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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0380**

State of Minnesota,
Respondent,

vs.

Brittany Tiara Johnson,
Appellant.

**Filed January 29, 2018
Reversed and remanded
Bratvold, Judge**

Swift County District Court
File No. 76-CR-15-594

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

Danielle H. Olson, Swift County Attorney, Allison T. Whalen, Assistant County Attorney,
Benson, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges convictions of fifth-degree possession of marijuana, child
endangerment, and possession of drug paraphernalia. She argues that the district court

committed plain error when it instructed the jury on child endangerment, that the district court failed to exercise its discretion when it refused to stay adjudication of her conviction for marijuana possession, and that the district court impermissibly imposed multiple sentences for conduct arising out of a single behavioral incident. Because we determine the district court's jury instructions were plain error that prejudiced appellant's substantial rights, we reverse Johnson's child-endangerment conviction and remand for a new trial. Because the district court failed to exercise its discretion when it refused to stay adjudication of appellant's marijuana-possession conviction, we reverse and remand for resentencing. Finally, because our disposition of the first and second issues eliminates the basis for appellant's third issue, we decline to decide it.

FACTS

On December 21, 2015, a narcotics task force entered appellant Brittany Tiara Johnson and her partner Denniss Hamilton's apartment, where they lived with their two-year-old daughter. The apartment building is directly adjacent to a high school football field.

The task force was executing a search warrant, based on an informant's statements that she had bought drugs there from a male. In the apartment's kitchen, officers found marijuana smoking pipes, a marijuana grinder, and some "baggies." The officers found a scale in the drawer of a living room table. The apartment had three upstairs bedrooms. The first room appeared to be a child's bedroom. The second bedroom had women's clothing in the closet, as well as a child's cup, and a bare mattress. In the third bedroom, the officers found a bed with sheets, men's clothing, a few articles of women's and children's clothing,

and “feminine hygiene cream.” Also in the third bedroom was a bank card and a rental agreement, both in Johnson’s name.

In the third bedroom, officers found in “plain view,” scattered bags of marijuana, marijuana seeds, and other paraphernalia, including marijuana packaging materials. In a suitcase on the floor of the third bedroom, officers also found 68.38 grams of marijuana, along with other marijuana paraphernalia, including digital scales and baggies used for packaging marijuana.

Outside the apartment, officers also searched a car, which was registered in Johnson’s name, and found more marijuana paraphernalia and a “corner-cut baggie which [was] consistent with the packaging of controlled substances.” Lastly, the officers found a nametag with “Brittany” handwritten on it.

The state charged Johnson with fourth-degree sale of marijuana in a school zone (Minn. Stat. § 152.024, subd. 1(4) (2014)), fifth-degree possession of marijuana (Minn. Stat. § 152.025, subd. 2(a)(1) (2014)), child endangerment (Minn. Stat. § 609.378, subd. 1(b)(2) (2014)), and possession of drug paraphernalia (Minn. Stat. § 152.092 (2014)).

During a two-day jury trial, Hamilton testified for the defense, stating that he sold drugs out of the apartment, but that Johnson had no knowledge that marijuana was in the house or that Hamilton had sold drugs out of the apartment.¹ He testified that he made only

¹ The state charged Hamilton with fourth-degree sale of marijuana in a school zone (Minn. Stat. § 152.024, subd. 1(4)), fifth-degree sale of marijuana (Minn. Stat. § 152.025, subd. 1(a)(1)), and child endangerment (Minn. Stat. § 609.378, subd. 1(b)(2)). Hamilton pleaded guilty to the fourth-degree sale charge. The district court in that case entered a stay of adjudication for the fourth-degree sale charge and dismissed the other two charges.

two sales from the apartment—one sale to a friend and a second sale to a police informant when their daughter was present. When pressed about whether Johnson knew about the drug sales based on the items found during the search, Hamilton testified that the marijuana in the suitcase had been in the house for one day before the raid. He also testified that he had kept the suitcase away from Johnson because she had been sleeping in the second bedroom for a month due to relationship strife. He explained that marijuana was strewn about the third bedroom on the day of the raid because he “was messing” with it. Lastly, Hamilton said that the women’s clothing in the third bedroom was there because the family did laundry “together” and he had put it in his laundry hamper.

The jury acquitted Johnson of the school-zone sale of marijuana charge, but found her guilty of the other three charges. For fifth-degree possession of marijuana, the district court stayed imposition of sentence for two years.² For child endangerment, the district court sentenced Johnson to 365 days in jail, but stayed execution of all but two days, with two days of credit for time served. For possession of drug paraphernalia, which is a petty misdemeanor, the district court imposed a \$50 fine. This appeal follows.

