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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0048**

State of Minnesota,
Respondent,

vs.

Kevin John LeClair,
Appellant.

**Filed November 21, 2022
Affirmed
Gaïtas, Judge**

Itasca County District Court
File No. 31-CR-20-452

Keith Ellison, Attorney General, Lisa Lodin Peralta, Assistant Attorney General, St. Paul, Minnesota; and

Matti R. Adam, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

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

Considered and decided by Gaïtas, Presiding Judge; Worke, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Kevin John LeClair appeals his conviction, following a jury trial, for fifth-degree possession of a controlled substance. LeClair argues that the trial evidence was insufficient to establish that he knowingly possessed the methamphetamine found in a

car and in his wallet. He also contends for the first time on appeal that the district court erred when it did not give a specific-unanimity instruction because the jury was asked to consider two distinct acts of drug possession. We conclude that (1) respondent State of Minnesota proved beyond a reasonable doubt that LeClair possessed methamphetamine and (2) the district court did not err in giving only a general unanimity instruction because both acts of possession were part of a single behavioral incident. We therefore affirm LeClair's conviction.

FACTS

In February 2020, LeClair was a passenger in J.R.'s car when they were stopped by police. J.R. accelerated and drove about a quarter mile before pulling over. When officers approached the car, they smelled marijuana. While getting out of the car, J.R. handed the officers a jar of marijuana, and a search revealed methamphetamine in his pocket. After failing a field sobriety test, J.R. was arrested.

While searching J.R.'s car, officers found shards of a crystal-like substance in the passenger's area where LeClair had been sitting. There were shards on the passenger's seat, in the pocket of the passenger's door, and in between the passenger's window and the rubber weather stripping. Officers suspected that these shards were methamphetamine, although they typically found methamphetamine in small plastic bags. They found no suspected methamphetamine on the driver's side.

Given the location of the substance, LeClair was arrested. During the arrest, officers removed LeClair's wallet from his jacket pocket. LeClair initiated a brief physical struggle

as the officers opened the wallet to search its contents. Officers found another shard in the fold of the wallet.

Later laboratory testing confirmed that the shards found on the passenger's side of the car and in LeClair's wallet contained methamphetamine. The weight of the shards recovered from the car totaled approximately 4 grams, and the weight of the shard in the wallet was 0.152 grams.

Based on this evidence, the state charged LeClair with a single count of fifth-degree possession of a controlled substance.¹ See Minn. Stat. §§ 152.02, subd. 3(d)(2), .025, subd. 2(1) (2018). LeClair pleaded not guilty and requested a jury trial.

At trial, J.R. testified for the state. He testified that before the traffic stop, he was at LeClair's house, where he and LeClair smoked some of LeClair's methamphetamine. J.R. explained that he often gave rides to people in exchange for drugs, and that day he offered to give LeClair a ride for more methamphetamine. According to J.R., the methamphetamine that police found in J.R.'s pocket was LeClair's payment for the ride. J.R. testified that he was not aware of any other drugs in his car that day, but he admitted he did not inspect the passenger's seat before driving with LeClair.

LeClair provided a different version of the events during his trial testimony. He denied smoking methamphetamine. According to LeClair, he planned to pay J.R. cash for the ride. Because LeClair was already on probation, he specifically asked J.R. whether there was anything illegal in the car before the ride. LeClair testified that J.R. said no. But

¹ The state also charged LeClair with obstructing legal process, Minn. Stat. § 609.50, subd. 1(2) (2018), but dismissed the charge before trial.

when J.R. accelerated after police signaled for him to stop, J.R. rolled down the driver's side window and LeClair then felt something hit him in the face. At first, he testified, he thought it was snow and ice. But he soon realized it was methamphetamine. LeClair admitted that, while officers were searching his wallet, he saw the shard in the wallet and tried to knock it out of the officer's hand. He believed the shard fell into his wallet when the methamphetamine landed on his side of the car.

The jury found LeClair guilty of fifth-degree possession of a controlled substance, and the district court stayed a 17-month prison sentence and placed him on probation for 5 years. On appeal, LeClair challenges the sufficiency of the evidence against him and the district court's jury instructions.

DECISION

I. The state's evidence was sufficient to establish beyond a reasonable doubt that LeClair knowingly possessed the methamphetamine in his wallet and on the passenger's side of the car.

