STATE OF MINNESOTA
IN COURT OF APPEALS
A10-323

State of Minnesota,
Respondent,

vs.

Cortez Martavius Bradl Rulford,
Appellant.

Filed February 22, 2011
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-09-20448

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

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

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges his conviction of second-degree controlled-substance possession, arguing that the district court erred by denying his motion to suppress and by

instructing the jury on constructive possession. Because appellant abandoned his possessory interest in the drugs prior to his seizure by the police, and because the error in the jury instruction was harmless, we affirm.

FACTS

A jury found appellant Cortez Martavius Bradl Rulford guilty of one count of second-degree controlled-substance possession. Prior to trial, Rulford moved to suppress the drugs, arguing that they were obtained as the result of an unconstitutional seizure. The motion was heard at an omnibus hearing.[1] The state called Sergeant David Pleoger as a witness, and the defense called Officer Geoffrey Toscano. Rulford did not testify at the hearing.

Pleoger testified that he and several other officers began following a Chevy Caprice based on a tip from a confidential informant that the Chevy contained drugs. The officers were in unmarked vehicles. Pleoger testified that the driver of the Chevy, later identified as Rulford, pulled over to the side of the road and began working under the hood of the car. While Rulford worked on the Chevy, the officers parked their vehicles nearby and approached Rulford on foot. Pleoger testified that all of the officers were either in civilian clothes or police t-shirts. Pleoger and Toscano testified that the officers did not place their hands on Rulford, and Pleoger testified that the officers did not draw their weapons.

[1] Because Rulford was charged with a felony, we refer to the hearing on his suppression motion as an omnibus hearing. *See* Minn. R. Crim. P. 11.02 (providing for a hearing at which the district court shall ascertain any constitutional or evidentiary issues that may be heard or disposed of before trial).

Pleoger's testimony indicates that after Rulford noticed two of the officers approaching, and the officers identified themselves as "police," Rulford threw a baggie to the ground. Next, the officers grabbed Rulford and asked to speak to him. The officers recovered the baggie, which contained a substance that tested positive for cocaine. The district court denied Rulford's motion to suppress, concluding both that the drugs were abandoned before Rulford was seized and that there was a legal basis for the seizure.

At trial, the district court instructed the jury on constructive possession, using a modified version of a controlled-substance-possession instruction from the Minnesota jury instruction guide (JIG). Rulford objected to the district court's inclusion of the constructive-possession instruction. After the jury returned its guilty verdict, the district court entered a judgment of conviction. This appeal follows.

D E C I S I O N

I.

Rulford claims that the district court erred by denying his motion to suppress, arguing that the drugs were obtained as the result of illegal police conduct. Specifically, Rulford asserts that his seizure was illegal because the police failed to articulate reasonable suspicion for an investigatory seizure. *See Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 184-85 (Minn. 1994) (stating that a police officer may stop and temporarily seize a person to investigate that person for criminal wrongdoing if the officer reasonably suspects that person of criminal activity); *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732-33 (Minn. 1985) (stating that the officer's suspicion must be based on specific, articulable facts). Rulford further asserts that the police recovered

the drugs as a result of his illegal seizure. In denying Rulford's motion, the district court reasoned that Rulford had not been "seized" when he abandoned the narcotics, implicitly concluding that the drugs were not obtained as the result of a seizure.

"[E]vidence discovered by exploiting previous illegal [police] conduct is inadmissible." *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). "When property is abandoned, however, generally the owner no longer has a reasonable expectation of privacy and the exclusionary rule will not apply." *State v. Askerooth*, 681 N.W.2d 353, 370 (Minn. 2004). "But, if the property is abandoned because of an unlawful act by police officers, it will not be admissible as evidence." *Id.* Under these principles, Rulford was entitled to suppression so long as (1) the narcotics were abandoned as the result of his seizure and (2) the seizure was illegal. In order to determine whether the narcotics were abandoned as a result of Rulford's seizure, it is necessary to determine the point at which the seizure occurred.

A seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (quotations omitted). "Under the Minnesota Constitution a person has been seized if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (quotation omitted). Minnesota has adopted the *Mendenhall-Royer* standard for judging the totality of the circumstances. *In re the Welfare of E.D.J.*, 502 N.W.2d 779, 781-82 (Minn. 1993). "Under that standard, some of the circumstances that

might indicate a seizure has taken place include: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Harris*, 590 N.W.2d at 98 (quotation omitted). "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *E.D.J.*, 502 N.W.2d at 781 (quotation omitted).

