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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0109**

State of Minnesota,
Respondent,

vs.

Jose Salud Botello Vargas,
Appellant.

**Filed January 6, 2020
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Mille Lacs County District Court
File No. 48-CR-17-109

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Joe Walsh, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Andrew P. Leiendecker, Special Assistant Public Defender, Jones Day, Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Kirk,
Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Judge

Jose Salud Botello Vargas was arrested for carrying a firearm without a permit. In a search incident to the arrest, a law-enforcement officer found methamphetamine in Botello Vargas's pocket, and the officer later found more methamphetamine in Botello Vargas's vehicle. Botello Vargas moved to suppress the evidence of the methamphetamine, but the district court denied the motion. The district court later found Botello Vargas guilty of two controlled-substance crimes after a stipulated-evidence court trial. We conclude that the district court did not err by denying Botello Vargas's motion to suppress evidence. But we conclude that the district court erred by convicting Botello Vargas of two offenses for the same criminal act. Therefore, we affirm in part, reverse in part, and remand to the district court with instructions to vacate one of the convictions.

FACTS

On the morning of January 14, 2017, State Trooper Otterson was on patrol on U.S. Highway 169 in Mille Lacs County. He saw a black sedan backing into the driveway of a nearby residence on a street that is perpendicular to the highway. He was familiar with the residence from prior drug-related investigations. Specifically, he and other law-enforcement officers had searched the residence approximately two years earlier and found a large amount of methamphetamine, four stolen firearms, and stolen vehicles. Trooper Otterson also had been on the property 30 minutes earlier to investigate a white sport-utility vehicle (SUV) that was parked on the property. The SUV had shattered windows and multiple bullet holes in the body of the vehicle. Trooper Otterson had used the SUV's

license-plate number to search for the owner of the vehicle and had discovered that it was registered to a person whom the trooper previously had arrested for possession of a large quantity of methamphetamine.

Trooper Otterson believed that the black sedan had an unlawfully dark tint to its windows. Trooper Otterson turned off the highway to investigate. As he drove past the driveway, he saw exhaust coming from the tailpipe of the black sedan, indicating that the engine was running. He saw two persons sitting in the vehicle. Both of them “slumped down” as he passed, indicating that they were trying to conceal themselves. Trooper Otterson used the sedan’s license-plate number to search for its owner and discovered that it was registered to Botello Vargas. The trooper was familiar with Botello Vargas because he had arrested him for a drug-related offense only two months earlier.

The trooper turned around at the end of the block, returned to the residence, and pulled partway into the driveway, facing the sedan. The trooper activated his squad vehicle’s rear emergency lights to warn other motorists because the rear of the squad vehicle extended into the roadway. As Trooper Otterson parked, he saw a man in the driver’s seat move his arm between the center console and his waist or lower back, which made the trooper concerned that the man was trying to hide or retrieve a weapon or contraband.

The trooper exited his squad vehicle and approached the driver’s side of the sedan. As he walked toward the sedan, he recognized the driver as Botello Vargas. Trooper Otterson knocked on the driver’s side window and asked Botello Vargas to roll down the window. After Botello Vargas did so, Trooper Otterson asked him a few questions about

what he was doing. Botello Vargas said that he was trying to get some sleep. The trooper observed that Botello Vargas “appeared nervous,” had “dilated pupils, bloodshot eyes, flushed skin, dry mouth and rigid movements,” and would not make eye contact with him. The trooper also saw a pair of binoculars, a night-vision monocular, a butane torch, and plastic baggies inside the vehicle.