D E C I S I O N

I. The district court committed prejudicial plain error when it instructed the jury on child endangerment.

Johnson argues the district court’s jury instructions on child endangerment misled the jury. Johnson did not object to the district court’s jury instructions at trial, and so this

² The stay of imposition was entered pursuant to Minn. Stat. § 609.135 (2014), under which Johnson’s conviction will be a misdemeanor, not a felony, provided she successfully completes probation.

court reviews the instructions for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under this test, the court must determine if there was “(1) error; (2) that is plain; and (3) the error must affect [the defendant’s] substantial rights.” *Id.* If the defendant is able to satisfy these first three prongs, this court may “correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Washington-Davis*, 881 N.W.2d 531, 541 (Minn. 2016) (quotation omitted).

A. *The child-endangerment instruction was plain error.*

A district court has significant latitude to select jury instructions. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). We review the exercise of this discretion for abuse of discretion. *Id.* Jury instructions, however, must “fairly and adequately explain the law of the case and not materially misstate the law.” *Id.* “An instruction is in error if it materially misstates the law.” *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002).

The state charged Johnson under Minn. Stat. § 609.378, subd. 1(b)(2), which defines the offense, as follows:

A parent, legal guardian, or caretaker who endangers the child’s person or health by . . . (2) knowingly *causing or permitting the child to be present* where *any person is selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing a controlled substance*, as defined in section 152.01, subdivision 4, *in violation of section 152.021 [2014], 152.022 [2014], 152.023 [2014], 152.024, or 152.0262 [2014]*; is guilty of child endangerment and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

Minn. Stat. § 609.378, subd. 1(b)(2) (emphasis added). For ease of reference, we will refer to this provision as “subdivision 1(b)(2).” A “controlled substance” includes marijuana.

See Minn. Stat. § 152.01 (2014) (defining “controlled substance” and referring to Minn. Stat. § 152.02 (2014)); Minn. Stat. § 152.02 (defining marijuana as a “schedule I” controlled substance). The possession crimes listed in subdivision 1(b)(2) are Minn. Stat. §§ 152.021, 152.022, 152.023, 152.024, or 152.0262. Minn. Stat. § 609.378, subd. 1(b)(2). Importantly, this list does not include fifth-degree possession of marijuana, which is the drug possession statute Johnson was charged with violating. See Minn. Stat. § 152.025.

When the district court instructed the jury on subdivision 1(b)(2), it closely followed the pattern instruction, but did not specify which possession crimes the state must prove were violated in the presence of a child.³ The district court instructed the jury that it could find Johnson guilty if she “knowingly caused or permitted a child to be present where a person was illegally selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or *possessing marijuana*.” (Emphasis added.)

Johnson contends that the district court plainly erred because the jury instructions allowed the jury to infer that possessing marijuana in any amount or form in the presence of a child would violate subdivision 1(b)(2). The state concedes that the district court plainly erred, and we agree. Knowingly causing or permitting a child to be present while

³ The pattern instruction for violations of subdivision 1(b)(2) describe the first element as follows: “First, the defendant knowingly caused or permitted (____), a child, to be present where a person was illegally selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing (____) (a controlled substance).” 10 *Minnesota Practice*, CRIMJIG 13.94 (2015). The footnote to the pattern instruction for subdivision 1(b)(2) accurately states which possession offenses must be violated in the presence of a child to violate subdivision 1(b)(2). See *id.* The pattern instruction itself, however, does not. *Id.*

possessing *any amount of marijuana* is *not* a violation of subdivision 1(b)(2). See Minn. Stat. § 609.378, subd. 1(b)(2). By instructing the jury that it could find Johnson guilty of child endangerment if she “knowingly caused or permitted” a child to be present while a person was illegally possessing any amount of marijuana, the district court plainly erred.

B. The district court’s error affected Johnson’s substantial rights.

“An error affects a defendant’s substantial rights if the error was prejudicial and affected the outcome of the case.” *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013). A jury instruction error is prejudicial if the defendant carries her “heavy burden” and shows “there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict.” *State v. Kelley*, 855 N.W.2d 269, 283 (Minn. 2014) (quoting *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006)).

Johnson contends that the district court’s plain error affected her substantial rights because she was acquitted of the only charge that satisfied subdivision 1(b)(2). While Johnson was charged with selling marijuana in a school zone,⁴ and subdivision 1(b)(2) includes sale of marijuana in a school zone as one of its enumerated offenses, the jury acquitted Johnson of that charge. Because the jury nonetheless convicted Johnson of violating subdivision 1(b)(2), she argues that the jury must have followed the erroneous jury instruction and determined that possessing marijuana in the fifth degree in the presence of a child was sufficient to violate subdivision 1(b)(2).

