

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1871**

State of Minnesota,
Respondent,

vs.

Lavelle Darnell Owens,
Appellant.

**Filed September 8, 2020
Affirmed in part, reversed in part, and remanded
Bryan, Judge**

Blue Earth County District Court
File No. 07-CR-17-2727

Keith Ellison, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Patrick McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Johnson, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

BRYAN, Judge

After a trial by stipulated evidence, appellant challenges the district court's denial of his motions to suppress the results of a search warrant and the district court's decision

to convict and sentence him for both possession of a revolver and possession of shotgun shells. We affirm the district court's decisions to deny the suppression motions. The district court had a substantial basis to conclude that probable cause existed and the district court did not clearly err in concluding that the warrant did not contain misrepresentations. In addition, we affirm the separate convictions for the two possession offenses, but we reverse appellant's two sentences and remand for the district court to vacate one of the two sentences.

FACTS

On July 20, 2017, law enforcement officers working as part of the Minnesota River Valley Drug Task Force (MRVDTF) attempted a controlled purchase of a handgun using a confidential reliable informant (the informant). After the transaction, Commander Jeffrey Wersal applied for, obtained, and executed a warrant to search the residence of appellant Lavelle Darnell Owens. Among the items seized from Owens's residence, officers recovered a loaded Smith & Wesson .38 caliber revolver from the bedroom and four 12-gauge shotgun shells from the kitchen.¹ Respondent State of Minnesota charged Owens with the following three crimes: (1) being an ineligible person in possession of a firearm in violation of Minnesota Statutes, section 624.713, subdivision 1(2) (2016); (2) being an ineligible person in possession of ammunition, also in violation of section 624.713, subdivision 1(2); and (3) being an ineligible person in possession of ammunition in violation of Minnesota Statutes, section 609.165, subdivision 1b(a) (2016).

¹ Officers also recovered a Sig Sauer handgun magazine in the kitchen, but the appeal does not concern the magazine.

A. Challenges to the Search Warrant

Owens contested the basis and validity of the search warrant. First, he made a motion to suppress the results of the search warrant, arguing that the supporting affidavit lacked probable cause. Second, he questioned the validity of the search warrant, arguing that the affidavit contained material misrepresentations of fact.

The application for the search warrant of Owens's residence on Broad Street listed the following four items that the affiant (Wersal) believed would be located inside the residence: firearms, ammunition, prerecorded MRVDTF funds, and Owens himself, from whose body Wersal hoped to obtain a DNA sample. According to Wersal's affidavit, the following facts justified a search of Owens's residence on Broad Street. In July 2017, an informant told law enforcement officers that he could help them purchase a handgun from B.R. Specifically, "[the informant] advised that [B.R.] would be getting the handgun from a [B]lack male who [the informant] believed to live on Broad Street." Law enforcement officers had the informant contact B.R., who agreed to sell the informant a gun for \$300. Law enforcement officers provided the informant with \$300 in prerecorded funds. At the agreed-upon location and at the agreed-upon time, B.R. met with the informant, took \$200 as an initial payment, and left to get the gun. Law enforcement officers followed B.R. directly to Owens's residence on Broad Street, where B.R. met with Owens. Together, they went for a walk before getting into B.R.'s vehicle and driving to Neubert Lane, in LeHillier, Minnesota. Law enforcement officers conducting surveillance on B.R. and Owens lost sight of them for approximately five minutes at this point. After this five-minute period, law enforcement officers followed B.R. and Owens as they travelled back

to Owens's residence, where Owens exited the vehicle. B.R. then contacted the informant and arranged to meet for the exchange. At the agreed-upon location, B.R. gave the informant a shoebox containing 13 live rounds of .38 caliber ammunition and a Daisy BB gun. The informant gave B.R. the remaining \$100. Based on these facts in Wersal's affidavit, the district court signed the requested search warrant for Owens's residence.

