

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BOIVAE FLEMING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66131

FILED

APR 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING*

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of five counts of trafficking in a controlled substance, four counts of sale of a controlled substance, one count of possession of a controlled substance with the intent to sell, and one count of escape. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.


Appellant Boivae Fleming claims the district court erred by denying his motion to strike trafficking-in-controlled-substance counts 1, 2, 5, 7, 9 and sale-of-controlled-substance count 6. Fleming argues these counts are redundant because he could only be convicted of one crime per transaction and the district court should have stricken the counts for the greater offenses. The State responds it does not oppose the dismissal of sale-of-controlled-substance counts 3, 6, 8, 10 and possession-of-controlled-substance-with-intent-to-sell count 4, but it asserts the proper remedy for redundant counts is dismissal of the lesser offense.

Having reviewed the record and the relevant statutes, we conclude the lesser-included offenses of sale of a controlled substance and

possession of a controlled substance with the intent to sell must be vacated. See NRS 453.321(1); NRS 453.337(2); NRS 453.3385(1); *Jackson v. State*, 128 Nev. ___, ___, 291 P.3d 1274, 1282 (2012) (establishing the test for determining permissibility for cumulative punishment); *Vidal v. State*, 105 Nev. 98, 100, 769 P.2d 1292, 1293 (1989) (NRS 453.337(2) prohibits a defendant from being “punished for possession with intent to sell when a greater penalty is provided for in . . . a trafficking conviction.”); *Point v. State*, 102 Nev. 143, 147, 717 P.2d 38, 41 (1986) (where the elements of the greater offense are sufficiently established, the lesser offense should simply be reversed without affecting the conviction for the more serious offense), *disapproved of on other grounds by Stowe v. State*, 109 Nev. 743, 746-47, 857 P.2d 15, 16 (1993). Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court with instructions to vacate counts 3, 4, 6, 8, and 10, and enter a corrected judgment of conviction.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

¹We have considered Fleming’s remaining claims and conclude his ineffective-assistance-of-counsel claims were not properly raised on direct appeal, see *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006), and his evidence-gathering and discovery claims were not preserved for appeal and he has not demonstrated plain error, see *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

cc: Hon. James M. Bixler, District Judge
Law Offices of C. Conrad Claus
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk