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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1190**

State of Minnesota,  
Respondent,

vs.

Franchel Delmar Davis,  
Appellant.

**Filed March 3, 2014  
Affirmed in part, reversed in part, and remanded  
Stauber, Judge**

Hennepin County District Court  
File No. 27CR1019744

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Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

**UNPUBLISHED OPINION**

**STAUBER**, Judge

On appeal from his conviction of and sentence for three counts of being a prohibited person in possession of a firearm, and from the district court's denial of his

petition for postconviction relief, appellant argues that the postconviction court erred by denying his request for a new trial because a state's witness testified falsely that a vehicle used to conceal weapons was registered to appellant, the witness was not a records custodian for the Department of Vehicle Services (DVS) as required by the rules of evidence, and another witness was allowed to testify that appellant was the subject of a search warrant for weapons. Appellant also argues that the evidence was insufficient to support his three convictions because the state did not eliminate the rational hypothesis that another person constructively possessed the three guns, and that the district court committed reversible error in the jury instructions. Appellant further challenges his sentence, arguing that the district court erred when it imposed three sentences for offenses that were part of the same behavioral incident under Minn. Stat. § 609.035 (2008). We affirm the convictions, but we reverse and remand appellant's sentence.

## **FACTS**

On April 30, 2010, police officers executed a search warrant at a residence in Minneapolis. Officer Scott Creighton arrived prior to the execution of the warrant in order to conduct surveillance. Officer Creighton surveilled appellant Franchel Delmar Davis outside at the rear of the house with another individual, J.E. Officer Creighton saw the two go to the passenger-side door of a blue Chevrolet Blazer parked behind the residence, and then approach the front of the vehicle. Both individuals went inside the residence for a few minutes, and then came out again. Officer Creighton again saw appellant, along with J.E., go into the passenger side of the Blazer. Then, a tan sedan pulled up with several people inside. Two people got out of the sedan, and it appeared to

Officer Creighton that appellant and J.E. were conducting some kind of exchange of narcotics or weapons. The police then executed the search warrant, arresting both J.E. and appellant.

Appellant was taken into custody at the front of the Blazer, and his wallet was found on the vehicle's hood. Police searched the Blazer and found three guns concealed on the exterior of the vehicle: a handgun hidden under a baseball cap in a wheel well, a .22 caliber pistol hidden in a cardboard beer box beside the Blazer, and a .40 caliber pistol concealed in a Crown Royal Whiskey bag on the Blazer's front bumper. Officer Kyle Ruud ran the Blazer's plates through the police computer system and retrieved DVS records indicating that the vehicle was registered to appellant. A small amount of cocaine was also found in a bedroom of the searched residence.

Appellant was charged with one count of third-degree controlled-substance crime, and three counts of being a prohibited person in possession of a firearm. At trial, Officer Ruud was permitted to testify over appellant's objection that, according to DVS, the Blazer was registered to appellant. Officer Creighton was also permitted to testify over appellant's objection that the search warrant specifically named appellant and that it was for weapons and drugs. The district court later denied appellant's motion for a mistrial following Officer Creighton's testimony. Appellant did not testify.

The jury acquitted appellant on the controlled-substance charge, but found him guilty on all three firearms charges. The district court denied appellant's motion for a new trial. Appellant was sentenced to three concurrent sentences, each for 60 months in prison. Appellant filed a direct appeal to this court, which was stayed so that appellant

could petition the district court for postconviction relief. In his postconviction petition, appellant argued that he was entitled to a new trial because Officer Ruud testified falsely that the Blazer was registered to appellant in light of appellant's affidavit stating that he never participated in a title transfer of that vehicle. The district court denied appellant's requested relief. This appeal followed.

## D E C I S I O N

### I.

“When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court's decisions using the same standard that we apply on direct appeal.” *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012).

Appellant argues that the postconviction court erred by denying his request for a new trial on the basis of evidence that Officer Ruud testified falsely when he stated that the Blazer was registered to appellant. When assessing the merits of a claim based on false or recanted testimony, this court applies the test set forth in *Larrison v. United States*, 24 F.2d 92, 87-88 (7th Cir. 1928).<sup>1</sup> *Roby v. State*, 808 N.W.2d 20, 27 n.6 (Minn. 2011). The *Larrison* test states that a new trial based on false testimony may be granted where (1) the court is reasonably well satisfied that the testimony was false; (2) the jury might have reached a different conclusion without the testimony; and (3) the petitioner was surprised by the testimony and was unable to refute it or did not know it was false

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<sup>1</sup> Although *Larrison* has since been overruled by *United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004), Minnesota still applies the *Larrison* test. See *Reed v. State*, 743 N.W.2d 725, 737 (Minn. 2010).

until after the trial. *State v. Nicks*, 831 N.W.2d 493, 511 (Minn. 2013). “[T]he third prong is not a condition precedent for granting a new trial, but rather a factor a court should consider when deciding whether to grant the petitioner’s request.” *Dobbins v. State*, 788 N.W.2d 719, 733-34 (Minn. 2010).