⁴ Johnson does not contest that her apartment was in a school zone. See Minn. Stat. § 152.024, subd. 1(4)); Minn. Stat. § 152.01, subd. 14a (2016) (defining “school zone”).

The state responds that it does not matter that Johnson was acquitted of selling marijuana in a school zone. Convicting a defendant under the child endangerment statute does not require that the state prove *the defendant* committed the enumerated offenses in a child's presence; rather, subdivision 1(b)(2) requires the jury to find that the defendant "knowingly . . . permitt[ed] the child to be present" where "*any person*" is violating one of the enumerated offenses. Minn. Stat. § 609.378, subd. 1(b)(2) (emphasis added). Here, Hamilton testified that he sold marijuana in the presence of their daughter at their apartment, which is in a school zone. Accordingly, the state argues the erroneous instruction was not prejudicial because the jury may have found that Johnson knowingly permitted their child to be present while Hamilton sold marijuana at their apartment. Johnson responds that the jury's acquittal on the school-zone-sale charge must have meant the jury accepted Hamilton's testimony that Johnson had no knowledge of his marijuana sales.

We conclude that the jury may have convicted Johnson of child endangerment on the grounds of fifth-degree marijuana possession. We must therefore determine if it is reasonably likely that the jury would not have convicted Johnson of child endangerment if it had received proper instruction. *Kelley*, 855 N.W.2d at 283. In *Watkins*, the supreme court identified three factors to resolve this issue: "whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the State submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element." 840 N.W.2d at 29. The state offers "overwhelming" evidence to prove a particular element if the "quantum of evidence" is

“considerable” or “ample” depending on the “analysis of any other relevant factors in a substantial-rights analysis.” *Huber*, 877 N.W.2d at 527. The *Watkins* factors are not the exclusive test, however, and appellate courts may consider other factors when determining if the instruction had a significant effect on the jury’s verdict. *Washington-Davis*, 881 N.W.2d at 543 n.13.

The first *Watkins* factor weighs in Johnson’s favor. In *State v. Peltier*, the defendant did not contest the erroneously omitted element from the jury instructions, and the court concluded that this factor weighed against her. 874 N.W.2d 792, 800 (Minn. 2016). In contrast, Johnson’s primary defense was that she did not know that Hamilton kept controlled substances in the apartment, or that he was selling them from the apartment. *See also Huber*, 877 N.W.2d at 526 (determining that appellant contested element of the law that was erroneously omitted from jury instructions weighed in favor of determining that the omission was prejudicial error).

The second *Watkins* factor also weighs in Johnson’s favor because the state did not submit overwhelming evidence that Johnson knew Hamilton was selling controlled substances from their apartment and in the presence of their child. In *Huber*, the supreme court determined that the evidence against Huber was not sufficiently overwhelming to ameliorate a jury instruction that did not clearly state that the jury must find the defendant *intentionally* assisted the principal in a crime to be guilty of aiding and abetting in the crime. 877 N.W.2d at 526-27. The court concluded there was no “direct evidence that” Huber knew the principal was going to commit the crime and Huber did not admit that he had agreed to assist with the crime. *Id.*

In Johnson's case, the state's evidence that she endangered her child was not overwhelming. The state did not submit evidence that Johnson was present at any of Hamilton's sales. Further, while the state argued that the contents of the apartment justified the inference that Johnson knew controlled substances were in the apartment, it did not present direct evidence that Johnson knew Hamilton was selling marijuana from the apartment or, crucially, in the presence of their child.⁵

In regards to the third *Watkins* factor, the jury's verdict did not encompass a finding on the missing element. No other jury instruction compensated for the district court's misstatement of the law and so no other jury finding compensated for the plainly erroneous instructions. Accordingly, this factor supports Johnson's position. *Watkins*, 840 N.W.2d at 29.

In addition to concluding that the *Watkins* factors favor a new trial, we conclude there is a reasonable likelihood that the plainly erroneous jury instructions led the jury to find Johnson guilty of endangering her child based on her possession of marijuana in the child's presence because this was one of the offenses the jury found Johnson committed. Johnson has carried her burden and shown that the district court's error "had a significant effect on the jury's verdict" and that the error affected her substantial rights.

⁵ We acknowledge that, based on the evidence that the state presented, the jury could have found Johnson guilty of violating subdivision 1(b)(2) based on her knowledge of Hamilton's sales and the ongoing presence of their daughter. The applicable standard here, however, is whether that evidence was *overwhelming*. We conclude it was not. *See Huber*, 877 N.W.2d at 526 (acknowledging there was conflicting evidence regarding whether defendant intentionally aided principal).