In his motion to suppress the results of the search warrant, Owens argued that because of the gap in surveillance and because B.R. and Owens drove to LeHillier, Wersal's affidavit did not establish probable cause to believe that evidence of a crime would be found in Owens's residence. After hearing arguments, the district court denied the motion. The district court concluded that despite the five-minute period when the surveillance officers lost sight of Owens and B.R., and despite the intervening drive from Owens's residence to Neubert Lane, the facts in Wersal's affidavit established a sufficient nexus between the transaction with the informant and Owens's residence to believe that evidence of a crime would be found in Owens's residence.

Owens subsequently requested a *Franks* hearing, arguing that the warrant was invalid because Wersal's affidavit contained intentional or reckless misrepresentations of fact. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676 (1978) (requiring suppression of "the fruits of the search" when police "knowingly or recklessly disregard the truth" in procuring a search warrant). To support his motion, Owens submitted an affidavit from B.R. contesting the informant's representations, as attributed to the informant by Wersal in the affidavit. The district court conducted an evidentiary hearing on the motion, admitting testimony from both B.R. and Wersal.

B.R. denied telling the informant that the gun would come from a Black male who lived on Broad Street, denied driving directly to Owens's residence after the first meeting with the informant, denied going for a walk with Owens, denied driving with Owens to LeHillier, and denied ever getting in the car with Owens. B.R. testified that although he did see Owens at Owens's residence during the transaction, Owens did not provide him with a firearm, did not provide him with ammunition, and had nothing to do with the transaction. On cross-examination, the state impeached B.R.'s testimony by showing him photographs that conflicted with his statements. B.R. also admitted that Owens is a close friend and B.R. did not want Owens to get in trouble.

The state then introduced the testimony of Wersal, who testified that, in a briefing before the transaction, "[the informant] said he thought that [B.R.] would get the firearm from a [B]lack male who lives somewhere on Broad Street." Wersal testified to what he and other officers observed regarding what B.R. and Owens did and where they went during the transaction. The testimony was consistent with the facts in Wersal's affidavit. Wersal also testified that several of B.R.'s statements conflicted with Wersal's own observations. Wersal also explained that B.R.'s statements regarding Owens could not be reconciled with the photographs of B.R. and Owens taken by law enforcement officers during the transaction.

The district court found that Wersal's testimony and the photographs contradicted B.R.'s testimony. Ultimately, the district court credited the state's evidence, concluded that "there were no material misstatements in the affidavit," and denied the motion to suppress the results of the search warrant.

B. Stipulated Evidence Trial and Sentencing Order

After the district court's decision denying Owens's challenge pursuant to *Franks*, the case proceeded to trial. Before trial was to begin, however, the parties agreed to obtain review of the pretrial rulings pursuant to rule 26.01, subdivision 4, of the Minnesota Rules of Criminal Procedure. Accordingly, Owens waived a jury trial, and the parties submitted the case by stipulating to the state's evidence. The district court received the state's evidence and found Owens guilty on all three counts.

Regarding count one, the district court determined that Owens knowingly possessed a firearm in his bedroom. Regarding count two, the district court determined that Owens knowingly possessed 12-gauge shotgun shells in his kitchen. Regarding count three, the district court restated its earlier finding that Owens knowingly possessed a firearm in his bedroom.² For each of the three counts, the district court also found that Owens had previously been convicted of a crime of violence. At sentencing, the district court did not enter a conviction for count three,³ and imposed two, concurrent 60-month sentences for counts one and two. This appeal followed.

² We note that, although the district court found that Owens was guilty of count three for possessing the firearm from the bedroom, count three charged Owens with possession of ammunition. The findings in support of count three do not mention ammunition at all.

³ The warrant of commitment reflects the district court's decision to "set aside" the conviction for count three. We conclude that this term means no conviction was entered.

