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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1245**

State of Minnesota,
Respondent,

vs.

Trezjaun Caprise Sims,
Appellant.

**Filed July 15, 2019
Reversed and remanded
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-17-26809

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Christopher L. Mishek, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal from his conviction for fifth-degree controlled-substance crime under Minn. Stat. § 152.025, subd. 1(1) (2016), appellant Trezjaun Sims argues that the

district court plainly erred in instructing the jury concerning the threshold weight of marijuana required to support his conviction. He also argues that the district court erroneously instructed the jury that it need not consider lesser-included charges if it found appellant guilty of the most-serious charge. We agree with both challenges, and therefore reverse appellant's conviction and remand to the district court for a new trial. We do not reach appellant's other claims of error.¹

FACTS

Appellant was driving his mother's car, with his girlfriend, J.W., as the front-seat passenger, when he was stopped for a traffic violation. This traffic stop ultimately led to the discovery of what the state measured to be 42.693 grams of marijuana in the car, packaged in 28 individually wrapped bags. The state charged appellant with fifth-degree controlled-substance crime, intent to sell marijuana under Minn. Stat. § 152.025, subd. 1(1), and fifth-degree controlled substance crime, possession of not a small amount of marijuana under Minn. Stat. § 152.025, subd. 2(1) (2016).²

¹ Appellant also argues that (1) the circumstantial evidence is insufficient to prove appellant possessed the marijuana or, if he did possess it, that he possessed it with the intent to sell; (2) it was plain error for the district court to allow expert opinion testimony that the marijuana was packaged with the intent to sell; and (3) his conviction for possession of greater than a small amount of marijuana is a lesser-included offense of count 1 and must be vacated. The state agrees that the district court erred when it entered a conviction on the fifth-degree possession charge, a count on which the jury returned no verdict, because it had been instructed that it "need not decide" the remaining counts if it found that appellant was guilty of the possession-with-intent-to-sell charge.

² The district court granted appellant's motion to add a lesser-included charge for petty misdemeanor—possession of small amount of marijuana under Minn. Stat. § 152.027, subd. 4 (2016).

At trial, a forensic analyst from the Minnesota Bureau of Criminal Apprehension (BCA) testified that she weighed the 28 bags of marijuana individually, finding an aggregate weight of 42.693 grams. The analyst testified that the respective weights for bags has an “uncertainty” of plus-or-minus 0.005 grams, with a 95% certainty that the true weight falls within that range. At the close of evidence, the district court instructed the jury on the elements of the charged offenses. The district court instructed the jury that the state was required to prove beyond a reasonable doubt that appellant possessed “42.5 grams or more” of marijuana. It instructed the jury that, if it concluded that appellant was guilty of that charge (count 1), it “need not decide” the other counts. The jury found appellant guilty of possession with intent to sell, and, as instructed, returned no verdicts on the other counts. Nevertheless, the district court entered convictions for both possession and possession with intent to sell (counts 1 and 2).

This appeal followed.

D E C I S I O N

Jury Instruction on Weight of Marijuana

Appellant argues that the district court plainly erred by instructing the jury that the state was required to prove that the marijuana had a total weight of “42.5 grams or more.” He argues that the proper instruction should have been “more than 42.5 grams.”

Jury instructions, reviewed in their entirety, must fairly and adequately explain the law. *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). Jury instructions that confuse, mislead, or materially misstate the law are erroneous. *State v. Vang*, 847 N.W.2d 248, 261 (Minn. 2014).

Because appellant did not object to this instruction, his claim is subject to plain-error review. *Peltier*, 874 N.W.2d at 799. Under a plain-error analysis, appellant must establish (1) error, (2) that is plain, and (3) that the error affects his substantial rights. *Id.* If all three of these requirements are met, we assess whether reversal is required to ensure the fairness, integrity, or public reputation of judicial proceedings. *Id.*

“An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). Jury instructions must define the crime charged and explain the elements. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). “To determine if a jury instruction correctly states the law, we analyze the criminal statute and the case law under it.” *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015).

