STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0666

State of Minnesota,
Respondent,

vs.

Stephen Thomas Conlin,
Appellant.

Filed March 31, 2014
Reversed and remanded
Larkin, Judge

Winona County District Court
File No. 85-CR-10-2277

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

Karin L. Sonneman, Winona County Attorney, Christina M. Davenport, Assistant County Attorney, Winona, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Stephanie A. Karri, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

LARKIN, Judge

A jury found appellant guilty of third-degree sale of marijuana while in possession of a firearm and fifth-degree possession of marijuana while in possession of a firearm. Appellant argues that the evidence is insufficient to sustain the jury's guilty verdict on the third-degree-sale offense. Appellant also argues that the underlying warrant for the search of his residence was not supported by probable cause, the state did not authenticate the marijuana evidence admitted at trial, he was denied his right to present a complete defense, and he cannot be convicted of both offenses because the fifth-degree offense is a lesser-included offense of the third-degree offense. Because we conclude that the evidence is insufficient to sustain appellant's conviction of third-degree sale of marijuana, we reverse that conviction. But we reject appellant's other arguments and remand for sentencing on the fifth-degree possession offense.

FACTS

Police officers found marijuana, evidence of a marijuana-grow operation, and several guns while executing a search warrant at appellant Stephen Thomas Conlin's residence on October 22, 2010. During two subsequent searches, officers found marijuana in a shed in Conlin's backyard and in a hair salon owned by Conlin and his wife. Respondent State of Minnesota charged Conlin with third-degree sale of marijuana while in possession of a firearm and fifth-degree possession of marijuana while in possession of a firearm.

Conlin moved the district court to suppress the evidence that was seized during the searches, arguing that the initial search-warrant application did not establish probable cause to believe that evidence of criminal activity would be found at his residence. The district court denied his motion, and the case was tried to a jury. During trial, the district court excluded some, but not all, of the state's marijuana evidence, concluding that the state failed to establish an adequate chain of custody. The jury found Conlin guilty of both charges, and the district court denied Conlin's motion for judgment of acquittal. The district court sentenced Conlin only on the third-degree offense, granted his motion for a dispositional departure, and placed him on probation. Conlin appeals.

D E C I S I O N

I.

We first address Conlin's argument that the evidence is insufficient to sustain his conviction of third-degree sale of marijuana.[1] An appellate court assesses the sufficiency of the evidence supporting a conviction by determining whether the legitimate inferences drawn from the evidence on the record would permit a jury to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). 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 allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the

[1] Conlin does not challenge the sufficiency of the evidence to sustain the jury's finding of guilt on the fifth-degree offense.

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

Conlin was convicted under Minn. Stat. § 152.023, subd. 1(5) (2010), which provides that

> [a] person is guilty of controlled substance crime in the third degree if:
> . . . .
> (5) on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of five kilograms or more containing marijuana or Tetrahydrocannabinols.

Conlin argues that his "conviction for possession of five or more kilograms of marijuana with intent to sell must be reversed because the [s]tate did not present evidence that the marijuana weighed at least five kilograms." Conlin cites *State v. Robinson*, 517 N.W.2d 336 (Minn. 1994), in support of his argument. In *Robinson*, the defendant was charged with first-degree sale of a controlled substance after the police found him with a pager, cash, and cocaine. 517 N.W.2d at 337. Specifically, the defendant was charged "[u]nder Minn. Stat. § 152.021, subd. 1(1) (Supp. 1991)," which stated that "a person is guilty of sale of a controlled substance in the first degree if 'on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of ten grams or more containing cocaine base.'" *Id.* at 337 n.1. But the state tested less than nine grams of the substance seized from the defendant. *Id.* at 338. The state argued

that the testing, "when considered along with the circumstantial evidence, [was] sufficient to prove beyond a reasonable doubt that the weight of the cocaine mixture . . . equaled or exceeded 10 grams." *Id*. The supreme court rejected that argument stating that

> random sampling in a case such as this one is insufficient to establish the total weight required of the mixture containing a controlled substance. The weight of the mixture is an essential element of the offense charged; like every other essential element, it must be proven by the state and proven beyond a reasonable doubt. . . . [T]here seems to be no good reason why a sufficient quantity of the mixture should not be scientifically tested so as to establish beyond a reasonable doubt an essential element of the crime charged.