DECISION

I. Probable Cause Supporting the Search Warrant

On appeal, Owens argues there was insufficient probable cause to issue the search warrant because the affidavit failed to establish a sufficient nexus between the transaction with the informant and Owens's residence. Owens argues that the nexus is insufficient because the surveillance officers lost sight of B.R. and Owens for five minutes in LeHillier, Minnesota, and because B.R. travelled to Owens's residence on Broad Street and to Neubert Lane in LeHillier, Minnesota. We are not persuaded that the five-minute surveillance lapse and the intervening drive to LeHillier during the transaction defeat or negate the connection between the transaction and Owens's residence. Because the district court had a substantial basis to conclude that there was a fair probability that evidence of a crime would be found in Owens's residence, we affirm the district court's denial of Owens's suppression motion.

The United States and Minnesota Constitutions require that warrants be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. When determining whether a search warrant is supported by probable cause, we consider whether the issuing judge had a substantial basis for concluding that probable cause existed. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). A search warrant is supported by probable cause, if, considering the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Fort*, 768 N.W.2d 335, 342 (Minn. 2009). "A sufficient 'nexus' must be established between the evidence sought and the place to be searched." *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014).

“[D]irect observation of evidence of a crime at the place to be searched is not required.” *Id.* “A nexus may be inferred from the totality of the circumstances.” *Id.* A number of circumstances inform a judge’s determination of whether such a nexus exists, including the type of crime, the nature of the items sought, the extent of a person’s opportunity for concealment, and normal inferences about where someone might usually keep the relevant items. *State v. Pierce*, 358 N.W.2d 672, 673 (Minn. 1984). For instance, the Minnesota Supreme Court has previously recognized that a normal person would keep ammunition at his or her residence. *Yarbrough*, 841 N.W.2d at 622 (*citing Pierce*, 358 N.W.2d at 674). Observations of the trafficking of contraband can also support probable cause for the issuance of a search warrant for a suspect’s residence. *See State v. Ruoho*, 685 N.W.2d 451, 457 (Minn. App. 2004) (holding that observations of suspected drug trafficking three days prior warranted the search of a suspect’s residence), *review denied* (Minn. Nov. 16, 2004). Courts interpret applications for search warrants “in a common-sense and realistic manner” when determining whether they “contain information which would warrant a person of reasonable caution to believe that the articles sought are located at the place to be searched.” *State v. Gail*, 713 N.W.2d 851, 858 (Minn. 2006) (quotation omitted).

We review the district court’s factual findings for clear error and the district court’s legal determinations de novo. *State v. Jenkins*, 782 N.W.2d 211, 223 (Minn. 2010) (citing *State v. Buckingham*, 772 N.W.2d 64, 70 (Minn. 2009)). In addition, “[w]e afford great deference to the issuing judge’s determination on probable cause.” *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). We do not want “the warrant requirement [to] become so burdensome as to discourage the police from seeking review by” a judge. *State v. Harris*,

589 N.W.2d 782, 791 (Minn. 1999). Accordingly, “the resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants.” *Gail*, 713 N.W.2d at 858 (quoting *Massachusetts v. Upton*, 466 U.S. 727, 734, 104 S. Ct. 2085, 2089 (1984)).

In this case, Owens argues that during the five minutes that the agents lost sight of B.R., he could have retrieved the gun and ammunition from his own home or from some other location or person. This is a possibility. Nevertheless, the affidavit also included information to support a belief that evidence of a crime would exist at Owens’s residence. Specifically, the evidence that Wersal hoped to recover from Owens’s residence included firearms, ammunition, prerecorded MRVDTF funds, and a DNA sample from Owens. The informant explained that he not only could purchase a gun from B.R., but also that B.R. would get it from someone who lived on Broad Street. In addition, the affidavit stated that the first place that B.R. went after taking the up-front portion of the purchase price was the residence on Broad Street. It was also the last place that B.R. visited before completing the transaction. Finally, the affidavit made clear that Owens himself could be located in the residence. Given our deferential standard of review, we conclude that—even with the lapse in surveillance and the intervening drive to LeHillier—the statements in the affidavit provide a sufficient basis for “a person of reasonable caution” to believe that firearms, ammunition, the prerecorded MRVDTF funds, and Owens would be located at Owens’s residence on Broad Street. *See id.*

II. Asserted Misrepresentations in the Affidavit

Owens next argues that the affidavit in support of the search warrant contained material misrepresentations. After an evidentiary hearing, the district court disagreed and found that Wersal did not make any misrepresentations in his affidavit. We conclude that based on the testimony admitted, the district court did not clearly err.

