STATE OF MINNESOTA

IN SUPREME COURT

A20-1254

Court of Appeals — Moore, III, J.
Dissenting, Gildea, C.J., Anderson, McKeig, JJ.

State of Minnesota,

Appellant/Cross-Respondent,

vs.

Filed: March 22, 2023
Office of Appellate Courts

Jason James Loveless,

Respondent/Cross-Appellant.

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Donald F. Ryan, Crow Wing County Attorney, Lindsey Lindstrom, Assistant County Attorney, Brainerd, Minnesota; and

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Cathryn Middlebrook, Chief Appellate Public Defender, Saint Paul, Minnesota, for respondent/cross-appellant.

Jeffrey C. O'Brien, Apple Valley, Minnesota, for amicus curiae Minnesota Industrial Hemp Association.

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S Y L L A B U S

1. A defendant's challenge to the sufficiency of the State's evidence that is grounded in a statutory-interpretation-based amelioration doctrine argument is not forfeited on appeal even though the issue was not raised in the district court.

2. A statutory amendment mitigates punishment under the amelioration doctrine when a change in the law either reduces the penalty for the criminal conduct or redefines the criminal conduct in a manner benefitting the defendant, including the decriminalization of the conduct. The 2019 amendment to exclude hemp from the definition of marijuana in Minn. Stat. § 152.01, subd. 9 (2022) decriminalized the possession of hemp, meaning a defendant convicted of marijuana offenses may obtain relief under the amelioration doctrine.

3. Because Minn. Stat. § 152.01, subd. 9, explicitly excludes "hemp" from the definition of "marijuana" and these substances are distinguished based on their delta-9 tetrahydrocannabinol concentration, the State must prove beyond a reasonable doubt that the delta-9 tetrahydrocannabinol concentration of a substance exceeds 0.3 percent on a dry weight basis to obtain a conviction for a fifth-degree controlled substance crime under Minn. Stat. § 152.025, subds. 1(1) and 2(1) (2022).

4. The evidence is insufficient to support the defendant's convictions for fifth-degree controlled substance offenses under Minn. Stat. § 152.025, subd. 2(1) and 1(1), because the State offered inadequate evidence that the delta-9 tetrahydrocannabinol

concentration of the plant material and liquid mixture in vaporizer cartridges found in the defendant's possession exceeded 0.3 percent on a dry weight basis.

Affirmed in part and reversed in part.

O P I N I O N

MOORE, III, Justice.

In early 2020, a Crow Wing County jury found respondent/cross-appellant Jason James Loveless guilty of two marijuana-related fifth-degree controlled substance offenses. One conviction is based on Loveless's alleged possession of approximately 3 pounds of plant material that the State claimed was marijuana. The second conviction is based on Loveless's alleged possession with intent to sell one or more vaporizer cartridges filled with an amber-colored liquid mixture containing tetrahydrocannabinols.

Loveless argues that the State's evidence is insufficient to support the jury's verdicts because of a 2019 amendment to the definition of marijuana in Minn. Stat. § 152.01, subd. 9 (2022), which explicitly excluded "hemp." Hemp is in turn elsewhere defined as having a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. *See* Minn. Stat. § 152.22, subd. 5a (2022) (defining "hemp" based on the definition of "industrial hemp" in Minn. Stat. § 18K.02, subd. 3 (2022)). The 2019 amendment went into effect 10 days after Loveless was charged by criminal complaint but more than 7 months before his case went to trial. According to Loveless, the 2019 amendment governs his case through the application of the common law amelioration doctrine. His interpretation of the amended statute requires the State to prove beyond a reasonable doubt that both the plant material and the liquid mixture in the vaporizer

cartridges contained delta-9 tetrahydrocannabinol in a concentration greater than 0.3 percent on a dry weight basis.

The court of appeals agreed with Loveless that the 2019 definition of marijuana applies to this case and reversed his conviction for possession of the plant material. However, the court appeals upheld his conviction for possessing with intent to sell the vaporizer cartridges filled with the liquid mixture containing tetrahydrocannabinols. The court reasoned that the possession of tetrahydrocannabinols in any amount is illegal under Minnesota's definition of Schedule I controlled substances.

We agree with the court of appeals that the 2019 amendment to the definition of marijuana in Minn. Stat. § 152.01, subd. 9, applies to this case through the operation of the common law amelioration doctrine. We also agree with the court of appeals that the State did not present sufficient evidence to prove that the plant material possessed by Loveless was marijuana as defined by the amended statute. We disagree, however, with the court of appeals' conclusion that the State presented sufficient evidence to prove that the liquid mixture in the vaporizer cartridges was a prohibited schedule I controlled substance. Therefore, we affirm in part and reverse in part and vacate both of Loveless's convictions.

FACTS

In June 2019, state troopers executed a search warrant on a residence belonging to T.W. When the state troopers entered the home, they found Jason Loveless in a bedroom. Loveless told the troopers that he was staying at T.W.'s home temporarily. During the search, the troopers discovered two guns, ammunition, vaporizer cartridges filled with an

amber-colored liquid, plastic bags containing a plant material, and approximately $4,600 in cash in the bedroom where Loveless was staying.

Based on the investigation, the State charged Loveless in Crow Wing County District Court with five crimes, two of which are relevant to this appeal: one count of fifth-degree possession of 3 pounds of marijuana, a controlled substance classified in Schedule I, II, III, or IV, under Minn. Stat. § 152.025, subd. 2(1) (2022)[1] (for the plastic bags filled with the plant material), and one count of fifth-degree possession of mixtures containing marijuana or tetrahydrocannabinols (THC) with intent to sell under Minn. Stat. § 152.025, subd. 1(1) (2022)[2] (for the vaporizing cartridges filled with liquid or wax).

A 3-day jury trial was held in February 2020. At the start of his trial, Loveless discharged his public defender, and the district court permitted him to proceed pro se with advisory counsel. Among the State's witnesses was a forensic scientist from the Minnesota Bureau of Criminal Apprehension (BCA) who tested the plant material and liquid-filled vaporizer cartridges found in the bedroom of T.W.'s home. The BCA forensic scientist testified that the plant material was marijuana based on her visual examination,

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[1] Under Minn. Stat. § 152.025, subd. 2(1), "[a] person is guilty of a controlled substance crime in the fifth degree" if he "unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana." As applied to marijuana, a " '[s]mall amount' . . . means 42.5 grams or less" of the non-resinous form of marijuana. Minn. Stat. § 152.01, subd. 16 (2022).

[2] Under Minn. Stat. § 152.025, subd. 1(1), "[a] person is guilty of a controlled substance crime in the fifth degree" if he "unlawfully sells one or more mixtures containing marijuana or tetrahydrocannabinols, except a small amount of marijuana for no remuneration." Minnesota Statutes section 152.01, subdivisions 15a(1) and (3) (2022), define the term "sell" to include possessing a controlled substance with the intent to sell it.

her examination under a microscope, a color test, and a gas chromatography-mass spectrometry (GC-MS) analysis. The BCA forensic scientist testified that she performed a color test and a GC-MS analysis of the liquid mixtures in two of the vaporizer cartridges, and that the mixtures contained THC but "no marijuana was identified" because she "did not observe any apparent plant material" in the cartridges. The BCA forensic scientist did not testify about the delta-9 THC concentration of either the plant material or the liquid mixture in the vaporizer cartridges.[3]

The jury found Loveless guilty of both counts of fifth-degree possession. Neither of the jury instructions for the charges defined "marijuana," "tetrahydrocannabinols," or referenced a concentration of delta-9 THC.

On appeal, Loveless challenged his convictions and argued that the evidence is insufficient to support them. Loveless pointed to recent changes to Minnesota law distinguishing between illegal marijuana and legal hemp based on the concentration of delta-9 THC in the substance.[4] As a threshold matter, Loveless argued that the 2019 amendment to the definition of marijuana in Minn. Stat. § 152.01, subd. 9, should apply to

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[3] The parties acknowledge that since Loveless's trial, the BCA has developed a testing procedure to determine the delta-9 THC concentration in both plant materials and liquid samples.

[4] In 2019, the Legislature amended the definition of marijuana in Minn. Stat. § 152.01, subd. 9, by adding the following language: "Marijuana does not include hemp as defined in section 152.22, subdivision 5a." Act of May 30, 2019, ch. 9, art. 11, § 77, 2019 Minn. Laws 1st Spec. Sess. 1481, 1941. Section 152.22, subdivision 5a, was also added in 2019 and defines "hemp" as "ha[ving] the meaning given to industrial hemp in section 18K.02, subdivision 3." *Id.* § 78. Minnesota Statutes section 18K.02, subdivision 3 was enacted in 2015. Act of June 13, 2015, ch. 4, art. 2, § 39, 2015 Minn. Laws 1st Spec. Sess. 1944, 1968.

his offenses, which were charged 10 days before the amendment took effect. According to Loveless, he should receive the benefit of the change in the law based on the application of the common law amelioration doctrine. Loveless contends that the amended version of the statute requires the State to prove that the substances he allegedly possessed are illegal marijuana based on their THC concentration. Because the BCA forensic scientist did not provide any testimony regarding the THC concentration of either the liquid mixture in the vaporizer cartridges or the plant material in the plastic bags, Loveless asked the court of appeals to reverse his convictions.