A person who “unlawfully sells one or more mixtures containing marijuana or tetrahydrocannabinols, except a small amount of marijuana for no remuneration” is guilty of a controlled-substance crime in the fifth degree. Minn. Stat. § 152.025, subd. 1(1). “Sell” means to “sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture” or to possess with intent to perform one of the described acts. Minn. Stat. § 152.01, subd. 15a (2016). Minnesota law defines small amount of marijuana as “42.5 grams or less.” *Id.*, subd. 16 (2016). In short, a conviction for fifth-degree controlled-substance crime—intent to sell—requires that the state prove that appellant intended to sell more than 42.5 grams of marijuana, or intended to sell 42.5 grams of marijuana or less for remuneration. Minn. Stat. § 152.025, subd. 1(1).

A conviction for fifth-degree controlled-substance crime—possession of marijuana—requires that the weight of the marijuana possessed not be a small amount. *Id.*, subd. 2(1). Possession of 42.5 grams or less is a petty misdemeanor. Minn. Stat. § 152.027, subd. 4. The state offered no evidence or argument concerning remuneration, and the case was tried solely on the weight of the marijuana having made the marijuana not a “small amount.” The weight of marijuana sufficient to make it not a “small amount” is *more than* 42.5 grams. But the district court instructed the jury that the weight element for both the intent to sell and possession offenses required proof of 42.5 grams *or more*. This instruction was error that is plain. The state agrees.³

We next consider whether the erroneous jury instruction affected appellant’s substantial rights. An erroneous jury instruction affects a defendant’s substantial rights if the error was prejudicial and affected the outcome of the case. *State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016). Stated differently, an erroneous jury instruction is prejudicial and affects a defendant’s substantial rights if there is a reasonable likelihood that the instruction had a significant effect on the jury’s verdict. *Id.*

³ As noted, the state did not argue at trial that appellant possessed the marijuana with the intent to sell it “for remuneration.” If the state had proven beyond a reasonable doubt that appellant intended to sell the marijuana for remuneration, the weight of the drugs would be irrelevant to a fifth-degree-intent-to-sell conviction. See *State v. Blahowski*, 499 N.W.2d 521, 526 (Minn. App. 1993) (explaining that a person is not required to possess more than a small amount of marijuana in order to be guilty of possession with intent to sell if the intended sale is for remuneration and that the state is not required to show a particular intended transaction), *review denied* (Minn. June 22, 1993). A proper instruction, had the case been so tried, would have required the jury to find *either* that the amount appellant intended to sell was *over* 42.5 grams, *or* the amount was 42.5 grams or less and appellant intended to sell the marijuana for remuneration. See 10A *Minnesota Practice*, CRIMJIG 20.34 (2015).

The state presented evidence that the total weight of the marijuana in the 28 bags weighed 42.693 grams. The BCA analyst weighed each bag individually, but never weighed the marijuana in the aggregate. The BCA analyst testified that the weight of each bag has an uncertainty of 0.005 grams or just “slightly outside of that” and that there was a five percent possibility that the true weight of the drug samples was outside of the margin of error range. The 0.005 per-bag margin of error, multiplied by 28 bags, puts the range of the aggregate weight within the agreed-to margin of error as low as 42.553 grams. And the BCA analyst conceded that the margin of error could be slightly more than 0.005 grams.

If the aggregate weight of the marijuana were to have been substantially above 42.5 grams, the district court’s definitional error would perhaps be harmless. But that is not so here. We are dealing with fractions of a gram difference between the aggregate weight of the marijuana and what the law defines as a “small amount.” Appellant contested the weight of the marijuana, and the state did not provide overwhelming evidence to prove the threshold amount. *Cf. Huber*, 877 N.W.2d at 526 (stating that whether the state presented overwhelming evidence is one factor in determining whether plain error in jury instructions affected appellant’s substantial rights). To the contrary, the state adduced evidence showing that the weight of the marijuana was very close to the threshold amount. The erroneous instruction, on these facts, affected appellant’s substantial rights.

Under the district court’s instruction, the jury could have found that the weight of the marijuana was 42.5 grams and nevertheless convicted appellant. We hold that this erroneous jury instruction in this case affected appellant’s substantial rights because there is a reasonable likelihood that the instruction had a significant effect on the jury’s verdict.