A search warrant “must be voided and the fruits of the search excluded” when police, in procuring a search warrant, knowingly or recklessly disregard the truth by including a material misrepresentation that is necessary to establish probable cause. *Franks*, 438 U.S. at 155-56. Following *Franks*, courts require the defendant to bear the burden of proving both parts of the following two-prong test: (1) that the affiant “deliberately made a statement that was false or in reckless disregard of the truth,” and (2) that “the statement was material to the probable cause determination.” *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (quoting *State v. McDonough*, 631 N.W.2d 373, 390 (Minn. 2001)). If a defendant makes such a showing, the “search warrant is void, and the fruits of the search must be excluded.” *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989). This principle applies to material omissions only; innocent or negligent misrepresentations will not invalidate a warrant. *Id.*; *State v. Causey*, 257 N.W.2d 288, 292 (Minn. 1977). A misrepresentation or omission is material if probable cause to issue the search warrant no longer exists once the misrepresentation is omitted or the omission is supplied. *Andersen*, 784 N.W.2d at 327.

This court reviews for clear error the district court’s findings on whether there was a statement or omission that was false or in reckless disregard of the truth. *Id.* In doing

so, this court gives due regard to the opportunity of the district court to judge the credibility of the witnesses. *State v. Fisler*, 374 N.W.2d 566, 569 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985). Findings are clearly erroneous only if the reviewing court is “left with the definite and firm conviction that a mistake has been made.” *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016) (quotations omitted). This court conducts a de novo review of the district court’s ruling on whether the alleged misrepresentations or omissions were material to the probable cause determination. *Andersen*, 784 N.W.2d at 327.

In this case, Owens asserts that the affidavit contained material omissions on the basis of B.R.’s statements. Here, B.R. testified at the *Franks* hearing and denied telling the informant that the gun would come from a Black male on Broad Street, denied driving directly to Owens’s residence after meeting with the informant, denied going for a walk with Owens, and denied ever getting in the car with Owens. B.R. also testified that Owens did not provide him with a firearm or ammunition and had nothing to do with the transaction. On cross-examination, the state impeached B.R.’s testimony by showing him photographs that conflicted with his statements. In addition, the state introduced the testimony of Wersal, who stated that several statements in B.R.’s testimony were not accurate, conflicted with Wersal’s own observations, and could not be true given what was depicted in the photographs. On this record, we are not left with the “definite and firm conviction that a mistake has been made.” Owens did not establish that the affidavit contained any statements that were false or made in reckless disregard of the truth. Because we conclude that the district court did not clearly err in this finding, we need not address the second part of the *Franks* two-prong test.

III. Entry of Multiple Convictions and Imposition of Multiple Sentences

Owens argues that the district court erroneously applied the firearms exception in Minnesota Statutes 609.035, subdivision 3 (2016). In response, the state argues that the general prohibition against multiple sentences and convictions does not apply to this case, and, if it does, then the firearms exception to the general rules also applies. First, we address whether the general rule in Minnesota Statutes section 609.04, subdivision 1 (2016), prohibits the entry of multiple convictions and whether the general rule in Minnesota Statutes section 609.035, subdivision 1 (2016), prohibits the imposition of multiple sentences in this case. Second, we address whether the firearms exception applies. We conclude that the district court properly entered convictions for both offenses, but erred by imposing separate sentences for both offenses. We reverse and remand for the district court to vacate one of the two sentences.