Notably, the State did not contest the application of the amelioration doctrine at the court of appeals. In fact, the State apparently agreed with Loveless that the amended definition of marijuana from the 2019 legislation applies here. The State merely argued to the court of appeals that the evidence as a whole supports the jury's verdicts on both counts. The State did not directly engage with Loveless's argument that, to sustain a conviction, the 2019 legislation requires proof of a minimum concentration of delta-9 THC in both the plant material and vaporizer cartridge liquid to show that the substances were marijuana, not legal hemp. Instead, the State argued that the issue of THC concentration is part of an affirmative defense provided in the industrial hemp statute, Minn. Stat. § 18K.08 (2022), but that Loveless forfeited the defense by not asserting it before the jury.

In a precedential opinion, the court of appeals affirmed in part and reversed in part. *State v. Loveless*, 966 N.W.2d 493, 509 (Minn. App. 2021). As a threshold matter, the court of appeals agreed with Loveless that the common law amelioration doctrine allows him to assert his claims under the 2019 changes to Minnesota law. *Id.* at 502. Specifically,

the court of appeals applied the test outlined in *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017), and concluded that the amelioration doctrine applies because no provisions in the revised law show that the amelioration doctrine does not apply, the changes to the law mitigate punishment by decriminalizing the possession and sale of certain substances, and this case was pending when the changes to the law went into effect on July 1, 2019. *Loveless*, 966 N.W.2d at 500–02.

The court of appeals dismissed the State's forfeiture argument because "a defendant does not forfeit a challenge to the sufficiency of the evidence based on the interpretation of a statute by not raising the issue in the district court." *Id.* at 503 (citing *State v. Pakhnyuk*, 926 N.W.2d 914, 918–20 (Minn. 2019)). In addressing the substance of Loveless's sufficiency-of-the-evidence claims, the court of appeals looked at each fifth-degree controlled substance conviction separately.

First, the court of appeals noted that "[b]ecause the definition of marijuana was amended only recently, there is no precedential caselaw specifically on point" and that it must "look to the supreme court's opinions concerning the evidence necessary to prove the identity of a controlled substance." *Id.* at 504. The court of appeals concluded that "[i]n light of the 2019 amendments to the definition of marijuana, the presence of delta-9 tetrahydrocannabinol in a concentration greater than 0.3 percent is an essential element of the offense of unlawful possession of marijuana," which the State may prove with either scientific or non-scientific evidence. *Id.* at 506. The court of appeals determined that the State failed to present sufficient evidence of either type to show the delta-9 THC concentration of the plant material in the plastic bags. *Id.* at 507–08. Thus, the court of

appeals reversed Loveless's conviction for fifth-degree marijuana possession for the bags containing plant material. *Id.* at 508–09.

Second, the court of appeals observed that "[u]nlike the definition of marijuana, the inclusion of tetrahydrocannabinols in Minnesota's Schedule I does *not* make any exception for hemp or for a substance or mixture that has a concentration of delta-9 tetrahydrocannabinol that is 0.3 percent or less on a dry-weight basis." *Id.* at 508. The court of appeals noted that the provisions of the law concerning THC had been unchanged since 2012 at the time of its opinion. *Id.* Based on the testimony from the BCA forensic scientist that the liquid mixture in the vaporizer cartridges included THC, the court of appeals concluded that the evidence was sufficient to uphold Loveless's conviction for fifth-degree possession of mixtures containing THC with intent to sell. *Id.* at 508–09.

Both the State and Loveless filed petitions for further review, which we granted.

ANALYSIS

At its core, this case concerns Loveless's challenge to the sufficiency of the State's evidence supporting his convictions for marijuana possession and sale. Reaching the merits of that challenge, however, requires us to consider a series of preceding issues. Loveless maintains that the State's evidence is insufficient to support his convictions because a 2019 amendment to the definition of marijuana controls his case through the application of the common law amelioration doctrine. Part I of this opinion considers whether Loveless's amelioration doctrine argument is properly before our court when it was not presented to the district court. In Part II, we address whether the amelioration doctrine applies to a change in the law that decriminalizes certain conduct and whether the

2019 amendment's addition of language excluding hemp from the definition of marijuana decriminalized conduct—that is, the possession of hemp. In Part III, we consider the effect the 2019 amendment had on the State's evidentiary burden in marijuana-related fifth-degree controlled substance cases. Finally, in Part IV we analyze Loveless's challenge to the sufficiency of the State's evidence in light of our interpretation of the 2019 amendment.

I.

As a preliminary matter, Loveless argues that the 2019 amendment to the definition of marijuana applies to his case even though his alleged criminal conduct took place before the change to the law went into effect. According to Loveless, he should receive the benefit of the change to the law under the common law amelioration doctrine. The State contends that Loveless forfeited this argument because he failed to raise it in the district court. Loveless counters that the State forfeited this forfeiture argument by not contesting—and therefore, implicitly conceding—the application of the amelioration doctrine in the court of appeals.

We must address the two intertwined arguments presented by the parties: first, whether Loveless's amelioration doctrine argument is properly before our court when it was not presented to the district court and second, whether the State has forfeited its objection to the question of whether the amelioration doctrine applies by not contesting that issue at the court of appeals. Whether the forfeiture rule applies is a question of appellate procedure that we review de novo. *Pakhnyuk*, 926 N.W.2d at 918.

Under the common law amelioration doctrine, an amendment that mitigates punishment may be applied to acts committed before that amendment's effective date. *Kirby*, 899 N.W.2d at 489–90. However, this doctrine applies only to "cases that are *not yet final* when the change in law takes effect." *Id.* at 488; *see also State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979) ("[A] statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached."). Although we first used the term "amelioration doctrine" in *Kirby*, we recognized that "four of our prior cases ha[d] followed and analyzed the doctrine." *Kirby*, 899 N.W.2d at 489; *see also Coolidge*, 282 N.W.2d at 514–15; *State v. Hamilton*, 289 N.W.2d 470, 474–75 (Minn. 1979); *Ani v. State*, 288 N.W.2d 719, 720 (Minn. 1980); *Edstrom v. State*, 326 N.W.2d 10, 10 (Minn. 1982). Since *Kirby*, we have applied the amelioration doctrine in *State v. Otto*, 899 N.W.2d 501, 503–04 (Minn. 2017), and *State v. Robinette*, 964 N.W.2d 143, 146–51 (Minn. 2021).

The State reads our amelioration doctrine case law as collectively creating a general rule that we will not consider amelioration doctrine arguments that a defendant could have raised in the district court but raises for the first time on appeal. To support this argument, the State relies on the fact that we have never addressed an amelioration doctrine argument in an analogous procedural context—where the amendment to the law implicating the amelioration doctrine went into effect before trial. But the fact that we have not yet addressed an issue in a particular context does not foreclose us from doing so, and our prior amelioration doctrine cases do not draw a bright-line rule regarding when the argument must be raised. Indeed, in *Ani* and *Edstrom* we addressed amelioration doctrine arguments

raised for the first time on appeal even after acknowledging that they were not raised in postconviction petitions in district court. *Ani*, 288 N.W.2d at 720; *Edstrom*, 326 N.W.2d at 10.

Moreover, the State's position is inconsistent with the underlying principles of the amelioration doctrine itself. We have stated that a harsher punishment should not stand if "the legislature has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient," and "[n]othing would be accomplished by imposing a harsher punishment . . . other than vengeance." *Coolidge*, 282 N.W.2d at 514–15. If Loveless's statutory interpretation argument about the effect of the 2019 amendment is correct, it would be a harsh result to subject him to punishment under a statutory provision that became obsolete (due to an amendment) 10 days after his conduct occurred—and 7 months before the jury trial—and then preclude him from challenging his conviction on appeal. *See Coolidge*, 282 N.W.2d at 514 ("But it would be harsh for defendant to receive a 10-year sentence in the spring of 1977, when the legislature was repealing the statute under which defendant was convicted and changed the maximum punishment for his act from 10 years to 1 year.").

Finally, the same three reasons that led us in *Pakhnyuk* to hold that a statutory-interpretation-based sufficiency challenge was not subject to our forfeiture rule equally apply here. 926 N.W.2d at 918–20. First, while we have recognized that forfeiture may apply to issues that "concern *how* guilt was proven in a particular case," a sufficiency of the evidence challenge based on the amelioration doctrine is more similar to

one based on statutory interpretation, which "concerns *whether* guilt was proven at all." *Id.* at 918–19.

Second, *Pakhnyuk* held that a statutory-interpretation-based sufficiency challenge was not forfeited because "[i]f the State's forfeiture argument prevailed, a defendant who failed to raise his statutory interpretation argument at trial would stand convicted of a crime—even if the defendant were correct that the language of the statute required the State to prove an element that was unproven in the defendant's case." *Id.* at 919; *see also State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017) (holding that the court of appeals did not err by interpreting a statute—even though the parties did not raise statutory interpretation arguments—before considering the sufficiency of the State's evidence because appellate courts must decide cases in accordance with law). Similar due process concerns are present here. If we agreed with the State's forfeiture argument, "[t]he harsh consequences of the forfeiture rule could threaten [Loveless's] due-process protection" because, if the amelioration doctrine applies and the State failed to meet its burden of proof under his proffered statutory interpretation, his conviction will still stand despite the possibility that the State did not prove every element of the offenses beyond a reasonable doubt. *See Pakhnyuk*, 926 N.W.2d at 919.

