they did not belong to the government, had not been received by the government, and were not kept by the government for information at the time they were executed. 717 S.W.2d 169, 172 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). The Beaumont Court of Appeals reached a similar conclusion in *Siegel v. State*, No. 09-13-00536-CR, 2015 WL 3897860, at *3 (Tex. App.—Beaumont June 24, 2015, pet. ref'd) (mem. op., not designated for publication) (finding, where appellant made a false entry regarding her length of residency in an application for a ballot place, that the application was not a governmental record at the time it was made). Here, the records at issue were governmental records at the time they were made because the police department of Indian Lake is part of the government for purposes of the statute, and Chambers directed the falsification of the records in his capacity as police chief. *See* TEX. PENAL CODE ANN. § 1.07(24)(C).

Chambers contends that this broad interpretation of the definition of "governmental record" would lead to an absurd result because "[i]t would include virtually any piece of paper with information kept at a police department." *See Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016) ("In construing a statute, we give effect to the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended."). We do not find this result to be absurd or contrary to legislative intent. The Legislature could have added a

requirement to the definition of "governmental record" in penal code section 37.01(2)(A)—similar to the one actually contained in section 37.01(2)(B)—that the record at issue be required to be kept by law. *See* TEX. PENAL CODE ANN. § 37.01(2)(A), (B). It is also noteworthy that section 37.10 provides for a defense to tampering with governmental record in cases where "the false entry or false information could have no effect on the government's purpose for requiring the governmental record." *Id.* § 37.10(f). Though this provision appears to presume that the government has some "purpose for requiring" the record that was falsified, there is no language anywhere in the statute explicitly stating that a record must be "required" by a government entity in order for the record to qualify as a "governmental record." In any event, the defense set forth in section 37.10(f) serves as a safety valve that would generally prevent conviction in cases where the record at issue, though "kept" by a government entity "for information," is insignificant or otherwise unrelated to the entity's governmental function.[4] The existence of the section 37.10(f) defense therefore undercuts Chambers' argument that a broad interpretation of "governmental records" would lead to an absurd result.

For the reasons set forth above, we conclude that the firearms qualifications records at issue in this case were "governmental records" for purposes of the tampering statute. Chambers' first issue is overruled.

B. Jury Charge Error

By his second issue, Chambers contends that the trial court erred in denying his request for a jury charge instruction regarding the "distinction between an employee and

[4] The jury charge contained an instruction as to the section 37.10(f) defense. Chambers does not argue on appeal that the evidence was insufficient to support the jury's implicit rejection of that defense.

a volunteer reservist" under section 341.012 of the local government code. He argues that this statute "establishes that the qualifications for reserve officers are set by the municipality and the chief, not TCOLE," and that "no rational trier of fact could have found [him] guilty beyond a reasonable doubt had they been instructed" on this statute.

The trial court is required to give the jury a written charge "distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury." TEX. CODE CRIM. PROC. ANN. art. 36.14 (West, Westlaw through 2015 R.S.). An accused generally has the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the evidence. *Sanchez v. State*, 400 S.W.3d 595, 598 (Tex. Crim. App. 2013) (noting that "[t]his rule is designed to ensure that the jury, not the judge, decides the credibility of the evidence"). But if the defensive theory is not explicitly listed in the penal code and merely negates an element of the State's case, rather than independently justifying or excusing the conduct, the trial judge should not instruct the jury on it. *Walters v. State*, 247 S.W.3d 204, 209 (Tex. Crim. App. 2007); *see Alonzo v. State*, 353 S.W.3d 778, 784 (Tex. Crim. App. 2011); *see also Giesberg v. State*, 984 S.W.2d 245, 246 (Tex. Crim. App. 1998) (noting that the defendant does not have the burden to prove "[a] defensive issue which goes no further than to merely negate an element of the offense," such as alibi, and concluding that a special instruction on alibi would constitute an unwarranted comment on the weight of the evidence).