Appellant argues that the postconviction court erred when it concluded that the *Larrison* test did not apply to the evidence presented in appellant’s affidavit, which stated that appellant never participated in a title transfer of the Blazer, and that if the Blazer was placed in his name it was not with his consent or knowledge. Appellant also submitted a printout of the DVS record showing a confusing chain of title that lists both appellant and another person as the registered owners. Appellant asserts that this evidence shows that Officer Ruud testified falsely when he stated that the Blazer was registered to appellant.

Appellant relies on *State v. Caldwell*, in which the Minnesota Supreme Court concluded that the *Larrison* test applied to evidence that a fingerprint expert inaccurately identified a fingerprint as the defendant’s at trial. 322 N.W.2d 574, 587 (Minn. 1982). In *Caldwell*, the defendant was convicted after a fingerprint expert testified that a print belonged to the defendant. *Id.* at 580. At his co-defendant’s trial, experts testified that the fingerprint expert had misidentified the print as Caldwell’s and that the print could not have belonged to him. *Id.* at 581-82. The supreme court concluded that the fingerprint expert’s testimony at trial was undoubtedly false, but not deliberately false. *Id.* at 586-87. Even so, the supreme court stated that “we do not believe that the witness’ state of mind necessarily should be the factor that determines whether a defendant is

entitled to a new trial,” and concluded that evidence of mistaken testimony can satisfy the first requirement of the *Larrison* test. *Id.* at 587.

This case does not involve testimony later learned to have been mistaken or deliberately false. Officer Ruud testified that DVS records showed that the Blazer was registered to appellant. Appellant concedes that the DVS record listed him as the registered owner at the time he was arrested. But he contends that the DVS record itself was false. We conclude that this evidence does not satisfy the first requirement of the *Larrison* test because it is not evidence that proves that a witness testified falsely.

Because appellant’s evidence does not satisfy the *Larrison* test, it must be analyzed under the *Rainer* test for newly discovered evidence. To pass the *Rainer* test, appellant must allege facts that, if proven, would show: (1) that the evidence was not known to the defendant or his or her counsel at the time of trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result. *Bobo v. State*, 820 N.W.2d 511, 517-18 (Minn. 2012) (citing *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997)). Appellant fails the *Rainer* test on the first requirement since appellant must have known prior to trial that the DVS record was not accurate. Therefore, we conclude that this evidence does not entitle appellant to a new trial.

## II.

Appellant also argues that Officer Ruud should not have been permitted to testify about the DVS records because a sufficient foundation for his testimony was not laid under the business records exception for hearsay evidence. “Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

The business-records exception to the rule against hearsay provides for the admission of documents “kept in the course of regularly conducted business activity.” Minn. R. Evid. 803(6). In order to lay a proper foundation under the business-records exception, “the custodian or other qualified witness who can explain the recordkeeping of his organization is ordinarily essential.” *Nat’l Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 61 (Minn. 1983) (quotation omitted). But “[t]he phrase ‘other qualified witness’ should be given the broadest interpretation; *he need not be an employee of the entity so long as he understands the system.*” *Id.* (quotation omitted). For example, an accountant could testify regarding a record after examining a company’s bookkeeping system. *Id.*

But Officer Ruud testified that he did not know how DVS compiles its records. He stated that he had “some familiarity with [DVS],” but said that “I don’t know exactly what their policies are and who they release information to.” He did not testify as to how

DVS keeps their records or how it was possible to determine whether a record from DVS accurately reflected the true owner of a vehicle.

The state argues that, even if the evidence was not admissible under the business-records exception, it was admissible under the public-records exception. We agree. Minn. R. Evid. 803(8) provides for the admission of otherwise inadmissible hearsay evidence contained in a public record concerning “matters observed pursuant to duty imposed by law as to which matters there was a duty to report.” In *State v. Vonderharr*, this court concluded in a pretrial appeal that state drivers’ license records are admissible without the testimony of a records custodian because the records are not testimonial, that is, they are not prepared for the purpose of prosecuting alleged crimes. 733 N.W.2d 847, 850-53 (Minn. App. 2007). But this court observed that a custodian may be required to testify where the defendant has presented evidence substantiating his claim that the record was incorrect. *Id.* at 853.

