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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1240**

State of Minnesota,
Appellant,

vs.

Esau Chucky Sago,
Respondent.

**Filed May 13, 2013
Affirmed
Chutich, Judge**

Ramsey County District Court
File No. 62-CR-12-740

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for appellant)

Charles F. Clippert, Clippert Law Firm, St. Paul, Minnesota (for respondent)

Considered and decided by Chutich, Presiding Judge; Peterson, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

In this appeal, the state argues that the district court erred in entering a judgment of acquittal and dismissing the charge against respondent Esau Chucky Sago, rather than

ordering a new trial. Because the district court properly denied the state's motion for a new trial and granted Sago's motion for judgment of acquittal, we affirm.

FACTS

Respondent Esau Chucky Sago was arrested on January 25, 2012, in St. Paul. Ramsey County subsequently charged him with possession of a firearm by an ineligible person. *See* Minn. Stat. § 624.713, subd. 1(2) (2010). In the complaint, the state cited three alleged prior convictions that made Sago ineligible to possess a firearm: a second-degree riot conviction; a juvenile adjudication for a fifth-degree controlled substance violation; and a juvenile adjudication for terroristic threats.

During a two-day jury trial, the state introduced into evidence a certified copy of Sago's criminal conviction for second-degree riot in Washington County in 2008. The state did not present any evidence of Sago's two juvenile adjudications. The jury convicted Sago of felon in possession based on the riot conviction.

During the pre-sentence investigation process, the state learned that Sago's 2008 conviction was actually for first-degree criminal damage to property and not second-degree riot. Under Minnesota law, criminal damage to property is not a crime of violence that makes a person ineligible to possess a firearm. *See* Minn. Stat. § 624.712, subd. 5 (2010). The state notified the defense and the district court of the error.

The state moved for a new trial and Sago moved for judgment of acquittal. The district court denied the state's motion, concluding that rule 26.04 of the Minnesota Rules of Criminal Procedure provided no mechanism for the state to move for a new trial. It

granted Sago's motion because his 2008 criminal-damage-to-property conviction did not support a conviction under section 624.713. The state appealed.

D E C I S I O N

I. Motion for a New Trial

The state first contends that the district court erred by denying its motion for a new trial. Here, the district court denied the state's motion for a new trial because it concluded that "[t]here is no procedural mechanism for the State to move for a new trial." Under the Minnesota Rules of Criminal Procedure, the district court may grant a new trial "on written motion of a defendant" or "on its own initiative and with the consent of the defendant."¹ Minn. R. Crim. P. 26.04, subd. 1, 2. The rules of criminal procedure, however, do not allow the state to move for a new trial. Thus, the district court did not err in denying the state's motion for a new trial.

II. Judgment of Acquittal

The state also appeals the district court's grant of Sago's motion for judgment of acquittal.² A motion for judgment of acquittal is properly granted where the evidence, viewed in the light most favorable to the state, is insufficient to sustain a conviction.

¹ The district court asked Sago if he would consent to a new trial, but Sago did not.

² A motion for judgment of acquittal is typically made at the close of evidence for either party or within 15 days after the jury is discharged. *See* Minn. R. Crim. P. 26.03, subd. 18(1), (3). The jury found Sago guilty on April 26, 2012, but Sago did not move for judgment of acquittal until June 28, 2012. The state objected to the timing of Sago's motion before the district court, and the district court concluded that Sago's motion was timely because it was brought within fifteen days after the error in his previous conviction was discovered. The state does not appeal this determination, and thus, has waived any argument about the timeliness of Sago's motion. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

State v. Simion, 745 N.W.2d 830, 841 (Minn. 2008); *see also* Minn. R. Crim. P. 26.03, subd. 18(1) (stating that a court may order “a judgment of acquittal on one or more of the charges if the evidence is insufficient to sustain a conviction”). When the state’s evidence is insufficient for a conviction, “the only just . . . remedy is the direction of a judgment of acquittal.” *State v. Clark*, 755 N.W.2d 241, 256 (Minn. 2008) (alteration in original) (quotation omitted). A reviewing court must determine whether the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably have concluded that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

The state charged Sago with violating Minnesota Statutes section 624.713, subdivision 1(2), which prohibits possession of a firearm by a person who has been convicted of a crime of violence. Because Sago had never actually been convicted of second-degree riot, the court explicitly found that the state failed to prove an essential element of the crime. The district court’s conclusion that the evidence was insufficient to convict is an acquittal on the merits “because such a finding involve[d] a factual determination about the defendant’s guilt or innocence.” *State v. Sahr*, 812 N.W.2d 83, 90 (Minn. 2012), *cert denied*, 133 S. Ct. 1455 (2013). Because the state’s evidence was insufficient for a conviction, the district court properly entered a judgment of acquittal. *See Clark*, 755 N.W.2d at 256.