Id. at 339 (citation omitted). The supreme court based its decision, in part, on a policy rationale: "[T]he fact that the sentences for drug offenses have greatly increased in recent years persuades us that the state should be required, in cases such as this, to test enough of the substance mixture to prove scientifically the requisite weight." *Id*. The supreme court subsequently made clear that the "decision in . . . *Robinson* . . ., dealing with scientific testing of suspected controlled substances to determine their identity, applies to marijuana cases, not just cocaine cases." *State v. Galvan*, 532 N.W.2d 210, 210 (Minn. 1995).

To establish the identity and weight of the marijuana in this case, the state presented the testimony and report of Minnesota Bureau of Criminal Apprehension (BCA) analyst Robert Lind. Lind testified that he received 34 bags of suspected marijuana related to Conlin's case. Lind analyzed the contents of only 14 of the bags because the substance in those bags weighed a total of 5.2 kilograms and exceeded the

five-kilogram threshold necessary to sustain the third-degree charge. The contents of the 14 bags tested positive for marijuana.

The district court subsequently excluded 12 of the 14 bags from evidence based on Conlin's chain-of-custody objection. The facts related to the district court's ruling are as follows. Approximately five days after the search and seizure in this case, and over a year before the substance was submitted to the BCA for testing, an officer who was not involved in the investigation of this case took 20 bags of suspected marijuana from the police evidence room to use in a dog-sniff training exercise. The officer labeled each bag that he took with a letter, A through T. But the officer testified that he did not sign the evidence out on a chain-of-custody log sheet. He also testified that after the training exercise, he did not return the bags directly to the evidence room. Instead, he placed some of the bags in a gun safe and placed the remaining bags in two lockers. He testified that he returned the bags from the gun safe to the evidence room the following day, but someone else took the remaining bags from the lockers.

Twelve of the 14 bags that the BCA tested in this case contained a letter identification, indicating that they had been removed from the evidence room for the training exercise prior to testing. The district court refused to admit those 12 bags into evidence, concluding that the state failed to establish an adequate chain of custody. An adequate chain of custody "insures that the items seized have not been exchanged for others more incriminating, and that they have not been contaminated or altered." *State v. Johnson*, 307 Minn. 501, 504, 239 N.W.2d 239, 242 (1976). Thus, the district court allowed only two of the bags that had been tested by the BCA into evidence. BCA

analyst Lind did not testify regarding the weight of the marijuana in the two bags that were admitted into evidence.

Conlin argues that because there was no testimony regarding the weight of the marijuana in the two bags that were admitted into evidence, the "[s]tate did not have evidence that the marijuana in this case weighed five or more kilograms" and "[t]herefore, the [s]tate did not prove beyond a reasonable doubt an essential element of the offense." The state counters that it need not prove that Conlin possessed five kilograms or more of marijuana to obtain a conviction under Minn. Stat. § 152.023, subd. 1(5). The state notes that the offense is statutorily defined to include "an intent to manufacture" and argues that "[t]he actual quantity of marijuana is therefore not required for the state to meet its burden." The state therefore contends that it only had to prove that Conlin "intended to grow five kilograms or more of marijuana," and not that he possessed that amount. We disagree.

Once again, the charging statute provides that

> [a] person is guilty of controlled substance crime in the third degree if:
> . . . .
> (5) on one or more occasions within a 90-day period the person unlawfully *sells* one or more mixtures of a *total weight of five kilograms or more* containing marijuana or Tetrahydrocannabinols.