We conclude that the DVS records were admissible under the public records exception. The DVS records were not prepared for the purpose of prosecuting crimes, but rather to determine vehicle ownership for a variety of purposes and for the benefit of the public generally. Because these records are not testimonial, a records custodian is not required to testify. *See id.* at 853. Although appellant challenged the validity of the records, we conclude that it was not an abuse of discretion to permit Officer Ruud to testify regarding these records instead of a records custodian. The ultimate issue in this case was not whether appellant owned the Blazer but whether appellant owned the guns found in and about the vehicle. The DVS records provided some support for the state’s

theory that appellant owned the vehicle, as did the vehicle's location at appellant's residence, the police observations of appellant going in and out of the vehicle, and the discovery of appellant's wallet on the hood of the vehicle. To the extent that other evidence supported the conclusion that appellant possessed those weapons, any error in admitting the DVS records into evidence was harmless. *See State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012) (stating the harmless-error standard).

### III.

Appellant also argues that the district court erred by permitting Officer Creighton to testify that appellant was the subject of the search warrant, and that the warrant was for weapons. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *Amos*, 658 N.W.2d at 203.

"In criminal cases, evidence that an arresting or investigating officer received a tip for purposes of explaining why the police conducted surveillance is not hearsay." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002). But "a police officer testifying in a criminal case may not, under the guise of explaining how [the] investigation focused on defendant, relate hearsay statements of others." *Id.* (quotation omitted). Where the potential for evidence to be used for an improper purpose outweighs its probative value, "even a limited elicitation, for nonhearsay purposes, of general testimony that a tip had been received" is inadmissible. *State v. Hardy*, 354 N.W.2d 21, 24-25 (Minn. 1984).

The police focused its investigation on appellant based on a tip from a confidential informant (CI). That tip led police to obtain a search warrant for a residence that specifically named appellant. At trial, the prosecution elicited testimony from Officer Creighton that the warrant focused on appellant and that the purpose of the investigation was to find drugs and weapons. During closing argument, the prosecutor told the jury that “[the police] were at that house to execute a search warrant at that house, and [appellant] was the subject of that search warrant. [J.E.] was not the subject of the search warrant.”

Because the prosecution used the contents of the warrant to explain to the jury not only why the police investigation focused on appellant, but to prove an element of the crime—that appellant, and no one else, possessed the three guns—we conclude that admission of this evidence was error. Even though Officer Creighton did not testify as to the contents of the statements he received from the CI that formed the basis of the warrant, the state’s use of this evidence to prove that appellant was in possession of weapons or drugs was improper and unfairly prejudicial. *See Hardy*, 354 N.W.2d at 24-25.

But “[a]n error is harmless beyond a reasonable doubt if the jury’s verdict was surely unattributable to the error.” *Davis*, 820 N.W.2d at 533 (quotation omitted). Although the testimony was erroneously admitted, we conclude that the state met its burden of showing that the error was harmless. *See State v. Schoen*, 598 N.W.2d 370, 377 n.2 (Minn. 1999) (recognizing that “the burden of showing that an error is harmless properly falls on the state”). Because there was other evidence connecting appellant with

the guns, admission of the testimony regarding the search warrant by itself was not enough to affect the outcome of the trial. While the better practice to avoid prosecutorial misconduct is to limit an officer's testimony to a mere statement that the police were at a residence to execute a search warrant, we conclude that the jury would have been able to discern the purpose and scope of the warrant by looking to the other evidence in the record.

#### IV.

Appellant also argues that the evidence was insufficient to support his convictions for weapons possession. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

"[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude

beyond a reasonable doubt any reasonable inference other than guilt. *Id.* This court applies a two-step analysis when reviewing circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). “The first step is to identify the circumstances proved. In identifying the circumstances proved, we defer to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Id.* at 598-99 (quotation and citation omitted). “The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 599 (quotation omitted).