Third, as in *Pakhnyuk*, "this rule is not unfair to the State." *Id.* That is particularly the case here, where the State failed to dispute—and instead implicitly conceded to—the application of the amelioration doctrine when arguing to the court of appeals. Accordingly, we hold that a defendant like Loveless does not forfeit a sufficiency-of-the-evidence

challenge that is grounded in a statutory-interpretation-based amelioration doctrine argument if the defendant fails to raise the argument in the district court.

We also, however, will not treat the State's challenge to the amelioration doctrine's applicability to this case as forfeited. Although we have declined to address *sua sponte* an argument regarding the application of the amelioration doctrine which was not raised by a party to the case, *Robinette*, 964 N.W.2d at 147 n. 6, we have the discretion to reach issues that would otherwise be forfeited when the "interests of justice require consideration of such issues" and our consideration "would not unfairly surprise a party to the appeal," *Roby v. State,* 547 N.W.2d 354, 357 (Minn. 1996); *see also* Minn. R. Crim. P. 28.02, subd. 11 ("On appeal from a judgment, the court may review . . . any other matter, as the interests of justice may require."); Minn. R. Civ. App. P. 103.04 (stating that appellate courts "may review any other matter as the interest of justice may require").

Here, we address the State's forfeiture argument because consideration of the issue is in the interests of justice and it will not unfairly surprise Loveless. Providing the State an opportunity to contest the application of a potentially dispositive legal issue that was never raised before the district court, and for which the defendant argued for the first time on appeal, is necessary to preserve the fairness of the judicial proceedings. Moreover, Loveless cannot credibly argue that he would be "unfairly surprised" by our consideration of the issue since it is central to his case, was raised in the State's cross-petition for further review, and has been fully briefed by the parties.

II.

Having resolved the forfeiture concerns raised by the parties, we next turn to the question of whether the amelioration doctrine should apply here. Because the doctrine ultimately dictates which law applies—and frequently involves questions of statutory interpretation, *see, e.g.*, *Kirby*, 899 N.W.2d at 490–95—we review this issue de novo. *See State v. Wigham*, 967 N.W.2d 657, 662 (Minn. 2021).

In *Kirby*, we articulated a three-part test for whether a defendant is entitled to relief under the amelioration doctrine. 899 N.W.2d at 490. We stated that an amended criminal statute applies to crimes committed before its effective date if: (1) there is no statement by the Legislature that clearly establishes its intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered when the amendment takes effect. *Id.*

The State concedes that the first and third prongs of the *Kirby* test are satisfied here. We agree. Nothing in the language of the 2019 amendment indicates that the Legislature intended to abrogate the amelioration doctrine for crimes committed before the effective date of the act. *See* Act of May 30, 2019, ch. 9, art. 11, §§ 77–78, 2019 Minn. Laws 1st Spec. Sess. 1481, 1941 (hereinafter 2019 amendment); *contra Edstrom*, 326 N.W.2d at 10 (finding that, in the act at issue, the Legislature had "clearly indicated its intent" that the amendment not apply to crimes committed before the effective date of the act). Moreover, when the amendment took effect on July 1, 2019, Loveless's criminal charges were still pending in the district court, so there is no dispute that final judgment had not been entered. *See Coolidge*, 282 N.W.2d at 515. We therefore focus our analysis on the

disputed second prong—that is, whether "the amendment mitigates punishment." *Kirby*, 899 N.W.2d at 490.

Loveless argues that the 2019 statutory amendment decriminalized certain conduct—namely, the possession of hemp. It follows, according to Loveless, that the mitigation requirement of the *Kirby* test is satisfied because the 2019 amendment decriminalized conduct that previously was deemed criminal. Loveless's mitigation argument presents an issue of first impression: whether the Legislature's removal of certain conduct from the definition of a crime is a mitigation of punishment under the *Kirby* test. If it is, the next question is whether the 2019 amendment decriminalized the possession of hemp.

A.

Our prior amelioration doctrine cases considered mitigation in the context of a sentence reduction—when the Legislature reduced the penalty for a particular crime. *See, e.g.*, *Coolidge*, 282 N.W.2d at 514–15 (applying the amelioration doctrine where the Legislature reduced the maximum punishment for an offense from 10 years to 1 year). We have not yet considered whether a statutory amendment decriminalizing certain conduct is a mitigation of punishment. But none of our previous cases indicate that the doctrine, or the concept of mitigation specifically, is meant to apply only to sentence reduction. This is for good reason. Limiting the scope of mitigation to criminal penalty reduction would lead to absurd results that are inconsistent with the underlying principles of the amelioration doctrine: that when "the legislature has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient[,] . . . [n]othing would be

accomplished by imposing a harsher punishment . . . other than vengeance." *Coolidge*, 282 N.W.2d at 514–15.

Consider the following two hypotheticals. In the first hypothetical, a statutory amendment changes the maximum penalty for an offense from 10 years to 1 year and 1 day and goes into effect before a defendant's conviction for that offense became final. In the second hypothetical, a statutory amendment decriminalizes the same conduct that previously carried a maximum sentence of 10 years and goes into effect after charging but before a defendant's conviction for this offense became final. Both defendants are sentenced to the statutory maximum of 10 years imprisonment and then appeal their sentences. The defendant in the first scenario would satisfy the mitigation prong and, assuming the other two prongs of the *Kirby* test are met, could have her sentence reduced to 1 year and 1 day. But if the scope of mitigation was limited to criminal penalty reduction, the defendant in the second scenario could not have his 10-year sentence reduced.

The disparate outcomes in these hypotheticals demonstrate why limiting the scope of mitigation to sentence reduction is illogical: it makes little sense to continue to impose punishment on a defendant whose conduct the Legislature has since deemed permissible but give ameliorative benefit to a defendant whose conduct the Legislature still condemns, just less harshly.[5] We have relied on "the common law and the weight of greater logic" in

[5] The dissent asserts that the amelioration doctrine should not apply when the Legislature decriminalizes conduct because we have only applied the doctrine in the penalty context. The logical extension of this argument is that *removing all penalty* for

previous application of the amelioration doctrine, and we do so again today.[6] *Coolidge*, 282 N.W.2d at 515.

The dissent asserts that applying the common law amelioration doctrine to legislative changes that decriminalize conduct "effectively revives the abatement doctrine," which the Legislature has abrogated through the enactment of Minn. Stat. § 645.35 (2022). We disagree. Abatement "is a common law presumption that the Legislature's repeal of a criminal statute requires the State to halt its prosecutions under the repealed statute." *Kirby*, 899 N.W.2d at 494. As we explained in *Kirby,* amelioration and abatement are different common law doctrines that address the effect of a change in the law on cases that are not final when the new law takes effect. *Id.* at 494–95. Compared

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certain conduct cannot be a mitigation of punishment. As discussed above, we believe that such a narrow view of mitigation is illogical.

[6] Moreover, other courts have given defendants the ameliorative benefits of statutory changes that decriminalize conduct or otherwise redefine conduct in a manner that benefits defendants. *See, e.g.*, *People v. Figueroa*, 24 Cal. Rptr. 2d 368, 369–71 (Cal. Ct. App. 1993) (holding that defendant was entitled to the benefit of an amendment to an enhancement statute that added a new element to the enhancement); *People v. Rossi*, 555 P.2d 1313, 1315–16 (Cal. 1976) (explaining that the common law principles supporting mitigation of sentencing apply with equal force when an amendment entirely eliminates criminal sanction).

The dissent contends that our reference to *Rossi* is misplaced. The dissent asserts that the California Supreme Court applied only the abatement doctrine to the statutory change at issue in *Rossi*. While we do not share the dissent's certainty on this point for the reasons noted above, we see little point in debating the nuances of another state's common law. We note only that our holding today—that a statute can mitigate punishment under our own common law amelioration doctrine by *decriminalizing conduct*—is hardly revolutionary. Other courts recognized nearly 50 years ago that it would be "absurd" and "belie[] reality" to give defendants the benefit of "amendments which mitigated punishment" but not "amendments which repealed all criminal sanction." *Rossi*, 555 P.2d at 1316 n.8.

to amelioration, the doctrine of abatement applies more broadly and provides a more extreme remedy to criminal defendants. The application of the amelioration doctrine is limited to changes in law that are ameliorative—that is, changes that benefit a criminal defendant—whereas abatement is implicated anytime the Legislature repeals a criminal statute—whether that repeal is ameliorative or is coupled with a new law providing harsher punishment for the same conduct. The result of applying the amelioration doctrine is that criminal prosecutions may *continue* under the new, ameliorative law. In contrast, the application of the abatement doctrine would require the State to *halt* all prosecutions under the repealed statute.

