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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1386**

State of Minnesota,
Respondent,

vs.

Jaycob Peter Hoffman,
Appellant.

**Filed September 3, 2019
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CR-17-8171

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal from the judgment of conviction of unlawful possession of a firearm, appellant argues that the district court's jury instructions materially misstated the

law regarding constructive possession. Because the district court did not plainly err when instructing the jury, we affirm.

FACTS

Isanti County law enforcement investigated appellant Jaycob Peter Hoffman for an assault, based on information that he had fired a gun at his father. Deputy Bowker learned that Hoffman was staying with S.S., with whom Hoffman had a romantic relationship and shared an apartment in Brooklyn Park. S.S. and two others, neither of whom was Hoffman, were listed as tenants on the lease. In addition, a fourth person was “subletting” a room in the apartment.

Bowker obtained a warrant to search S.S.’s apartment, and he and two other officers, Sergeant Nordan and Sergeant Lehmann, executed the warrant on March 2, 2017. Based on the information about the prior assault, the officers believed that there “was the high probability of the presence of a firearm” in the apartment.

Only Hoffman and S.S. were at the apartment when the officers arrived with the warrant. Hoffman opened the door, “retreated back into the apartment closing the door,” and attempted to leave the apartment through the balcony, but was stopped by officers. Officers escorted S.S. out of the apartment for the duration of the search.

Bowker searched the apartment; when he reached the master bedroom, he found men’s and women’s clothing, correspondence addressed to Hoffman and S.S., and a “small Sentry security safe.” At some point, Bowker found a “lanyard with keys out in the living room area.” One of the keys opened the bedroom safe. Inside the safe, Bowker found “a

Smith and Wesson black over silver handgun,” an extra magazine, a box of ammunition, a jewelry box, a key, and “two Social Security cards, one for Mr. Hoffman and one for [S.S.]”

On April 4, 2017, the state charged Hoffman with being an ineligible person in possession of a firearm under Minn. Stat. § 624.713, subd. 1(2) (2016). The case proceeded to a jury trial in May 2018. At the start of trial, outside the presence of the jury, Hoffman stipulated that he was ineligible to possess a firearm, which is an essential element of the charged offense. Nordan, Lehmann, and Bowker testified to the facts described above. Bowker also testified that, while he searched S.S.’s apartment, he received information that the lanyard belonged to Hoffman, and that Hoffman put the Social Security cards in the safe. On cross-examination, Bowker testified that he did not collect fingerprint evidence from the lanyard, the key to the safe, the ammunition in the gun, the ammunition in the safe, the magazine in the safe, the key in the safe, or the safe itself. Bowker also did not obtain DNA samples from the other individuals living in the apartment or the individuals on the apartment’s lease.

A forensic scientist at the Minnesota Bureau of Criminal Apprehension (BCA) testified that the grip, slide, and trigger of the handgun were tested for DNA. The sample from the slide contained a mixture of DNA from at least four or more individuals. The BCA scientist also testified that 99.98% of the population could be excluded as contributors, but Hoffman could not be excluded as a contributor to the DNA mixture on the slide. The sample from the trigger contained a mixture of DNA from at least two individuals, from which 99.999999999% of the population could be excluded.

Additionally, the BCA scientist testified that Hoffman “could not be excluded as a possible contributor” to the DNA mixture on the trigger.

After deliberating, the jury found Hoffman guilty of being a prohibited person in possession of a firearm. At sentencing, on May 24, 2018, the district court denied Hoffman’s motion for a downward durational departure and committed him to the commissioner of corrections for 60 months. Hoffman appeals.

D E C I S I O N

Hoffman asserts that he is entitled to a new trial because the jury instruction “defining constructive possession did not accurately explain the law.” District courts are allowed “considerable latitude” in selecting language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This court reviews the adequacy of jury instructions for an abuse of discretion. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998). A district court abuses its discretion if the jury instructions “confuse, mislead, or materially misstate the law.” *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). 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.” *Id.*

Hoffman acknowledges that he did not object to the jury instruction at trial, and therefore, this court reviews the challenged instruction for plain error. *See State v. Robinson*, 699 N.W.2d 790, 799 (Minn. App. 2005), *aff’d*, 718 N.W.2d 400 (Minn. 2006). Under this test, the appellant must show (1) an error, (2) that is plain, and (3) that the error affects the appellant’s substantial rights. *Baird*, 654 N.W.2d at 113. “If all three prongs are

satisfied, the court determines whether the error must be addressed to ensure the fairness and integrity of the judicial proceedings.” *Id.*

Accordingly, this court must first consider whether the district court erred when it instructed the jury on constructive possession. A district court errs when its jury instructions materially misstate the law. *See State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

In *State v. Florine*, the supreme court held that, to prove constructive possession of an item, the state must show that: (1) the police found the item “in a place under defendant’s exclusive control to which other people did not normally have access,” or (2) that, if the police found the item “in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.” 226 N.W.2d 609, 611 (Minn. 1975).