Viewing the evidence in the light most favorable to the convictions, the evidence adduced at trial proved that on April 30, 2010, in the early afternoon, police executed a search warrant at a residence. Prior to the execution of the warrant, Officer Creighton observed appellant and J.E. go in and out of the residence and in and out of a blue Blazer parked at the residence. Officer Creighton then observed a tan sedan approach the residence and an exchange occur between appellant, J.E., and the occupants of the sedan. Based upon Officer Creighton’s experience, it appeared that “they were making an exchange of narcotics or possible weapons.” The sedan left, J.E. went back inside the house, and appellant stayed outside near the Blazer. The search warrant was executed and appellant was taken into custody while he was standing in front of the Blazer. After appellant was arrested, his wallet was found on the hood of the Blazer, and three guns were found in and about the Blazer. Officer Ruud ran the Blazer’s plates through the police computer system, and the report stated that it was registered to appellant. Police

searched the house and found photos of appellant in a bedroom and mail addressed to appellant at that address as well as other pieces of mail addressed to appellant at a different address.

Appellant argues that the evidence is insufficient to show that appellant possessed the guns because the evidence adduced at trial is equally consistent with the hypothesis that the weapons belonged to J.E. We disagree. The state was required to show constructive possession by showing either that

(a) the police found the item in a place under the defendant's exclusive control to which other people did not have access, or (b) that, if the police found the item in a place to which others had access, there is a strong probability, inferable from the evidence, that the defendant was consciously exercising dominion and control over the item at the time.

*State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). “Proximity is an important consideration in assessing constructive possession.” *Id.* And “constructive possession need not be exclusive, but may be shared.” *Id.* On review, this court looks at the totality of the circumstances to determine whether constructive possession has been proved. *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000), *review denied* (Minn. June 13, 2000).

Because constructive possession can be shared with another, the fact that J.E. was also present does not exclude appellant from possessing the weapons. Moreover, the weapons were found in the yard of a house where appellant resided, his wallet was found near the weapons, and the vehicle that concealed the weapons was registered to appellant at the time of his arrest. *See id.* (concluding that evidence was sufficient to support

constructive possession of drugs where drugs were found in appellant's closet among her clothing, and in areas of the house that she shared with her spouse). Therefore, viewing the evidence in the light most favorable to the convictions, we conclude that the evidence is sufficient to support the convictions.

## V.

Appellant also argues that the district court diluted the state's burden of proof and misconstrued the jury's role in the jury instructions. Appellant did not object to the jury instructions at trial. "On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) (citing Minn. R. Crim. P. 31.02.). To review the claimed error, there must have been (1) an error, (2) that is plain, and (3) that affects substantial rights. *Id.* at 298. "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted).

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). And "jury instructions must be viewed in their entirety." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Appellant asserts that the following instruction given to the jury was erroneous:

The final test of the quality of service will be in the verdict that you return to the court and not in the opinions that any of you might have as you retire from this case. Have in mind

that you will make a definite contribution to the efficient judicial administration if you arrive at a just and proper verdict. To that end, the Court will remind you that in your deliberations in the jury room there can be no triumph except the determination and the declaration of truth.

Remember that this case is important to both sides. It's important in respect that a person is guilty of a commission of a crime be brought to justice and be punished. It is equally important that a person who is not guilty of the commission of a crime should not be punished for something they did not do.

Appellant argues that the reference to “truth” makes it sound as though the jury should determine whether appellant was guilty or innocent, not whether the state proved all elements of the crime beyond a reasonable doubt. And appellant argues that the reference to punishment is improper because determination of punishment is for the court and not the jury. *See State v. Finley*, 214 Minn. 228, 232, 8 N.W.2d 217, 218 (1943) (stating that the jury may not consider “the matter of punishment”).

But appellant concedes that the court gave correct instructions on the state's burden of proof. The court also instructed the jury that “[t]he defendant has no obligation to prove innocence,” and that “[i]n arriving at your verdict in this case, the subject of possible disposition, penalty, or punishment is not to be discussed or considered by you as that matter is one that lies solely within the discretion of the Court.” Therefore, taken as a whole the jury instructions were not plainly erroneous. Rather, the court's final charge to the jury emphasized the importance of taking the role of juror seriously, but in no way negated the prior correct instructions on burden of proof and punishment.

## VI.

Finally, appellant argues that the district court erred by imposing three sentences for conduct arising out of the same behavioral incident. Appellant did not object to the imposition of multiple sentences, but the prohibition against multiple sentences arising out of the same behavioral incident cannot be waived. *State v. Johnson*, 653 N.W.2d 646, 650-51 (Minn. App. 2002). The district court's decision whether multiple offenses were committed as part of a single behavioral incident so as to preclude multiple sentencing entails factual determinations that will not be reversed unless clearly erroneous. *State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). When the facts are not in dispute, the decision whether multiple offenses are part of a single behavioral incident presents a question of law that is reviewed de novo. *State v. Ferguson*, 808 N.W.2d 586, 890 (Minn. 2012).