We have previously recognized that the Legislature abrogated the abatement doctrine through the enactment of a general savings clause, Minn. Stat. § 645.35. *Kirby*, 899 N.W.2d at 494. Thus, defendants cannot escape prosecution simply because the Legislature repeals the law under which they are being prosecuted. *See, e.g.*, *State v. Smith*, 64 N.W. 1022, 1022 (Minn. 1895).[7] But this statute does not preclude defendants from receiving the ameliorative benefits of a legislative amendment that takes effect before their cases become final because Minn. Stat. § 645.35 does not abrogate the common law

[7] In *Smith*, the defendant was prosecuted under a section of the penal code that made his crime a misdemeanor. 64 N.W.2d at 1022. Before his trial, that section of the law was repealed and a new law substituted that made the offense a felony. He argued not only that he could not be prosecuted under the new law, but also "that he cannot be prosecuted or punished under [the old law], because it has been repealed." *Id.* *Smith* was thus a case where the defendant asserted that a repeal required the prosecution to *halt*. We treated the defendant's assertion as an argument for abatement that was foreclosed by a general savings statute that operated similarly to Minn. Stat § 645.35. *See Kirby*, 899 N.W.2d at 494–95 (discussing *Smith*, 64 N.W. at 1022–23).

amelioration doctrine.[8] *Kirby*, 899 N.W.2d at 494, 495 n.7. This case is not about whether prosecutions must automatically halt as a result of legislative changes that decriminalize conduct. This case is about whether a legislative change that decriminalizes conduct is a mitigation of punishment, thus allowing a defendant to receive the ameliorative benefits of the change in the law.[9] We therefore hold that a statutory amendment mitigates punishment—and satisfies the second prong of the *Kirby* test for the amelioration doctrine—when a change in the law either reduces the penalty for criminal conduct or

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[8] To the extent that the dissent is concerned that the result of applying the amelioration doctrine in cases where a legislative change decriminalizes conduct simply leads to the same result as application of the abatement doctrine (*i.e.*, the dismissal of charges against a defendant), we note that such a result is not guaranteed to a defendant when the new, ameliorative law is applied to a non-final case. A law can decriminalize some conduct while still imposing a penalty for other, similar conduct. Thus, a prosecution under the new law could still result in a defendant's conviction if the State presents sufficient evidence that the defendant's conduct is the type of conduct that is still penalized.

[9] The dissent points to *Bethune Assocs. v. County of Hennepin*, for the proposition that section 645.35 sweeps more broadly and applies to a legislative change that "did not specifically repeal the existing law," but "had the same effect." 362 N.W.2d 323, 328 (Minn. 1985). But *Bethune Associates* did not involve any statutory interpretation by our court as to the scope of 645.35's meaning. Instead, it was a tax case where we were simply quoting the tax court's reasoning, rather than engaging in any independent analysis. *See id.* at 325, 328. And the tax court's reference to section 645.35 was in any event dicta to support its primary tax-specific holding that, "[b]ased upon the facts peculiar to this 1984 amendment to Minn. Stat. § 278.05, Subd. 4, we conclude that the legislature did not intend it to have any retroactive application." *Bethune Assocs.*, 362 N.W.2d at 324. Moreover, the dissent's reliance on *Smith* to argue that section 645.35 applies here is misplaced because that case—unlike this case—concerned a legislative change that increased the punishment for the defendant's acts.

redefines criminal conduct in a manner benefitting the defendant, including through the decriminalization of the conduct.[10]

B.

Having determined that the decriminalization of conduct is a mitigating change in the law, the next question in this case is whether the 2019 amendment decriminalized conduct—that is, the possession of hemp. To answer this question, we must interpret the 2019 amendment to the definition of marijuana. *Cf. Kirby*, 899 N.W.2d at 490–95 (relying on statutory interpretation to determine whether a portion of the Minnesota Sentencing Guidelines abrogated the amelioration doctrine). In interpreting statutes, we read the statute as a whole, *see State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018), and favor an interpretation that gives "each word or phrase in a statute a distinct, not an identical, meaning," *State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017).

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[10] The dissent argues that allowing a defendant to invoke the amelioration doctrine when legislative action decriminalizes conduct "raises serious separation of powers issues." Specifically, the dissent claims that this application of the common law amelioration doctrine "overrides the express will of the Legislature" and "treads on the power of the executive branch to pursue criminal prosecutions." But the dissent's fear is misplaced. Before a court can apply the common law amelioration doctrine, it must ensure that there is no statement by the Legislature that clearly establishes its intent to abrogate the amelioration doctrine. *Kirby*, 899 N.W.2d at 490. In other words, if the Legislature does *not* want a legislative change that decriminalizes conduct to apply to non-final cases and *does* want the executive branch to continue the prosecutions of such cases under the former law, all the Legislature needs to do is clearly indicate this intent. *See, e.g.*, *Edstrom*, 326 N.W.2d at 10 (concluding that the amelioration doctrine did not apply because the Legislature "clearly indicated" that it did not want the ameliorative change in law to apply to crimes committed before the effective date of the new law).

In 2015, the Legislature enacted the Industrial Hemp Development Act, which legalized industrial hemp as a strictly regulated agricultural crop.[11] Minn. Stat.§§ 18K.01–.09 (2016); Act of June 13, 2015, ch. 4, art. 2, §§ 38–46, 2015 Minn. Laws 1st Spec. Sess. 1944, 1968–70. The Act authorized possession, transportation, processing, sale, and purchase of industrial hemp "that is grown pursuant to [the Act]."[12] Minn. Stat. § 18K.03 (2016). The Act defined "[i]ndustrial hemp," in relevant part, as "the plant Cannabis sativa L. and any part of the plant, . . . with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. Industrial hemp is not marijuana as defined in section 152.01, subdivision 9." Minn. Stat. § 18K.02, subd. 3 (2016).

The Act also provided that " '[m]arijuana' has the meaning given in section 152.01, subdivision 9." Minn. Stat. § 18K.02, subd. 4 (2016). Section 152.01 set forth the definitions of controlled substances, and at the time, subdivision 9 defined "[m]arijuana" as follows:

> all parts of the plant of any species of the genus Cannabis, including all agronomical varieties, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks,

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[11] The Legislature passed the Industrial Hemp Development Act after enactment of the federal Agricultural Act of 2014 (2014 Farm Bill), which allowed higher education institutions and state departments of agriculture to pursue the cultivation of industrial hemp under specific conditions. 7 U.S.C. § 5940(a) (2014).

[12] To comply with federal direction from the 2014 Farm Bill, Minnesota has instituted several strict rules governing the growth of industrial hemp in the state, including licensing requirements, background checks, data reporting, and crop testing. *See* Minn. Stat. §§ 18K.04–.06 (2022); Minn. R. 1565.0100–1565.1500 (2021).

> except the resin extracted therefrom, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Minn. Stat. § 152.01, subd. 9 (2016).

In 2019, the Legislature added references to "hemp" in statutes governing the therapeutic use of THC and the possession of marijuana. It amended the THC Therapeutic Research Act, Minn. Stat. §§ 152.21–.37, by adding section 152.22, subd. 5a, which defined "[h]emp" as having "the meaning given to industrial hemp in section 18K.02, subdivision 3." 2019 amendment § 78. In the same session law, the Legislature also amended the definition of marijuana in section 152.01, subdivision 9, adding that "[m]arijuana does not include hemp as defined in section 152.22, subdivision 5a." 2019 amendment § 77.[13]

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[13] We recognize that the Minnesota Board of Pharmacy and the Legislature each acted to change the law in apparent response to the court of appeals' decision in this case. In March 2022, the Board of Pharmacy, acting pursuant to its statutory authority to reschedule substances to conform with federal law, *see* Minn. Stat. § 152.02, subds. 8, 12(a) (2022), issued an order amending the description of tetrahydrocannabinols in Schedule I, Minn. Stat. § 152.02, subd. 2(h)(2), to add the following language: "Tetrahydrocannabinols does not include any material, compound, mixture, or preparation that falls within the definition of industrial hemp set forth in Minn. Stats § 18K.02." 46 Minn. Reg. 1181–84 (Apr. 11, 2022). On May 22, 2022, the Legislature passed a bill adopting several regulations regarding the sale of cannabinoid products derived from hemp and amending the description of tetrahydrocannabinols in Schedule I. Act of June 2, 2022, ch. 98, art. 13, §§ 5, 10, 2022 Minn. Laws 637, 909–10, 920 (codified as amended at Minn. Stat. §§ 151.72, subd. 3, 152.02, subd. 2(h)(2) (2022)) (hereinafter 2022 amendment). The description of tetrahydrocannabinols was amended to exclude "any material, compound, mixture, or preparation that qualifies as industrial hemp as defined in section 18K.02, subdivision 3 . . ." *Id.* § 10 (codified as amended at Minn. Stat. § 152.02, subd. 2(h)(2) (2022)).

The Legislature explicitly stated that the amendment to the description of tetrahydrocannabinols applies only to crimes committed on or after August 1, 2022. *Id.* Because the Legislature indicated its intent to abrogate the amelioration doctrine with

In sum, the statutory definition of marijuana as a controlled substance made no reference to hemp or industrial hemp before the 2019 amendment, but the definition of industrial hemp in the Industrial Hemp Development Act expressly excluded marijuana since its 2015 enactment. After the 2019 amendment, the definition of marijuana as a controlled substance expressly excluded *hemp*, which was defined by reference to the definition of *industrial hemp*.

