This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1565

State of Minnesota,
Appellant,

vs.

John William Hofer,
Respondent.

Filed June 20, 2023
Reversed and remanded
Smith, Tracy M., Judge

Chisago County District Court
File No. 13-CR-21-611

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

Janet Reiter, Chisago County Attorney, John L. Lovasz, Assistant County Attorney, Center City, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Smith, Tracy M., Judge; and Hooten, Judge.*

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

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant State of Minnesota charged respondent John William Hofer with fifth-degree controlled-substance possession. Hofer moved to dismiss the charge based on constitutional double jeopardy, and the district court granted the motion. Because double jeopardy is not implicated by this prosecution, we reverse the dismissal and remand for further proceedings.

FACTS

On August 6, 2021, Hofer was charged with fifth-degree drug possession under Minnesota Statutes section 152.025, subdivision 2(1) (2020). According to the complaint, on August 5, 2021, law enforcement officers executed a search warrant on a residential property. As part of the search, they searched an RV, which was parked in a barn on the property and was occupied by two persons, one of whom was Hofer. In the RV, officers discovered about five grams of substances that field-tested positive for methamphetamine, hundreds of small plastic bags commonly used to package and sell controlled substances, and documents with Hofer's name.

In January 2022, in a separate case, Hofer was acquitted by a jury of third-degree murder under Minnesota Statutes section 609.195(b) (2020)—unintentionally causing a death by unlawful sale or distribution of a controlled substance. About six months after his acquittal, Hofer brought a motion to dismiss the fifth-degree-possession charge in this case, asserting that constitutional double jeopardy barred the prosecution. The same district court judge who oversaw the third-degree-murder trial heard Hofer's motion to dismiss.

At the hearing, Hofer argued that his acquittal for third-degree murder meant the state could not prosecute him for the fifth-degree possession charge. Hofer acknowledged that the offense dates for the third-degree murder and the fifth-degree possession charges were different, but he contended that the state used evidence related to the August 5 search in the third-degree murder trial and thus double jeopardy and "preclusion" barred the prosecution for possession. Hofer did not provide transcripts or documents from the third-degree murder file.

The state argued that double jeopardy did not apply, stating that the offense dates for the charged third-degree murder were July 21-22, 2021, and that the two charged offenses "do not encompass in any way the same incident."

In considering the motion, the district court noted that the offense dates for the third-degree murder charge were April to July 2021. The district court then explained that it "believe[d] the State brought [evidence from the August 5 search] in as part of its case in chief to show that [Hofer] has a pattern of selling drugs." Based on that "faint recollection from doing the [third-degree murder] trial," the district court granted Hofer's motion to dismiss this case (which had a file number ending in 21-611), explaining:

> I'm going to grant the dismissal for the file ending in 21-611. I do believe the State is precluded from going forward because at trial, in the file that was 13-CR-21-749, *State vs. John William Hofer*; that was a trial for 3rd Degree Murder. The elements being that he sold drugs to a -- to the decedent. And as part of that trial, the State did bring in it its case in chief and as part of evidence the fact that police raided the barn where Mr. Hofer resided and recovered drugs. At the time that that was brought into evidence, it should have been either added to the Complaint or contemplated by the jury. So, 611 is dismissed.

The state appeals.[1]

DECISION

The state argues that the district court improperly dismissed the complaint because constitutional double jeopardy does not bar the prosecution. Hofer argues that constitutional double jeopardy applies and, for the first time on appeal, argues that statutory protections against double jeopardy also bar this prosecution.

I. Constitutional Double Jeopardy

The federal Double Jeopardy Clause provides that no person may "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, the Minnesota Double Jeopardy Clause states that "no person shall be put twice in jeopardy of punishment for the same offense." Minn. Const. art. I, § 7. Both provisions[2] "protect a criminal defendant from three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *State v. Hanson*, 543 N.W.2d 84, 86 (Minn. 1996). In addition, in some cases, relitigation of an issue in a subsequent prosecution may

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[1] As required for a prosecution's pretrial appeal, the state asserted that the ruling had a critical impact on the prosecution—specifically, because the complaint was dismissed. *See* Minn. R. Crim. P. 28.04, subd. 2(2)(b). Respondent does not challenge the existence of a critical impact, and we agree that the threshold is met. *See State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001) ("Dismissal of a complaint satisfies the critical impact requirement.").

