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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1248**

State of Minnesota,
Respondent,

vs.

Larry Gene Lester,
Appellant.

**Filed July 16, 2018
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Waseca County District Court
File No. 81-CR-17-68

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

Brenda Miller, Waseca County Attorney, Rachel V. Cornelius, Assistant County Attorney,
Waseca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant
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Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and
Kirk, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Larry Lester was convicted of and sentenced for both first-degree sale of
a controlled substance (sales aggregated over 90 days) and second-degree sale of a

controlled substance (sale in a school zone). Lester challenges his convictions, arguing that the district court erred in admitting evidence of a previous drug-possession offense. Lester also argues that the district court erred in convicting him of and sentencing him for both the first- and second-degree sales crimes. Because any error by the district court in admitting the previous-offense evidence was not prejudicial, we affirm his first-degree sale conviction. But because the district court erred in entering a conviction for the second-degree sale offense, we reverse that conviction and remand to the district court with instructions to vacate it.

FACTS

On December 14 and 16, 2016, and January 9 and 17, 2017, the South Central Drug Investigation Unit (SCDIU) conducted four separate controlled buys in which Lester sold methamphetamine totaling over 17 grams to two different confidential informants (CIs). Agent Joseph Linde was the representative from SCDIU principally working with the CIs on the controlled buys, and he led three of the four controlled buys.

Lester was charged with one count of first-degree sale of a controlled substance (17 grams or more, sales aggregated over 90 days) under Minn. Stat. § 152.021, subd. 1(1) (2016), and one count of second-degree sale of methamphetamine (sale in school zone) under Minn. Stat. § 152.022, subd. 1(7)(ii) (2016). Before trial, the state filed notice of its intent to offer evidence of multiple previous controlled-substance offenses by Lester under Minn. R. Evid. 404(b). Lester objected. After a hearing, the district court allowed the state to introduce evidence of only one offense—Lester’s 2015 offense of fifth-degree controlled-substance possession in Steele County.

A jury trial was held over two days. Agent Linde testified to the details of the controlled buys that SCDIU conducted on December 14 through January 17. He also briefly testified about Lester's previous fifth-degree controlled-substance offense. One CI testified that, on December 14 and 20, 2016, she bought methamphetamine from Lester during two controlled buys. The second CI testified that she bought methamphetamine from Lester on January 9 and 17, 2017, during two controlled buys. Video recordings of the controlled buys were also played.

The jury found Lester guilty on both counts. Lester was adjudicated guilty by the district court and sentenced to 105 months in prison for each of the two counts, the sentences to be served concurrently.

Lester appeals.

D E C I S I O N

I. The admission of Lester's previous possession-of-controlled-substance offense was not prejudicial.

We review the district court's decision to admit "evidence of other crimes, wrongs, or acts for an abuse of discretion." *See State v. Welle*, 870 N.W.2d 360, 365 (Minn. 2015). Even if we determine that there was an abuse of discretion, we will affirm the district court unless the appellant can also demonstrate that he was prejudiced by the erroneous admission. *See id.* at 366.

Evidence of other crimes or misconduct, also referred to as *Spreigl* evidence, is not admissible to show bad character or a propensity to behave criminally. *State v. Spreigl*, 272 Minn. 488, 493, 139 N.W.2d 167, 170 (1965). It may be allowed, however, if offered

for a limited non-propensity purpose such as showing “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Minn. R. Evid. 404(b).

In admitting evidence of Lester’s previous offense of controlled-substance possession, the district court reasoned:

The *Spreigl* act was possession, the State claims in order to sell methamphetamine he had to possess it. Further, prior convictions of the same controlled substance shows knowledge of the controlled substance and absen[ce of] a mistake to possess it. The *Spreigl* conduct in Steele County is sufficiently material to the State to aid their case in showing Defendant’s knowledge and lack of mistake of possessing the controlled substance.

Lester contends that neither his knowledge nor a lack of mistake was at issue because he never contested that he knew what methamphetamine was nor did he suggest he intended to sell a different substance and mistakenly sold methamphetamine. The state responds by emphasizing that controlled-substance crimes require proof of “actual knowledge” that the defendant possessed a controlled substance. *See State v. Ali*, 775 N.W.2d 914, 919 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010). Thus, according to the state, “[w]hen knowledge is an element of the charged offense, *Spreigl* evidence is admissible to prove that element.”