Section 341.012 of the local government code provides, in its entirety, as follows:

> (a) The governing body of a municipality may provide for the establishment of a police reserve force.
>
> (b) The governing body shall establish qualifications and standards of training for members of the reserve force.
>
> (c) The governing body may limit the size of the reserve force.
>
> (d) The chief of police shall appoint the members of the reserve force. Members serve at the chief's discretion.
>
> (e) The chief of police may call the reserve force into service at any time the chief considers it necessary to have additional officers to preserve the peace and enforce the law.
>
> (f) A member of a reserve force who is not a peace officer as described by Article 2.12, Code of Criminal Procedure, may act as a peace officer only during the actual discharge of official duties.
>
> (g) An appointment to the reserve force must be approved by the governing body before the person appointed may carry a weapon or otherwise act as a peace officer. On approval of the appointment of a member who is not a peace officer as described by Article 2.12, Code of Criminal Procedure, the person appointed may carry a weapon only when authorized to do so by the chief of police and only when discharging official duties as a peace officer.

TEX. LOC. GOV'T CODE ANN. § 341.012. Chambers notes that the State had the burden to prove that the records at issue were "governmental records," and he argues that "[t]he jury was unable to rationally decide this question because it was denied an instruction on the law applicable to whether this firearms qualification data was required by law to be kept."

The trial court did not err in declining to instruct the jury on this statute. The State had the burden to establish all elements of the offense, including that the falsified documents at issue fell within the penal code's broad definition of "governmental records." *See* TEX. PENAL CODE ANN. §§ 37.01(2), 37.10(a)(1). Chambers was not entitled to a jury

charge instruction on local government code section 341.012 because, to the extent he asserted a defensive theory relating to that statute, it consisted only of negating this element of the State's case. *See Walters*, 247 S.W.3d at 209. Moreover, we have already concluded that the State met its burden to establish this element, notwithstanding section 341.012. Chambers' second issue is overruled.

C. Intent to Harm or Defraud

Tampering with governmental records is a state-jail felony if "the actor's intent is to defraud or harm another." TEX. PENAL CODE ANN. § 37.10(c)(1). Here, the indictment alleged that Chambers acted with the intent to defraud or harm the State. Chambers argues by two issues that "to defraud or harm the State" means "to deprive the State of a pecuniary or property interest." He contends by his third issue that there was insufficient evidence to support a finding that he intended to deprive the State of a pecuniary or property interest, and he contends by his fourth issue that the district court lacked jurisdiction because no such interest was alleged in the indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (West, Westlaw through 2015 R.S.) (setting forth criminal jurisdiction of district courts).

The jury charge in this case, consistent with the penal code, defined "harm" as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested." *See* TEX. PENAL CODE ANN. § 1.07(25). "Defraud" is not defined in the penal code.[5] An undefined statutory term is "to be understood as ordinary usage allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance." *Clinton v.*

[5] The jury was instructed that "defraud" "should be given the plain meaning it bears in ordinary use."

State, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011) (citing *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992)).

Chambers argues that the word "defraud" "inherently refers to wrongful acts bent upon the immoral or unlawful acquisition of property." *See* MERRIAM-WEBSTER'S ONLINE DICTIONARY, at http://www.merriam-webster.com/dictionary/defraud (last visited May 1, 2017) (defining "defraud" as "to deprive of something by deception or fraud"); *see also McNally v. United States*, 483 U.S. 350, 351 (1987) ("The words 'to defraud' commonly refer to wronging one in his property rights by dishonest methods . . . ."). He contends that the State's interest in the firearms qualifications records at issue "is neither proprietary nor pecuniary, and the State cannot be defrauded solely of its regulatory power." *See Cleveland v. United States*, 531 U.S. 12, 20 (2000) (holding that, for purposes of the federal mail fraud statute, a state or municipal license "is not 'property' in the government regulator's hands" and therefore the government does not "part[] with 'property'" when it issues a license).