A. Application of the General Prohibitions in Sections 609.035 and 609.04

Generally, Minnesota law prohibits district courts from imposing multiple sentences for offenses committed as part of a single behavioral incident. Minn. Stat. § 609.035, subd. 1. Additionally, appellate courts have interpreted the provisions of Minnesota Statutes, section 609.04 (2016), to prohibit district courts from entering multiple convictions for a single act.⁴ See *e.g.*, *State v. LaTourelle*, 343 N.W.2d 277, 283-84 (Minn. 1984) (holding that “only one conviction can be sustained” because section 609.04 prohibits multiple convictions “for a single criminal act”); *State v. Saxton*, 331 N.W.2d

⁴ This section also prohibits convictions for both a greater and an included offense.

240, 242-43 (Minn. 1983) (holding that section 609.04 permits only one conviction when the same act resulted in four separate convictions); *State v. Spears*, 560 N.W.2d 723, 726-27 (Minn. App. 1997) (vacating three duplicative convictions because section 609.04 “bars a court from entering two convictions for one act simply because a defendant’s single act violated multiple provisions of a statute”), *review denied* (Minn. May 28, 1997).

Although both rules govern dispositions for multiple offenses, they have two important differences. First, section 609.035 concerns multiple sentences, while section 609.04 concerns multiple convictions. *See, e.g., Munt v. State*, 920 N.W.2d 410, 415 (Minn. 2018) (concluding that, unlike claims pursuant to section 609.035, postconviction claims based on section 609.04 are not properly brought under rule 27.03 of the Minnesota Rules of Criminal Procedure because section 609.04 relates to convictions, not sentences); *Spears*, 560 N.W.2d at 726-27 (conducting a separate analysis of sentences under section 609.035 and convictions under 609.04); *State v. Papadakis*, 643 N.W.2d 349, 358 (Minn. App. 2002) (affirming district court’s decision to enter multiple convictions under section 609.04 and affirming district court’s decision to impose only a single sentence under section 609.035). Second, while section 609.035 focuses on whether the record involves a single behavioral incident, section 609.04 concerns whether the record involves a single act:⁵

⁵ Occasionally, our criminal statutes define a crime as including multiple acts, such as multiple acts of sexual penetration, Minn. Stat. § 609.342, subd. 1(h)(iii) (2018), and multiple acts of sexual contact, Minn. Stat. § 609.343, subd. 1(h)(iii) (2018). Section 609.04 necessarily applies to a group of acts when the crime itself includes multiple acts. In addition, appellate courts have, at times, used the phrase “single behavioral incident” when applying section 609.04, even though the case involves a single act. *E.g., State v.*

Under Minnesota law 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.

. . . .

Minn. Stat. § 609.035 . . . prohibits multiple sentences for conduct that is part of a single behavioral incident. We agree with the state that appellant’s conduct was “single behavior” rather than “single act.”

. . . The district court rejected appellant’s contention that his convictions were a Minn. Stat. § 609.04 “single criminal act” We affirm the district court’s analysis that appellant’s criminal actions were not part of a single criminal act, but rather were parts of a single behavioral incident.

Papadakis, 643 N.W.2d at 357-58.

It is well established that separate acts can support multiple convictions under section 609.04, but if the acts are part of an overarching single behavioral incident, then the district court can impose a sentence for only one of the convictions under section 609.035. *E.g.*, *id.* at 358 (“We conclude that appellant’s conviction arose not from a single act, but from a single behavioral incident, which allows multiple convictions but not multiple sentences.”); *see also, e.g.*, *State v. Jones*, 848 N.W.2d 528, 532-34 (Minn. 2014) (pursuant to section 609.035, vacating one of the two imposed sentences for stalking and violating an order for protection because the conduct underlying the offenses arose out of

Jackson, 363 N.W.2d 758, 760 (Minn. 1985) (“[S]ection 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.”). As noted above, when applying section 609.04, it is more accurate to focus on whether multiple convictions stem from “the same act or transaction” as opposed to a series of acts or overarching conduct, unless the statute at issue includes multiple acts.