Minn. Stat. § 152.023, subd. 1(5) (emphasis added).

"Sell" is defined as follows:

> (1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to *manufacture*; or

(2) to offer or agree to perform an act listed in clause (1); or

(3) to *possess with intent* to perform an act listed in clause (1).

Minn. Stat. § 152.01, subd. 15a (2010) (emphasis added).

The state has consistently relied on the third subpart of the definition of sell as its theory of the case. During its closing argument to the jury, the state argued that "when you look at what the state [has] to prove, the first charge is intent to grow marijuana. You don't need the five kilograms actually into your evidence. You need proof that he intended to grow five kilograms or more within a ninety day period." At oral argument to this court, the state cited the third subpart of the definition of sell and argued that it only needed to prove that Conlin intended to manufacture five kilograms of marijuana and not that he *possessed* five kilograms with intent to manufacture. That argument is unavailing under *State v. Traxler*, 583 N.W.2d 556 (Minn. 1998).

In *Traxler*, the supreme court considered the proper method of instructing a jury on a charge of controlled-substance crime in the first degree under Minn. Stat. § 152.021, subd. 3(1) (1996), which provided that a person is guilty of a crime if "on one or more occasions within a 90-day period the person unlawfully *sells* one or more mixtures of a total weight of 50 grams or more containing methamphetamine." 583 N.W.2d at 560 (quotation omitted). The language in the charging statute in *Traxler* is similar to the charging statute in this case. In addition, the statutory definition of sell that applied in *Traxler* is identical to the definition in this case, and it included the component that the state relies on here: "to possess with intent to perform an act listed in clause (1)." *Id.* (quotation omitted).

Regarding the proper jury instructions in *Traxler*, the supreme court explained

> Normally, in order to tailor the jury instructions to the particular offense and the factual context with which a defendant is charged, the district court must replace individual terms in the controlled substance crime statutes with other definitional phrases. Before jury instructions were given in this case, defense counsel urged the court to replace "sell" in § 152.021, subd. 1(3), simply with "manufacture." The court instead replaced "sell" with the phrase "possess[ ] with the intent to manufacture" taken from § 152.01, subd. 15a(3), and instructed the jury on first-degree controlled substance crime as follows: "whoever unlawfully possesses with the intent to manufacture on one or more occasion within a 90-day period one or more mixtures of a total weight of 50 grams or more containing methamphetamine is guilty of a controlled substance crime in the first degree. . . ."
>
> . . . .
>
> While we recognize that the statute certainly could have been more artfully drafted, we conclude that the district court's instructions, which included "possession with intent to manufacture" as one of the definitions of "sell," did not materially misstate the law. . . . To prove a charge of possession with intent to manufacture, the state must show that the defendant possessed "one or more mixtures [of a total weight of 50 grams or more] containing methamphetamine."

Id. at 560-61. Next, the supreme court held that "the state's evidence was insufficient to establish the element of weight—50 grams—beyond a reasonable doubt." *Id*. at 562.

Relying on *Traxler*, we conclude that under the state's theory in this case, the state was required to prove, beyond a reasonable doubt, that Conlin "on one or more occasions within a 90-day period . . . unlawfully [possessed with intent to manufacture] one or more mixtures of a total weight of five kilograms or more containing marijuana or Tetrahydrocannabinols." *See* Minn. Stat. § 152.023, subd. 1(5). To conclude otherwise under the state's theory would ignore plain statutory language and render the words

"possess with" in the statutory definition of sell meaningless. *See* Minn. Stat. § 152.01, subd. 15a(3), *see also State v. Wilson*, 830 N.W.2d 849, 853 (Minn. 2013) (stating that appellate courts apply a statute's plain meaning when the legislature's intent is clear from the plain and unambiguous language of the statute, and, in doing so, courts interpret the statute in a manner that renders no part of it meaningless).

