STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0415

State of Minnesota,
Respondent,

vs.

Lawrence Bernard Nowels,
Appellant.

Filed March 30, 2020
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Ramsey County District Court
File No. 62-CR-17-7413

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

S Y L L A B U S

Under Minnesota Statutes section 609.035, subdivisions 1, 3 (2016), a district court cannot convict and sentence a defendant for being an ineligible person in possession of both a firearm and ammunition in violation of Minnesota Statutes section 624.713, subdivision 1(2) (2016), when the defendant possesses a single loaded firearm.

O P I N I O N

JESSON, Judge

Appellant Lawrence Bernard Nowels challenges his convictions and sentences for robbing—at gunpoint—a person trying to buy marijuana from him. Nowels advances several arguments on appeal. First, he argues that prosecutorial misconduct tainted his trial such that reversal is necessary. Second, he contends that he was improperly convicted and sentenced for unlawful possession of both a firearm and ammunition. Finally, Nowels advances several arguments in his pro se supplemental brief. Because we conclude that any prosecutorial misconduct did not affect his substantial rights and his supplemental arguments are without merit, we affirm in part. But because the district court improperly convicted and sentenced Nowels for both counts of possession, we reverse and remand for the district court to vacate one possession conviction and sentence consistent with this opinion.

FACTS

Hoping to buy some marijuana, J.C. went to a gas station on Rice Street in St. Paul. At the station, he approached a white car with a couple men inside and asked if they had any "green." The men agreed to a sale, but not at the gas station because it was too "hot," meaning that police officers frequent the store. Two of the men from the car got in J.C.'s car with him, and J.C. drove, at their direction, to a nearby parking lot. Once parked, the person in the front passenger seat (later identified as appellant Lawrence Bernard Nowels) put a gun to J.C.'s head and demanded his belongings. The man in the back seat (later

identified as accomplice D.R.) put his arms around J.C.'s head and chin and threatened to break his neck.

J.C. handed over his iPhone, car key, wife's bank card, wallet, and $18 cash. The men got out of J.C.'s car and into a car idling nearby. This was the same white car that Nowels and D.R. occupied at the gas station when J.C. first approached them.

After borrowing a passerby's phone, J.C. called 911. He told the operator that two men had robbed him and that one had put a gun to his head. Police showed up shortly after that and spoke with J.C. Later, a relative came to pick him up, and he left the scene.

But J.C. was so upset by the robbery that he took matters into his own hands, borrowing a car and phone to search for those who robbed him. J.C. spotted the men not far from the scene of the robbery, outside a market on Rice Street. And he called the police to have them come arrest the men, telling them that he was going to kill the men if the police did not come.

In response to J.C.'s call, police pulled up to the market. As they drove up, J.C. ran toward them. J.C. pointed out D.R. standing outside the market saying he was the man who robbed him. Police arrested D.R.

Next, J.C. said that Nowels went inside the market, so police entered and arrested him. J.C. told police that Nowels was the man who held the gun to his head so they searched him for weapons. Finding nothing but suspecting Nowels had abandoned the gun when he saw them arrive, police searched the market. After a quick, unsuccessful search, police reviewed the store's surveillance video.

In the video, Nowels appeared to watch police pull up and arrest D.R. outside. And police noticed that Nowels spent most of his time in the store in one of the middle aisles. Police searched the aisle and found a loaded gun hidden behind some cans of soup. When police asked J.C. if it was the gun that Nowels used to rob him, he said it was the same one.

The state charged Nowels with three criminal offenses: (1) first-degree aggravated robbery, (2) possession of a firearm by an ineligible person, and (3) possession of ammunition by an ineligible person.

The case was tried to a jury over three days. At the outset, Nowels stipulated that he was ineligible to possess a firearm or ammunition at the time of the robbery. J.C. gave his account of the robbery and the events that followed. Police officers involved in the case also testified. And a forensic investigator with the police department testified that, when he compared the latent fingerprints on the gun magazine to Nowels's and D.R.'s fingerprints, the results were inconclusive—which is "quite common."[1] In addition, the state presented to the jury J.C.'s first 911 call and several surveillance videos, including videos from the gas station, the parking lot where the robbery happened, and the inside and outside of the market.

[1] Another forensic scientist with the Minnesota Bureau of Criminal Apprehension who analyzed DNA swabs from the gun and magazine also determined that the results were inconclusive.