The state argues that the district court applied the wrong remedy and that it should have granted a new trial rather than granting a judgment of acquittal and dismissing the charge against Sago. This argument requires us to analyze whether double jeopardy bars

re-trial. “[W]hen there is an acquittal on the merits, double jeopardy bars review of any underlying issues” *Id.*; *see also Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013) (“A mistaken acquittal is an acquittal nonetheless, and we have long held that [a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.” (alteration in original) (quotation omitted)).

The state argues that this case is governed by the Supreme Court’s decision in *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285 (1988). In *Lockhart*, the defendant pleaded guilty to burglary and the state sought to sentence him under the habitual criminal statute “which provides that a defendant who is convicted . . . and who has previously been convicted of . . . [or] found guilty of four . . . or more felonies, may be sentenced to an enhanced term of imprisonment of between 20 and 40 years.” *Id.* at 34–35, 109 S. Ct. at 287 (alteration in original) (quotation omitted). At the sentencing hearing, the state introduced certified copies of four prior felony convictions. *Id.* at 36, 109 S. Ct. at 288. On cross-examination, the defendant claimed that the governor had pardoned one of the convictions but eventually “agreed that the conviction had been commuted rather than pardoned.” *Id.* Based on the four prior convictions, the jury found that the defendant qualified for an enhanced sentence. *Id.*

Several years later, the state investigated the allegedly pardoned conviction at the district court’s request and found that the defendant had in fact been pardoned for the crime. *Id.* at 37, 109 S. Ct. at 289. The state informed the court that it intended to move to resentence the defendant as a habitual offender, using a different prior conviction. *Id.*

The district court held that the double-jeopardy clause prevented the state from attempting to resentence the defendant as a habitual offender. *Id.* The Eighth Circuit Court of Appeals affirmed. *Id.*

The Supreme Court granted review to address the issue of “whether the Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant’s conviction must be reversed because evidence was erroneously admitted against him.” *Id.* at 40, 109 S. Ct. at 290. The Supreme Court distinguished reversals “based solely on evidentiary insufficiency” where the “government has failed to prove its case against the defendant,” and reversals based on “ordinary trial errors [such] as the incorrect receipt or rejection of evidence.” *Id.* (quotations omitted). “[T]he latter implies nothing with respect to the guilt or innocence of the defendant but is simply a determination that [he] has been convicted through a judicial *process* which is defective in some fundamental respect.” *Id.* (alteration in original) (quotation omitted). The Supreme Court concluded that “in cases such as this, where the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.” *Id.* at 34, 109 S. Ct. at 287.

The state argues that the district court should have applied the *Lockhart* standard in determining whether to grant a judgment of acquittal. Specifically, the state contends that the district court should have considered the evidence of the second-degree riot charge offered by the state, erroneous or not, in determining whether the evidence was sufficient to sustain a guilty verdict. Because second-degree riot is a crime of violence

that makes a person ineligible to possess a firearm, the state contends that the district court erred by concluding that the evidence was insufficient and granting the judgment of acquittal.

Although the facts of the present case are somewhat similar to those of *Lockhart*, the procedural posture of this case is remarkably different. In *Lockhart*, the district court did not grant a judgment of acquittal, but rather “declared [Lockhart’s] enhanced sentence to be invalid.” *Id.* at 37, 109 S. Ct. at 289. Accordingly, the Supreme Court reviewed the district court’s determination that double jeopardy would bar the state’s attempt to resentence Lockhart. The court concluded that, in the context of the double-jeopardy clause, the district court applied the incorrect standard and should have considered all the evidence presented by the state, erroneous or not, to determine whether retrial was permitted. *Id.* at 34, 109 S. Ct. at 287.

Here, unlike *Lockhart*, the state is appealing from the grant of a judgment of acquittal. When determining whether to grant a judgment of acquittal, the district court is required to view the evidence in the light most favorable to the state. *See Simion*, 745 N.W.2d at 841. Because the district court granted the judgment of acquittal and denied the state’s motion for a new trial, the district court never reached the double-jeopardy issue presented in *Lockhart*. The state cites no caselaw demonstrating that, when viewing the evidence in the light most favorable to the state in the context of a judgment of acquittal, the district court is required to ignore the erroneous nature of evidence presented by the state.

In addition, Sago was never convicted of second-degree riot, unlike the conviction in *Lockhart* that occurred and was subsequently pardoned. Thus, Sago's judgment of acquittal was not based on an ordinary trial error, but rather was based on evidentiary insufficiency because the government failed to prove its case. *See Lockhart*, 488 U.S. at 40, 109 S. Ct. at 290. The state could have introduced evidence at trial of Sago's juvenile adjudications that make him ineligible to possess a firearm, but it chose not to do so. "[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Clark*, 755 N.W.2d at 256 (quotation omitted).

The district court properly concluded that "[w]ithout one or more of those convictions . . . the State has failed to prove an essential element of the crime charged, and this conviction may not stand." Thus, we affirm the district court's judgment of acquittal.

Affirmed.