C. *Remanding the case is necessary “to protect the fairness, integrity, and public reputation of judicial proceedings.”*

In *Huber*, the supreme court ruled that a faulty jury instruction necessitated a new trial because the instruction “prevented the jury from fully considering Huber’s defense” and allowed the jury to convict Huber for actions that were insufficient to prove guilt for the charged offense. 877 N.W.2d at 528. Here, the faulty instruction similarly allowed the jury to convict Johnson of child endangerment based on actions that were not sufficient to prove guilt for the charged offense. Also, the erroneous instruction prevented the jury from fully considering Johnson’s defense that she did not know that Hamilton was selling controlled substances in their child’s presence.

II. The district court erred by determining it lacked authority to stay the adjudication of Johnson’s conviction of fifth-degree possession of marijuana.

This court reviews de novo a district court’s decision that it did not have the authority to stay adjudication of a conviction. *See State v. Pflepsen*, 590 N.W.2d 759, 763 (Minn. 1999) (“Questions concerning the authority and jurisdiction of the lower courts are legal issues subject to de novo review.”). A stay of adjudication “is a procedure whereby the district court, upon a defendant’s guilty plea or a fact-finder’s determination of guilt, does not adjudicate the defendant guilty but imposes conditions of probation.” *State v. Martin*, 849 N.W.2d 99, 102 (Minn. App. 2014) (quotation omitted), *review denied* (Minn. Sept. 24, 2014). Generally, district courts may stay adjudication only with the prosecutor’s consent. *Id.* (citing Minn. Stat. § 609.095(b) (2012)). The legislature, however, has carved

out narrow exceptions to this rule.⁶ District courts may stay adjudication of a conviction without the prosecutor’s consent if the offender pleaded or was found guilty of violating one of several enumerated statutes. Minn. Stat. § 152.18, subd. 1 (2014). The jury found Johnson guilty of violating one of these enumerated statutes—fifth-degree possession of marijuana under Minn. Stat. § 152.025, subd. 2(a)(1). *Id.*

At sentencing, Johnson asked the district court to say adjudication of her marijuana possession conviction. The district court rejected the motion stating:

And so—but ignoring the jury verdict and granting a stay of adjudication over the objection of the state is—is something I don’t know, even if I was willing to do, I could do today, Ms. Johnson. I don’t know if that remedy is available to the court. What I’m saying is I don’t have the authority to do that without the state’s permission.

Johnson contends that that the district court erred because it denied her motion based on the mistaken impression that it lacked authority to grant it. We note that while the state withheld its permission to stay adjudication, the state’s permission was not required under section 152.18. The state agrees and does not oppose Johnson’s request for a remand. Lastly, we note that section 152.18 contains exclusions and other qualifications that the district court must consider when it decides whether to stay adjudication of Johnson’s conviction. *See* Minn. Stat. § 152.18, subd. 1.

⁶ In the Drug Sentencing Reform Act (DSRA), the legislature enacted many new policies, including changing Minn. Stat. § 152.18 to *require*, rather than merely *allow*, the district court to stay adjudication of some offenders. While the parties’ briefs to this court mention the DSRA, both parties agree that it does not apply to Johnson’s case. Thus, we apply the pre-DSRA version of Minn. Stat. § 152.18 to Johnson’s case.

Because the district court declined to exercise its discretion to stay, or not stay, adjudication of Johnson’s guilt for fifth-degree possession of marijuana, we vacate Johnson’s sentence on this count and remand so that the district court may exercise its discretion consistent with the record and this opinion. *See State v. DeLaCruz*, 884 N.W.2d 878, 888 (Minn. App. 2016) (determining a district court failed to exercise its discretion and remanding the case for further proceedings).

III. We do not address if the district court impermissibly imposed multiple sentences for conduct arising out of a single behavioral incident.

Finally, Johnson argues that her sentences for child endangerment and possession of paraphernalia must be vacated because they arose from the same behavioral incident as the drug possession conviction and Minn. Stat. § 609.035, subd. 1(2014), provides that she “may be punished for only one of the offenses.” Because we have reversed her child endangerment conviction and vacated her sentence for drug possession, we decline to address this issue.⁷

D E C I S I O N

Because we determine the district court plainly erred in its jury instructions on child endangerment and substantially affected Johnson’s rights, we reverse Johnson’s conviction of that charge and remand for a new trial. Additionally, we reverse and vacate Johnson’s

⁷ We note, however, that Minn. Stat. § 609.035, subd. 1, does not apply to petty misdemeanors, such as Johnson’s paraphernalia-possession conviction, because petty misdemeanors are not “offenses.” *State v. Krech*, 312 Minn. 461, 464 n.2, 252 N.W.2d 269, 272 n.2 (1977); *see also* Minn. Stat. § 152.092 (defining possessing drug paraphernalia as a petty misdemeanor).

sentence for fifth-degree possession of marijuana and remand for resentencing so the district court may exercise its discretion consistent with the record and this opinion.

Reversed and remanded.