Before the end of the trial, the state proposed a modified jury instruction defining proof beyond a reasonable doubt. Specifically, the state requested the district court read the following statement:

> Proof beyond a reasonable doubt is simply that amount of proof that ordinary men and women rely upon in making their own most important decisions. You have a reasonable doubt if your doubts are based upon reason and common sense. *You do not have a reasonable doubt if your doubts are based upon speculation or irrelevant details.*

Nowels requested that the court rely on the pattern jury instruction, which reads:

> Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. *It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.*

After arguments, the district court decided to give the pattern jury instruction.

During its rebuttal argument, the state referenced the standard of proof, drawing on some of the language in its proposed jury instruction, using the words "speculation" and "irrelevant details." The defense did not object to any portion of this statement. And the state addressed Nowels's theory that J.C. made up the robbery and stated, "*[J.C.] didn't lie*. He told the police what happened as best he could back on October 2 of 2017 and he then came here and told you what happened in the best way that he could." Nowels did not object to this statement either.

After deliberation, the jury found Nowels guilty of all three counts. The district court sentenced Nowels to 60 months in prison on count two (possession of a firearm),

111 months on count one (aggravated robbery), and 60 months on count three (possession of ammunition), all to be served concurrently. Nowels appeals.

ISSUES

I. Did the prosecutor's statements in her rebuttal closing argument constitute misconduct that requires a new trial?

II. Did the district court err by convicting and sentencing Nowels for unlawful possession of both a firearm and ammunition for possessing one loaded gun?

III. Do Nowels's arguments in his supplemental brief warrant relief?

ANALYSIS

Under two theories of prosecutorial misconduct, Nowels requests that we vacate his convictions and remand his case to the district court for a new trial. He also asserts that he was improperly convicted and sentenced twice for the same possession crime. Finally, Nowels makes a number of arguments in his pro se supplemental brief. We address each issue in turn.

I. The prosecutor's statements in her rebuttal closing argument do not constitute misconduct requiring a new trial.

Nowels first contends that the prosecutor made improper statements in her rebuttal closing argument that require a new trial. Nowels did not object at trial to any of the statements he now challenges. Accordingly, we review unobjected-to claims of prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Nowels bears the burden of establishing plain error. *Id.* "An error is plain if it is clear or obvious; usually this means an error that violates or

contradicts case law, a rule, or an applicable standard of conduct." *State v. Bustos*, 861 N.W.2d 655, 660-61 (Minn. 2015) (quotation omitted).

If Nowels establishes error that is plain, the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. Said another way, the error must affect Nowels's substantial rights to justify a new trial. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also Ramey*, 721 N.W.2d at 299. And even if it does, "plain error affecting substantial rights warrants reversal *only if* the error must be addressed to ensure the fairness, integrity, or public reputation of the judicial proceedings." *Bustos*, 861 N.W.2d at 663 (emphasis added).

In addition, because the errors Nowels alleges are in the prosecutor's closing argument, this court considers the argument as a whole to ensure that no single word or phrase is "taken out of context and used as a basis for reversal." *State v. Schwartz*, 122 N.W.2d 769, 774 (Minn. 1963). With this framework in mind, we review each alleged instance of prosecutorial misconduct.

Prosecutor's Description of the Burden of Proof

Nowels first challenges the prosecutor's description of the burden of proof in her rebuttal summation, advancing two reasons why the statements constituted misconduct.[2] We address each theory in turn.

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[2] Nowels also argued that the prosecutor's description of the burden of proof improperly instructed the jury, but we are unpersuaded. "[I]t is solely the responsibility of the court to instruct juries on the law necessary to render a verdict." *State v. Cao*, 788 N.W.2d 710, 716 (Minn. 2010). And the district court reminded the jurors of the roles of the parties

First, according to Nowels, the prosecutor "circumvented the district court's ruling" when she explained "beyond a reasonable doubt" in her preferred way, despite the district court denying her motion for a modified instruction. It is misconduct for a prosecutor to violate an order from the district court. *State v. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016). Nowels contends that the prosecutor's closing argument violated the district court's order denying the state's proposed jury instruction.

While the district court adopted the pattern jury instruction, it did not order the parties to refrain from any further discussion or explanation of the standard. Nor did it prohibit the parties from using any language outside of that instruction. And explaining or referencing the jury instructions in different ways in closing arguments is permissible. *See* Minn. R. Crim. P. 26.03, subd. 19(3) ("Any party may refer to the instructions during final argument."). Given the district court's lack of an order prohibiting the phrases the state used, the prosecutor did not violate a court ruling. This was not plain error.

