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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0408**

State of Minnesota,
Respondent,

vs.

Ronnie Bila Shaka,
Appellant.

**Filed February 16, 2021
Affirmed in part, reversed in part, and remanded
Gaïtas, Judge**

Ramsey County District Court
File No. 62-CR-16-8870

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gaïtas,
Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

On direct appeal from two convictions of unlawful firearms possession, and after
remand for postconviction proceedings, appellant Ronnie Bila Shaka argues that (1) the
police obtained the evidence against him during an unlawful warrantless entry of a home,

(2) his trial attorney provided ineffective assistance of counsel in pursuing a pretrial motion to dismiss the case based on the state's destruction of evidence, (3) his trial attorney provided ineffective assistance of counsel in failing to request a special jury instruction on his defense theory, and (4) the district court erroneously entered two judgments of conviction or, alternatively, erroneously imposed two sentences, where both offenses occurred during a single behavioral incident. We affirm the denial of Shaka's motion to suppress the evidence, the denial of Shaka's postconviction ineffective-assistance-of-counsel claims, and the district court's entry of two convictions for two acts of possession. But because Shaka's two sentences stem from acts committed during a single behavioral incident, we reverse and remand for the district court to vacate one of the sentences.

FACTS¹

Shaka's Arrest

In July 2016, Shaka called 911 to report that two guns, a wedding ring, and keys to a lockbox had been stolen from his home while his wife was at the hospital giving birth. Officers from the Saint Paul Police Department were dispatched to the house and arrived about an hour and a half after the call. The dispatcher told the officers that, according to Shaka, there were additional firearms still inside the safe in the home.

Shaka was in the front yard when the first officers arrived. He waved them down and told them that his firearms—which he described as a Glock 40 and a nine millimeter pistol—had been stolen, along with a wedding ring. Shaka said that he had spent the night

¹ Our summary of the facts is taken from the pretrial hearing on Shaka's motion to suppress the evidence, his subsequent jury trial, and the postconviction proceedings.

with a woman and he believed the woman had taken a keychain from his pocket while he was asleep, which included a key to a safe located in the house. He alleged that the woman had unlocked the safe and stolen the contents.

During Shaka's conversation with the officers, his wife S.S. came out to the porch with an infant in her arms. Two officers approached S.S. on the porch. She told the officers that the stolen guns belonged to her and the officers asked to see her permit. S.S. then turned and entered the home to retrieve her paperwork. The two officers accompanied her inside. S.S. did not invite the officers into the home or object to their entry. And the officers did not ask for S.S.'s permission to enter the house—they simply followed her indoors.

S.S. produced her permit to possess the missing guns. While standing inside the home, the officers looked through an open doorway near the front door, which led into the master bedroom, and observed an AR-15 rifle, ammunition, and "a couple safes" on top of the bed.

In the meantime, another officer spoke with Shaka in the front yard. Shaka acknowledged that he was a felon, but assured the officer that any guns in the house belonged to S.S. The officer informed Shaka that a felony conviction prohibited him from owning guns, being around guns, and being in a house containing guns. The officer handcuffed Shaka and seated him in the back of a squad car.

After observing the guns in the house, and learning of Shaka's felony status, the officers asked S.S. to sign a form giving consent to search the master bedroom. S.S. signed

the form. Officers searched the master bedroom and seized several firearms, gun parts, ammunition, and gun safes. Shaka had a keychain with keys to the safes in his pocket.

While in the squad car, Shaka asked an officer to retrieve his phone from inside the house. He wanted to show the officer some text messages he had exchanged with the alleged thief. The officer entered the home and fetched Shaka's phone. Shaka then showed the officer a text he sent the alleged thief, which stated, "I know you took my guns b--ch." Another stated, "and you got my guns." And yet another text stated, "You thought you was slick. You took my lockbox key and stole the heat and took my wedding ring." Shaka was arrested for unlawfully possessing firearms.

Following the arrest, Shaka met with a police sergeant. Shaka told the sergeant that when he called 911 to report the theft, he asked the operator for instructions about handling the remaining guns in the house given that police would soon be arriving. The sergeant did not obtain a recording of the 911 call or make efforts to preserve any recording. The 911 call was later destroyed in accordance with a records-retention policy. Shaka initially told the sergeant that he did not remember touching any of the firearms, but then acknowledged that he may have touched the guns. The sergeant took a DNA sample from Shaka. Subsequent testing revealed that Shaka's DNA was consistent with DNA obtained from the seized firearms.