The trooper asked Botello Vargas to step out of the vehicle. Botello Vargas did not respond, even after two requests, which made the trooper “extremely nervous.” Trooper Otterson saw Botello Vargas reach toward the center console. The trooper opened the door and ordered Botello Vargas to step out. After the trooper opened the door, he saw an empty pistol holster between the driver’s seat and the door. The trooper asked Botello Vargas whether there was a gun in the car. Botello Vargas initially did not respond but later admitted that there might be a gun in the vehicle. Trooper Otterson called for back-up assistance. While Trooper Otterson was waiting for another officer to arrive, Botello Vargas told Trooper Otterson that a gun was behind his back. Trooper Otterson expressed concern for his own safety. After another trooper arrived to assist, Trooper Otterson removed Botello Vargas from the car and handcuffed him. Trooper Otterson asked Botello Vargas whether he had a permit to carry the firearm. Botello Vargas responded in the negative. Trooper Otterson arrested Botello Vargas for carrying a firearm without a permit.

Trooper Otterson searched Botello Vargas incident to his arrest. He found methamphetamine in Botello Vargas’s pocket and 25 Xanax pills in the sedan, among other things. Officers later searched the sedan’s locked glove box pursuant to a warrant and found more methamphetamine.

The state charged Botello Vargas with first-degree controlled substance crime for possessing more than 100 grams of methamphetamine while possessing a firearm, in violation of Minn. Stat. § 152.021, subd. 2b(1) (2016), and fifth-degree controlled substance crime for possessing controlled substances other than a small amount of marijuana, in violation of Minn. Stat. § 152.025, subd. 2(1) (2016).

In January 2018, Botello Vargas moved to suppress the evidence arising from the January 14, 2017 investigation and arrest. The district court conducted an omnibus hearing at which the state called Trooper Otterson as its sole witness. After the omnibus hearing, Botello Vargas filed a memorandum of law in which he argued, first, that Trooper Otterson did not have a reasonable suspicion of criminal activity when he initiated the investigatory seizure and, second, in the alternative, that Trooper Otterson did not have a reasonable suspicion of criminal activity to justify an expansion of the initial investigatory seizure when the trooper ordered him out of his vehicle.

In February 2018, the district court filed an order in which it denied Botello Vargas's motion to suppress. The district court reasoned that a suspected window-tint violation may justify an investigatory seizure. The district court also reasoned that Trooper Otterson did not seize Botello Vargas when he parked the squad vehicle at the base of the driveway or when he approached Botello Vargas's sedan. The district court further reasoned, apparently in the alternative, that Trooper Otterson had a reasonable suspicion of criminal drug activity when he approached Botello Vargas's sedan. The district court continued by reasoning that Trooper Otterson had additional reasons to expand the scope of the investigation after he engaged Botello Vargas in conversation, saw indications that Botello

Vargas was using drugs, and saw binoculars, a monocular, a butane torch, and baggies inside Botello Vargas's sedan.

In June 2018, the state and Botello Vargas agreed to a stipulated-evidence trial. *See* Minn. R. Crim. P. 26.01, subd. 4. The district court found Botello Vargas guilty of both offenses. The district court imposed executed prison sentences of 86 months on count 1 and one year and one day on count 2. Botello Vargas appeals.

D E C I S I O N

I. Motion to Suppress

Botello Vargas first argues that the district court erred by denying his motion to suppress evidence.

The Fourth Amendment to the United States Constitution guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. The Fourth Amendment also protects the right of the people to be secure in their motor vehicles. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). As a general rule, a law-enforcement officer may not seize a person in a motor vehicle without probable cause. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). But a law-enforcement officer may, consistent with the Fourth Amendment, briefly detain a person in a motor vehicle for purposes of a limited investigation if the officer has a reasonable, articulable suspicion that the person might be engaged in criminal activity. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)). This court applies a *de novo* standard

of review to the question whether an investigatory detention is valid. *Britton*, 604 N.W.2d at 87; *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Botello Vargas's argument has three parts. He first argues that Trooper Otterson seized him when the trooper parked his squad vehicle at the base of the driveway. He next argues that Trooper Otterson did not have a reasonable suspicion of criminal activity when he parked his squad vehicle at the base of the driveway. And he last argues, in the alternative, that even if Trooper Otterson had a reasonable suspicion of criminal activity when he first seized Botello Vargas, Trooper Otterson unlawfully expanded the scope of the seizure.