We now consider whether the evidence is sufficient to establish that Conlin possessed the requisite amount of marijuana. "[W]here the identification of the drug is in question, the sufficiency of the evidence is examined on a case-by-case basis." *State v. Olhausen*, 681 N.W.2d 21, 29 (Minn. 2004). The identity and weight of a suspected controlled substance may be proved directly with scientific evidence or, in certain situations, circumstantially with scientific or nonscientific evidence. *See id*. at 22, 28 (holding that "non-scientific evidence presented at trial relating to the identity and weight of a controlled substance"—including defendant's and coconspirator's statements regarding the identity and weight of the substance, along with a police officer's opinion as to drug's authenticity, size, and weight—"was sufficient to sustain respondent's first-degree controlled substance crime conviction where the defendant prevented scientific testing by disposing of the alleged controlled substance").

The scientific evidence in this case consists of the testimony and report of BCA analyst Robert Lind. Obviously, the same chain-of-custody defect that caused the district court to exclude from evidence 12 of the bags that were tested by the BCA prevents the state from relying on the BCA's testing of those 12 bags to sustain its burden of proof. Once again, the fatal break in the chain of custody occurred before the bags were sent to

the BCA. Moreover, although the district court allowed two of the tested bags into evidence and the substance in those bags tested positive for marijuana, there is no evidence regarding the weight of that marijuana. Because the state's evidence shows that the contents of all 14 of the tested bags were necessary to meet the five-kilogram threshold, the contents of the two bags that were admitted into evidence cannot meet the threshold. Lastly, the state does not argue that random sampling or extrapolation is appropriate in this case. *See Robinson*, 517 N.W.2d at 339 (discussing "[t]he trouble with determining the required weight of a mixture by extrapolation from random samples"). In sum, the scientific evidence from the BCA is inadequate to prove that Conlin possessed five kilograms of marijuana.

We next consider whether the nonscientific evidence is adequate. Investigator Mark Dungy of the Winona County Sheriff's Office testified that a couple of days after seizing the suspected marijuana from Conlin's house, shed, and business, he and another officer removed the stems from the plants and weighed all of it at just over 17 pounds. But the state does not argue that this testimony is adequate to meet its burden, choosing instead to rely on its incorrect theory that it does not need to prove any particular weight. Moreover, precedent leads us to conclude that the state has not met its burden.

In most cases in which the supreme court relied on nonscientific evidence to establish the identity or weight of a controlled substance, there was also scientific evidence and the adequacy of the scientific evidence was not in question. *See State v. Soutor*, 316 N.W.2d 576, 577 (Minn. 1982) (considering "evidence that the substance was packaged as hashish is commonly packaged, smelled like hashish to experienced

police officers, and was referred to by one of the defendants as hashish," in addition to an expert's "microscopic analysis, . . . modified Duquenois-Levine test and gas chromatograph-mass spectrometer analysis," to conclude that the evidence was sufficient to prove "beyond a reasonable doubt that the suspected hashish was in fact hashish"); *State v. Dick*, 253 N.W.2d 277, 279 n.1 (Minn. 1977) (considering the testimony of a policeman "that when lit, the substance gave off an odor which he concluded was the odor of burning marijuana" and that the "defendant had represented the substance to be marijuana" in addition to testimony from the state's expert that the substance at issue "looked like marijuana under a microscope" and produced a positive result on "the modified Duquenois test" to conclude that "the jury was justified in concluding that the substance in question was marijuana"). However, in a case in which the proffered scientific evidence was found to be inadequate, the supreme court concluded that the nonscientific evidence was inadequate to establish the identity of a suspected controlled substance, even though that evidence included the defendant's admission that the substance was marijuana. *State v. Vail*, 274 N.W.2d 127, 133-34 (Minn. 1979).

