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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A06-2127**

State of Minnesota,  
Respondent,

vs.

James Martin,  
Appellant.

**Filed May 13, 2008  
Reversed and remanded  
Lansing, Judge**

Hennepin County District Court  
File No. 06033011

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Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Ross, Judge.

## UNPUBLISHED OPINION

LANSING, Judge

A jury found James Martin guilty of illegal possession of a firearm and acquitted him of second-degree assault. Because the jury instructions, when combined with the district court's answer to a jury question, would permit the jury to find Martin guilty based only on the fact that a gun was kept in his house, we reverse Martin's conviction. But because the evidence was nonetheless sufficient to support a conviction, we remand for a new trial.

### FACTS

YM called St. Louis Park police on May 14, 2006 to report that her boyfriend, James Martin, had assaulted her. When officers arrived, YM told them that she and Martin had argued, that she ran away, that Martin followed her in his car, and that Martin pointed a gun at her and told her he was going to kill her.

The officers then entered Martin's home and arrested him. Two officers interviewed Martin in a police car, and Martin acknowledged that there was a gun in the house. The interview was not recorded. Based on this information, officers obtained a search warrant, entered the house, and discovered a gun underneath a mattress.

Martin was charged with second-degree assault and possession of a firearm by a prohibited person. Before trial, Martin moved to suppress the gun on the basis that it was the product of the initial, warrantless arrest and the unrecorded custodial interview. The district court denied the motions. At the conclusion of the evidentiary segment of the jury trial, the district court instructed the jury that a person possesses a weapon if he

“exercised authority, dominion or control over the firearm.” During deliberations, the jury submitted a written question to the district court, asking “[D]oes having knowledge of a gun in your house mean you have ‘possession’ of it[?]” In response, the district court repeated its instructions on possession of a firearm by a prohibited person. The jury found Martin guilty of illegal possession of a firearm and not guilty of second-degree assault. Martin now appeals his conviction.

## DECISION

### I

We review jury instructions “in their entirety to determine whether they fairly and adequately explain the law of the case.” *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004). “A jury instruction is erroneous if it materially misstates the law.” *State v. Goodloe*, 718 N.W.2d 413, 421 (Minn. 2006). In general, the failure to object to jury instructions or to propose specific instructions constitutes a waiver of the issue on appeal. *State v. White*, 684 N.W.2d 500, 508 (Minn. 2004). Under the plain-error doctrine, we can consider challenges made for the first time on appeal if there is plain error that affects the defendant’s substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Martin argues that the jury instruction defining possession constituted plain error because it permitted the jury to convict him based on conduct that did not constitute being a prohibited person in possession of a firearm. In its brief, the state agreed that the conviction should be reversed. We also agree.

Under Minn. Stat. § 624.713 (2004), certain persons, because of age, condition, or criminal conduct, are prohibited from possessing firearms. Martin does not dispute that his criminal record prohibits his possession of a firearm. Under the statute, possession can be actual or constructive. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Actual possession involves “direct physical control.” *State v. Simion*, 745 N.W.2d 830, 842 (Minn. 2008). Constructive possession of an item can be established in two ways. First, the state can show that the item was in a place under the defendant’s “exclusive control to which other people did not normally have access.” *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). Second, if the item was in a place to which others had access, the state can show that there is a strong probability that the defendant was “at the time consciously exercising dominion and control over it.” *Id.* The purpose of the constructive-possession doctrine is to include within possession statutes those cases in which “the inference is strong that the defendant at one time physically possessed [an item] and did not abandon his possessory interest in the [item] but rather continued to exercise dominion and control over it up to the time of the arrest.” *Id.* at 104-05, 226 N.W.2d at 610.

The jury instructions failed to accurately instruct the jury on this standard. The district court instructed the jury that: “The term ‘possessed’ means to have exercised *authority*, dominion or control over the firearm. Possession may be sole or joint.” (Emphasis added). Because the district court used “or” when it defined “possession” as having “exercised authority, dominion or control,” it was possible for the jury to convict Martin solely on the basis that he exercised authority over the firearm. In other words,

the instruction permitted the jury to convict Martin for simply being the owner of the house in which the firearm was located. This result is inconsistent with the standard for constructive possession. *See id.* at 105, 226 N.W.2d at 611 (requiring dominion *and* control). Furthermore, the error in the instruction was reinforced by the district court's response to the jury question. The jury asked whether knowledge that the gun was in the house was sufficient to establish possession. Because other people lived in the house, knowledge alone was insufficient. Instead of communicating this to the jury, the district court materially misstated the law by simply repeating its earlier instruction.