A.

We first consider Botello Vargas's argument that Trooper Otterson seized him when he parked his squad vehicle at the base of the driveway. The state argues in response that Botello Vargas was not seized until after Trooper Otterson approached his sedan and engaged him in conversation.

"Not all encounters between the police and citizens constitute seizures." *Harris*, 590 N.W.2d at 98. A person is seized only if, given the totality of the circumstances, "a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). Circumstances that might indicate a seizure include the threatening presence of several officers, an officer's display of a weapon, an officer's physical touching of the person, or the officer's use of language or tone of voice indicating that compliance

might be compelled. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980)).

It is unnecessary in this case to resolve the parties' conflicting arguments on when Botello Vargas was seized. For the reasons stated below, we would reach the same conclusion regardless of how we resolved that issue. Accordingly, we assume without deciding that Botello Vargas was seized when Trooper Otterson parked his squad vehicle at the base of the driveway.

B.

We next consider Botello Vargas's argument that Trooper Otterson did not have a reasonable suspicion of criminal activity when he parked his squad vehicle at the base of the driveway. A reasonable, articulable suspicion exists if "the police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. Reasonable suspicion requires "something more than an unarticulated hunch"; "the officer must be able to point to something that objectively supports the suspicion at issue." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted); *see also Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880.

Botello Vargas focuses primarily on whether the seizure is justified by Trooper Otterson's suspicion of a window-tint violation. Botello Vargas contends that a window-tint violation is not criminal in nature because it is a petty misdemeanor. *See* Minn. Stat. §§ 169.71, subd. 4(a)(3), 169.89, 609.02, subd. 4a (2016); *State v. Eakins*, 720 N.W.2d 597, 601 (Minn. App. 2006). He also contends that he did not violate the window-tint law

because he was not driving his car on a “street or highway” but, rather, was parked on private property. *See* Minn. Stat. § 169.71, subd. 4(a)(3). He further contends that Trooper Otterson’s suspicion of a window-tint violation is not supported by the record because the statute regulates only rear and side windows and Trooper Otterson likely saw only the sedan’s front windshield. *See id.*

We note that Botello Vargas did not make these arguments to the district court in connection with his motion to suppress. At the omnibus hearing, Trooper Otterson testified briefly about his initial suspicion, upon first seeing the black sedan, that its windows were too dark. But most of Trooper Otterson’s testimony related to his suspicion of drug-related activity at the residence where Botello Vargas’s sedan was parked. In the memorandum of law that was filed after the omnibus hearing, Botello Vargas’s attorney argued that Trooper Otterson did not have a reasonable suspicion of drug-related criminal activity. The memorandum mentions Trooper Otterson’s initial suspicion of a window-tint violation twice but only because the window tint first drew Trooper Otterson’s attention to Botello Vargas’s car. The district court’s order refers to both the suspicion of a window-tint violation and the suspicion of drug-related criminal activity, but the order is primarily concerned with the latter suspicion, which, the district court determined, justified the investigative detention. Accordingly, it is immaterial whether Trooper Otterson had a reasonable suspicion of a window-tint violation. Botello Vargas cannot prevail on appeal unless he can show that the district court erred by reasoning that Trooper Otterson had a reasonable suspicion of drug-related criminal activity. We will proceed to consider that issue.

As stated above, a law-enforcement officer may detain the driver of a vehicle for a brief investigation if the officer has a reasonable, articulable suspicion that the person might be engaged in criminal activity. *Diede*, 795 N.W.2d at 842 (citing *Terry v. Ohio*, 392 U.S. 1, 19-21, 88 S. Ct. 1868, 1878-80 (1968)). A reasonable, articulable suspicion exists if “the police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. Whether a reasonable, articulable suspicion exists is assessed in light of the totality of the circumstances. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). “[S]eemingly innocent factors may weigh into the analysis.” *Id.* Appellate courts “are deferential to police officer training and experience and recognize that a trained officer can properly act on suspicion that would elude an untrained eye.” *Britton*, 604 N.W.2d at 88-89.