a single behavioral incident, but not vacating the convictions for both offenses); *State v. Mullen*, 577 N.W.2d 505, 511-12 (Minn. 1998) (pursuant to section 609.035, vacating one of the two imposed sentences for criminal damage to property and exhibiting a pattern of harassing conduct because these offenses arose out of a single behavioral incident, but not vacating the convictions for these offenses); *State v. Herberg*, 324 N.W.2d 346, 348-49 (Minn. 1982) (pursuant to section 609.035, vacating three of the four imposed sentences because “there was an underlying unity to the various acts of assault, penetration, and degradation,” but not vacating the convictions for the four offenses); *Spears*, 560 N.W.2d at 726-27 (vacating three out of the six total convictions because the case involved only three acts, not six, and then vacating two of the three remaining sentences because all three separate acts occurred as part of a single behavioral incident).

With this context in mind, we first address the prohibition against multiple convictions in section 609.04. Whether section 609.04 precludes multiple convictions, presents a legal question that we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). We have previously determined that possessing two different items in different places constitutes two, separate acts. *Papadakis*, 643 N.W.2d at 353, 57-58 (affirming conclusion that act of possessing cocaine in a lock box inside a garage was a separate act from the act of possessing steroids in a bedroom). We have also held that possessing a single loaded gun constitutes a single act, and section 609.04 precludes convictions for possessing both the firearm and the ammunition contained inside. *State v. Nowels*, 941 N.W.2d 430, 442 n.8 (Minn. App. 2020), *review denied* (Minn. June 16, 2020) In this case, the parties do not dispute that the two counts of conviction relate to separate

items located in different places: the revolver recovered from the bedroom and the shotgun shells recovered from the kitchen. Following *Papadakis*, we conclude that each offense constituted a separate act. Therefore, section 609.04 does not bar two separate convictions.

We next address the applicability of the general prohibition against multiple sentences in section 609.035. To determine whether the facts show a “single behavioral incident” for purposes of applying the general prohibition against multiple sentences in section 609.035, we consider whether the facts show a unity in time, place, and purpose. *E.g.*, *Munt*, 920 N.W.2d at 416-17 (“[A]cts that lack a unity of time and place or are motivated by different criminal objectives do not constitute a single behavioral incident, and therefore, are not ‘conduct,’ for purposes of section 609.035.” (citing *State v. Bauer*, 792 N.W.2d 825, 827-30 (Minn. 2011))). “The State bears the burden of proving, by a preponderance of the evidence, that a defendant’s offenses were not part of a single behavioral incident.” *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). “The determination of whether offenses arise from a single behavioral incident is dependent upon the particular facts and circumstances of each case.” *State v. Jackson*, 615 N.W.2d 391, 394 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000). “The single-behavioral-incident analysis presents a mixed question of law and fact.” *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. App. 2006). “We review the district court’s finding of fact under a clearly erroneous standard, and its application of the law to those facts *de novo*.” *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020).

In this case, because the state conceded that the two offenses were part of the same behavioral incident, it chose not to develop the sentencing record necessary to carry its

burden of proof. On appeal, the state argues that, pursuant to *State v. Grunig*, we can determine whether the conduct in this case shares a unity of time, place, and purpose. 660 N.W.2d 134, 137 (Minn. 2003) (allowing consideration of the state’s alternative arguments on appeal). While *Grunig* could apply in some instances, it does not permit the alternative argument raised in this case. *Grunig* requires a fully developed record to support the alternative argument. *Id.* The record in this case, however, does not contain sufficient information for this court to determine the “particular facts and circumstances” surrounding the possible times, places, and purposes of Owens’s continuing possession of the revolver and the shotgun shells. Without a more developed record, we cannot consider whether the two offenses arose out of separate, distinct behavioral incidents. We, therefore, conclude that the general prohibition in section 609.035 applies to the sentences at issue in this case.