Shaka was charged with two counts of being an ineligible person in possession of a firearm, Minn. Stat. § 624.713, subd. 1(2) (2018). One count related to a Beretta Nano nine-millimeter handgun found in the bedroom. The second count related to a Sig Sauer AR-15 rifle, also seized from the bedroom.

Shaka's Pretrial Motions

Before trial, Shaka's attorney pursued two motions. First, he moved to suppress the evidence, arguing that the officers' warrantless entry of the home was unconstitutional because S.S. had not voluntarily consented to the entry. Second, he moved to dismiss the case based on spoliation of evidence—the recording of Shaka's 911 call. The motion to dismiss alleged that the 911 operator had instructed Shaka to place any guns in the home on a bed so that the police would see them upon arrival. According to Shaka, the destruction of the 911 call violated his due-process rights and required dismissal of the case.

The district court held an evidentiary hearing on Shaka's motions. Regarding the entry of the home, the responding police officers testified that S.S. did not object to them following her inside when she went to obtain her permit. They explained it was “natural” to enter the home with S.S. because they were talking to her about the theft report. Additionally, they testified that it was unsafe for officers to allow S.S. to enter a residence containing guns. After they observed the AR-15 and ammunition in plain view, they asked S.S. to sign a consent form authorizing a search of the bedroom. The officers testified that S.S. raised no objection to the consent form or the subsequent search. S.S. was primarily concerned that Shaka had been with another woman in the home.

The state also called the police sergeant who spoke with Shaka following the arrest. He explained that he did not make efforts to retain the recording of the 911 call because he did not see the relevance of the recording at the time.²

Finally, the state called one of the two 911 operators who had received Shaka's 911 call about the theft. The operator had no memory of the call and her notes did not reflect whether she communicated with Shaka about how to handle the remaining guns in the home.

The defense called S.S. She testified that before going to the hospital to give birth, she put her wedding ring in a safe with two guns and gave Shaka the key to the safe. When she returned from the hospital, she discovered her wedding ring was missing and she asked Shaka to call 911. According to S.S., the responding officers followed her into the home without her permission when she went inside to retrieve her gun permit. Afterwards, S.S. testified, the police "basically forced" her to sign a consent-to-search form, threatening to call child protection if she did not cooperate.

Finally, Shaka testified at the hearing. According to Shaka, he told the 911 operator that he was a convicted felon, but the operator instructed him to "secure the weapons." Shaka testified that based on this instruction, he went into the bedroom and moved the firearms.

² There were at least two 911 calls made within a short time span, and each of these calls was destroyed as a matter of course pursuant to a records-retention policy. In the interest of clarity, we refer to Shaka's 911 calls in the singular.

After the hearing, the district court issued a written order denying both motions. The district court concluded that S.S. had consented to the officers' search, and therefore, there was no constitutional violation. Regarding Shaka's destruction-of-evidence claim, the district court determined that the exculpatory nature of the 911 call was not apparent to the sergeant. Thus, the sergeant did not act in bad faith when he failed to preserve the recording of the call.

The Trial

Shaka's case proceeded to a jury trial. At trial, the state called the responding officers, who testified about their involvement in the case. The police sergeant who interviewed Shaka after the arrest also testified on behalf of the state. In addition to testifying about his interview of Shaka, the sergeant explained to the jury that he did not preserve Shaka's 911 call because it was a report of a theft, which did not seem to have evidentiary value to him. Two forensic analysts testified that Shaka's fingerprints and DNA were found on the guns recovered from the master bedroom. Finally, the same 911 operator testified that she would not give advice about what to do with guns in a home in preparation for a visit from the police.

Shaka's defense theory was that the firearms belonged to S.S. and he never possessed them. He testified on his own behalf. Shaka claimed that he did not live in the home with his wife S.S. According to Shaka, his fingerprints and DNA were on the firearms because he moved them at the instruction of the 911 operator while the police were en route. When asked about his text messages where he referred to the guns as "his," he told the jury that he was mistaken when he sent the messages because he was angry.

The jury found Shaka guilty of both counts. The district court entered a conviction for each of the two guilty verdicts and sentenced Shaka to two concurrent prison terms of 60 months.