In this case, the district court instructed the jury by using the following definition of constructive possession:

The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing is then in actual possession of it. A person who is not in actual possession of a thing but who knowingly has both the power and the intention to exercise authority and control over it, either directly or through another person, is then in constructive possession of it.

Hoffman contends, and the state agrees, that the district court modified the pattern jury instruction on constructive possession. The pattern instruction for constructive possession is drawn from *Florine*, and states: “A person is in constructive possession of [an item] if

[it] was in a place under [his] exclusive control to which other people did not normally have access, or if found in a place to which others had access, the person knowingly exercised dominion and control over [the item].” 10A *Minnesota Practice*, CRIMJIG 32.42 (6th ed. 2015). The use of the pattern instruction is not required. *See State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007) (“[J]ury instruction guides merely provide guidelines and are not mandatory rules; jury instruction guides are instructive, but not precedential or binding on this court.”).

Still, Hoffman makes three arguments why the jury instruction in this case misstated Minnesota law on constructive possession. First, he argues that the district court’s instruction removed *Florine*’s requirement for possession at the time of the arrest because it allowed the jury to find constructive possession based on “a future” “intention to exercise authority and control,” rather than requiring the jury to find that Hoffman actually exercised “dominion and control” over the handgun at the time of the offense. But the instruction required the jury to find that Hoffman “knowingly ha[d] *both the power and the intention* to exercise authority and control” over the handgun. (Emphasis added.) Thus, the jury instruction directed the jury to determine whether Hoffman had power *and* intention, not just that he had the intent. This language is substantially similar to the “consciously exercising dominion and control” language found in *Florine*, and is not a misstatement of the law.¹ *See Florine*, 226 N.W.2d at 611. Additionally, the district court instructed the

¹ We observe that “knowingly ha[d] both the power and the intention to exercise authority and control” is substantially synonymous with “consciously exercising dominion and control” because “knowing” is defined in part as “conscious”; “power” is defined in part as having “[d]ominance, control, or influence”; and “intentional” means “[d]one with the

jury that, to convict Hoffman of “possession of a firearm by a prohibited person,” it must find that the possession “took place on or about March 1, 2017 in Hennepin County,” which alleviates any concern that the jury may have convicted Hoffman for any “future” intent.

Second, Hoffman argues that the given instruction “expands *Florine*’s requirement that the defendant personally exercise control over an object to possess it.” Hoffman argues that the instruction allowed the jury to conclude that he constructively possessed the handgun “through another person.” It is true that the district court’s instruction stated that a person may be in constructive possession “either directly or through another person.” This language is supported by caselaw that states constructive possession “exists where an owner intentionally gives actual possession . . . of the property to another.” *See State v. Simion*, 745 N.W.2d 830, 842 (Minn. 2008). Thus, the “through another person” language correctly states the law because a defendant may constructively possess a handgun “through another person” if the defendant’s dominion and control continued after relinquishing a handgun to another person. *See id.* Consequently, the district court’s instruction did not improperly expand liability under the constructive-possession doctrine.

Third, Hoffman argues that the given instruction “vitiates the purpose of the doctrine of constructive possession” because it did not require the jury to find that Hoffman at one time “physically possessed” the handgun. Hoffman correctly points out that *Florine* states that the “purpose” of the constructive-possession doctrine is to extend possession to include “those cases . . . where the inference is strong that the defendant at one time physically

aim of carrying out the act.” *Black’s Law Dictionary* 1003 (defining knowing), 1358 (defining power), 932 (defining intentional) (10th ed. 2014).

possessed the [item]” and then maintained that possessory interest through “dominion and control.” *Florine*, 226 N.W.2d at 610. But *Florine* did not hold that the defendant must have physically possessed the item in the past. *See id.* at 610-11; *see also State v. Willis*, 320 N.W.2d 726, 728-29 (Minn. 1982) (stating that, under the constructive-possession doctrine, “the state has to prove beyond a reasonable doubt that, although not in actual or physical possession of the item at the time of arrest, the defendant consciously exercised dominion and control over it”). Accordingly, we conclude that the district court did not materially misstate the law in its jury instruction regarding constructive possession.

Because the district court’s instruction defining constructive possession of a firearm did not materially misstate the law, the district court did not err in instructing the jury. Therefore, we decline to consider the remaining steps of the plain-error test.

Affirmed.