Second, Nowels contends that the prosecutor misstated the law, thereby lowering the state's burden of proof. Such misstatements constitute prosecutorial misconduct. *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007). And "[a]ny time a prosecutor makes such a misstatement of law, the defense is free to object and ask for a curative instruction." *State v. Jolley*, 508 N.W.2d 770, 773 (Minn. 1993).

Read in context, the prosecutor's statements are revealing. In her principal closing argument, the prosecutor only spoke generally about the beyond-a-reasonable-doubt

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during its jury instructions, saying: "If an attorney's argument contains any statement of the law that differs from the law that I gave you, disregard the statement."

standard. Then, in defense counsel's closing, counsel described reasonable doubt as a consideration that is "different for everybody," "[i]t's not 51 percent," and as a "yeah, but" theory. The defense then applied the "yeah, but" description of reasonable doubt to the state's evidence. In the state's rebuttal, the prosecutor assailed this argument, stating: "The defendant is asking you to speculate on evidence that you don't have. You have the evidence that there is. Don't speculate on what you don't have. Don't engage in the 'what if' thinking . . . ." And later, she added that reasonable doubt is "not based upon speculation and irrelevant details," the phrase from the state's proposed jury instruction.

When we review the closing arguments as a whole, the prosecutor's statements characterizing reasonable doubt were a direct response to the defense's statements on the same topic. Neither characterization was precisely included in the jury instructions. But statements from each party about the standard, explained in words or phrases other than those used in the jury instructions, are not per se erroneous.[3] Rather, both parties here were attempting to explain abstract legal phrases in terms that an average juror could understand and apply. This is not impermissible. *See* Minn. R. Crim. P. 26.03, subd. 19(3).

Nor were the prosecutor's references to "speculation" and "irrelevant details" misstatements of law. Two Minnesota Supreme Court cases compel this conclusion. First, in *State v. Smith*, the court ruled on the district court's use of "speculation" and "irrelevant details" in its jury instruction regarding the beyond-a-reasonable-doubt standard. 674 N.W.2d 398, 403 (Minn. 2004). In fact, the jury instruction in *Smith* and the one the

[3] We note that defense counsel's statements are not at issue in this appeal, and our analysis is not intended to address the appropriateness of those comments.

state proposed here are identical. *See id.* at 401. The court in *Smith* held that, when read in context, this instruction did "not impermissibly narrow the reasonable doubt standard nor mislead, confuse, or misstate the law." *Id.* at 403. And the Minnesota Supreme Court reiterated this point in *State v. Thao*, 875 N.W.2d 834, 842 (Minn. 2016). There, the defense argued that "the words 'speculation' and 'irrelevant details' . . . impermissibly narrowed the standard" thereby lowering the state's burden. *Thao*, 875 N.W.2d at 842. But the supreme court stated that it "rejected this precise argument in *Smith*." *Id.*

Nowels acknowledges both of these cases but argues that his case is distinguishable because it does not have the context and circumstances present in *Smith* and *Thao*. Nowels appears to argue that, because the prosecutor referenced "speculation" without referring to "irrelevant details," this makes the statements incorrect. But we do not read *Smith* and *Thao* so narrowly. And Nowels provides no legal authority to support his contention that *any* rephrasing of "speculation or irrelevant details"—even a minor one—is erroneous.

In sum, when read in context, the prosecutor's statements in her rebuttal are consistent with the law and are therefore not plainly erroneous.

Vouching for the Victim's Credibility

Nowels further contends that the prosecutor improperly vouched for the victim-witness, J.C., when she said that he "didn't lie." Generally, there is a "well-established prohibition against" an attorney "injecting [her] personal opinion concerning the veracity of a witness during closing argument." *State v. Williams*, 210 N.W.2d 21, 26 (Minn. 1973). "A prosecutor's statements in closing argument become improper vouching when the prosecutor implies a guarantee of a witness's truthfulness,

refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Smith*, 825 N.W.2d 131, 139 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Mar. 19, 2013). Such conduct violates the rules of professional responsibility. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). It is the jury's job to determine witness credibility. *Id.* "But prosecutors are not prohibited from arguing that certain witnesses are believable." *State v. Rucker*, 752 N.W.2d 538, 552 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008).