The Postconviction Proceedings

Shaka filed a direct appeal from the judgment of conviction. He then moved to stay the appeal to pursue postconviction proceedings. We granted Shaka's request to stay the appeal.

In the postconviction proceedings, Shaka alleged that his trial attorney had provided ineffective assistance of counsel. He alleged two deficiencies in the attorney's performance. First, Shaka claimed that the attorney failed to present the most significant evidence supporting the pretrial motion to dismiss—a statement that S.S. gave to the police sergeant. During the recorded statement, S.S. told the sergeant that the 911 operator had instructed Shaka and her to move the guns. Although the sergeant said he would check the recording of the 911 call, he never did. Second, Shaka claimed his trial attorney was ineffective when the attorney failed to create and request a special jury instruction allowing the jury to acquit if Shaka moved the firearms in reliance on an instruction from a government agent or official. Shaka alleged that the 911 operator was such an official.

A postconviction evidentiary hearing was held on Shaka's claims. Following the hearing, the postconviction court denied relief, concluding that Shaka failed to establish that the alleged errors of his trial attorney affected the outcome of the trial.

Shaka's Appeal

After the postconviction court denied relief, we lifted the stay of appeal. Shaka now challenges the district court's denial of his pretrial motion to suppress the evidence and the denial of his postconviction claims of ineffective assistance of counsel. Additionally, Shaka argues that the district court erred in entering two convictions and imposing two sentences for offenses that occurred at the same time.

DECISION

I. The officers' warrantless entry of the home did not violate Shaka's federal and state constitutional rights because S.S. voluntarily consented to the entry.

Shaka first argues that the district court erred in denying his motion to suppress the evidence because the officers who responded to his 911 call performed an unlawful search by entering the home without a search warrant. His argument focuses on the officers' first entry into the home—when they followed S.S. inside as she retrieved her gun permit.³ In reviewing the denial of a motion to suppress, appellate courts review the district court's factual findings for clear error and legal determinations de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012).

The United States and Minnesota Constitutions prohibit police from conducting “unreasonable searches and seizures.” U.S. Const. amend IV; Minn. Const. art. 1, § 10. Generally, warrantless searches are per se unreasonable unless they fall within an exception to the constitutional requirement for a search warrant. *State v. Lemert*, 843 N.W.2d 227,

³ Shaka does not challenge the formal search of the master bedroom that occurred after S.S. signed a form consenting to the search.

230 (Minn. 2014) (citing *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S. Ct. 1552, 1558 (2013)). When the police conduct a warrantless search, the state “bears the burden of showing that at least one exception [to the warrant requirement] applies, or evidence seized without a warrant will be suppressed.” *State v. Frank*, 650 N.W.2d 213, 216 (Minn. App. 2002) (quoting *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988)).

As a threshold issue, Shaka argues that in the proceedings below, the state failed to advance *any* recognized exception to the warrant requirement to justify the officers’ entry of the home with S.S. At the suppression hearing in the district court, the prosecutor argued that the officers, who were aware there were possible guns in the home, followed S.S. inside in the interest of “safety.”

The district court did not address the prosecutor’s “safety” argument and, instead, seemed to consider the consent exception to the warrant requirement in determining the legality of the officers’ first entrance into the home. In its findings of fact, the district court stated that the officers “followed [S.S.] into the residence to see her permit to carry” and that the officers testified S.S. “did not object to police coming into the residence.” Then, in its conclusions of law, the district court applied the legal standard for consent, concluding that “[u]nder the totality of the circumstances surrounding the search, a reasonable person would have felt free to decline the officer’s requests or otherwise terminate the encounter.” We agree with the district court’s summation of the legal standard for consent. *See State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994) (stating that consent to a search is not voluntary unless ““a reasonable person would have felt free to

decline the officer[’s] requests or otherwise terminate the encounter’”) (quoting *Florida v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388 (1991)).

Now, the state argues that the district court correctly considered and applied the consent exception to the warrant requirement. The state asks us to affirm the district court’s order on the ground that S.S. consented to the officers’ entry of the home.