B. Application of the Firearms Exception

The parties’ primary arguments relate to the applicability of the firearms exception to the prohibitions against multiple convictions and sentences. We agree with Owens that the firearms exception does not apply to the possession offenses.

The legislature created various exceptions to the general prohibitions in sections 609.035 and 609.04, including an exception for firearms offenses: “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.” Minn. Stat. § 609.035, subd. 3. Even though it is found in a subdivision of section 609.035, this exception applies to both

of the general rules in sections 609.035 and 609.04. *State v. Watson*, 829 N.W.2d 626, 633 (Minn. App. 2013) (“We conclude that section 609.035, subdivision 3, is unambiguous in stating that neither the single-behavioral-incident rule nor section 609.04 is ‘a bar to conviction of or punishment for *any* other crime committed by the defendant as part of the same conduct.’”), *review denied* (Minn. June 26, 2013).

To determine whether the exception applies, our analysis centers on the meaning of the phrase “any other crime.” *State v. Holmes*, 778 N.W.2d 336, 341 (Minn. 2010) (interpreting the burglary exception and stating that “we must determine whether third-degree assault is ‘any other crime’”); *Nowels*, 941 N.W.2d at 441 (“The issue before us is whether the ‘any other crime’ language removes the bar against multiple convictions and sentences . . .”). We compare the “statutory elements” of the offenses at issue, without regard to the facts of a particular case, to determine whether the offenses are different or not. *Holmes*, 778 N.W.2d at 340 (“when considering whether multiple convictions are prohibited, the court compares the statutory elements of both crimes and determines whether the elements of the crimes are different”). We recently held that the statutory elements for being an ineligible person in possession of a firearm are the same as the statutory elements for being an ineligible person in possession of ammunition:

Here, *Nowels* was also charged with two counts of the same crime—unlawful possession—but each count is a different means to commit the crime—possessing a *firearm* and possessing *ammunition*.

[T]he two possession crimes charged require proof of the same elements: (1) that *Nowels* was prohibited from possessing a firearm or ammunition based on a conviction for

a crime of violence and (2) that he possessed a firearm or ammunition.

Nowels, 941 N.W.2d at 442-43. This court’s holding in *Nowels* controls our analysis of the statutory elements of the possession offenses at issue in this case. Therefore, the firearms exception does not apply because possessing the revolver is not an “other crime” from possessing the shotgun shells. We remand to the district court to vacate one of the two sentences imposed.

IV. Conviction and Sentence for Count Three

Owens also argues that the district court erred by setting aside the conviction on count three instead of entering a conviction on count three and choosing not to enter the convictions on counts one and two. Although the resulting sentence would not change, Owens asserts that this distinction matters because a violation of Minnesota Statutes section 609.165, as charged in count three, would bar convictions and sentences for counts one and two, reducing his criminal-history score in the future. We do not agree for two reasons.

First, in light of our decision regarding the applicability of the general rule in section 609.04 and the inapplicability of the firearms exception, the issue regarding Owens’s criminal history score in the future is moot. After remand, Owens’s criminal history score will only reflect a single offense. *State v. McAdoo*, 330 N.W.2d 104, 107 (Minn. 1983) (concluding that a defendant generally may not receive criminal-history points for more than one offense arising out of a single behavioral incident); Minn. Sent. Guidelines 2.B.1 (2016) (permitting inclusion of only prior felony convictions that resulted in a “stayed or

imposed” sentence). Moreover, both section 624.713 and section 609.165 offenses correspond to the same severity level. Minn. Sent. Guidelines 5.A (2016) (both sections correspond to severity level 6); *see also* Minn. Sent. Guidelines cmt. 2.B.107 (2016) (“In cases of multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered.”). Second, Owens does not present any legal authority requiring district courts to prioritize a section 609.165 offense over a section 624.713 offense. Without support for this argument, we decline to establish a new legal rule requiring prioritization or sequencing of these offenses. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Therefore, we affirm the district court’s decision not to enter a conviction on count three.

Affirmed in part, reversed in part, and remanded.