Although Martin did not object to the instruction, we conclude that the error was plain and that it affected Martin's substantial rights. In *State v. Porter*, the district court instructed the jury that the defendant "possessed the firearm if he 'knowingly . . . exercised authority, dominion *or* control, over the firearm.'" 674 N.W.2d 424, 428 (Minn. App. 2004). We held that this instruction materially misstated the law. *Id.* at 429. We recognize that the *Porter* decision was based on the jury instructions in their entirety and did not establish a per se rule that the use of "or" in the instructions materially misstates the law. *See id.* at 429 (emphasizing that instructions suggested that constructive possession of firearm was easier to establish than constructive possession of cocaine). But because the *Porter* decision held that a very similar instruction was erroneous, we conclude that the error in the jury instruction was plain. Furthermore, in light of the jury's question, we conclude that error affected Martin's substantial rights. As a result, Martin has established plain error affecting his substantial rights. Because we conclude that the error must be addressed to ensure fairness and the integrity of the

judicial proceedings, we reverse Martin's conviction of being a prohibited person in possession of a firearm.

## II

A challenge to the sufficiency of the evidence requires "a very thorough analysis of the record" to determine whether the evidence was sufficient to permit the verdict. *State v. Spann*, 574 N.W.2d 47, 54 (Minn. 1998). The reviewing court assumes that the fact-finder believed the state's witnesses and rejected any contrary evidence. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007).

Martin argues a new trial should not be held because the state failed to produce sufficient evidence of possession. We conclude, however, that the evidence of possession was sufficient under two theories.

First, the evidence was sufficient to establish that Martin had actual possession of the firearm. YM testified that while Martin was chasing her, she saw something in his hand and stated that, "I believe it was a gun." YM's statements to the responding officers were more certain. She told one officer that "Mr. Martin pointed a handgun at her and said, 'I'm going to kill you.'" She described the gun as "black in color" and similar to the officer's handgun "except much smaller." She said that "it was the kind that had the slide that rocked back." Based on YM's statements to the officer, which were admitted at trial, the evidence was sufficient to permit the jury to find that Martin was in direct physical control of the firearm.

Second, the evidence was sufficient to establish that Martin had constructive possession of the firearm. YM testified that she had first seen Martin with the firearm

several weeks before the incident. According to YM, Martin “pull[ed] this gun out on everybody . . . I don’t know why but he was proving a point. He proved his point. That’s the first time I [saw] his gun.” She testified that Martin sometimes kept the firearm underneath his bed. When an officer was executing the search warrant, he asked Martin’s son where Martin had put the gun. The son told the officer that Martin put the gun in the bedroom, and the gun was found underneath the mattress in the bedroom. Based on this evidence, the jury could conclude that Martin at one time actually possessed the firearm and that he did not abandon that possessory interest. Thus, the evidence was sufficient to establish a strong probability that Martin was exercising dominion and control over the firearm.

Because the evidence was sufficient to support Martin’s conviction, we remand for a new trial.

### III

Finally, we address Martin’s claim that the search warrant was invalid and that the gun should therefore have been suppressed. Although this issue is not necessary to our decision, we address the question in the interests of judicial efficiency because it will likely arise again on remand.

Martin argues that the search warrant was invalid because it was based on evidence obtained in violation of his *Miranda* rights and was unrecorded in violation of *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). The district court did not address whether the fruit-of-the-poisonous-tree doctrine would require suppression. Instead, the district court concluded that the search warrant was supported by probable cause even

without the information obtained in the police-car interview. We agree with the district court's conclusion.

If a search warrant is not *at all* based on illegally obtained information, then the execution of the search warrant provides an independent source for obtaining the evidence. *Murray v. United States*, 487 U.S. 533, 539, 108 S. Ct. 2529, 2534 (1988). In addition, Minnesota applies the independent-source doctrine to “mixed warrants” in which the application is based on both legally and illegally obtained information. *State v. Hodges*, 287 N.W.2d 413, 416 (Minn. 1979). The warrant will provide an independent source for the evidence if the lawfully obtained information is sufficient to establish probable cause. *Id.*

On review, we determine “whether the issuing judge had a substantial basis for concluding that probable cause existed.” *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). Probable cause to search exists when, under the totality of the circumstances, “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Carter*, 697 N.W.2d 199, 205 (Minn. 2005) (quotation omitted). Probable cause to search requires “a direct connection, or nexus, between the alleged crime and the particular place to be searched.” *State v. Souto*, 578 N.W.2d 744, 747-48 (Minn. 1998).

Martin argues that the search-warrant application did not provide a basis for concluding that the gun would be found at the house unless the information obtained in the police-car interview is considered. We conclude, however, that the search-warrant application, even without the information obtained in the police-car interview, did in fact



provide a substantial basis for finding probable cause. The warrant application indicates that the dispute began at Martin's house, that Martin followed YM, that Martin pointed a gun at YM, and that YM then fled by running between houses in the area. Based on these facts, it would be reasonable to assume that Martin would return to the house with the gun. The district court reached this conclusion, stating, "I don't even believe that it is a leap in faith to think that when you're observed to have a gun at a particular place . . . you go back to where you came from . . . ." We agree. Thus, regardless of whether there was a *Scales* or *Miranda* violation, the gun was properly admitted.

Finally, we note that Martin has raised claims of prosecutorial misconduct and an evidentiary issue. These alleged errors were not objected to at trial. Because we are reversing Martin's conviction and remanding for a new trial, we do not address these residual issues from the first trial.

**Reversed and remanded.**