Here, the prosecutor went beyond merely arguing J.C.'s credibility or that he was believable—she stated that *he did not lie*. Because she implicitly injected her personal opinion about the veracity of his testimony, we conclude that this statement constitutes impermissible vouching. The prosecutor's misconduct was plainly erroneous.

Having found plain error, we move to the next step in our analysis: determining whether the error affected Nowels's substantial rights such that a new trial is necessary. *Ramey*, 721 N.W.2d at 299-300. We find a Minnesota Supreme Court case, *State v. Swanson*, to be particularly instructive in this regard. 707 N.W.2d 645 (Minn. 2006). There, the court considered whether two statements were impermissible vouching under the plain-error standard. *Id.* at 656. In closing arguments, the prosecutor made two statements: first, that "[t]he *state believes* [the witness] is very believable," and second, that a witness was "very believable." *Id.* While the court determined that the first statement was impermissible vouching amounting to plain error, the error did not warrant relief. *Id.* It reasoned that, "[g]iven the strength of the evidence against [the defendant] and given that the impermissible vouching constituted only a small part of the prosecutor's

closing argument, we hold the statements, while plain error, were not sufficiently prejudicial to warrant a new trial." *Id.*

All of those factors are present in this case. The evidence against Nowels is strong. J.C. testified about how he was robbed at gunpoint, and he identified Nowels and the gun found in the market as the one Nowels put to his forehead. Surveillance footage confirmed J.C.'s recitation of the events and the descriptions of the robbers and cars. And the police corroborated J.C.'s testimony. Further, the prosecutor's statement was a small phrase in a rebuttal closing argument. Relying on the principles from *Swanson*, we conclude that the vouching did not affect Nowels's substantial rights.

The district court's instructions bolster our conclusion. When a prosecutor expresses a personal opinion about the veracity of a witness, but the district court provides an instruction that counsel's arguments are not evidence, evidence of guilt is adequate, and the argument is otherwise proper, the statement about a witness's veracity is harmless. *See Ture*, 353 N.W.2d at 517. Here, the court gave such an instruction, the case was strong, and the argument was otherwise proper. Nowels is not entitled to a new trial.

In sum, while the statement, "[J.C.] didn't lie" was impermissible vouching and plainly erroneous, it did not affect Nowels's substantial rights. As a result, a new trial is not warranted on this basis. And we do not discern any error in the other alleged misconduct. Accordingly, we affirm with respect to this issue.

II. The district court erred by convicting and sentencing Nowels for unlawful possession of both a firearm and ammunition for possessing a single loaded gun.

Nowels also argues that the district court erroneously convicted and sentenced him for counts two and three—possession of a firearm and possession of ammunition by an ineligible person—because they are "the same offense." We agree. Because the gun Nowels possessed was loaded with ammunition, his possession of a firearm and ammunition involved a single course of conduct. We reverse and remand.[4]

We consider de novo whether multiple sentences are permissible under Minnesota Statutes section 609.035 (2016). *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012). But whether Nowels's "offenses occurred as part of a single course of conduct is a mixed question of law and fact." *State v. Patzold*, 917 N.W.2d 798, 809-10 (Minn. App. 2018), *review denied* (Minn. Nov. 27, 2018). When considering mixed questions, we review factual findings for clear error and legal conclusions de novo. *Id.*

We begin our review with the constitutional backdrop for this statute. Both the United States and Minnesota Constitutions prohibit the government from jeopardizing a person's liberty twice for the same offense. *See* U.S. Const. amend. V, XIV; Minn. Const. art. I, § 7. This idea—one deeply ingrained in American jurisprudence—is commonly referred to as double jeopardy. *See Green v. United States*, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223 (1957); *see also State v. Chavarria-Cruz*, 839 N.W.2d 515, 520 (Minn. 2013).

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[4] At sentencing, Nowels did not object to the district court entering multiple convictions and sentences. But "an appellant does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007).

And state statutes expand these protections for criminal defendants facing charges for multiple offenses. *See State v. Hill*, 918 N.W.2d 237, 242 (Minn. App. 2018). These broader protections aim to prevent exaggerating the criminality of a person's behavior and safeguard the policies rooted in our constitutional double-jeopardy protections. *See State v. Johnson*, 141 N.W.2d 517, 522 (Minn. 1966).