"[W]hen the facts are not in dispute, a reviewing court must determine whether a police officer's actions constitute a seizure . . . ." *Harris*, 590 N.W.2d at 98. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *Id.*

In this case, the district court did not make explicit findings of fact regarding the evidence presented at the omnibus hearing. *See* Minn. R. Crim. P. 11.07 (requiring the district court to make appropriate findings on the omnibus issues either "in writing or on the record"). One of the main reasons for requiring findings is to make it "possible to ascertain from the record the basis for the trial court's ruling." *State v. Rainey*, 303 Minn. 550, 550, 226 N.W.2d 919, 921 (1975). "In some cases we have concluded that a remand for findings is necessary before we will decide the validity of the [district] court's order." *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983). In other cases we have been able to determine the validity of the district court's decision without a remand because we could infer the findings from the district court's conclusions. *See Rainey*, 303 Minn. at 550,

226 N.W.2d at 921 (deciding the case without a remand because there was no conflict in the evidence and the district court's conclusions were consistent with the evidence). This case falls into the latter category.

The uncontested omnibus-hearing evidence shows that Rulford was approached by several non-uniformed officers; two of the officers identified themselves as "police." Although as many as six officers ultimately approached Rulford, the omnibus record does not indicate how many officers were visible to Rulford when he tossed the drugs. Pleoger testified that he observed Rulford working on the Chevy. Pleoger parked his unmarked vehicle across the street, exited the vehicle, and approached Rulford, alone, from behind the Chevy. Pleoger testified that he did not believe Rulford was aware of him. Pleoger explained, "[Rulford] was working on his engine pretty hard; so when I got out of the vehicle across the street, I never saw him look up at me or anything." Pleoger explained that as he was standing behind the Chevy, two other officers pulled up in an unmarked vehicle, got out of the vehicle, approached Rulford, and identified themselves as police officers. Pleoger testified that, at this time, Rulford may have become aware of his presence. At that point, Pleoger observed Rulford throw the baggie to the ground.

Toscano testified that he and his partner, Officer Mark Johnson, were in an unmarked vehicle. Toscano was driving. Toscano testified that he observed Rulford working under the hood of the Chevy. He parked his vehicle approximately 20 feet away from Rulford's vehicle. Rulford was facing north, and Toscano was facing south. Toscano explained, "[Rulford] had his back to us. I don't even know if he was even

aware that we were there." While Rulford had his back to Toscano, Toscano observed him throw the baggie. At that point, Toscano was still in his vehicle.

The record supports the district court's observation that "[i]t is unclear how many [police officers] [Rulford] was aware of. He was aware of some but probably not all of the police that were approaching." Moreover, there is no evidence in the omnibus record that any officer touched Rulford, spoke to him in a threatening tone, or drew a weapon prior to Rulford tossing the baggie of drugs on the ground.

The omnibus record supports the district court's conclusion that Rulford was not seized when the officers approached him on the roadway and identified themselves as "police." As noted by the district court, "[a] person generally is not seized merely because a police officer approaches him in a public place or in a parked car . . . ." *Harris*, 590 N.W.2d at 98; *see also State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980) (holding that it is not a seizure for officers to approach a vehicle in a visibly closed service station and shine a flashlight into the vehicle); *Paulson v. Comm'r of Pub. Safety*, 384 N.W.2d 244, 245 (Minn. App. 1986) (determining that an officer has a right to make a reasonable investigation of stopped vehicles in order to determine whether assistance is needed).

After the officers identified themselves, Rulford tossed the baggie of drugs to the ground. Rulford thereby abandoned the baggie and, as a result, had no expectation of privacy with respect to its contents. *See Askerooth*, 681 N.W.2d at 370 (explaining that, generally, an owner no longer has a reasonable expectation of privacy once he or she has abandoned property). Because Rulford had not been seized when he abandoned the

drugs, the district court correctly concluded that the drugs were not subject to suppression under the exclusionary rule. *See id*.

Rulford asserts that he was seized before the drugs were abandoned, arguing that the officers said, "Don't run" as they approached him. We disagree. Rulford cites only his *trial* testimony to support this assertion. Rulford did not testify at the omnibus hearing, and the omnibus hearing evidence does not indicate that the officers said "Don't run" as they approached Rulford. The district court's ruling on this issue, and our review of that ruling, is based on the evidence presented at the omnibus hearing. *See* Minn. R. Crim. P. 11.07 cmt. (stating that "[t]he intent of the [o]mnibus [h]earing rule is that all issues that can be determined before trial must be heard at the [o]mnibus [h]earing and decided before trial"); *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) ("A party cannot complain about a district court's failure to rule in [the party's] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question."), *review denied* (Minn. Nov. 25, 2003).