But in the context of the tampering with governmental records statute, courts have construed "intent to defraud" as the intent "to cause another to rely upon the falsity of a representation, such that the other person is induced to act or is induced to refrain from acting." *See Wingo v. State*, 143 S.W.3d 178, 187 (Tex. App.—San Antonio 2004), *aff'd*, 189 S.W.3d 270 (Tex. Crim. App. 2006) (citing 41 TEX. JUR. 3d *Fraud and Deceit* § 9 (1998)); *Martinez v. State*, 6 S.W.3d 674, 678 (Tex. App.—Corpus Christi 1999, no pet.) (finding sufficient evidence to support conviction for tampering with governmental records); *see also State v. Gollihar*, No. 04-07-00623-CR, 2008 WL 2602095, at *2 (Tex. App.—San Antonio July 2, 2008) (mem. op., not designated for publication), *aff'd on other*

grounds, No. PD-1086-08, 2010 WL 3700790 (Tex. Crim. App. Sept. 22, 2010); *Christmann v. State*, No. 08-04-00103-CR, 2005 WL 3214832, at *5 (Tex. App.—El Paso 2005, no pet.) (not designated for publication).[6] Under this definition, which is "acceptable in common parlance," *see Clinton*, 354 S.W.3d at 800, the State does not need to allege or prove that Chambers deprived the State of a proprietary or pecuniary interest in order to sustain a felony tampering charge. And the evidence supported a finding that Chambers directed the falsification of the records in order to cause TCOLE to refrain from taking action against him and his department. *See Wingo*, 143 S.W.3d at 187; *Martinez*, 6 S.W.3d at 678.

Chambers notes that "[t]he act of intentionally making a false entry in a governmental record is inherently deceptive" and he argues that, under this interpretation of "intent to defraud," "it is difficult to conceive of any prosecution" under the tampering statute that would not rise to the level of a state jail felony. He contends that construing "intent to defraud" in this fashion, though consistent with the statute's plain language, would lead to an absurd result that the Legislature "could not possibly have intended when it created a base level offense and a separate enhancement for fraud or harm." *See Ex parte Perry*, 483 S.W.3d at 902; *Whitelaw v. State*, 29 S.W.3d 129, 131 (Tex. Crim. App. 2000) (noting that, in conducting an inquiry into a statute's plain meaning, "we generally presume that every word in a statute has been used for a purpose" and "each word,

[6] As the State notes, conspiracy to defraud has also been interpreted under federal law to include deception unrelated to pecuniary or property loss. *See Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) ("To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated . . . ."); *United States v. Goldberg*, 105 F.3d 770, 773 (1st Cir. 1997) ("[C]onspiracies to defraud are not limited to those aiming to deprive the government of money or property, but include conspiracy to interfere with government functions.").

phrase, clause, and sentence should be given effect if reasonably possible") We acknowledge that the interpretation of "intent to defraud" to include deception unrelated to pecuniary or property loss is broad; however, we do not agree that the Legislature could not have intended this result. It is possible for a person to commit tampering with governmental records without triggering the "intent to harm or defraud" enhancement; for example, as Chambers concedes, the offense would be a misdemeanor if the governmental record at issue "is never intended to be seen by another person." In any event, Chambers has not provided us with a reason to deviate from the established precedent, in the tampering with governmental records context, construing intent to defraud as intent "to cause another to rely upon the falsity of a representation, such that the other person is induced to act or is induced to refrain from acting." *See Wingo*, 143 S.W.3d at 187; *Martinez*, 6 S.W.3d at 678.

For the foregoing reasons, we conclude that a felony tampering charge does not require pleading or proof of a pecuniary or property loss by the government. Accordingly, the evidence was sufficient to support the intent finding and the district court properly exercised jurisdiction.[7] We overrule Chambers' third and fourth issues.[8]

[7] We note that, even if the indictment alleged facts only amounting to a misdemeanor, the district court would still have jurisdiction because the alleged offense involved official misconduct. *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (West, Westlaw through 2015 R.S.) (providing that district courts "shall have original jurisdiction in criminal cases of the grade of felony" and "of all misdemeanors involving official misconduct"); *see also id.* art. 3.04(1) (West, Westlaw through 2015 R.S.) (defining "official misconduct" as "an offense that is an intentional or knowing violation of a law committed by a public servant while acting in an official capacity as a public servant"); TEX. PENAL CODE ANN. § 1.07(41)(A) (West, Westlaw through 2015 R.S.) (defining "public servant" as, among other things, "an officer, employee, or agent of government").

[8] In his brief, Chambers lists a fifth appellate issue challenging the exclusion of certain evidence at trial. However, the issue is not supported by any argument. Accordingly, it is waived. *See* TEX. R. APP. P. 38.1(i).

III. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Justice

Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
4th day of May, 2017.