With this context for the applicable laws in mind, we turn to the substantive statutes at issue here, followed by analysis of the relevant caselaw, before applying both to the facts in this case. We begin with the provision under which Nowels was charged for counts two and three: Minnesota Statutes section 624.713, subdivision 1(2). Under this provision, if a person has been convicted of a crime of violence, that person shall not possess a firearm or ammunition. Minn. Stat. § 624.713, subd. 1(2). Nowels stipulated that he was prohibited from possessing these items at the time of the robbery. And the jury found that Nowels possessed a loaded gun. Therefore, he violated this statute.

However, Nowels contends that his possession of the loaded gun does not warrant two convictions and two sentences under the same statute. As indicated above, Minnesota law prohibits a district court from convicting and sentencing a defendant for more than one crime if his unlawful conduct is part of the same behavioral incident. *See* Minn. Stat. §§ 609.035, subd. 1, .04 (2016). "And unless a statutory exception applies, '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.'" *State v. Mitchell*, 881 N.W.2d 558, 563 (Minn. App. 2016) (quoting Minn. Stat. § 609.035, subd. 1), *review denied* (Minn. Aug. 23, 2016). Here, Nowels's possession of the loaded gun constitutes more than one

offense—whether the state charged the conduct as possession of ammunition, possession of a firearm, or both—but the unlawful conduct occurred as part of the same behavioral incident.

Yet, several statutory exceptions to this same-behavioral-incident prohibition exist. *See Patzold*, 917 N.W.2d at 810. One of these exceptions applies to firearms offenses. Section 609.035, subdivision 3, provides that, "a prosecution for or conviction of a violation of section . . . 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*." (Emphasis added.) The issue before us is whether the "any other crime" language removes the bar against multiple convictions and sentences so that Nowels can be punished separately for aggravated robbery, possession of a firearm, and possession of ammunition.

Precedent informs our review of the phrase "any other crime." We begin with *State v. Mitchell*. Based on his nonconsensual entry into his former girlfriend's residence in which he assaulted her with a knife, Mitchell was convicted of two counts of first-degree burglary. *Mitchell*, 881 N.W.2d at 560. The two convictions were based on alternative means of committing a first-degree burglary: one involved an assault and the other involved a dangerous weapon.[5] *Id.* The district court imposed concurrent sentences for each

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[5] In Minnesota, there are three ways to commit a first-degree burglary. Generally, a person commits first-degree burglary when she or he enters a building without consent with the intent to commit a crime and satisfies one of the following alternative means. Minn. Stat. § 609.582, subd. 1 (2018). The first type of burglary is committed when a burglar enters a dwelling and another person is present. *Id.*, subd. 1(a). The second type is committed when a burglar enters the building and possesses a dangerous weapon. *Id.*, subd. 1(b). The third type occurs when a burglar assaults someone within the building. *Id.*, subd. 1(c). The second and third types are relevant to *Mitchell*.

first-degree-burglary conviction. *Id.* Similar to section 609.035, subdivision 3, there is a statutory exception to the bar against multiple sentences for burglaries. That exception provides that "a prosecution for or conviction of the crime of burglary is not a bar to conviction of or punishment for *any other crime* committed on entering or while in the building entered." Minn. Stat. § 609.585 (2018) (emphasis added). After engaging in statutory interpretation, we concluded that, under the plain language of section 609.585, "any other crime" means "a crime different from burglary." *Mitchell*, 881 N.W.2d at 564. We remanded for the district court to vacate Mitchell's conviction and sentence for one of the first-degree burglary counts. *Id.*

We reached a result similar to *Mitchell* two years later in *State v. Patzold*. 917 N.W.2d at 810-11. Based on his conduct during a single attack on his girlfriend—including repeated strikes to her arms and face, and kicks to her pelvic area—the jury found Patzold guilty of two counts of domestic assault. *Id.* at 802, 811. The two assault counts were based on alternative means—intent to cause fear and intent to inflict bodily harm—but both assaults arose from the exact same conduct.[6] *Id.* at 811. The jury also found Patzold guilty of three counts of criminal sexual conduct based on his conduct during the assault. *Id.* at 809. We concluded that Patzold was properly sentenced for one count each of domestic assault and criminal sexual conduct under Minnesota Statutes section 609.035,