We are aware of only one case, *State v. Olhausen*, in which nonscientific evidence alone was sufficient to establish the identity and weight of a suspected controlled substance. In *Olhausen*, "[t]he non-scientific evidence presented at trial relating to the identity and weight of a controlled substance was sufficient to sustain respondent's first-degree controlled substance crime conviction where the defendant prevented scientific testing by disposing of the alleged controlled substance." 681 N.W.2d at 22. The nonscientific evidence was obtained during an attempted controlled buy, during which,

an undercover officer spent time with the defendant and handled the suspected controlled substance, and the defendant made numerous statements regarding the content and weight of the substances. *Id*. at 23-25. The nonscientific evidence included the police officer's opinion regarding the substance's authenticity and weight, admissions by the defendant and his coconspirator regarding the contents and weight of the substance, and the defendant's "consciousness of guilt," as evidenced by his flight from the scene of the attempted controlled buy with the substance. *Id*. at 28-29. The supreme court distinguished both *Vail* and *Robinson*, stating that in those cases, "the state had possession of the entire amount of controlled substance at issue but failed to use adequate procedures to scientifically test this substance." *Id*. at 28.

This case is more like *Vail* and *Robinson* than *Olhausen*. Unlike the defendant in *Olhausen*, Conlin did not prevent the state from conducting the necessary testing. Instead, the state had possession of the necessary amount of the suspected controlled substance "but failed to use adequate procedures to scientifically test [the] substance," because it failed to maintain an adequate chain of custody prior to sending the substance to the BCA for testing. *See id*. Based on the unique facts of this case, we conclude that there is no good reason why the alleged drugs could not be tested. *Cf. id*. at 29 (stating, "in the present matter there is a good reason that the alleged drugs could not be tested; namely, that respondent admittedly disposed of the package when he fled the police to avoid confiscation of the package").

In sum, the state failed to present sufficient evidence to prove, beyond a reasonable doubt, that Conlin possessed with intent to manufacture one or more mixtures

of a total weight of five kilograms or more containing marijuana. We therefore reverse Conlin's conviction of third-degree sale of marijuana while in possession of a firearm. Because we conclude the evidence was insufficient to sustain the verdict, the double jeopardy clause bars a new trial. *See Vail*, 274 N.W.2d at 128 (holding that "[w]here the evidence is insufficient to support the verdict rendered by the [district] court, the double jeopardy clause bars a new trial").

II.

We next address Conlin's other arguments, which pertain to the fifth-degree possession offense. Conlin argues that the district court "erred when it denied [his] [m]otion to [s]uppress and [d]ismiss because the information contained in the police officer's affidavit supporting his application for a search warrant" was based "upon an invalid narcotic field test, stale information, and utility records that did not support [the] allegation that [his] house used an amount of electricity consistent with marijuana grow houses."

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search is lawful only if it is executed pursuant to a valid search warrant issued by a neutral and detached judge based on a finding of probable cause. *See* Minn. Stat. § 626.08 (2010); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). "When determining whether a search warrant is supported by probable cause, we do not engage in a de novo review." *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, "when reviewing a district court's

probable cause determination made in connection with the issuance of a search warrant, an appellate court should afford the district court's determination great deference." *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). This court limits its "review to ensuring that the issuing judge had a substantial basis for concluding that probable cause existed." *McGrath*, 706 N.W.2d at 539.

The search-warrant affidavit in this case alleges that (1) investigators obtained a substance from Conlin's garbage after the garbage was removed from his property by a trash hauler and the substance field tested positive for methamphetamine, (2) authorities had received previous reports, "sometime in 2005," that Conlin was growing marijuana, and (3) utility records suggested that Conlin's use of electricity and water was consistent with a marijuana grow operation. We begin by considering the garbage search and field test.

The search-warrant affidavit states that Investigator Dungy searched Conlin's garbage on October 22. The affidavit states that Investigator Dungy found, among other things, a "[p]lastic baggie with corner torn off and white residue [that] field tested positive for methamphetamine," along with a "green leafy substance, consistent with marijuana" that was not tested because "[t]here was not enough substance to field test accurately." Investigator Dungy applied for the search warrant later the same day.