The Minnesota Supreme Court’s decision in *State v. Rossberg* calls the state’s argument into question. 851 N.W.2d 609 (Minn. 2014). In *Rossberg*, the defendant moved to preclude the state from offering evidence of his past bad conduct because it was

irrelevant. *Id.* at 614. In concluding that the district court erred by admitting testimony of the defendant's prior bad acts, the supreme court explained:

[W]e review “whether the . . . rationale *cited by the district court* provides a proper basis upon which to admit the . . . evidence,” *State v. Fardan*, 773 N.W.2d 303, 317 (Minn. 2009) (emphasis added) In short, because the “precise disputed fact[s]” identified by the court were either not precise or not disputed, they did not support admission of *Spreigl* evidence

Id. at 615-16.

Here, the district court allowed the state to introduce evidence of Lester's previous fifth-degree controlled-substance offense by reasoning that the offense would help show Lester's “knowledge and lack of mistake of possessing the controlled substance.” Yet, similar to *Rossberg*, the district court did not identify the “precise disputed fact” to which Lester's prior drug offense was relevant. While the court stated the language of rule 404(b), it did not identify as disputed facts Lester's knowledge of methamphetamine or his intent to sell methamphetamine rather than another substance.

Moreover, at trial, the state did not use the evidence for the district court's authorized purposes of showing Lester's knowledge and absence of mistake. During Agent Linde's testimony, the district court read to the jury a stipulation by the parties describing Lester's prior offense and gave a cautionary instruction:

The parties stipulated that they will be introducing evidence of defendant's prior conviction, which defendant was charged on November 8, 2014, and convicted on May 18, 2015, of fifth-degree controlled-substance possession, in Steele County, Minnesota. This evidence is being offered for the limited purpose of assisting you in determining whether the defendant committed those acts which the defendant is charged in the

complaint. The defendant is not being tried for and may not be convicted of any offense other than the charged offenses. You are not to convict the defendant on the basis of the occurrences on November 8, 2014, in Steele County, Minnesota. To do so might result in unjust double punishment.

Following this explanation, Agent Linde was briefly questioned by the prosecutor about Lester becoming a “target” for the controlled buys. Agent Linde responded that, during the investigation process, he “did learn that Mr. Lester did have a criminal background,” which was “the conviction that the judge just relayed to the jury.” The prosecutor then asked Agent Linde to confirm that this “conviction” was from 2015, which he did. This was the extent of the evidence regarding Lester’s prior bad act. Notably, in her brief questioning, the prosecutor never identified for the jury that this conviction was for methamphetamine possession—the key piece of information that would have made the offense relevant for the permissible purposes previously identified by the district court. Rather, at trial, the offense was identified only as “fifth-degree controlled-substance possession.”

Nevertheless, we conclude that any error in admitting the evidence was harmless. Erroneous admission of other-acts evidence constitutes reversible error only if there is a “reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006). Relevant factors to consider in making this determination include the prosecutor’s reliance on the evidence in closing argument, the presence of a limiting instruction to the jury, and the strength of the prosecution’s other evidence of guilt. *State v. Bolte*, 530 N.W.2d 191, 198-99 (Minn. 1995).

At the outset, we observe that the testimony regarding the prior offense was brief and limited to Agent Linde's direct examination. Moreover, the prosecutor made no mention of the evidence in closing argument. And the district court gave two cautionary instructions on the use of the *Spreigl* evidence, forbidding the jury from convicting Lester based on this prior incident. We presume jurors follow the district court's instructions and recognize that cautionary instructions minimize the prejudicial effect of *Spreigl* evidence. *See State v. Clark*, 755 N.W.2d 241, 261 (Minn. 2008).