[6] Similar to burglary, there are two ways to commit a domestic assault in Minnesota. In either case, the victim must be a family or household member. Minn. Stat. § 609.2242, subd. 1 (2018). The first type of domestic assault is committed when a person acts with intent to cause fear of immediate bodily harm or death in the victim. *Id.*, subd. 1(1). The second type is committed when a person intentionally causes or attempts to cause the victim bodily harm. *Id.*, subd. 1(2). Both types of assault are relevant in *Patzold*.

subdivision 6 (2016), which permits a sentence for criminal sexual conduct and any other crime committed as part of the same conduct. *Id.* at 811. But the general prohibition against multiple sentences did not permit two sentences for *domestic assault* based on the same conduct.[7] *Id.* (citing Minn. Stat. § 609.035, subd. 1). We explained that, "[i]f a jury has convicted a defendant of more than one offense from a single course of conduct, the court is to adjudicate formally and impose sentence on one count only." *Id.* at 810 (quotation omitted).

Earlier, in *State v. Holmes*, the supreme court considered a similar question: whether Holmes could be convicted of and sentenced for both third-degree assault and first-degree burglary when the assault was committed during the burglary in a single course of conduct. 778 N.W.2d 336, 340 (Minn. 2010). There, the issue again turned on the meaning of "any other crime" under Minnesota Statutes section 609.585 (2008). *Id.* at 341-42. To answer these questions, the court considered what was required to prove each offense—the elements. *Id.* at 341. First-degree burglary with an assault—the third type discussed earlier—requires proof that a person entered a building without consent with intent to commit a crime and assaulted a person within the building. *Id.* (citing Minn. Stat. § 609.582, subd. 1(c) (2008)). And third-degree assault requires proof of an assault that inflicts substantial bodily harm. *Id.* (citing Minn. Stat. § 609.223, subd. 1 (2008)). The court concluded that, because the crime of first-degree burglary (assault) and the crime

[7] Patzold did not challenge whether the district court properly entered judgments of conviction for both counts of assault under section 609.04. *Patzold*, 917 N.W.2d at 809 n.4.

of third-degree assault (bodily harm) have different statutory elements, the assault fell within the meaning of "any other crime." *Id.* Accordingly, Holmes's convictions and sentences for both crimes were permitted. *Id.*

With these precedents in mind, we turn to Nowels's sentences.[8] We view this case to be more like *Mitchell* and *Patzold* than *Holmes*. In *Mitchell* and *Patzold*, the defendants were charged with two counts of the same crime, but each count was a different means of committing the same crime. 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*. And like *Patzold*, where we permitted punishment for both the domestic assault and sexual assault, Nowels may be convicted and punished for one unlawful-possession offense and aggravated robbery because aggravated

[8] Nowels also briefly cited—without supporting argument—to Minnesota Statutes section 609.04 in his brief, which prohibits a defendant from being convicted twice for the same offense. *See* Minn. Stat. § 609.04; *see also State v. Dudrey*, 330 N.W.2d 719, 721 (Minn. 1983) ("We have interpreted section 609.04 as preventing the state from convicting a defendant twice of the same offense or of a greater and a lesser-included offense on the basis of the same act or course of conduct."). Whether multiple convictions are appropriate is a separate question from whether multiple sentences are appropriate. *See State v. Spears*, 560 N.W.2d 723, 726-27 (Minn. App. 1997) (conducting a separate analysis of sentences and convictions), *review denied* (Minn. May 28, 1997).

To determine whether an offense falls under section 609.04, "a court examines the elements of the offense instead of the facts of the particular case." *Mitchell*, 881 N.W.2d at 562. Here, unlawful possession of ammunition or a firearm requires proof of the same elements. And the same conduct—Nowels's possession of a single loaded gun—is the basis of the two charged offenses. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) ("We hold that the proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only."). For these reasons, and those articulated in our analysis, we conclude that section 609.04 prohibits the district court from convicting Nowels for both unlawful possession offenses.

robbery is "any other crime," under the firearms-offense exception.[9] *See* Minn. Stat. §§ 609.035, subd. 3, .04. But he cannot be convicted and punished for two possession offenses under the *Mitchell* and *Patzold* analytical frameworks.

This case differs in meaningful ways from *Holmes*, making our holding consistent with that precedent as well. In *Holmes*, it was permissible that the defendant was punished for the two crimes at issue because they required proof of *different* elements. But here, the 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. *See* Minn. Stat. § 624.713, subd. 1(2).