We agree with Shaka that the state did not assert the consent exception below. Moreover, it is not entirely clear whether the district court’s consent analysis applied to the officers’ first entry of the home. But we also note that Shaka’s argument to the district court was imprecise; his attorney did not explicitly challenge the first entry.⁴

Notwithstanding these flaws in the record, “[a] respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted.” *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003). Here, the record

⁴ Shaka’s counsel argued:

Yes, I would start out with the search that the police did which the witness, [S.S.], testified that she told the police officers not to come into the house, and they did, and they threatened her with child protection and all kinds of concerns that a woman like her would have breastfeeding a newborn and then the other children. She felt like she had to sign the consent form. And there was no reason why the police couldn’t have gone to a judge, obtained a search warrant. And the veracity of [S.S.] and feeling coerced and feeling like she had no choice but to sign this authorization is evidenced by her.

is adequately developed for us to consider the consent exception, the state advances legal authority for its position on appeal, and our consideration of the issue does not impact the scope of relief.⁵ Thus, we elect to fully consider whether the consent exception applies.

The consent exception applies when a person voluntarily consents to a search. *See Dezso*, 512 N.W.2d at 880. To establish that an individual voluntarily consented to a search, the onus is on the state to prove that the consent was given freely and was “manifestly voluntary.” *See State v. Shellito*, 594 N.W.2d 182, 186 (Minn. App. 1999); *see also State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (holding that state must show by a preponderance of the evidence that consent was given freely and voluntarily). In determining whether consent was voluntary, a court must examine the totality of the circumstances, “including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said.” *Dezso*, 512 N.W.2d at 880. As noted, consent is not voluntary unless “a reasonable person would have felt free to decline the officer[’s] requests or otherwise terminate the encounter.” *Id.* (quotation omitted). “An individual does not consent . . . simply by acquiescing to a claim of lawful authority.” *State v. Brooks*, 838 N.W.2d 563, 569 (Minn. 2013). Consent can be given verbally or impliedly by nonverbal actions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992).

Whether consent to a search was truly voluntary is a question of fact. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). The appellate court applies the “clearly erroneous” standard in reviewing a district court’s finding of voluntary consent. *Id.* A finding of fact

⁵ We also note that Shaka does not argue that the state waived or forfeited the claim of consent.

is clearly erroneous if, considering all of the evidence, the reviewing court is “left with the definite and firm conviction that a mistake occurred.” *Id.* at 846-47.

Shaka does not challenge the accuracy of the district court’s underlying factual findings. Instead, he argues that the district court’s factual findings and the record do not support the conclusion that S.S. voluntarily consented to the officers’ initial entry of the home.

We disagree. The district court did not clearly err in concluding that S.S. voluntarily consented to the officers’ entry by her actions.

Preliminarily, we note that Shaka and S.S. summoned the police to the home to investigate a crime allegedly perpetrated against them. They were victims of a theft that occurred inside of the home. Because the officers were thus invited to the home and their purpose was to investigate a crime committed against Shaka and S.S., the dynamic was different than it may have been if S.S. had been a suspect or had been stopped in a motor vehicle. *See Diede*, 795 N.W.2d at 847 (observing that a person detained by the police is more susceptible to duress and coercion); *see also Dezso*, 512 N.W.2d at 881.

Against this backdrop, the other circumstances present indicate that S.S. gave the officers implied, nonverbal consent to enter. The district court found that the officers simply followed S.S. into the home while in conversation with her. Indeed, the officers testified that it seemed “natural” to follow S.S. inside as she went to fetch her permit for the stolen guns. Further, the officers testified that S.S. did not object to their entry into the home. And the district court explicitly rejected S.S.’s contrary testimony.

We conclude that the record supports the district court’s findings—S.S. implicitly consented to the officers’ entry into the home and her consent was manifestly voluntary. Thus, these findings are not clearly erroneous.

We have also upheld a finding of consent under similar circumstances. *See Carlin v. Comm’r of Pub. Safety*, 413 N.W.2d 249, 250 (Minn. App. 1987) (affirming district court’s finding of consent where an individual answered the door and then turned and walked into the house leaving the door open, impliedly for officers to follow). And the district court’s consent finding is consistent with the factual circumstances presented in several unpublished opinions cited by the state. *See State v. McGinty*, No. A14-0501, 2015 WL 853430, at *2 (Minn. App. Mar. 2, 2015) (determining there was consent when an individual “[made] way for an officer to enter”), *review denied* (Minn. Apr. 28, 2015); *Lennartson v. Comm’r of Pub. Safety*, No. A07-0500, 2008 WL 933435, at *4 (Minn. App. Apr. 8, 2008) (determining there was consent when an individual “stepped aside without objection as the officers entered” the home); *Gustafson v. Comm’r of Pub. Safety*, No. A03-0912, 2004 WL 237364, at *2 (Minn. App. Feb. 10, 2004) (determining there was consent when an individual “led the officers to the house, opened the door and entered,” and the officers followed). We are, of course, not bound by these decisions. *See Dynamic Air, Inc. v. Block*, 502 N.W.2d 796, 800 (Minn. App. 1993) (holding that unpublished opinions are of persuasive value “[a]t best”). But they are aligned with the district court’s finding that S.S. voluntarily consented to the entry by her nonverbal actions.