Moreover, the other evidence against Lester was strong. The state's case included two different CIs identifying Lester as the person who sold them methamphetamine on a total of four different occasions; two drug-task-force agents testifying about the four controlled buys; and videos of each incident, which were played for the jury. In at least two of these videos, Lester's face is visible as he entered the passenger side of the CI's vehicle and as he exited the vehicle after spending just a short period of time in the vehicle with the CI. The CIs and task-force officers all testified that the CIs and their vehicles were thoroughly searched immediately before the controlled buy, that the CIs drove directly to and from the controlled-buy locations while followed by law enforcement, and that officers met with the CIs directly after each controlled buy and were given a small bag that tested positive for methamphetamine. This evidence overshadowed any error in admitting the prior-bad-act evidence. Therefore, it is unlikely that the admission of Lester's prior conviction significantly affected the verdict. Because there is no "reasonable possibility that the wrongfully admitted evidence significantly affected the verdict," we

conclude that any error in admitting evidence of Lester's prior offense was not prejudicial. *See Ness*, 707 N.W.2d at 691.

II. The district court erred by entering a conviction of and sentence for second-degree controlled-substance crime.

Lester argues that the district court erred in entering a conviction of and sentence for his second-degree sale crime because the sales underlying that conviction were among the aggregated sales forming the predicate for the first-degree sales offense. The state counters that the second-degree sale conviction is proper but asserts that the sentence for that offense should be vacated because both offenses were part of the same behavioral incident.

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). “If the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an ‘included offense’ under section 609.04.” *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995); *see also* Minn. Stat. § 609.04, subd. 1(1) (stating that “[a] lesser degree of the same crime” is an included offense). The Minnesota Supreme Court has held that the proper procedure “[w]hen the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

In this case, the district court entered a conviction of first-degree aggregated sales under Minn. Stat. § 152.021, subd. 1(1), and a conviction of second-degree sale in a school zone under Minn. Stat. § 152.022, subd. 1(7)(ii). The drug sales on December 20, 2016, and January 17, 2017 were the sales underlying Lester’s second-degree sale conviction. See Minn. Stat. § 152.022, subd. 1(7)(ii) (making it a second-degree sales crime to sell “one or more mixtures” of methamphetamine in a school zone). The same sales were two of the four drug sales that were aggregated to meet the statutory threshold necessary to convict Lester of the first-degree sale crime. See Minn. Stat. § 152.021, subd. 1(1) (making it a first-degree sale crime to sell more than 17 grams of methamphetamine in a 90-day period). Thus, the second-degree sale conviction was a second conviction under a multi-tiered statutory scheme for acts committed during a single behavioral incident. See *Hackler*, 532 N.W.2d at 559; see also *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985) (“[S]ection 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.”).

The state argues that “multiple drug sales over a period of several days” constitute multiple incidents, and therefore Minn. Stat. § 609.04, subd. 1, is not a bar to multiple convictions. The state relies on *State v. Soto*, in which the Minnesota Supreme Court affirmed the multiple sentences of an individual convicted of four counts of first-degree controlled-substance crime based on four cocaine sales that took place on four different days. 562 N.W.2d 299, 301-02 (Minn. 1997).

Soto differs from this case in at least two important aspects. First, in *Soto* the defendant appealed only his sentences, not his convictions. *Id.* at 302 (noting that, although

in his first appeal the defendant “appealed the jury’s convictions as well as the sentences imposed,” after a remand “[i]n this second appeal, [the defendant] again challenged his sentence” with no mention of a challenge to his convictions). Thus, the court was not considering what constituted a conviction of a lesser offense under Minn. Stat. § 609.04, but rather the different question of whether, assuming multiple convictions were appropriate, the district court could sentence the defendant on each conviction.

Second, in *Soto* each of the four sales in question independently involved enough cocaine to support a first-degree controlled-substance crime conviction. *See id.* at 301-02 (noting that each sale involved more than ten grams of cocaine, the amount required for first-degree controlled-substance crime cocaine sale in 1992). In this case, however, all four of Lester’s sales must be aggregated to reach the 17-gram threshold required to sustain a charge of first-degree controlled-substance crime. If either school-zone sale is removed from the aggregate and made an independent offense, then the remaining aggregated sales would total less than 17 grams. Thus, to convict Lester of both first- and second-degree controlled-substance crimes would be to “to adjudicate formally and impose sentence” twice for the same, singular act—selling methamphetamine in a school zone—in violation of Minn. Stat. § 609.04 and the supreme court’s instructions in *LaTourelle*. Entering a conviction of second-degree controlled-substance crime was therefore error. Accordingly, we reverse that conviction and remand to the district court to vacate the second-degree-sale conviction and amend the warrant of commitment.

Affirmed in part, reversed in part, and remanded.