At the suppression hearing, Investigator Dungy testified that he tested the white residue for methamphetamine twice. He testified that the first test produced "a small indication . . . of a blue color indicating a positive test," and that he "[b]elieved it to be a positive test." Investigator Dungy further testified that he conducted a second test on the

white residue, which also produced a blue color. But he admitted on cross-examination that the procedure he used to conduct the second test did not comply with the manufacturer's instructions. Conlin argues that Investigator Dungy "misrepresented the results of the test by failing to inform the court in his affidavit that he had used a nonstandard testing practice."

"[A] search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause." *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (quotation omitted). "When a defendant seeks to invalidate a warrant, the two-prong *Franks* test requires a defendant to show that (1) the affiant deliberately made a statement that was false or in reckless disregard of the truth, and (2) the statement was material to the probable cause determination." *Id*. (quotation omitted). "A misrepresentation or omission is material if, when the misrepresentation is set aside or the omission supplied, probable cause to issue the search warrant no longer exists." *Id*. "[T]he issue of whether an affiant deliberately made statements that were false or in reckless disregard of the truth involves a fact-based question that is reviewed under the clearly erroneous standard, and the issue of materiality presents a mixed question of law that is reviewed under the de novo standard." *Id*.

The district court found that Investigator Dungy did not misrepresent the results of the test in his affidavit. The district court found that "Investigator Dungy conducted two tests," and that the "first field test indicated the substance was methamphetamine." The district court reasoned that because the first test was valid, "[w]hether or not the second

test was conducted according to proper procedure becomes immaterial." Conlin argues that Investigator Dungy's testimony regarding the first test "was not credible" because photographs produced at the hearing "show that the ampule was white, with no blue." But the district court considered the photographs and specifically credited Investigator Dungy's testimony over the photographs. The district court explicitly stated that Investigator Dungy "explained that the angle of the photos did not allow the blue to appear" and his "testimony as a licensed and trained drug investigator is to be credited over photographic evidence." We do not second guess the district court's credibility determinations. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) ("Because the weight and believability of witness testimony is an issue for the district court, we defer to that court's credibility determinations."), *review denied* (Minn. July 15, 2003). The district court's findings regarding the validity of the first test are not clearly erroneous.

And the district court correctly concluded that omission of the second test was immaterial to the probable-cause determination. Even if Investigator Dungy had included the improperly conducted second field test in his search-warrant affidavit, probable cause to issue the search warrant would still exist based on the results of the first test. "Contraband seized from a garbage search can provide an independent and substantial basis for a probable-cause determination." *McGrath*, 706 N.W.2d at 543. The initial field test, which indicated the presence of methamphetamine, was sufficient to establish probable cause to search Conlin's residence. *See State v. Papadakis*, 643 N.W.2d 349, 356 (Minn. App. 2002) (concluding that "an independent and substantial basis" for

probable cause existed where a "search of the trash produced a spoon with burn marks on the bottom and pieces of plastic bags with white powder residue, which later tested positive for cocaine"). The fact that Investigator Dungy may have conducted a second field test using an improper procedure does not affect the probable-cause determination in this case.

In sum, the district court did not err in determining that Investigator Dungy did not misrepresent the results of the field test, and the issuing judge had a substantial basis for concluding that probable cause existed based on that field test. Because we conclude that the garbage search and field test established probable cause to search Conlin's residence, we do not address Conlin's other challenges to the warrant.

III.

Conlin argues that his "conviction must be reversed because the [s]tate did not authenticate the marijuana evidence that it alleged [he] possessed." "The standard of review of the adequacy of foundation for the admission of evidence is whether an abuse of discretion is shown." *McDonald v. State*, 351 N.W.2d 658, 660 (Minn. App. 1984), *review denied* (Minn. Oct. 16, 1984).