In this case, the district court concluded that Trooper Otterson had “more than a hunch that criminal activity may be occurring based on his personal knowledge of Defendant, who was the registered owner of the vehicle; the residence the vehicle was parked at, which is well known for drug activity to law enforcement; the [trooper’s] numerous contacts with the residence known for drug activity; and the damaged [SUV] at the residence he investigated a half hour earlier.”

Botello Vargas contends that the facts and circumstances identified by the district court do not create a reasonable suspicion of criminal activity. He contends that Botello Vargas’s presence at a known drug house is insufficient on the ground that “mere proximity to, or association with, a person who may have previously engaged in criminal activity is

not enough to support reasonable suspicion.” See *Diede*, 795 N.W.2d at 844. He also contends that slumping in one’s seat may be merely “nervous behavior” and that courts are “reluctant to rely on nervous behavior as evidence to support a reasonable, articulable suspicion of criminal activity.” See *State v. Burbach*, 706 N.W.2d 484, 490 (Minn. 2005). He asserts that Trooper Otterson’s observations provided him with nothing more than “a mere hunch” of criminal activity. See *Harris*, 590 N.W.2d at 99.

In response, the state contends that Trooper Otterson had a reasonable suspicion of drug-related criminal activity for the following reasons:

Appellant’s [vehicle] was parked in the driveway of a known drug house; in fact Trooper Otterson had previously arrested two or three people seen leaving that house for possessing drugs, guns, or both. Nearby was a bullet-riddled vehicle, owned by a person who Trooper Otterson had previously arrested while in possession of 45 grams of methamphetamine, and who had an active felony warrant. Appellant, the registered owner of the [vehicle], had himself been recently arrested by Trooper Otterson and found to be in possession of methamphetamine, and either a firearm or a knife. Following that arrest, Trooper Otterson learned from the Stearns County Drug Task Force that Appellant was a midlevel methamphetamine dealer who they suspected transported methamphetamine all over central Minnesota. As Trooper Otterson drove by, the driver and the front-seat passenger both slid down in their seats when they saw the trooper in an effort to hide. Finally, before he got out of his squad car, the trooper saw the driver move his right hand to the center console, as well as to his waistband. Based on his training and experience, as well as his observations, Trooper Otterson believed that the driver of Appellant’s [vehicle] was at [the] house to conduct a drug transaction, and the evidence presented amply supported that that belief was reasonable.

The facts and circumstances recited by the state, which are supported by the record of the omnibus hearing, are sufficient to create a reasonable suspicion of drug-related

criminal activity. This case is similar to *State v. Lugo*, 887 N.W.2d 476 (Minn. 2016). The appellant in *Lugo* was parked in the driveway of a known drug house in a vehicle registered to a person with an outstanding arrest warrant for a drug-related offense. *Id.* at 479. He entered the house, exited 12 minutes later, and drove away. *Id.* When an officer attempted to stop the vehicle, the appellant did not immediately stop. *Id.* When he parked his car, he bent over briefly before sitting up again. *Id.* The supreme court reasoned that Lugo's presence inside a known drug house provided support for the officer's suspicion. *Id.* at 487. The supreme court also noted that Lugo's actions made it appear "as though he was trying to hide something," which is "relevant in a reasonable-suspicion analysis." *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85, 95 S. Ct. 2574, 2582 (1975)). The supreme court further noted that Lugo had recently been arrested for drug possession, which was relevant because it was an arrest for an offense "of the same general nature" as the instant suspected offense. *Id.*