A plain language comparison of the definition of marijuana in section 152.01, subdivision 9, before and after the 2019 amendment supports Loveless's decriminalization argument. Before the amendment, the definition of marijuana in Chapter 152—which creates criminal penalties for possessing controlled substances—made no exceptions for (or even mentioned) "hemp" *or* "industrial hemp." After the 2019 amendment, the definition of marijuana explicitly excluded "hemp." Therefore, the impact of the 2019 amendment is that a person can now be convicted of a marijuana-related controlled substance crime *unless* the possessed substance is "hemp." In other words, after the 2019 amendment went into effect, it was no longer a crime to possess hemp.

The Legislature's use of word "hemp" rather than "industrial hemp" in the 2019 amendment to the definition of "marijuana" as a controlled substance also supports Loveless's argument that the 2019 amendment broadly decriminalized hemp. It is significant that the 2019 amendment excludes "hemp" from the definition of marijuana,

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respect to the 2022 amendment, Loveless is not entitled to any ameliorative benefit this amendment may have provided. *See Edstrom*, 326 N.W.2d at 10. This appeal thus concerns only the 2019 amendment to the definition of marijuana, and we do not rely on the 2022 changes to the law in this opinion.

and not only "industrial hemp," a term that already existed in section 18K.02. Comparing the two terms, "hemp" lacks the descriptor "industrial," which shows that the Legislature intended the term, as used in the definition of "marijuana," to have a different, less constrained meaning. If the Legislature wanted to exclude "industrial hemp" from the definition of marijuana—and attach all of the requirements in Chapter 18K—it could have written the amendment as follows: "Marijuana excludes industrial hemp as defined in section 18K.02, subdivision 3, that is grown pursuant to chapter 18K." *See* Minn. Stat. § 18K.03, subd. 1 (2022) ("Industrial hemp is an agricultural crop in this state. A person may possess, transport, process, sell, or buy industrial hemp that is grown pursuant to this chapter or lawfully grown in another state.").

But the fact that section 152.01, subdivision 9, instead uses the term "hemp" is telling. "Hemp" is defined in section 152.22, subdivision 5a, by reference to the specific definition of "industrial hemp" in section 18K.02, subdivision 3, rather than a broad reference to all of the requirements in Chapter 18K. The use of "hemp," therefore, indicates that this term, as used in the 2019 amendment, was intended to have a different meaning than the circumstances under which "industrial hemp" may be lawfully possessed, transported, processed, sold, or bought pursuant to the requirements of Chapter 18K. *See* Minn. Stat. § 18K.03, subd. 1. The specific definition of "industrial hemp" under section 18K.02, subdivision 3, refers only to "the plant Cannabis sativa L. and any part of the plant," with a critical component being that it have a "a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Under these different meanings, "industrial hemp," as that term is used in the Industrial Hemp Development Act,

is legal to possess in the narrow circumstances permitted in Chapter 18K. After the 2019 amendment, a person may legally possess "hemp"—the Cannabis sativa L. plant with a delta-9 THC concentration on a dry weight basis of not more than 0.3 percent—without similar constraints.

The different contexts in which the terms are used are also evidence that the Legislature intended to decriminalize hemp in 2019. "Industrial hemp" is used in Chapter 18K, which governs growth and distribution of the substance as an agricultural crop. *See* Minn. Stat. § 18K.03 (2022) (permitting a person to "possess, transport, process, sell, or buy industrial hemp that is *grown pursuant to this chapter*" (emphasis added)). "Hemp," however, is used in Chapter 152, which governs controlled substance crimes. By using the general term "hemp" to carve out an explicit exception from the definition of marijuana in the general controlled substance crime statute, the Legislature conferred broader permission to possess hemp than just under the circumstances in Chapter 18K.

In summary, the 2019 amendment revised section 152.01 so that the possession of "hemp"—the plant Cannabis sativa L. and its derivatives "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent"—is no longer criminal under Chapter 152. By decriminalizing the possession of all hemp, the 2019 amendment mitigated punishment and Loveless has satisfied the second prong of the *Kirby* test.

Because the 2019 amendment satisfies all three prongs of the *Kirby* test, we hold that the common law amelioration doctrine applies to this case and through its application, the 2019 amendment to the definition of marijuana in Minn. Stat. § 152.01, subd. 9, controls Loveless's fifth-degree controlled substance convictions.

III.

Our analysis does not end with the conclusion that the amelioration doctrine applies to this case. Because both parties challenge the court of appeals' conclusions on the sufficiency of the evidence supporting Loveless's convictions, we must now address how the amended definition of marijuana impacts the State's evidentiary burden at trial.

The court of appeals held, and Loveless maintains, that, to prove the plant material possessed by Loveless was marijuana rather than hemp, the State's evidence "must be sufficient to prove beyond a reasonable doubt that the concentration of delta-9 tetrahydrocannabinol is greater than 0.3 percent on a dry-weight basis." *Loveless*, 966 N.W.2d at 506. In its petition for further review, the State argues that the court of appeals erred in reaching this conclusion because its interpretation renders the affirmative defense to possession of marijuana in Minn. Stat. § 18K.08 entirely inoperable.[14] We first address whether the court of appeals was correct that the burden is on the State, and then address the impact on the affirmative defense under section 18K.08.

A.

The question of whether the 2019 amendment to the definition of marijuana requires the State to affirmatively prove—through evidence showing the delta-9 THC concentration of a possessed substance—that the substance is marijuana and not hemp, is a matter of

[14] As relevant here, Minn. Stat. § 18K.08(1), provides that "[i]t is an affirmative defense to a prosecution for the possession of marijuana under chapter 152 if . . . the defendant possesses industrial hemp grown pursuant to this chapter."

statutory interpretation. Statutory interpretation is a question of law we review de novo. *State v. Holl*, 966 N.W.2d 803, 808 (Minn. 2021).

As previously discussed, marijuana as a controlled substance is defined by statute as follows:

> all parts of the plant of any species of the genus Cannabis, including all agronomical varieties, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks, except the resin extracted therefrom, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. *Marijuana does not include hemp as defined in section 152.22, subdivision 5a.*

Minn. Stat. § 152.01, subd. 9 (emphasis added). The italicized language was added by the 2019 amendment. 2019 amendment § 77.

The term "hemp" is defined in section 152.22, subdivision 5a, to have "the meaning given to industrial hemp in section 18K.02, subdivision 3." The term "industrial hemp," in turn, is defined in section 18K.02, subdivision 3 of the Industrial Hemp Development Act, as follows:

> "Industrial hemp" means the plant Cannabis sativa L. and any part of the plant, whether growing or not, including the plant's seeds, and all the plant's derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, *with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis*. Industrial hemp is not marijuana as defined in section 152.01, subdivision 9.

(Emphasis added.)

The effect of this cascade of cross-references—which the 2019 amendment sets in motion—is to insert a delta-9 THC concentration requirement into the definition of

marijuana. Marijuana, which encompasses mixtures derived from plants in the genus Cannabis, now does not legally include the plant Cannabis sativa L., or any part of the plant, or the plant's derivatives or extracts, with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis. In other words, plant material of the genus Cannabis—as well as the plant's derivatives or extracts, and mixtures containing the plant's derivatives or extracts—can be either "marijuana" or "hemp," the first of which remains an illegal controlled substance, while the second is not.

Based on the plain language of the 2019 amendment, the only material difference between marijuana and hemp is the delta-9 THC concentration. Because the 2019 amendment effectively incorporates the delta-9 THC concentration requirement into the definition of marijuana, it follows that the delta-9 THC concentration of a substance is a required element to be proven by the State when prosecuting marijuana-related controlled substance offenses. *See State v. Robinson*, 517 N.W.2d 336, 339 (Minn. 1994) (explaining that if an alleged offense includes a numerical threshold, that threshold is "an essential element of the offense charged" that "must be proven by the state and proven beyond a reasonable doubt"). We therefore agree with the court of appeals and hold that due process now requires the State to prove beyond a reasonable doubt that a substance is marijuana by proving that the substance's delta-9 THC concentration exceeds 0.3 percent on a dry weight basis. *See In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

B.

Having determined that the court of appeals correctly interpreted the 2019 amendment as requiring the State to prove beyond a reasonable doubt that a substance is marijuana by proving its delta-9 THC concentration, we turn to the State's argument that this interpretation impliedly repeals the affirmative defense to marijuana possession in Minn. Stat. § 18K.08(1). The affirmative defense applies to the possession of "industrial hemp *grown pursuant to this chapter.*" Minn. Stat. § 18K.08(1) (emphasis added).

As discussed above, Chapter 18K imposes several requirements on industrial hemp, including the requirements that a person obtain a license before growing or processing the substance and document that the seeds planted "are of a type and variety" that contain less than 0.3 percent delta-9 tetrahydrocannabinol. Minn. Stat. §§ 18K.04–.06; *see also* Minn. R. 1565.0100–1565.1500 (2021). But THC levels can vary depending on when the plant is harvested.[15] A licensed industrial hemp grower who harvested too late, for example, could accidentally wind up with a marijuana crop. Assuming this hypothetical grower had complied with all the requirements in Chapter 18K, it is possible that the affirmative defense may be available.

