**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1035**

State of Minnesota,
Respondent,

vs.

Raul Martinez Lopez,
Appellant.

**Filed September 22, 2009**
**Affirmed**
**Collins, Judge**[*]

Stearns County District Court
File No. 73-K3-05-004684

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Janelle Kendall, Stearns County Attorney, 448 Stearns County Administration Center, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Minge, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**COLLINS**, Judge

Appellant argues that the evidence was insufficient to support his convictions and the district court committed plain error by admitting *Spreigl* evidence. Appellant also contends that the district court abused its discretion in sentencing by ordering him to pay restitution for the "buy money" used in the controlled drug transactions. We affirm.

## D E C I S I O N

### I.

A jury found Raul Lopez guilty of three counts of first-degree controlled-substance crime and one count of second-degree controlled-substance crime stemming from a series of controlled drug transactions that occurred in 2005. Lopez argues that the evidence is insufficient to prove beyond a reasonable doubt that he sold methamphetamine to a confidential informant (CI) on two of the occasions for which he was convicted.

In considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in [the] light most favorable to the conviction," is sufficient to permit a jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A reviewing court assumes that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that

the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

"While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). But the circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430. "[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Gates*, 615 N.W.2d 331, 338 (Minn. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

The chain of circumstantial evidence, viewed as a whole, excludes beyond a reasonable doubt any reasonable inference other than Lopez's guilt on each count. Both drug buys that Lopez disputes occurred at Lopez's apartment and involved a CI who had been provided money to purchase the drugs and was searched before and after the buy. Although the CI wore a body wire and was under surveillance as much as possible throughout the transaction, officers did not consistently monitor the transactions because the wire was unoperable during the first transaction and there were several other voices and a loud television interfering with transmission of the second transaction.

Lopez raises the mere possibility that someone else could have sold the drugs to the CI on these two occasions. But, scrutinizing the evidence as a whole and in the light most favorable to conviction, this theory is not reasonable. Lopez and the CI had previously engaged in drug transactions, and there is no reason to believe that someone other than Lopez would be selling drugs from his apartment or that the CI would have approached anyone other than Lopez to purchase them there. The cooperating CI was under police surveillance at the time of these transactions and would not have known that the body-wire transmissions would be inaudible. Thus, based on our careful review of the record, we conclude that the evidence presented is sufficient to support the jury's verdict.

**II.**

Lopez next contends that the district court erred by admitting *Spreigl* evidence. Other-crimes, or *Spreigl*, evidence is inadmissible to prove the defendant's character or that the defendant acted in conformity with that character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). In addition to notice requirements the state must meet before seeking the admission of *Spreigl* evidence, the district court must determine

> (1) that the evidence is clear and convincing that the defendant participated in the other offense; (2) that the *Spreigl* evidence is relevant and material to the state's case; and (3) that the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice.

*State v. Shannon*, 583 N.W.2d 579, 583 (Minn. 1998).

"Failure to object to the admission of evidence generally constitutes waiver of the right to appeal on that basis." *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). An appellate court may consider a waived issue if there is (1) error, (2) that was plain, and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). A defendant bears a "heavy burden" of persuasion to show that "the error was prejudicial and affected the outcome of the case." *Id.* at 741. If these three prongs are met, the court must then decide whether it should address the issue in order to "ensure fairness and the integrity of the judicial proceedings." *Id.* at 740. "[W]hile [district] courts are advised, even absent a request, to give a cautionary instruction upon the receipt of other-crimes evidence, failure to do so is not ordinarily reversible error." *Vick*, 632 N.W.2d at 685. When there was a failure to object to *Spreigl* evidence, the question becomes whether the district court's failure to strike the testimony sua sponte or to provide a cautionary instruction constitutes plain error. *Id.*

Lopez contends that the district court committed plain error by admitting evidence of two (uncharged) incidents: (1) when the CI went to Lopez's apartment for a controlled drug buy but received a plastic bag with only trace amounts of methamphetamine, and (2) when, without prearrangement, the CI went to Lopez's apartment to attempt a controlled drug buy but was unable to find Lopez.

As to the first incident, Lopez did not object when the state gave pretrial notice of its intent to introduce it as *Spreigl* evidence. At trial, an officer outlined the procedures that were used and testified that the CI returned with money and trace amounts of methamphetamine. Because testimony that Lopez possessed trace amounts of the drug

and transferred it to the CI constitutes evidence of another wrong, and because the district court had been afforded a pretrial opportunity to consider its admissibility, admission of this evidence without explicit *Spreigl* analysis was error. But Lopez fails to satisfy his heavy burden of persuasion to show that the district court's failure to strike the unobjected-to testimony or provide a cautionary instruction sua sponte was prejudicial. Although this evidence indicates that Lopez was involved in the illegal sale of drugs, there is evidence of no less than four other drug transactions, each involving more than trace amounts of methamphetamine, from which the jury could have reached the same conclusion. There was also substantial evidence supporting the convictions without reliance on this incident. Admission of this evidence, although erroneous, was not prejudicial and, thus, does not satisfy the plain-error standard.

Lopez's argument that testimony regarding the failed attempt to conduct a drug buy was inadmissible *Spreigl* evidence also fails. Minn. R. Evid. 404(b) *expressly* addresses "evidence of another crime, wrong, or act." Here, the evidence does not describe any crime, wrong, or act attributable to Lopez, and thus does not fall within the purview of this rule.

Based on our review of the record, the district court did not commit plain error by failing to exclude the evidence or to instruct the jury, sua sponte, regarding either of these two incidents.

**III.**

"[District] courts are given broad discretion in awarding restitution." *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). "Under Minn. Stat. § 611A.04, subd. 1(a),

a restitution request may include, but is not limited to, any out-of-pocket losses resulting from the crime[.]" *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). "The primary purpose of the statute is to restore crime victims to the same financial position they were in before the crime." *Id.*

When challenging a restitution request,

> [a]t the sentencing, dispositional hearing, or hearing on the restitution request, the offender shall have the burden to produce evidence if the offender intends to challenge the amount of restitution or specific items of restitution or their dollar amounts. This burden of production *must* include a detailed sworn affidavit of the offender setting forth all challenges to the restitution or items of restitution, and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim or victims. The affidavit *must* be served on the prosecuting attorney and the court at least five business days before the hearing.

Minn. Stat. § 611A.045, subd. 3(a) (2004) (emphasis added). "Under the statute, the affidavit is both the sole vehicle by which the offender can meet the burden of pleading, and an essential element of the offender's case required to meet the burden of production." *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000).

Lopez failed to submit an affidavit challenging a restitution request, which is expressly required by the statute.[1] Thus, the district court did not abuse its broad

[1] "'Restitution' includes payment of compensation to a government entity that incurs a loss as a direct result of a crime." Minn. Stat. § 609.10, subd. 2(a)(2) (2006). Because state and local police departments are government entities and are within the purview of "victims" for restitution purposes, the loss of the "buy money" is compensable here, and Minn. Stat. § 611A.045, subd. 3 must be satisfied.

discretion by ordering payment of restitution for the "buy money" expended in the transactions for which Lopez stands convicted.

**Affirmed.**