Because S.S. consented to the officers' entry into the home, no warrant was required and the officers did not violate Shaka's federal and state constitutional rights. The district court accordingly did not err in denying his motion to suppress the evidence.

II. Shaka's ineffective-assistance-of-counsel claims fail because the alleged deficiencies of his trial attorney had no impact on the outcome of his case.

Next, Shaka argues that the postconviction court erred in denying his two claims of ineffective assistance of counsel. A postconviction court's denial of relief after an evidentiary hearing involves both factual findings, which are reviewed for clear error, and legal conclusions, which are reviewed de novo. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). The reviewing court defers to the postconviction court's credibility determinations. *Miles v. State*, 840 N.W.2d 195, 201 (Minn. 2013). But the appellate court independently determines whether the established facts show ineffective assistance of counsel. *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

Under the federal and state constitutions, a criminal defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. The right to counsel means "the right to *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970) (emphasis added). The benchmark for judging any ineffective assistance of counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). To prevail on a claim that counsel was ineffective, a defendant must show that (1) counsel was deficient and (2) the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; *see also State v. Cram*, 718 N.W.2d 898, 906-07 (Minn. 2006) (applying *Strickland*). If one of the *Strickland* requirements is not satisfied, a court need not consider the other. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017).

A. Shaka was not prejudiced by the alleged mistake of his trial attorney in presenting Shaka’s destruction-of-evidence claim.

Shaka argued to the postconviction court that his trial attorney provided ineffective assistance of counsel in pursuing Shaka’s motion to dismiss based on the destruction of Shaka’s 911 call. He alleged that during the evidentiary hearing on his motion, his trial attorney failed to confront the police sergeant—the official who could have preserved the evidence—with S.S.’s statement. In her statement to the sergeant, S.S. said the 911 operator had instructed Shaka and her to move the guns. The sergeant remarked that he would check the recording of the call. According to Shaka, because S.S. explained the significance of the 911 call to the sergeant, and the sergeant indicated he would listen to the call, the attorney missed the best evidence supporting Shaka’s motion to dismiss the case.

Without considering whether the trial attorney’s performance was deficient, the postconviction court determined that it was “unable to conclude as a matter of law that there is a reasonable probability that [Shaka’s] motion to dismiss would have been granted but for counsel’s alleged error.” The postconviction court therefore held that Shaka’s claim of ineffective assistance of counsel failed on the second prong of the *Strickland* test. *See Mosley*, 895 N.W.2d at 591.

We agree with the postconviction court that Shaka does not satisfy *Strickland's* prejudice requirement. Even if trial counsel had presented S.S.'s statement, Shaka would not have prevailed on his motion to dismiss the case.

When the state loses, destroys, or otherwise fails to preserve material evidence, a defendant's constitutional right to due process is implicated. *State v. Jenkins*, 782 N.W.2d 211, 235 (Minn. 2010) (citations omitted). In considering a destruction-of-evidence claim, a court considers whether the destruction was intentional and whether the exculpatory value of the evidence was apparent and material. *State v. McDonough*, 631 N.W.2d 373, 387 (Minn. 2001) (explaining that state's intentional release of the motor vehicle in which the victims were killed did not violate defendant's right to due process because defendant failed to show that the evidence had exculpatory value). When evidence is intentionally destroyed, a court determines whether there was bad faith. *Jenkins*, 782 N.W.2d at 235. Specifically, the court must decide whether the state destroyed the evidence to prevent the defense from using it. *Id.* (citations omitted).