An amendment can only be understood to repeal a former law by implication if it is entirely irreconcilable with the prior law. Minn. Stat. § 645.39 (2022); *see also Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 725 (Minn. 2014). That is not the case here

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[15] *See* Minn. Dep't Agric., *2020 Hemp Annual Report* 5 (Jan. 2021) (explaining that "length of time under cultivation" is a crucial factor affecting THC production and that "[c]orrectly timing testing and harvesting is essential").

because the 2019 amendment and the affirmative defense *are* reconcilable. Someone like Loveless—who did not argue in district court that the substances he possessed were "grown pursuant to" the requirements of Chapter 18K—could not invoke the affirmative defense, whereas the defense *would* be available to hemp producers and manufacturers who complied with the statutory requirements.

Because the 2019 amendment and the affirmative defense are reconcilable, we hold that the court of appeals' decision did not impliedly repeal section 18K.08(1).

IV.

Finally, we turn to the merits of the parties' respective sufficiency-of-the-evidence challenges. Loveless was convicted of two counts of fifth-degree controlled substance offenses. The court of appeals concluded that the evidence was insufficient to support the conviction for possession of the plant material but sufficient to support a conviction for possession with intent to sell mixtures containing tetrahydrocannabinols. *Loveless*, 966 N.W.2d at 508–09.

In analyzing an argument that the evidence is insufficient to support a conviction, we undertake "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (citation omitted) (internal quotation marks omitted). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (citation omitted) (internal quotation marks omitted). We "carefully examine the record to determine whether the facts and the

legitimate inferences drawn from them would permit the [factfinder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (alteration in original) (citation omitted) (internal quotation marks omitted).

The standard of review stated above applies when a conviction is adequately supported by direct evidence. *State v. Horst*, 880 N.W.2d 24, 39–40 (Minn. 2016). Direct evidence is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (alteration in original) (citations omitted) (internal quotation marks omitted). Circumstantial evidence, on the other hand, is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *Id.* (citations omitted) (internal quotation marks omitted). If a conviction, or an element of the offense, is based solely on circumstantial evidence, we review the sufficiency of the evidence under a heightened standard of review. *State v. Al-Naseer*, 788 N.W.2d 469, 473–74 (Minn. 2010).

This standard of review for circumstantial evidence consists of two steps. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we "identify the circumstances proved," and in doing so, we "assume that the jury resolved any factual disputes in a manner that is consistent with the jury's verdict." *Id.* Second, "we examine independently the reasonableness of [the] inferences that might be drawn from the circumstances proved" and "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (alteration in original) (citations omitted) (internal quotation marks omitted). At the second step of the analysis, we give no

deference to the jury's verdict. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). In assessing the circumstances proved and the inferences that may be drawn from them, we consider the evidence "as a whole and not as discrete and isolated facts." *State v. Cox*, 884 N.W.2d 400, 412 (Minn. 2016).

Finally, when a sufficiency-of-the-evidence claim turns on the meaning of a statute, we review the question of statutory interpretation de novo. *State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020). We address the sufficiency of the State's evidence for each conviction in turn.

A.

First, Loveless was convicted under Minn. Stat. § 152.025, subd. 2(1), for unlawfully possessing one or more mixtures containing a controlled substance in Schedule I, specifically the bags of plant material alleged to be marijuana. The State challenges the court of appeals' determination that the evidence presented was insufficient to support a conviction, arguing that even if delta-9 THC concentration is a required element of a marijuana possession charge, the circumstantial evidence here still supports the jury's finding of guilt. Loveless maintains that the only way to prove beyond a reasonable doubt that the substance is marijuana is through a chemical analysis of the delta-9 THC concentration. Because the State did not test the delta-9 THC concentration of the plant material, Loveless believes a rational alternate inference exists—that the substance was hemp, which means the State failed to meet its burden of proof.

While "Minnesota law requires proof of the actual identity of the substance" in substance identification cases, "[w]e have not prescribed minimum evidentiary

requirements." *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979). Instead, we "examine the sufficiency of the evidence on a case-by-case basis." *Id.* The State may satisfy its burden of proof with scientific evidence based on laboratory tests of the alleged controlled substance. *State v. Wiley*, 366 N.W.2d 265, 269, 271 (Minn. 1985) (affirming conviction); *State v. Dick*, 253 N.W.2d 277, 278–79 (Minn. 1977) (same). If an alleged offense depends on proof of a numerical threshold, that threshold is "an essential element of the offense charged," which "must be proven by the state and proven beyond a reasonable doubt." *Robinson*, 517 N.W.2d at 339–40 (reversing conviction because scientific evidence of weight—an element of the charged offense—was insufficient because of inadequate random sampling). Alternatively, the State may prove a substance's identity with nonscientific or circumstantial evidence when the substance is unavailable for testing due to the defendant's actions. *State v. Olhausen*, 681 N.W.2d 21, 27–29 (Minn. 2004). The State may also satisfy its burden of proof with a combination of scientific evidence, nonscientific evidence, and circumstantial evidence. *See Vail*, 274 N.W.2d at 134 (considering both types of evidence but concluding that " 'additional factors' simply do not advance the state in satisfying its burden of proof, given the trial court's skepticism of the scientific evidence").

Here, the State introduced scientific evidence related to the bags of plant material. The BCA forensic scientist testified that she performed a macroscopic visual examination with her naked eye, a visual examination with a microscope, a color test, and GC-MS analysis. Based on her examination, the forensic scientist concluded that the plant material

was marijuana. But she did not testify that any tests were conducted to determine the concentration of delta-9 THC in the plant material.

Beyond the scientific evidence provided by the BCA forensic scientist, there is a limited amount of circumstantial evidence relevant to the identity of the plant material. The State proved the following circumstances: (1) the plant material was found in a bedroom inside a locked plastic tote box; (2) Loveless had been staying in the bedroom where the locked plastic tote box was found; (3) the locked plastic tote box was found near other items that are associated with controlled substances, including smoking pipes, rolling papers, a torch lighter, and a marijuana grinder; (4) the locked plastic tote box was found near multiple vaporizer cartridges that contain amber-colored liquid mixtures containing tetrahydrocannabinols, and (5) the locked plastic tote box was found near significant amounts of cash and guns and ammunition.

From the circumstances proved, a jury could infer that the plant material found inside the box had a delta-9 THC concentration greater than 0.3 percent. A jury could also rationally conclude, however, that the plant material had a hemp-level delta-9 THC concentration of less than 0.3 percent.

While the circumstances proved—such as the smoking pipes, rolling papers, a torch lighter, and a marijuana grinder—suggest that Loveless was familiar with marijuana, the conclusion that the plant material was marijuana is not the sole reasonable inference from this evidence. Our reasoning in *Robinson* guides us here. In that case, we concluded that circumstantial evidence that a defendant was familiar with drugs was insufficient to establish the identity of untested substances found in his possession. *Robinson*,

517 N.W.2d at 338. While the State had presented scientific evidence that some of the substances found were cocaine, it had not tested all of the substances. *Id.* We observed that "drug dealers are known to substitute placebos for the real thing," and ultimately concluded that while "the circumstantial evidence tends to prove defendant . . . was a drug dealer," it did not prove what was in the untested packets. *Id.* at 338–39. The same reasoning applies here: although the circumstantial evidence suggests that Loveless was familiar with marijuana, the evidence does not prove the THC concentration of the plant material in the locked tote was greater than 0.3 percent on a dry weight basis.

Therefore, we agree with the court of appeals that the State's circumstantial evidence does not exclude the rational inference that the plant material Loveless possessed had a delta-9 THC concentration of 0.3 percent or less. In other words, a jury could reasonably conclude from the circumstantial evidence that the plant material was hemp, which is excluded from the statutory definition of marijuana. We affirm the court of appeals decision reversing Loveless's fifth-degree controlled substance possession conviction under Minn. Stat. § 152.025, subd. 2(1).

B.

Second, Loveless was convicted for unlawfully possessing with intent to sell one or more mixtures containing tetrahydrocannabinols in violation of Minn. Stat. § 152.025, subd. 1(1), namely the liquid-filled vaporizer cartridges. The State tested the cartridges for THC, which came back positive, but the State did not test the liquid mixture's delta-9 THC concentration. The court of appeals nevertheless determined that the State was not required to ascertain the THC concentration of the liquid in the cartridges—despite concluding

such testing was required for plant marijuana. *Loveless*, 966 N.W.2d at 508–09. The court of appeals reasoned that "[u]nlike the definition of marijuana, the inclusion of tetrahydrocannabinols in Minnesota's Schedule I does *not* make any exception for hemp or for a substance or mixture that has a concentration of delta-9 tetrahydrocannabinol that is 0.3 percent or less on a dry-weight basis." *Id.* The court also noted that (at the time of its opinion) the "provisions concerning tetrahydrocannabinols ha[d] been unchanged since 2012."[16] *Id.*

Loveless argues the court of appeals erred in treating tetrahydrocannabinols as a prohibited substance discrete from marijuana. By doing so, Loveless maintains that the court of appeals established an irreconcilable conflict in the statutory definitions of marijuana and hemp, undermining the legislative intent of the 2019 amendment and bringing into question the legality of most cannabis products, regardless of their THC concentration.

1.