In conclusion, because Rulford had not been seized at the point when he abandoned the drugs, the drugs were not obtained as the result of illegal police conduct, and they are not subject to suppression. *See City of St. Paul v. Vaughn*, 306 Minn. 337, 345-47, 237 N.W.2d 365, 370-71 (1975) (finding no basis for suppression when contraband was abandoned prior to the warrantless seizure). There is no need for this court to determine the illegality of any seizure that followed the abandonment.

II.

Rulford argues that the district court erred by instructing the jury on constructive possession because the constructive-possession doctrine is inapplicable to his case and because the district court's modified instruction misstated the law.

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). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *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).

Rulford was charged under Minn. Stat. § 152.022, subd. 2(1) (2008), which provides that "a person is guilty of a controlled substance crime in the second degree if . . . the person unlawfully possesses one or more mixtures of a total weight of six grams or more containing cocaine, heroin, or methamphetamine." Possession can be physical or constructive. *See State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975) (explaining that, in order to convict a defendant of unlawful possession of a controlled substance, the state must prove the defendant physically or constructively possessed the substance). Possession is not defined in the statute, but caselaw suggests that the usual and ordinary meaning of the term is to be used. *See State v. Lewis*, 394 N.W.2d 212, 217 (Minn. App. 1986) (concluding that the usual and ordinary meaning of the term "possession" does not include substances injected into the body and assimilated into the system), *review denied* (Minn. Dec. 12, 1986).

> The purpose of the constructive-possession doctrine 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 and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest.

Florine, 303 Minn. at 104-05, 226 N.W.2d at 610.

In this case, the district court instructed the jury as follows: "In order to find that the defendant possessed cocaine, it is not necessary that it was on the defendant's person. The defendant possessed cocaine if the cocaine was found near the defendant and the defendant had just knowingly exercised dominion and control over the cocaine."

This instruction is a modified version of the standard jury instruction on second-degree controlled-substance possession,[2] and it reflects a constructive-possession theory. 10A *Minnesota Practice*, CRIMJIG 20.14 (2006) (defining elements of second-degree controlled-substance possession). But this is not a constructive-possession case. The state alleged that Rulford physically possessed the baggie of drugs and tossed it to the ground when he was approached by the police. Toscano and Pleoger testified that they saw Rulford toss the baggie to the ground; both testified that they saw the baggie "leave his hand." This testimony shows that Rulford physically possessed the drugs. Contrary to the officers' testimony, Rulford testified that he did not possess any crack cocaine or cocaine that day and that he did not throw anything. Thus, a finding of guilt hinged on a

[2] "[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." *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

credibility determination regarding whether Rulford physically possessed the drugs and not on a determination of whether he constructively possessed them as they lay on the ground. Because the evidence did not support a constructive-possession instruction, it should not have been provided. *See State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995) (stating that a party is entitled to an instruction if evidence presented at trial supports the instruction).

We next consider Rulford's argument that the modified instruction misstates the law. The argument has merit. The instruction states that Rulford constructively possessed the cocaine if the cocaine was found near him and he "had just" exercised dominion and control over it, whereas constructive possession requires that the defendant was "at the time" exercising dominion and control over the cocaine. *See State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004) (stating that, to prove constructive possession of an item found in a place to which others had access, the state must prove that there is a strong probability, inferable from the evidence, that the defendant was, at the time, consciously exercising dominion and control over the item). But even if the instruction was in error, Rulford is not entitled to a new trial unless he was prejudiced by the instruction. *See Rowe v. Munye*, 702 N.W.2d 729, 743 (Minn. 2005) (explaining that an erroneous jury instruction does not necessitate a new trial unless the error was prejudicial).

"We evaluate the erroneous . . . jury instruction under a harmless error analysis." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). When faced with an erroneous instruction, the reviewing court must "examine all relevant factors to determine whether,

beyond a reasonable doubt, the error did not have a significant impact on the verdict." *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989). "If the error might have prompted the jury . . . to reach a harsher verdict than it might have otherwise reached, the defendant must be awarded a new trial." *Id.*

Here, the jury was presented with two scenarios: Toscano and Pleoger testified that they saw the baggie of drugs in Rulford's hand; Rulford denied possession. The jury's guilty verdict indicates that it believed the officers and not Rulford. And because the officers' testimony established physical and not constructive possession, there is no reason to believe that the constructive-possession instruction impacted the jury's determination of guilt. Moreover, to the extent that the instruction states "the defendant had just knowingly exercised dominion and control over the cocaine," it suggests, on these facts, recent physical possession. This physical-possession aspect of the instruction refutes Rulford's argument that the instruction invited conviction based on his mere proximity to the drugs.

We conclude, beyond a reasonable doubt, that inclusion of the constructive-possession instruction did not have a significant impact on the verdict. Accordingly, the instruction was not prejudicial, and Rulford is not entitled to a new trial.

Affirmed.

Dated:

Judge Michelle A. Larkin