Minn. Stat. § 609.035, subd. 1 provides that “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.” But subdivision 3 of that section provides an exception for firearms offenses: “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.” *Id.*, subd. 3.

Appellant argues that one conviction under section 624.713, subdivision 1, clause (2) is a bar to punishment for a second and third conviction under the same section

because those convictions are not “other” convictions under the plain meaning of section 609.035, subdivision 3. The state did not brief this argument.

In *State v. Watson*, this court concluded that the district court did not err by sentencing the defendant for both the crime of being a felon in possession of a firearm under section 624.713, subdivision 1, clause (2), and the crime of possession of a firearm on which the serial number was obliterated under Minn. Stat. § 609.667(2). 829 N.W.2d 626, 631 (Minn. App. 2013), *review denied* (Minn. June 26, 2013). This court observed that the “purpose of Minnesota Statutes section 609.035 (2010), often referred to as the single-behavioral-incident rule, is to protect against exaggerating the criminality of a person’s conduct and to make both punishment and prosecution commensurate with culpability.” *Id.* at 632 (quotation omitted). The court construed the word “any” in subdivision 3 broadly, concluding that the defendant could be sentenced for both felon in possession of a firearm and possession of a firearm with the serial numbers obliterated. *Id.* at 633.

But, as appellant points out, this court did not define the term “other.” Questions of statutory interpretation are reviewed de novo. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013). “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2012). “If the meaning of a statute is unambiguous, we interpret the statute’s text according to its plain language.” *Brua v. Minn. Joint Underwriting Ass’n*, 778 N.W.2d 294, 300 (Minn. 2010). “If a statute is ambiguous, we apply other canons of construction to discern the legislature’s intent.” *Id.* “Ambiguity exists only where statutory language is subject to

more than one reasonable interpretation.” *State v. Crawley*, 819 N.W.2d 94, 102 (Minn. 2012).

The American Heritage Dictionary defines “other” as “[d]ifferent from that or those implied or specified” or as “[a]dditional; extra.” *The American Heritage Dictionary* 1249 (5th ed. 2011). The Sixth Edition of Black’s Law Dictionary defines “other” as “[d]ifferent or distinct from that already mentioned; additional, or further.” *Black’s Law Dictionary* 1101 (6th ed. 1990). Therefore, in the context of Minn. Stat. § 609.035, subd. 3, “other” might have one of two meanings. It could mean different or distinct from, so that subdivision 3 might permit punishment for only a “different” crime; or, “other” could mean additional or extra, so that subdivision 3 might permit punishment for any “additional” crime a defendant committed.

By way of analogy, possession of multiple controlled substances “at the same time and place, for personal use, is a single behavioral incident” dictating punishment for only one conviction. *State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002). In *Papadakis*, the defendant was convicted of second-degree controlled-substance possession for cocaine, and also received “seven fifth-degree controlled-substance convictions” for possessing hashish and steroids. *Id.* at 358. This court concluded that the defendant could receive multiple convictions, but could not receive multiple punishments because the defendant’s possession of multiple drugs arose out of a single behavioral incident. *Id.*

In another context, possession of multiple pornographic images of children can result in multiple punishments because of the multiple-victim exception. *State v.*

*Rhoades*, 690 N.W.2d 135, 139 (Minn. App. 2004). The multiple-victim exception is a “judicially created exception to this single-behavioral-incident rule” under Minn. Stat. § 609.035, and “permits the imposition of multiple sentences when (1) the offenses involve multiple victims and (2) the multiple sentencing does not unfairly exaggerate the criminality of the defendant’s conduct.” *Id.* at 138. Because pornographic images of children victimize each child who is portrayed, each pornographic image amounts to a separate act for which a defendant may be punished. *Id.* at 139. But under the sentencing guidelines, felon in possession of a firearm is not a crime against a person. *Lewis v. State*, 697 N.W.2d 624, 627 (Minn. App. 2005). Therefore, possession of multiple weapons does not result in the victimization of multiple persons; thus, we conclude that the multiple-victim exception does not apply.

We conclude that the better analogy is to drug offenses, and that an interpretation of “other” as “different” better comports with the legislature’s intent to punish more severely felons in possession of weapons who use those weapons to commit other crimes. Therefore, we conclude that the district court erred by sentencing appellant on all three of his convictions. Accordingly, we reverse appellant’s sentence and remand to the district court for resentencing.

**Affirmed in part, reversed in part, and remanded.**