> The "chain of custody" rule, requiring the prosecution to account for the whereabouts of physical evidence connected with a crime from the time of its seizure to its offer at trial, serves the dual purpose of demonstrating that (1) the evidence offered is the same as that seized, and (2) it is in substantially the same condition. It insures that the items seized have not been exchanged for others more incriminating, and that they have not been contaminated or altered.

> There can be no rigid formulation of what showing is necessary in order for a particular item of evidence to be admissible. Rather, admissibility must be left to the sound discretion of the trial judge. He must be satisfied that, in all reasonable probability, the item offered is the same as the item seized and is substantially unchanged in condition.
>
> Admissibility should not depend on the prosecution negativing all possibility of tampering or substitution, but rather only that it is reasonably probable that tampering or substitution did not occur. Contrary speculation may well affect the weight of the evidence accorded it by the factfinder but does not affect its admissibility.

Johnson, 307 Minn. at 504-05, 239 N.W.2d at 242 (citations omitted).

In this case, the district court concluded that the chain of custody was inadequate regarding the bags that were removed from the evidence room for the training exercise before being sent to the BCA for testing and therefore excluded 12 of the 14 bags that the BCA tested. The district court considered Conlin's arguments for excluding the remaining marijuana, analyzed Conlin's arguments under the correct law, and ruled that Conlin's remaining reasons for excluding the evidence could be "argued and left up to the fact finder." Conlin argues that "there was definite indication of substitution, alteration, and tampering" because "[n]one of the [IRC numbers on the] marijuana matched the [IRC] number the police assigned to Conlin's case." But there was also testimony that "[o]ne specific bin [in the evidence room] was used for only the Conlin case," and "[a]ll of the evidence from that case was placed into that bin." The district court did not abuse its discretion by ruling that the chain of custody was adequate for the marijuana that had not been removed from the evidence room for training.

Conlin further argues that although he did not object to "Lind's testimony regarding the nature and weight of the substance," it was plain error to allow the testimony. Generally, an issue cannot be raised for the first time on appeal. *State v. Anderson*, 733 N.W.2d 128, 134 (Minn. 2007). Moreover, "[a]n objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). Nevertheless, an appellate court may review an issue not raised in the district court if there was plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under this standard, we consider (1) whether there was an error, (2) whether such error was plain, and (3) whether it affected the defendant's substantial rights. *Id*. An error is plain if it is "clear" or "obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the three plain-error factors are established, this court considers whether the error seriously affected the fairness and integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740, 742 (explaining that a court may exercise its discretion to correct a plain error only if such error seriously affected fairness, integrity, or public reputation of judicial proceedings).

Because the district court did not err by admitting the two bags of marijuana that were not used in the training exercise, we discern no error in allowing BCA testimony from the BCA analyst regarding the testing of that evidence. And because we reverse Conlin's third-degree sale conviction and Conlin does not challenge the sufficiency of the evidence to prove the weight necessary for the fifth-degree offense, the BCA testimony

regarding testing of the substance in the inadmissible bags is not prejudicial. In sum, Conlin's argument fails two prongs of the plain-error test and is therefore unavailing. *See id*.

IV.

Conlin argues that he is entitled to a new trial because the district court denied him his constitutional right to present a complete defense. A criminal defendant is constitutionally "afforded a meaningful opportunity to present a complete defense." *State v. Quick*, 659 N.W.2d 701, 712 (Minn. 2003) (quotations omitted). "[T]he right to present a defense encompasses the right to offer the testimony of witnesses so that the defense can present its version of the facts to the jury as well as the state so that the jury can decide where the truth lies." *Id*. at 713. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Even when it is claimed that the exclusion of evidence deprived a criminal defendant of his or her constitutional right to present a complete defense, we review the ruling under the abuse-of-discretion standard. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

Conlin's complete-defense argument appears to be twofold: (1) the district court erred in refusing his proposed jury instructions regarding the legal status of marijuana, and (2) because his proposed jury instructions were rejected, it was "pointless for him to

testify," presumably about his belief that marijuana was legal. We address each part of Conlin's argument in turn.