In denying Shaka's motion to dismiss, the district court concluded that there was no indication the 911 call was destroyed in bad faith because the exculpatory value of the call, if any, was simply not evident to the sergeant. Likewise, S.S.'s statement—the evidence that Shaka's trial counsel failed to present—was hardly a smoking gun. S.S. told the sergeant that *she*, and not Shaka, had moved the guns at the 911 operator's instruction. Thus, what the 911 operator did or did not say still had no apparent exculpatory value for Shaka. The postconviction court found, and we agree, that it is highly unlikely S.S.'s statement would have changed the district court's ruling on the motion to dismiss.

Moreover, as the postconviction court recognized, the 911 call was neither exculpatory nor material. It may have corroborated Shaka's explanation for touching the guns after he called 911. But the evidence of Shaka's gun possession was not limited to his temporary possession when he supposedly moved the guns to the bed. There was strong evidence that Shaka had possessed the guns well before his 911 call. He texted the alleged gun thief and accused her of stealing "*his*" guns. He also admitted that he was the only person with keys to S.S.'s house—where the guns were located—while she was giving birth. And the keys to the gun safes were in Shaka's pocket when the police responded to his 911 call. In light of this strong evidence of possession, an instruction from a 911 operator to put the guns on the bed would not have been helpful to Shaka's defense. And the fact that the evidence was unhelpful to Shaka makes it even less likely that the sergeant intentionally destroyed the evidence in bad faith.⁶

Shaka has not shown that he was prejudiced by his counsel's failure to present S.S.'s statement in support of the pretrial motion to dismiss. Thus, his ineffective assistance of counsel claim regarding S.S.'s statement fails on the second prong of *Strickland*, and we need not further consider the first prong.

B. Shaka was not prejudiced by his trial attorney's failure to prepare and request a jury instruction for relying on official advice.

Shaka also alleged in his petition for postconviction relief that his attorney was ineffective in failing to draft and request a special jury instruction regarding Shaka's theory

⁶ To the extent that Shaka is challenging the district court's denial of his pretrial motion to dismiss, we conclude that there was no error for the same reasons—the evidence was not exculpatory or material and there was no indication of bad faith.

of the case. Specifically, Shaka claims he was entitled to an instruction that would have permitted the jury to find him not guilty of unlawfully possessing the firearms if he touched the guns in reasonable reliance on the 911 operator's official instruction to move the guns.

The postconviction court concluded that the trial attorney's failure to prepare and request such an instruction was neither deficient performance nor prejudicial to Shaka. First, the postconviction court noted that any request for the instruction probably would have been denied. And second, the postconviction court found that there was no reasonable probability that Shaka would have prevailed at trial but for his attorney's failure to request the instruction.

Once again, we agree with the postconviction court. Although a defendant may assert a defense of "reliance on official actions or pronouncements regarding his conduct," *State v. Holmberg*, 527 N.W.2d 100, 106 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995), the circumstances in Shaka's case—where he allegedly relied on the advice of a 911 operator—likely did not warrant such an instruction.⁷ But even more damaging to Shaka's claim, the trial evidence simply did not support the theory that he only touched the guns because the 911 operator told him to secure the guns before officers arrived. Plus, the record reveals that Shaka's story evolved between the date of his arrest and trial. Initially, he told police that he did not recall touching any of the guns. When he learned there would be DNA testing, he changed his statement to acknowledge that "it could be

⁷ The judge who presided over the postconviction proceedings was also the judge who presided over Shaka's trial. In the order denying postconviction relief, the postconviction court stated, "[I]t is unlikely that *this* Court would have allowed the proposed jury instruction." (Emphasis added.)

possible” that he touched the guns. Finally, at trial, Shaka testified that he only touched the guns when ordered to do so by the 911 operator, who was also aware that Shaka was a felon and ineligible to possess firearms. This evidence, in conjunction with the other strong evidence of Shaka’s possession *before* the 911 call, makes it highly unlikely that Shaka would have prevailed at trial even if his trial attorney had requested the special instruction and the district court had read the instruction to the jury.

Because there is no reasonable probability that Shaka would have received the special instruction and that the instruction would have impacted the jury verdicts, he cannot establish prejudice. For this reason, his second ineffective-assistance-of-counsel claim also fails and we therefore affirm the postconviction court’s denial of relief.

III. The district court properly entered separate convictions for Shaka’s two offenses, but erred in imposing separate sentences for the two convictions.

Finally, Shaka argues that the district court erred in entering two convictions and separate sentences for each of the two guns that Shaka possessed during the same behavioral incident. Without presenting any argument or authority, the state agrees.