In sum, we conclude that the district court erred in entering convictions and sentences for both counts two and three because the possession of a single firearm loaded with ammunition constituted one course of unlawful conduct and is not subject to multiple convictions and sentences.[10] This conclusion is consistent with our published caselaw and acknowledges Minnesota's broad protections against double jeopardy, while respecting the jury's determination about Nowels's criminal conduct. Accordingly, we reverse and

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[9] We also observe that this is consistent with the Minnesota Supreme Court's recent decision in *State v. Smith*, ___ N.W.2d ___, ___, No. A19-0695, slip op. at 14-15 (Minn. Mar. 18, 2020). There, the court concluded that the district court erred by sentencing the defendant for more than one additional crime as permitted under the burglary exception. *Smith*, slip op. at 14-15 (citing Minn. Stat. § 609.585 (2018)).

[10] For its argument on this issue, the state relied on two unpublished cases from this court. But unpublished cases are not binding precedent. *See* Minn. Stat. § 480A.08, subd. 3(c) (2018).

remand for the district court to vacate the conviction and sentence for one of the counts of unlawful possession.

III. The arguments advanced in Nowels's supplemental brief do not warrant reversal.

In a supplemental brief filed on his own behalf, Nowels advanced several additional claims.[11] We address his claims below.

Ineffective Assistance of Counsel

According to Nowels, his trial counsel was ineffective. In order to prevail on an ineffective-assistance-of-counsel claim, Nowels has the affirmative burden to show (1) that his attorney's representation "fell below an objective standard of reasonableness" and (2) that, but for his attorney's failings, the outcome would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Nowels points to a number of strategic and evidentiary decisions that his counsel made with which he disagreed. But deciding which "evidence to present and which witnesses to call at trial are tactical decisions properly left to the discretion of trial counsel." *State v. Outlaw*, 748 N.W.2d 349, 359 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. July 15, 2008). And Nowels failed to describe *how* his attorney's evidentiary and strategic choices would have

[11] We note that Nowels failed to support any of these arguments with specific legal authority. Instead, at the end of his brief, he listed more than 50 Minnesota cases, many of which are unpublished and therefore not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c). While failing to cite to applicable law generally results in forfeiture, *see State v. Bursch*, 905 N.W.2d 884, 889 (Minn. App. 2017), we choose to address his arguments substantively in this opinion.

changed the outcome of his trial. For these reasons, his ineffective-assistance-of-counsel claim fails.

Misuse of Evidence

Nowels also contends that the prosecutor improperly used surveillance video of him in the market to support the state's theory that he hid the gun there. Specifically, he asserts that the state "chopped up misleading shots" to misrepresent his conduct to the jury. But there is no evidence that the video was distorted or altered, and prosecutors are permitted to argue all reasonable inferences from the evidence they present. *See State v. Mems*, 708 N.W.2d 526, 532 (Minn. 2006) ("Counsel has the right to analyze and explain the evidence, and to argue all proper inferences to be drawn from the evidence."). This claim does not merit reversal.

Order of Sentencing

Finally, Nowels takes issue with the order in which the district court sentenced him because sentencing count two (possession of a firearm) first resulted in a longer sentencing recommendation for count one (aggravated robbery). But under the sentencing guidelines, "[m]ultiple offenses sentenced at the same time before the same court *must* be sentenced in the order in which they occurred." Minn. Sent. Guidelines 2.B.1.e (Supp. 2017). And the district court found that Nowels would have to *possess* the gun first before he could use it to commit the aggravated robbery. Therefore, the district court did not err by sentencing Nowels on the possession-of-a-firearm conviction first, because it occurred first.

DECISION

Alleging prosecutorial misconduct, erroneous conviction and sentencing, and other issues in his supplemental brief, Nowels requests that we grant him a new trial. But none of the alleged instances of prosecutorial misconduct require reversal and none of his supplemental issues merit relief. For these reasons, we affirm in part. However, we agree with Nowels that the district court erroneously convicted and sentenced him for both unlawful possession counts. Accordingly, we hold that under Minnesota Statutes sections 609.035, subdivisions 1, 3, and .04, a district court cannot convict and sentence a defendant for being an ineligible person in possession of both a firearm and ammunition when the defendant possesses a single loaded firearm. Because Nowels was erroneously convicted and sentenced, we reverse and remand with respect to the possession offenses for the district court to vacate one of his convictions and sentences.

Affirmed in part, reversed in part, and remanded.