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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0968**

State of Minnesota,
Respondent,

vs.

Jeremy William Kohler,
Appellant.

**Filed May 4, 2020
Affirmed
Jesson, Judge**

Becker County District Court
File No. 03-CR-18-642

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Brian McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and Kirk, Judge.*

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

UNPUBLISHED OPINION

JESSON, Judge

Appellant Jeremy William Kohler was arrested and charged with second-degree sale of methamphetamine after facilitating a sale of the drug to a confidential informant in a public park. Kohler argues that the district court committed structural error during his trial when it instructed the jury that the parties “stipulated that the substance sold was methamphetamine,” which he asserts amounted to a directed verdict on the sale element of the offense. We affirm.

FACTS

In October 2017, appellant Jeremy William Kohler contacted a woman to see if she would like to purchase methamphetamine. Unbeknownst to Kohler, the woman was cooperating with a local drug task force as a confidential informant (CI). The CI reported Kohler’s call to a task-force agent, who authorized her to set up a buy with Kohler.

The CI picked up Kohler at his house, proceeded to an apartment complex, and gave Kohler the cash provided to her by the task-force agent. Kohler left the car and met with A.M. at a picnic table in a park near the apartment. A.M. sold Kohler a gram of methamphetamine for \$100. Kohler returned to the CI’s car and gave her the methamphetamine. After dropping Kohler off, the CI turned over the methamphetamine and extra cash to the task-force agents.

Kohler was arrested and charged with second-degree sale of methamphetamine in a public park. Prior to trial, Kohler stipulated “[t]hat the substance purchased was methamphetamine” weighing 1.024 grams. Kohler again stipulated to this fact at trial, and

waived his right to a jury trial on the element of the offense “that there was in fact methamphetamine that changed hands in this case.”

Kohler made a strategic decision to limit the trial to the sole issue of whether he was entrapped by the CI and task-force agents into participating in the sale. As Kohler’s attorney stated—a statement with which Kohler agreed—the reason for the stipulation was because “[w]e agree it is not the issue in this case of whether it was methamphetamine, it was whether entrapment occurred.” Consistent with this strategy, Kohler admitted during his testimony that he accepted cash from the CI and then gave the cash to A.M. in exchange for the methamphetamine.

Following the close of evidence, the district court instructed the jury on the elements of second-degree sale of methamphetamine in a public park. The district court incorporated the stipulation and waiver into its instruction on the first element of the offense, stating:

The elements of second-degree sale of methamphetamine/amphetamine in a school park public zone are, [f]irst, the defendant unlawfully sold one or more mixtures containing methamphetamine or amphetamine. To sell means to sell, give away, barter, deliver, exchange, distribute or dispose of to another to offer or agree to do the same, to possess with the intent to do the same or to manufacture. A mixture is a preparation, compound, mixture, or substance containing a controlled substance regardless of its purity. *I want you to note the parties in this case have stipulated that the substance sold was methamphetamine, and no further proof will be required on this element of the charge.*

(Emphasis added.) Kohler did not object to the instruction. The jury found Kohler guilty, and the district court sentenced him to a stay of imposition, with 15 years of probation and 180 days in jail. Kohler appeals.

D E C I S I O N

Kohler asserts that the district court's instruction to the jury on the first element of second-degree methamphetamine sale in a public park constituted structural error because the instruction did not accurately convey the terms of his stipulation. While the adequacy of jury instructions is reviewed for an abuse of discretion, *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005), “[w]hether a criminal defendant has been denied the right to a jury trial is a constitutional question that we review de novo.” *State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011).

“[S]tructural errors are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards.” *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005) (quotations omitted). Structural error occurs when a jury instruction fails to comport with “the requirement that criminal convictions must rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Moore*, 699 N.W.2d at 737 (quotation omitted). In *Moore*, the district court committed a structural error by instructing the jury that the loss of a tooth constitutes the permanent loss of the function of a bodily member, when that was an element of the offense for the jury to determine. *Id.* at 738. In the present matter, however, the instruction comported with the terms of the stipulation and waiver, and thus the district court did not err in its instruction to the jury.

The district court instructed the jury that “I want you to note the parties in this case have stipulated that *the substance sold* was methamphetamine, and no further proof will be required on *this* element of the charge.” (Emphasis added.) This instruction was consistent with the parties’ written stipulation, which recites that the parties agreed “[t]hat the substance *purchased* was methamphetamine.” (Emphasis added.) By definition, a purchase¹ involves a sale, and thus the district court’s instruction to the jury that the parties stipulated that the “substance sold” was methamphetamine was consistent with the terms of the executed stipulation.

The instruction was also consistent with the terms of Kohler’s on-the-record waiver of his right to a jury determination. During his on-the-record waiver, Kohler agreed that he was stipulating to the fact that “one of the elements the [s]tate would have to prove is that there was in fact methamphetamine *that changed hands* in this case,” (emphasis added) which again goes beyond an agreement that the substance was methamphetamine to include an agreement that an exchange occurred. Because Kohler stipulated and waived his right to a jury determination that the substance purchased was methamphetamine, the district court did not err by using the passive construction “the substance sold” in its instruction to the jury.

We turn next to the district court’s instruction to the jury that “no further proof will be required on *this* element of the charge.” (Emphasis added.) Within context, the district

¹ The American Heritage College Dictionary defines “purchase” as “[t]o obtain in exchange for money or its equivalent; buy” and defines “sell” as “[t]o exchange or deliver for money or its equivalent.” *The American Heritage College Dictionary* 1110, 1238 (3rd ed. 1997).

court began by defining the entire first element of the offense. It then proceeded to define each subcomponent of the first element, defining “to sell” and “mixture” in turn. Following the definition of “mixture,” the district court instructed the jury that the substance sold was methamphetamine, and then, within the same sentence, states that “no further proof will be required on this element of the charge.” The use of the conjoining “and” in the sentence at issue—“I want you to note the parties in this case have stipulated that the substance sold was methamphetamine, and no further proof will be required on this element of the charge”—limits the meaning of the word “this” to the fact that the substance sold was methamphetamine, not the entire first element of the offense.

In sum, the instruction that Kohler asserts constituted structural error was not only consistent with his written stipulation and on-the-record waiver, it was also consistent with his entire trial strategy. Kohler made a strategic decision to admit his participation in the sale in order to assert the defense that he was entrapped by the CI and task-force agents into participating. Therefore, the district court’s instruction that “the substance sold was methamphetamine, and no further proof will be required on this element of the charge” accurately conveyed the parties’ stipulation, and no structural error occurred in the district court’s instruction on the first element of the charged offense.

Affirmed.