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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1439**

State of Minnesota,
Respondent,

vs.

Raymon Freeman,
Appellant

**Filed June 26, 2017
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-15-6272

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

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Cheri A. Townsend, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his third-degree possession-of-a-controlled-substance conviction, arguing that the district court committed plain error affecting his substantial rights by failing to instruct the jury on constructive possession. We affirm.

FACTS

In February 2015, police were dispatched to an apartment building. Officers encountered appellant Raymon Freeman sitting on a landing between the building's second and third floors. Freeman appeared to be intoxicated, and the officers noticed a kitchen knife sitting on the landing next to Freeman's leg. While Officer Kyle Toavs used an alternative stairway to go up to the third floor, the other officers ordered Freeman to walk down the stairs, towards them, and away from the knife. Freeman did not comply. Unsure if Freeman could stand, the officers at the bottom of the stairs told him to remain sitting and scoot down the stairs. Again, Freeman failed to comply. Freeman stood up and turned to go up the stairs toward Officer Toavs.

Officer Toavs, who had his Taser out, saw Freeman turn and reach into his pocket. Officer Toavs believed that Freeman was reaching for a weapon. He ordered Freeman to go downstairs and get on the ground. Freeman failed to comply and did not take his hand out of his pocket. Officer Toavs deployed his Taser, and Freeman fell facedown onto the landing. When he fell, Freeman tucked his arms underneath his body. He was ordered to show his hands but did not comply. Officers pulled Freeman's arms behind his back and handcuffed him.

Officers rolled Freeman over and immediately noticed a small plastic bag where Freeman's arms had been tucked under his body. Officer Toavs looked closely at the landing before Freeman fell and saw only the kitchen knife and a beer bottle. The plastic bag contained a substance that the officers believed was heroin. The officers searched Freeman's person and discovered a small scale typically used for narcotics and a significant

amount of cash. Subsequent testing confirmed that the substance in the plastic bag contained heroin and weighed 4.812 grams.

Freeman was charged with third-degree possession of a controlled substance. A jury found Freeman guilty, and the district court sentenced him to 24 months in prison. This appeal followed.

D E C I S I O N

Freeman argues that the district court committed plain error affecting his substantial rights by failing to instruct the jury on constructive possession. The district court gave the standard instruction on the elements of third-degree possession of a controlled substance from the Minnesota Jury Instruction Guides. *See* 10A *Minnesota Practice*, CRIMJIG 20.20 (2015). The instruction required the jury to find that Freeman “possessed” heroin. The district court, however, did not define possession. Freeman did not object to the district court’s instructions.

Because Freeman failed to object, we review only for plain error. *See State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). Under the plain-error test, this court considers whether the district court’s instructions contained “an (1) error (2) that was plain and (3) that affected the defendant’s substantial rights.” *Id.* If all three of these prongs are established, we must determine whether it is necessary to “address the error to ensure [the] fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted). If any one of the prongs is not satisfied, we need not address the remaining prongs. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011).

The district court has wide latitude in crafting jury instructions. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). The district court errs “if its jury instructions confuse, mislead, or materially misstate the law.” *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). “[D]etailed definitions of the elements to the crime need not be given in the jury instructions if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements.” *State v. Davis*, 864 N.W.2d 171, 177 (Minn. 2015) (quotation omitted). This court reviews the “jury instructions as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury.” *Kelley*, 855 N.W.2d at 274.

Possession of contraband “may be proved through actual or constructive possession.” *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). A person is in actual possession of contraband if it is on his person or he is otherwise exercising “direct physical control” over it. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quotation omitted); *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). To prove constructive possession, the state must show:

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

State v. Florine, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). The constructive-possession doctrine’s purpose is to “include within the possession statute those cases where the state cannot prove actual or physical possession at the time of arrest but where the

inference is strong that the defendant at one time physically possessed the substance.” *Id.* at 104-05, 226 N.W.2d at 610.

Freeman argues that because the heroin was not found on his person, this was not an actual possession case, and the state had to prove constructive possession, i.e., that he was consciously exercising dominion and control over the substance at the time of arrest. But the fact that a controlled substance is not on the defendant’s person at the time of arrest does not preclude the possibility of actual possession, and “actual possession of a controlled substance can be established by circumstantial evidence.” *Barker*, 888 N.W.2d at 350, 355 (concluding that circumstantial evidence provided probable cause of actual possession when defendant purchased controlled substances in Chicago and similar controlled substances were found in a ditch next to the Minnesota road defendant used to flee from police). In reviewing a case based on circumstantial evidence, we first identify the circumstances proved and then “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013) (quotations omitted). The circumstances proved are that before Freeman fell, there was no plastic bag on the landing. When Freeman fell, he put his hands underneath his body. When police turned Freeman over, they found the plastic bag of heroin where Freeman’s arms had been tucked under his body. Police also discovered a scale typically used for narcotics and a large amount of cash in Freeman’s pockets. The only rational inference from this evidence is that Freeman took the heroin out of his pocket while he was on the ground with his hands under his body.

Because the evidence supported a finding of actual possession based on circumstantial evidence, there was no reason to instruct the jury on constructive possession.

Freeman also claims that the state erroneously equated proximity with constructive possession in closing argument. He is mistaken. The state argued that the circumstantial evidence proved that Freeman was in actual possession of the heroin: “The heroin wasn’t there on the ground when . . . Freeman fell, when he rolled over there it was. There’s no other reasonable inference that can be drawn from those facts other than that it came from . . . Freeman’s person.” The case was presented to the jury as one of actual possession, and there was ample evidence that Freeman had actual possession of the heroin immediately before police rolled him over. The district court did not err by not instructing on constructive possession.

Even if the district court had erred, Freeman has not shown that the error affected his substantial rights. To satisfy this prong of the plain-error test, Freeman must show that there is “a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *See State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). An appellant bears a “heavy burden” of proving prejudice. *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015), *cert. denied*, 136 S. Ct. 595 (2015). Because the overwhelming evidence supported a finding of actual possession, it is not reasonably likely that the district court’s decision to not instruct the jury on constructive possession had any effect on the verdict.

Affirmed.