Trooper Otterson's suspicion of drug-related criminal activity was based on similar facts. Botello Vargas's black sedan was parked at a known drug house, where Trooper Otterson had found drugs, stolen firearms, and a stolen vehicle in a prior search. Two individuals were inside the sedan, both of whom slumped as if they were trying to avoid detection. Trooper Otterson determined that the car was registered to Botello Vargas, whom Trooper Otterson had recently arrested for a drug-related offense. Only 30 minutes earlier, on the same property, Trooper Otterson had investigated an SUV with shattered windows and bullet holes, which was registered to another person whom the trooper had previously arrested for possession of a large amount of methamphetamine. Considered in

their totality, these facts and circumstances created a reasonable suspicion of drug-related criminal activity.

Thus, the district court did not err by concluding that the initial investigatory seizure of Botello Vargas was justified by a reasonable suspicion of criminal activity.

C.

We last consider Botello Vargas's contention that, even if Trooper Otterson had a reasonable suspicion of criminal activity when he first seized Botello Vargas, Trooper Otterson unlawfully expanded the scope of the investigatory seizure.

An investigatory seizure generally must be limited in scope to the original purpose of the stop. *Diede*, 795 N.W.2d at 845. The scope of an investigatory seizure may be expanded only if doing so would be “reasonably related to the investigation of an offense lawfully discovered or suspected during the stop,” *State v. Askerooth*, 681 N.W.2d 353, 370 (Minn. 2004), and only if the officer “develops a reasonable, articulable suspicion” concerning the additional offenses ““within the time necessary to resolve the originally-suspected offense,”” *Diede*, 795 N.W.2d at 845 (quoting *State v. Wiegand*, 645 N.W.2d 125, 136 (Minn. 2002)). Thus, each incremental step in an expanded detention must be ““tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*.’”” *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012) (quoting *Askerooth*, 681 N.W.2d at 365).

In this case, the district court recited the information that Trooper Otterson acquired after he parked the squad vehicle at the base of the driveway and reasoned that the additional information gave rise to a reasonable suspicion of additional criminal activity

that justified expanding the scope of the seizure. The district court found that, when Trooper Otterson stood next to Botello Vargas's sedan and engaged him in conversation, he observed "dilated pupils, bloodshot eyes, flushed skin, dry mouth around his lips, and rigid movements" and that Botello Vargas refused to make eye contact with him and looked around nervously. The district court also found that Trooper Otterson used his training as a police officer and drug-recognition instructor to identify binoculars sitting in Botello Vargas's lap, a night-vision monocular on the dashboard, a butane torch in the console, and plastic bags in the cup-holder.

Botello Vargas contends that his physical characteristics alone are insufficient to support reasonable suspicion of present drug use. He also contends that the items identified by Trooper Otterson have legitimate uses. In response, the state contends that Trooper Otterson observed numerous indicators that Botello Vargas was under the influence of a controlled substance and that he might be armed and dangerous. In addition to the facts identified by the district court, the state points to Botello Vargas's furtive movements as Trooper Otterson approached, his nervous demeanor, and his refusal to exit the sedan. The state also notes that Trooper Otterson had recently arrested Botello Vargas for possession of methamphetamine and that Botello Vargas had a weapon in his vehicle during that arrest.

The record supports the state's argument. As the investigatory seizure unfolded, Trooper Otterson sequentially acquired additional information that reasonably caused him to expand the scope of the investigative seizure. As Trooper Otterson parked his squad vehicle at the base of the driveway, he saw the person in the driver's seat of the black sedan make furtive movements consistent with hiding or retrieving a weapon or contraband.