To determine whether the court of appeals erred in reaching this conclusion—and by extension, affirming Loveless's conviction—we must first interpret the impact, if any,

[16] After the court of appeals released its opinion, the Legislature amended Schedule I's description of tetrahydrocannabinols. *See* 2022 amendment § 10 (codified as amended at Minn. Stat. § 152.02, subd. 2(h)(2) (2022)). This amendment explicitly provided that "tetrahydrocannabinols do not include any material, compound, mixture, or preparation that qualifies as industrial hemp as defined in section 18K.02, subdivision 3." *Id.* For the reasons previously addressed, this appeal concerns only the 2019 amendment to the definition of marijuana. *See supra* n.13.

that the 2019 amendment to the definition of marijuana had on the provision of Schedule I that addresses tetrahydrocannabinols. The first step in statutory interpretation is to determine if the statute's language is facially ambiguous. *Henderson*, 907 N.W.2d at 625. If the statute's language is free and clear of all ambiguity, "we apply the plain meaning of the statutory language without engaging in any further construction." *State v. Barrientos*, 837 N.W.2d 294, 298 (Minn. 2013). "In interpreting a particular statutory provision, we read the provision 'in context with other provisions of the same statute.' " *State v. Carson*, 902 N.W.2d 441, 445 (Minn. 2017) (quoting *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005)).

Section 152.025, subd. 1(1), the statute under which Loveless was charged, provides that "[a] person is guilty of a controlled substance crime in the fifth degree" if "the person unlawfully sells one or more mixtures containing marijuana or tetrahydrocannabinols, except a small amount of marijuana for no remuneration." Section 152.025 does not define tetrahydrocannabinols, but they are listed in Schedule I. *See* Minn. Stat. § 152.02, subd. 2. At the time of Loveless's trial, Schedule I described them as follows:

> tetrahydrocannabinols naturally contained in a plant of the genus Cannabis, synthetic equivalents of the substances contained in the cannabis plant or in the resinous extractives of the plant, or synthetic substances with similar chemical structure and pharmacological activity to those substances contained in the plant or resinous extract, including, but not limited to, 1 cis or trans tetrahydrocannabinol, 6 cis or trans tetrahydrocannabinol, and 3,4 cis or trans tetrahydrocannabinol.

Minn. Stat. § 152.02, subd. 2(h)(2) (2018).[17] This definition includes "any natural or synthetic material, compound, mixture, or preparation that contains any quantity of the following substances [including tetrahydrocannabinols], their analogs, isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of the isomers, esters, ethers, or salts is possible" unless such a substance has been "specifically excepted or . . . listed in another schedule." *Id.*, subd. 2(h).

The applicable plain language of "tetrahydrocannabinols" as listed in Schedule I includes *both* (1) tetrahydrocannabinols naturally contained in a cannabis plant, and (2) their synthetic equivalents. *Id.*, subd. 2(h)(2). Thus, the phrase "marijuana or tetrahydrocannabinols" in section 152.025, subd. 1(1) for fifth-degree sale crimes can be read as encompassing, on one hand, marijuana and all its derivatives, excluding hemp, and on the other, tetrahydrocannabinols that are not naturally contained in the cannabis plant. In other words, section 152.025, subd. 1(1) criminalizes the unlawful sale of both natural derivatives and mixtures of marijuana, excluding hemp, as well as synthetic products containing tetrahydrocannabinols that are in neither marijuana nor hemp.

We therefore agree with Loveless that the court of appeals created a conflict between "tetrahydrocannabinols" as discussed in Schedule I and the definition of hemp when it did not look at the statutory scheme as a whole. Based on the 2019 amendment,

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[17] As noted, while this case was pending, the Legislature amended Schedule I's description of tetrahydrocannabinols. *See* 2022 amendment § 10 (codified as amended at Minn. Stat. § 152.02, subd. 2(h)(2) (2022)). Our analysis here relates solely to the statute as it was written before the 2022 amendment. We offer no opinion on the meaning of the statute as amended in 2022. *See supra* n.13.

hemp is legal and defined based on its delta-9 THC concentration. In other words, hemp is now defined by the very substance the court of appeals determined is broadly illegal under Schedule I. It is difficult to see how the Legislature could have intended that hemp, which contains some THC, be legal if THC itself is completely illegal. Thus, the court of appeals' interpretation is unreasonable.

2.

Having determined that the plain language of section 152.025, subd. 1(1), in conjunction with the description of "tetrahydrocannabinols" in Schedule I and the amended definition of marijuana, does not broadly criminalize the sale of all tetrahydrocannabinols, the remaining question is whether the State presented sufficient evidence to support Loveless's conviction for possessing the liquid-filled vaporizer cartridges with intent to sell. The State tested the liquid mixture only for the presence of THC. Though the liquid mixture tested positive for THC, the State presented no evidence as to the *type* of THC in the mixture (e.g., delta-8 versus delta-9 tetrahydrocannabinols or synthetic equivalents of tetrahydrocannabinols), nor the specific concentration of delta-9 THC in the liquid mixture to determine whether it exceeded 0.3 percent. Absent this direct evidence, the State can only rely on circumstantial evidence. The State proved the following circumstances: (1) 89 vaporizer cartridges containing an amber-colored liquid were found in a box with a mailing label addressed to Loveless; (2) many of the cartridges were in original packaging; (3) Loveless had been staying in the room where they were found; (4) other items associated with controlled substance use were found in the same room, including smoking pipes, rolling papers, a torch lighter, and a marijuana grinder; and

(5) the box of vaporizer cartridges was located near a locked plastic tote that was revealed to contain 3 pounds of marijuana-like plant material with an unknown THC concentration.[18]

Similar to the analysis for the plant material above, a jury could draw a reasonable inference that the liquid mixture inside the vaporizer cartridges had a delta-9 THC concentration greater than 0.3 percent. A jury could also, however, rationally conclude that the liquid mixture in the vaporizer cartridges had a hemp-level THC concentration of less than 0.3 percent.

We therefore conclude that, when the State's evidence is considered under the correct interpretation of the relevant controlled substance statutes, the evidence is insufficient to support this conviction. We reverse the court of appeals and vacate Loveless's conviction under Minn. Stat. § 152.025, subd. 1(1), for possession of the liquid-filled vaporizer cartridges with intent to sell.

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[18] At oral argument, the State asserted that the packaging of the vaporizer cartridges listed a THC concentration well above 0.3 percent. However, there was no testimony offered at trial on this point, and the record does not otherwise include any evidence of a THC concentration listed on the packaging. We are bound by the trial court record and may not consider matters outside the record on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988). Accordingly, we do not consider the State's contention that the packaging contained a reference to the cartridges' THC concentration and offer no opinion on whether this type of evidence would be sufficient to prove a substance's THC concentration.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals in part and reverse in part.

Affirmed in part and reversed in part.

D I S S E N T

GILDEA, Chief Justice (dissenting).

The common law doctrine of amelioration is limited to legislative changes that reduce punishment. By applying the amelioration doctrine to a legislative change that decriminalizes conduct, the majority not only misapplies the doctrine, but it also infringes on the powers of the legislative and executive branches. Because the amelioration doctrine does not apply to the facts of this case, I respectfully dissent.[1]

At the heart of this case is a 2019 legislative change to Minn. Stat. § 152.01, subd. 9 (2018), which reads:

> "Marijuana" means all parts of the plant of any species of the genus Cannabis, including all agronomical varieties, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks, except the resin extracted therefrom, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. Marijuana does not include hemp as defined in section 152.22, subdivision 5a.

Act of May 30, 2019, ch. 9, art.11, § 77, 2019 Minn. Laws 1st Spec. Sess. 1481, 1941. The newly added language, which is underlined above, does not mention punishment. Instead, it decriminalizes the possession of hemp by excluding it from the definition of marijuana, a controlled substance.

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[1] Because I find that the amelioration doctrine does not apply to the facts of this case, I take no position on the majority's threshold determination that the amelioration doctrine argument was not forfeited on appeal.

Before the 2019 legislative change, the State charged appellant Jason Loveless with possession of approximately 3 pounds of marijuana plant material and possession with intent to sell tetrahydrocannabinol vaporizer cartridges. A jury found him guilty as charged, and the district court imposed a sentence within the guidelines range. On appeal, Loveless does not claim that his sentence should be reduced. Instead, he claims his convictions must be vacated, arguing that he is entitled to the benefit of the newly added language under the common law doctrine of amelioration. Loveless's argument is meritless.

The amelioration doctrine applies to a legislative change that "mitigates *the punishment* for 'acts committed before its effective date, as long as no final judgment has been reached.' " *State v. Robinette*, 964 N.W.2d 143, 144 (Minn. 2021) (emphasis added) (quoting *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979)); *see also State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017) ("[T]he amelioration doctrine establishes a presumption . . . that an amendment *mitigating punishment* applies to non-final cases." (emphasis added)). And we have never applied the amelioration doctrine outside the penalty context. The 2019 amendment to Minn. Stat. § 152.01, subd. 9, does not change the penalty for the crime of possession or sale of a controlled substance. Accordingly, the amelioration doctrine does not apply. That should be the end of the case.

Even though we have only applied the amelioration doctrine when a statute changes the sentence for a crime, the majority contends the doctrine nevertheless applies here. The majority is mistaken.

What the majority is really doing is applying the common law doctrine of abatement. Under the abatement doctrine, "prosecutions under statutes impliedly or expressly repealed while the case is still pending on direct review must abate *in the absence* of a demonstration of contrary congressional intent *or* a general saving statute." *Pipefitters Loc. Union No. 562 v. United States*, 407 U.S. 385, 432 (1972) (emphasis added). We have recognized that the abatement doctrine establishes a "presumption that the Legislature's repeal of a criminal statute *requires the State to halt its prosecutions* under the repealed statute" and no judgment of conviction can be rendered. *Kirby,* 899 N.W.2d at 494 (emphasis added). The fact that a legislative change does not specifically repeal an existing law is immaterial to application of the abatement doctrine when the legislative change has the same effect as a repeal. *See Bethune Assocs. v. County of Hennepin*, 362 N.W.2d 323, 328 (Minn. 1985) (adopting tax court's interpretation of Minn. Stat. § 645.35).

Because the 2019 amendment has the same effect as a repeal of the earlier version of the statute that criminalized possession of hemp, one might wonder why the majority is not grounding its result in abatement. The majority is not grounding its result in abatement because the Legislature has enacted a general saving statute that abrogates the common law doctrine of abatement.

In enacting Minnesota's general saving statute, Minn. Stat. § 645.35 (2022), the Legislature expressed its intent to abrogate the abatement doctrine. *Kirby*, 899 N.W.2d at 494–95 (citing *State v. Smith*, 64 N.W. 1022, 1022 (Minn. 1895)); *see also* 1 Wayne R. Lafave, *Substantive Criminal Law* § 2.5(b) (3rd ed. 2018) (explaining that "[t]he common law rule that repeal of a criminal statute bars further prosecution against earlier offenders,

being based on the legislature's presumed intent, may of course be changed by an expression of legislative intent that earlier violations may still be prosecuted"). Section 645.35 reads:

> The repeal of any law *shall not affect* any right accrued, any duty imposed, any penalty incurred, or *any proceeding commenced, under or by virtue of the law repealed*. Any civil suit, action, or proceeding pending to enforce any right under the authority of the law repealed shall and may be proceeded with and concluded under the laws in existence when the suit, action, or proceeding was instituted, notwithstanding the repeal of such laws; or the same may be proceeded with and concluded under the provisions of the new law, if any, enacted.[2]

Minn. Stat. § 645.35 (emphasis added). The purpose of general saving statutes, like section 645.35, is to prevent a decriminalization of criminal conduct from triggering unintentional and unwarranted legislative pardons. Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 142 (1972). General saving statutes shift "the legislative presumption from one of abatement unless otherwise specified to one of non-abatement in the absence of contrary legislative direction." *Id.* at 127. Section 645.35 expresses the intent that a legislative change decriminalizing conduct, such as the 2019 amendment at issue here, should not affect criminal proceedings that were initiated before the legislative change, such as the State's prosecution of Loveless. *See Bethune Associates*, 362 N.W.2d at 328 (noting that section 645.35 applies to a legislative change that "did not specifically

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[2] The second sentence of section 645.35 is inapplicable here for two reasons. First, this is not "a civil suit, action, or proceeding." Second, the criminal prosecution cannot "proceed[] with and conclude[] under the provisions of the new law" because the Legislature did not enact any new law criminalizing the possession of hemp.

repeal the existing law" but has "the same effect" as a repeal); *Smith*, 64 N.W. at 1023 (explaining that "[w]hen a repeal is enacted, either directly or by way of amendment, accompanied by no special saving clause, the general and permanent saving clause contained in an existing and prior statute attaches to the repeal or amendment, unless a contrary legislative intent plainly appears from the repealing statute or amendment").[3]

In short, Loveless is not entitled to have his criminal prosecution dismissed based on the 2019 legislative change decriminalizing possession of hemp because the Legislature expressly abrogated the abatement doctrine when it enacted Minnesota's general saving clause, Minn. Stat. § 645.35.

With abatement unavailable, the majority grounds its result by expanding the scope of the amelioration doctrine to include laws that decriminalize conduct.[4] According to the

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[3] The Legislature's enactment of section 645.35, however, does not express an intent to abrogate the amelioration doctrine. *Kirby*, 899 N.W.2d at 494 (explaining that section 645.35 "abrogates the abatement doctrine, not the amelioration doctrine") (internal quotation marks omitted). Instead, as we explained in *Kirby*, the Legislature has chosen to abrogate the amelioration doctrine on a statute-by-statute basis, using the language at issue in *Edstrom*, 326 N.W.2d 10 (considering language that read, "Except for section 8 of this act, crimes committed prior to the effective date of this act are not affected by its provisions"). *Kirby*, 899 N.W.2d at 489–90.

[4] The majority cites two California cases for the proposition that "courts have given defendants the ameliorative benefits of statutory changes that decriminalize conduct or otherwise redefine conduct in a manner that benefits defendants." *Supra* at 18 n.6 (citing *People v. Rossi*, 555 P.2d 1313, 1315–16 (Cal. 1976), and *People v. Figueroa*, 24 Cal. Rptr. 2d 368, 369–71 (Cal. Ct. App. 1993)). The majority's reliance on *Rossi* is misplaced because the California Supreme Court applied the abatement doctrine, not the amelioration doctrine, to the statutory change that decriminalized the conduct. *See* 555 P.2d at 1315–16 (explaining that the general savings clause, Gov. Code § 9608 did not apply when a conviction is abated by an amendment that entirely eliminates any sanction for the defendant's act).

majority, such an expansion is reasonable because punishment is necessarily mitigated when an act is decriminalized.[5] In my view, the court's reasoning is flawed because it effectively collapses the distinct common law doctrines of amelioration and abatement into a single doctrine that applies with equal force to laws that mitigate punishment or decriminalize conduct.[6]

Not only is the majority's reasoning inconsistent with the historical application of the common law doctrines, it also effectively revives the abatement doctrine; a doctrine the

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[5] In the context of Minn. R. Crim. P. 27.03, subd. 9, which concerns the correction of an unauthorized sentence, we have rejected similar reasoning. In *Hannon v. State*, the defendant argued that his punishment was unlawful because he did not commit the underlying crime. 957 N.W.2d 425, 433 n.9 (Minn. 2021). We rejected the argument because it was not really a challenge to the defendant's punishment. *Id.*

[6] The majority argues that following our precedent applying amelioration only to legislative changes that reduce criminal penalties "would lead to absurd results that are inconsistent with the underlying principles of the amelioration doctrine." The majority attempts to demonstrate the claimed absurdity through two hypotheticals. I disagree with the majority. When the doctrines of amelioration and abatement are applied to the hypotheticals the majority sets out, the outcomes are fair and logical. In the first hypothetical, a statutory amendment changes the maximum penalty for an offense from 10 years to 1 year and 1 day prior to a conviction for that offense becoming final. In the second hypothetical, a statutory amendment decriminalizes the conduct which previously carried a maximum sentence of 10 years after charging but prior to a conviction for this offense becoming final. Both defendants are convicted and sentenced to the statutory maximum of 10 years imprisonment. On appeal, the defendant convicted of an offense in the first scenario is entitled to have his sentence reduced to 1 year and 1 day under the amelioration doctrine, and the defendant in the second scenario is entitled to have the criminal prosecution dismissed under the abatement doctrine (assuming that it had not been legislatively abrogated). Essentially, the majority contends that it is absurd for the Legislature to have abrogated the abatement doctrine. But it has always been up to the Legislature—not the judiciary—to determine what behavior is criminal. *See, e.g.*, *State v. Witt*, 245 N.W.2d 612, 615 (Minn. 1976) ("State legislatures possess broad discretion to define criminal offenses and prescribe penalties therefor.").

Legislature expressly abrogated through its enactment of Minn. Stat. § 645.35. *See Kirby*, 899 N.W.2d at 494–95 (explaining that section 645.35 abrogates the abatement doctrine). By substituting the judiciary's judgment that a legislative change decriminalizing conduct should apply to all non-final, criminal proceedings, the majority overrides the express will of the Legislature articulated in section 645.35.[7] Such action raises serious separation of powers issues. *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983) (explaining that it is "a basic principle of constitutional law" that the court cannot substitute its judgment for that of the legislature); *see also Fed. Distillers*, *Inc. v. State*, 229 N.W.2d 144, 154 (Minn. 1975). Moreover, in substituting its judgment for the will of the Legislature, the majority treads on the power of the executive branch to pursue criminal prosecutions in accordance with section 645.35.

The majority's application of the amelioration doctrine to a legislative change that decriminalizes conduct misapplies the doctrine. The majority's expansion of the doctrine

[7] The majority contends that it is not overruling the express will of the Legislature articulated in the *general savings* statute, Minn. Stat. § 645.35, because the Legislature still has the power to include a *specific saving* clause whenever it amends a statute. *Supra* at 21 n.10. But the purpose of a general savings clause is that it applies in the absence of a specific savings clause. The rule of law the majority writes in this case undoubtedly confounds that purpose by shifting the presumption of non-abatement in the absence of contrary legislative direction to one of abatement unless otherwise specified.

to this case also infringes on the powers of the legislative and executive branches. Accordingly, I respectfully dissent.

ANDERSON, Justice (dissenting).

I join in the dissent of Chief Justice Gildea.

MCKEIG, Justice (dissenting).

I join in the dissent of Chief Justice Gildea.