Conlin argues that he was denied his right to present a defense when the district court declined to instruct the jury that "[m]arijuana is specifically excluded from the definition of controlled substances in Minn. Stat. § 270D.01, subd. 2 (2010)," and "specifically excluded under the definition of hallucinogens in Minn. Stat. § 152.01, subd. 5(a) (2010)." "[I]t is solely the responsibility of the court to instruct juries on the law necessary to render a verdict." *State v. Cao*, 788 N.W.2d 710, 716 (Minn. 2010). "[A] district court has the discretion to determine whether to give a requested jury instruction." *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). We "afford a court significant discretion to craft the jury instructions." *Id*. We "review the court's decision to refuse the requested instruction under an abuse of discretion standard." *Id*.

Neither of Conlin's proposed jury instructions was necessary or even relevant to the jury's verdict. Conlin was charged under Minn. Stat. § 152.023, subd. 1(5), which makes sale of marijuana a crime, and Minn. Stat. § 152.025, subd. 2(a)(1) (2010), which makes possession of marijuana a crime. Whether or not marijuana is excluded from definitions of other statutes is not relevant to this case. The district court did not abuse its discretion by denying Conlin's proposed jury instructions.

Conlin further contends that the district court's ruling effectively denied him his right to testify because he could not "argue to the jury that marijuana is not prohibited under Minnesota law." But the district court did not prevent Conlin from testifying and presenting his defense. The district court ruled that Conlin was "precluded from

misleading the jury by arguing during opening or closing that [he] cannot be found guilty unless he knew that possessing marijuana was illegal," and that "in closing [he] shall not misstate, mischaracterize, or in any way distort the applicable law." But the district court specifically ruled that Conlin was "not prevented from eliciting testimony and presenting evidence regarding [his] misinterpretation of the statute."

It appears that Conlin essentially wanted to argue that his possession of marijuana was legal. But whether or not his alleged possession was a crime is a legal determination to be made by the district court, not the jury. *See Cao*, 788 N.W.2d at 716 (stating that it "is solely the responsibility of the court to instruct juries on the law necessary to render a verdict"). And although a party can refer to the law during its argument to the jury, Conlin could not misstate the law. *See id*. (stating that "[a]ttorneys may reference the law during trial," but that "such references run the risk of misstatements by attorneys during trial that may require the court to issue curative jury instructions"). The district court did not abuse its discretion by ruling that Conlin could testify about his belief regarding the legality of marijuana, but that he could not misstate the law.

V.

Conlin argues that his "conviction for possession of marijuana in the fifth degree must be vacated" because it is "a lesser-included offense of the first count and both are based upon the same act." Because we reverse Conlin's conviction of third-degree sale, this issue is moot.

VI.

In his pro se supplemental brief, Conlin makes numerous assertions, including that he has "not been confronted with the witness who started the investigation"; he was "not provided with discoveries when [he] asked for the reports that are mandated by 299C.12"; he was subject to cruel and unusual punishment; he was denied the opportunity to "challenge jurisdiction"; and that marijuana "is not a controlled substance." We have reviewed Conlin's assertions and determine that none has merit. *See State v. Manley*, 664 N.W.2d 275, 289 (Minn. 2003) ("With respect to the remainder of Manley's pro se claims, we have thoroughly reviewed the record and conclude that those claims have no merit.").

In conclusion, we reverse Conlin's conviction of third-degree sale of marijuana while in possession of a firearm because the state did not present sufficient evidence to sustain the conviction. But we are not persuaded by Conlin's other arguments for reversal. Because the record on appeal does not contain a judgment of conviction, we cannot discern whether or not the district court entered a conviction on the fifth-degree possession offense. We therefore remand for the district court to enter judgment of conviction on the fifth-degree possession offense if necessary and to sentence Conlin on that offense. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (explaining the procedure to be used when a defendant is found guilty of more than one charge for the same act).

Reversed and remanded.