As a result, we consider the fourth element of the plain-error test—whether granting appellant a new trial is required to ensure the fairness, integrity, and public reputation of the judicial proceedings. A plain error that affects substantial rights, without more, does not entitle a defendant to a new trial. *Id.* at 527. But the plain-error doctrine allows for a new trial in those circumstances in which a miscarriage of justice would otherwise result. *Id.* at 528. The state’s limited, and contested, evidence concerning the weight of the marijuana convinces us that fairness requires a new trial where appellant may have been convicted of a felony for possessing a non-felony amount of marijuana.

Jury Instructions on the Order Concerning Consideration of the Charges

Appellant also argues that the district court erred by instructing the jury that it need not decide counts 2 or 3 if it found appellant guilty of count 1. A person who is prosecuted and found not guilty of one charged crime may be guilty of a lesser crime. Minn. Stat. § 609.04 (2016). It is error for a district court to suggest the order in which the jury should consider charges. *State v. Prtine*, 784 N.W.2d 303, 316 (Minn. 2010); see 10 *Minnesota Practice*, CRIMJIG 3.20 cmt. (2015) (cautioning district courts not to indicate any order in which the crimes should be considered and not to “instruct the jury to consider the lesser crimes only if it finds the defendant not guilty of the charged offense”).

The district court instructed the jury that if it finds that each of the four elements of count 1, possession of marijuana with intent to sell, was proved beyond a reasonable doubt,

it must find the appellant guilty of that count. It further instructed that “[i]n that case, you need not decide” the other counts.⁴

The state objected to these instructions, arguing that its “preference would have been for each count to remain separate and the jury to consider each element of each count separately and not in conjunction with the other count.” Appellant *agreed* and requested that the standard jury instructions be used. The district court nevertheless overruled the objection.⁵

The district court also instructed the jury that it was to consider the instructions as a whole, that the order in which the instructions are given is of no significance, and that the jury was “free to consider the issues in any order you wish.” The district court explained that the jury has two verdict forms for each of the charges against appellant—guilty and not guilty—and that the jury should draw no inference from the order in which the verdict forms are read.

In *Prtine*, the supreme court determined that it was error for the district court to instruct the jury to proceed “down the line” until it arrived at a guilty verdict and after arriving at a guilty verdict it was not required to consider the remaining offenses. 784

⁴ The district court similarly instructed the jury that if it found the elements of count 2 proven beyond a reasonable doubt, it must find appellant guilty of count 2 but not guilty of count 1, and in that case, need not decide count 3.

⁵ The district court stated that the standard jury instructions have been criticized by appellate courts, and that its restructuring of this instruction was to limit the amount of repetition so as to make the instruction easier to follow, and was of the understanding that this modified instruction has been reviewed and found acceptable on appellate review. We are not aware of any reported cases that have found this modified instruction acceptable on appellate review.

N.W.2d at 317. But, by “[c]onsidering the jury instructions as whole,” the court held that Prtine was not prejudiced by the error such that the error affected the outcome of the case. *Id.*

Here, despite the district court’s instructions to the jury that it is free to consider the issues in any order, the instruction that the jury should not return verdicts on the remaining counts if it found appellant guilty of the possession-with-intent-to-sell count “reasonably could be construed as suggesting an order in which the jury should consider the charges.” *State v. Davis*, 864 N.W.2d 171, 179 (Minn. 2015). In *Davis*, the supreme court explained that it was error to instruct the jury that it need not consider lesser offenses, because logically, “the jury could have concluded from that instruction that if it found the defendant guilty of the most serious charge, it need not continue its deliberations.” *Id.* This instruction was in error. On remand, the instruction must not be given.

An erroneous jury instruction does not require a new trial if the error is harmless—an error in jury instructions is harmless and a new trial should not be granted if the reviewing court determines beyond a reasonable doubt that the error has no significant impact on the verdict. *State v. Kuhnau*, 622 N.W.2d 552, at 558-59 (Minn. 2001). Because we conclude that the district court’s jury instruction concerning the weight element of marijuana requires reversal of appellant’s conviction, we do not address whether this additional error, by itself, would require a new trial. For the same reason, we do not reach appellant’s additional arguments.

Reversed and remanded.