Notwithstanding the state’s concession, we are obligated to independently review these issues. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (explaining that appellate courts must decide cases “in accordance with [the] law”). Whether a district court erred in entering separate *convictions* for multiple offenses and whether the district court erred in imposing separate *sentences* for these offenses are two distinct issues; both present questions of law that are reviewed de novo. *See State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012) (stating that whether Minnesota law precludes multiple convictions for

separate offenses is a question of law); *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012) (“Whether an offense is subject to multiple sentences under Minn. Stat. § 609.035 is a question of law, which we review de novo.”).

At trial, the state presented evidence that Shaka possessed two firearms in the same place, at the same time. The jury found that Shaka possessed both firearms, rendering two separate guilty verdicts. Then, the district court entered a conviction for each guilty verdict and imposed separate, concurrent sentences for the two offenses.

In support of his argument that the district court erred in entering separate convictions, Shaka cites *State v. Papadakis*, 643 N.W.2d 349 (Minn. App. 2002). But Shaka’s reliance on *Papadakis* is misguided. There, the defendant was convicted of and sentenced for multiple counts of drug possession for drugs found in different parts of his home during a police search. *Id.* at 357. The district court held a bench trial and found the defendant guilty of possessing cocaine, hashish, and six different steroids, resulting in eight separate guilty verdicts—one for each type of drug found. *Id.* at 352, 357. Then, the district court entered separate convictions for each verdict and imposed separate sentences for each conviction. *Id.* at 358. On appeal, the defendant argued that the district court erred in entering a separate conviction for each substance. *Id.* at 357. We observed, however, that “there is a distinction between sentencing on multiple convictions that arose from a single behavioral incident and convictions of more than one offense arising from the same act.” *Id.*

Under Minnesota Statutes section 609.04, a defendant cannot be convicted of more than one offense arising from the same *act*. *Id.* (citing Minn. Stat. § 609.04). “Upon

prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04 (2018); *see State v. LaTourelle*, 343 N.W.2d 277, 283-84 (Minn. 1984) (concluding that “only one conviction can be sustained” because section 609.04 prohibits multiple convictions “for a single criminal act”). Whereas, under Minnesota Statutes section 609.035, a defendant cannot be sentenced for multiple convictions stemming from a single *behavioral incident*. *Papadakis*, 643 N.W.2d 357 (citing Minn. Stat. § 609.035). “[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.” Minn. Stat. § 609.035 (2018). We concluded in *Papadakis* that the defendant committed separate *acts* in possessing each of the unlawful substances. *Papadakis*, 643 N.W.2d at 358. Thus, separate convictions for each of the substances were permissible. *Id.* But we determined that the defendant’s possession of each substance occurred during the course of a single behavioral incident. *Id.* Accordingly, the district court’s imposition of separate sentences was improper under section 609.035. *Id.* *Papadakis* therefore provides that a defendant’s possession of multiple items during a single behavioral incident can result in a conviction for each item but not a sentence for each conviction.

Shaka also cites our recent decision in *State v. Nowels*, claiming that *Nowels* holds that a defendant “cannot be twice convicted of violating section 624.713 for acts committed during a single behavioral incident.” 941 N.W.2d 430, 442 n.8 (Minn. App. 2020). But in *Nowels*, the defendant possessed a single loaded gun and was found guilty and convicted twice as a result—once for the gun and once for the ammunition. *Nowels*, 941 N.W.2d at

442 n.8. And there, we concluded that the defendant’s possession of a single loaded gun was a single *act* that precludes two separate convictions. *Id.* at 443.

Here, where Shaka engaged in two separate acts of possession—one for each gun—during a single behavioral incident, we conclude that separate convictions were proper under *Papadakis*. But because separate sentences for the two acts occurring during a single behavioral incident indeed violate section 609.035, we reverse and remand to the district court to vacate one of Shaka’s two sentences.⁸

Affirmed in part, reversed in part, and remanded.

⁸ Shaka argues that the “firearms exception” to section 609.035 should not apply under the circumstances of his case. *See* Minn. Stat. § 609.035, subd. 3 (“Notwithstanding section 609.04, a prosecution for or conviction of a violation of section 609.165 or 624.713, subdivision 1, clause (2), is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct.”). Because the state has not invoked the exception, we decline to address this issue.