After Trooper Otterson exited his squad vehicle and approached the sedan, he was able to recognize the person in the driver's seat as Botello Vargas. After the trooper began speaking with Botello Vargas, he observed that Botello Vargas "appeared nervous," had "dilated pupils, bloodshot eyes, flushed skin, dry mouth and rigid movements," and would not make eye contact with the trooper. The trooper also observed that Botello Vargas had a butane torch in the drink-holder and "drug packaging baggies in the center console," items that often are associated with drug-related criminal activity. After Trooper Otterson asked Botello Vargas to exit the vehicle, Botello Vargas did not comply and reached toward the center console. Trooper Otterson testified that he was concerned that Botello Vargas was "armed and dangerous and in the midst of some sort of drug transaction," which made him concerned for his own safety. Trooper Otterson opened the driver's door and immediately saw an empty pistol holster between the driver's seat and the door. Trooper Otterson was justified in opening the door because the scope of an investigatory seizure may include a limited search for weapons for the purpose of ensuring officer safety, *see Askerooth*, 681 N.W.2d at 370-71; *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998); *State v. Alesso*, 328 N.W.2d 685, 688 (Minn. 1982), and an officer may ask a person to step out of a vehicle to allow such a search, *see State v. Ortega*, 770 N.W.2d 145, 152 (Minn. 2009); *State v. Krenik*, 774 N.W.2d 178, 184 (Minn. App. 2009), *review denied* (Minn. Jan. 27, 2010). When Trooper Otterson asked about the location of the pistol, Botello Vargas initially said that he did not know and later said that it was behind his back. After Trooper Otterson removed Botello Vargas from the car, he asked Botello Vargas whether he had a permit to carry the pistol, and Botello Vargas responded that he did not.

Thus, Trooper Otterson arrested Botello Vargas for carrying a pistol without a permit. *See* Minn. Stat. § 624.714, subd. 1a (2016); *State v. Timberlake*, 744 N.W.2d 390, 394-95 (Minn. 2008). During a search incident to the arrest, Trooper Otterson found controlled substances on Botello Vargas’s person. At each incremental step of the investigatory seizure, Trooper Otterson had a reasonable suspicion of criminal activity that justified the extension of Botello Vargas’s detention. *See Smith*, 814 N.W.2d at 350.

Thus, the district court did not err by concluding that Trooper Otterson’s expansion of the initial investigatory seizure was justified.

In sum, the district court did not err by denying Botello Vargas’s motion to suppress evidence.

II. Multiple Convictions and Sentences

Botello Vargas also argues that the district court erred by entering two convictions for the same criminal act and by imposing two sentences for the same behavioral incident.

We first address the argument concerning multiple convictions. A defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). An offense is an included offense if it is:

- (1) a lesser degree of the same crime; or
- (2) an attempt to commit the crime charged; or
- (3) an attempt to commit a lesser degree of the same crime; or
- (4) a crime necessarily proved if the crime charged were proved; or

(5) a petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Id. In determining whether an offense is an “included offense” under section 609.04, courts examine “the elements of the offense instead of the facts of the particular case.” *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). This court applies a *de novo* standard of review to the application of section 609.04. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

Botello Vargas contends that the fifth-degree offense charged in count 2 is a lesser-included offense of the first-degree offense charged in count 1. The state agrees, stating that the offense charged in count 2 is “a lesser-degree offense” of the offense charged in count 1. Accordingly, the state concedes that the conviction on count 2 should be vacated. For purposes of this case, we accept the state’s concession and conclude that the fifth-degree controlled-substance crime in this case is a lesser-included offense of the first-degree controlled-substance crime in this case. *See State v. Traxler*, 583 N.W.2d 556, 562 (Minn. 1998); *cf. State v. Osborne*, 715 N.W.2d 436, 446-47 (Minn. 2006).

Thus, the district court erred by convicting Botello Vargas of both the offense charged in count 1 and the offense charged in count 2. As a consequence, we reverse and remand to the district court with instructions to vacate Botello Vargas’s conviction on count 2. The district court’s finding of guilt on count 2 should remain intact but unadjudicated. *See State v. Walker*, 913 N.W.2d 463, 466-69 (Minn. 2018). In light of our

resolution of Botello Vargas's multiple-convictions argument, we need not consider his multiple-sentences argument.

Affirmed in part, reversed in part, and remanded.