[2] Hofer cites both the federal and the state Double Jeopardy Clauses. We address the provisions collectively because the Minnesota Supreme Court does not differentiate between the clauses when analyzing the scope of their protection. *See, e.g.*, *State v. Larson*, 980 N.W.2d 592, 597 (Minn. 2022).

be an impermissible relitigation of the same offense. *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018). An appellate court reviews constitutional double-jeopardy issues de novo. *State v. Large*, 607 N.W.2d 774, 778 (Minn. 2000).

The state first argues that double jeopardy does not bar this prosecution because the fifth-degree possession charge is not the "same offense" as the third-degree murder of which Hofer was acquitted. Second, the state argues that the district court erred by concluding that the state was "precluded" from bringing the prosecution based on the state's use of evidence in the third-degree murder trial. We address each argument in turn.[3]

A. The fifth-degree possession charge is not the "same offense" as the charged third-degree murder.

The state argues that the fifth-degree possession is a separate offense from the third-degree murder and thus double jeopardy does not apply.

Double jeopardy is implicated when offenses are "identical," that is, "the same in both law and fact." *State v. Struzyk*, 869 N.W.2d 280, 291 (Minn. 2015). The district court did not make findings that the charged fifth-degree possession was the same offense as the charged third-degree murder. Nevertheless, the question of whether the offenses are the same is resolvable based on the undisputed facts.

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[3] Hofer argues that we must affirm because the state did not order the transcript from the prior third-degree murder trial. He asserts that this court cannot evaluate whether the district court properly "recollected" the third-degree murder trial, citing cases in which the appellant failed to provide a sufficient record to assess the appellant's contentions of error. *See, e.g.*, *State v. Axford*, 417 N.W.2d 88, 93 (Minn. 1987). But the state does not challenge the district court's recollection of what happened in the prior trial—it challenges the district court's reasoning that the state's use of evidence in the prior trial bars prosecution in this case. Unlike in the cases cited by Hofer, here the state, as the appellant, has provided a sufficient record to evaluate its claims of error.

The undisputed facts demonstrate that the fifth-degree possession charge is based on separate criminal conduct from that underlying the third-degree murder charge. As Hofer acknowledges, the alleged distribution of drugs leading to the death in the third-degree murder case occurred before the drugs at issue in this case were discovered on August 5. Hofer allegedly possessed drugs on August 5, 2021, and the offense date for the charged third-degree murder was, at the latest, July 2021. As a result, the fifth-degree possession and third-degree murder charges involve different conduct on different days with different drugs—the drugs leading to the decedent's death in July cannot have been the drugs found in August. Thus, the alleged crimes are not the "same offense" for purposes of double jeopardy.

Hofer, though, argues that *Brown v. Ohio*, 432 U.S. 161 (1977), compels a different result. In *Brown*, the U.S. Supreme Court considered whether a defendant's convictions for both joyriding and auto theft, based on different dates during a nine-day joyride in the same stolen vehicle, violated the Double Jeopardy Clause. 432 U.S. at 162-64. The Supreme Court held that the Double Jeopardy Clause was violated, explaining that "the theft and operation of a single car [is] a single offense" under Ohio law and that double jeopardy protections cannot be avoided "by dividing a single crime into a series of temporal or spatial units." *Id.* at 169.

Hofer asserts that his possession of the drugs found on August 5 was a continuing offense that overlapped with the offense date for the third-degree murder charge and thus these circumstances are analogous to those in *Brown*. We are unpersuaded. First, Hofer's assertion that he possessed the drugs since July has no support in the record. The sole basis

for Hofer's assertion is the district court's "faint recollection" that "the State brought [evidence related to the August 5 search] in as part of its case in chief to show that [Hofer] has a pattern of selling drugs." The state's use of evidence that Hofer possessed drugs in August to show a pattern of selling drugs, however, does not suggest that Hofer's August 5 possession coincided with the charged third-degree murder. As a result, there is no basis for determining that the charged possession overlapped with the charged third-degree murder. Second, even if Hofer did possess these drugs on the offense date for the third-degree murder charge, *Brown* is distinguishable. In *Brown*, the defendant's convictions arose from "the theft and operation of a single car" and thus were "a single offense." 432 U.S. at 169. But, as outlined above, the fifth-degree possession charge involves different drugs than the third-degree murder charge. Thus, even if Hofer's possession overlapped with the offense date for the charged third-degree murder, we are not persuaded that double jeopardy would be implicated.

B. The use of evidence related to the August 5 search did not result in an impermissible relitigation of an offense.

The state also argues that the district court erred by concluding that the fifth-degree possession prosecution was "precluded" by the state's presentation of evidence related to the August 5 search in the prior third-degree murder trial.

In some cases, a subsequent prosecution may be barred by the Double Jeopardy Clause "if to secure a conviction the prosecution must prevail on an issue necessarily resolved in the defendant's favor in the first trial." *Currier*, 138 S. Ct. at 2150. "The burden rests on defendant to show that the jury's verdict in the first trial must have necessarily

decided the issues raised in the second prosecution." *State v. DeSchepper*, 231 N.W.2d 294, 300 (Minn. 1975) (quotation omitted).

The district court determined that the state's use of evidence related to the August 5 search "precluded" a later prosecution based on that evidence. But neither the jury's consideration of the evidence discovered in the August 5 search in the prior trial nor the acquittal for third-degree murder would "necessarily resolve[]" whether Hofer unlawfully possessed drugs several weeks after the offense date of the charged third-degree murder. *Cf. State v. McAlpine*, 352 N.W.2d 101, 103 (Minn. App. 1984) (rejecting the defendant's argument that the jury's consideration of his possession of cocaine in a prior conspiracy case was necessarily resolved by an acquittal for conspiracy because it was "equally likely that the jury simply found" that the state had not proved the existence of an agreement, as required for a conspiracy). Thus, the state's use of evidence related to the August 5 search in the earlier proceeding does not implicate double jeopardy.

In sum, the fifth-degree possession prosecution is not barred by constitutional double jeopardy.

II. Hofer's statutory double-jeopardy arguments fail.

In the alternative, Hofer contends that Minnesota Statutes sections 609.04 (2022) and 609.035 (2022)—statutes that "broaden the protection afforded by our constitutional provisions against double jeopardy"—bar this prosecution. *State v. Johnson*, 141 N.W.2d 517, 522 (Minn. 1966). Although Hofer did not make arguments about these statutes in district court, "[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). We address each of Hofer's statutory arguments in turn.

A. Minn. Stat. § 609.04 does not apply.

Under section 609.04, "[a] conviction or acquittal of a crime is a bar to further prosecution of any included offense, or other degree of the same crime." Minn. Stat. § 609.04, subd. 2. To qualify as the "same crime" for the purposes of section 609.04, the offenses must be a "single criminal act." *State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002). Hofer's section 609.04 argument fails for the same reason his constitutional double jeopardy argument fails—the fifth-degree possession charge is not the same act, and thus not the "same crime," as the charged third-degree murder.

B. Minn. Stat. § 609.035 does not bar prosecution.

Under section 609.035, "if 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 and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1. This statute "protects criminal defendants from both multiple prosecutions and multiple sentences for offenses resulting from the same behavioral incident." *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). But "acts 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." *Munt v. State*, 920 N.W.2d 410, 416-17 (Minn. 2018).

Hofer asserts that his drug possession overlapped with the offense date for the third-degree murder charge and thus section 609.035 is implicated. But, as discussed above, this assertion is not supported by the record. Thus, Hofer has not established that the fifth-degree possession on August 5 and the alleged third-degree murder in July shared "a unity of time and place" or were "motivated" by the same "criminal objectives." *See id.* To the contrary, the record demonstrates that the August 5 possession and the conduct that led to the victim's death in the third-degree murder case lacked such unity. The two offenses therefore did not arise from the same behavioral incident, and section 609.035 does not provide an alternative ground for affirming the dismissal.

Reversed and remanded.