We first consider whether the state's evidence established LeClair's guilt. In a criminal case, the state must prove each element of the crime beyond a reasonable doubt. *State v. Martin*, 293 N.W.2d 54, 55 (Minn. 1980). To convict LeClair of fifth-degree controlled substance possession, the state was required to prove that he unlawfully and knowingly possessed one or more mixtures of methamphetamine. *See* Minn. Stat. §§ 152.02, subd. 3(d)(2), .025, subd. 2(1). Possession can be actual or constructive. *See State v. Florine*, 226 N.W.2d 609, 610-11 (Minn. 1975). Actual possession occurs when an individual physically possesses an item. *Id.* at 610. Constructive possession is an inference that "at one time [the individual] physically possessed the substance and did not

abandon [a] possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest.” *Id.* Possession can also be joint or exclusive. *State v. Harris*, 895 N.W.2d 592, 603 n.9 (Minn. 2017).

When evaluating a sufficiency-of-the-evidence claim, we view the evidence “in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). But the level of scrutiny we apply depends on whether the elements of an offense are supported by direct or circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). “[D]irect evidence is evidence that is based on personal knowledge or observation.” *Harris*, 895 N.W.2d at 599 (quotation omitted). When an element is supported by direct evidence, our review is limited to “a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted).

Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Harris*, 895 N.W.2d at 599 (quotation omitted). A heightened two-step standard is used when reviewing the sufficiency of circumstantial evidence. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). First, we identify the circumstances proved. *Silvernail*, 831 N.W.2d at 598. In this step, we defer to “the jury’s acceptance of the proof of these circumstances” and “assume that the jury believed the State’s witnesses and disbelieved the defense witnesses.” *Id.* at 598-99 (quotations omitted). Second, we determine if the circumstances are “consistent with guilt

and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable.” *Id.* at 599 (quotation omitted). During this step of the analysis, reviewing courts do not defer to the factfinder’s choice between reasonable inferences. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010).

A. There was sufficient evidence to prove that LeClair possessed the methamphetamine in his wallet.

Here, the state used a combination of direct and circumstantial evidence to prove that LeClair unlawfully possessed the methamphetamine in his wallet. Direct evidence established that he physically possessed methamphetamine. Methamphetamine was found in LeClair’s wallet, which was in his jacket pocket. And LeClair admitted that the wallet belonged to him.

Circumstantial evidence proved that LeClair knowingly possessed the methamphetamine in his wallet. The circumstances proved regarding his knowledge were as follows. LeClair had methamphetamine on his person earlier that day because he gave some of it to J.R. in exchange for a ride. Methamphetamine was scattered throughout the passenger’s side of the car where LeClair was sitting at the time of the traffic stop. The methamphetamine on the passenger’s side was in plain view. There was no methamphetamine found on the driver’s side of the car. LeClair owned the wallet where the methamphetamine was found. And LeClair admitted that he struggled with officers to knock the methamphetamine from his wallet into the snow.

It can be reasonably inferred from these circumstances that LeClair knew he had methamphetamine in his wallet. He possessed methamphetamine earlier that day, and he

recognized that the substance in his wallet was methamphetamine. LeClair's attempt to destroy the methamphetamine during the search strongly suggested that he knew he possessed the substance. Thus, the circumstances proved are consistent with LeClair's guilt.

LeClair argues that the circumstances proved also are consistent with a theory of innocence—that the methamphetamine fell into his wallet without his knowledge. But this alternative theory is not reasonable. It is unreasonable to infer from the evidence that, unbeknownst to LeClair, a shard of methamphetamine fell into his coat pocket and somehow nestled its way into the fold of his wallet in the moments before J.R. stopped the car. Because the only reasonable inference is that LeClair knowingly possessed the methamphetamine in his wallet, there was sufficient circumstantial evidence to establish his guilt.

B. There was sufficient evidence to prove that LeClair constructively possessed the methamphetamine in J.R.'s car.

The state proved LeClair constructively possessed the methamphetamine in the car using circumstantial evidence. Along with the circumstances proved that support actual possession, the state proved additional circumstances, including: (1) many shards of methamphetamine were on and around the passenger's seat where LeClair was sitting at the time of the stop, (2) one shard was located between the weather stripping and the passenger's side window, (3) LeClair knew the shards in the passenger's seat were methamphetamine, (3) LeClair knowingly possessed a shard of methamphetamine found in his wallet, and (4) LeClair was on probation and concerned about new criminal charges.

These circumstances show that LeClair actually possessed methamphetamine earlier in the day, had control over the drugs found in the car, knew the drugs were methamphetamine, and attempted to destroy or conceal the methamphetamine when police initiated a traffic stop. In other words, the circumstances proved are entirely consistent with guilt.

We are not convinced by LeClair's argument that these circumstances could also support a reasonable inference that the drugs belonged to J.R. or a previous passenger. It is unreasonable to infer that J.R. attempted to discard the drugs through the driver's side window, yet all of the shards landed on the passenger's side where LeClair was sitting, including under LeClair's body. Moreover, because the drugs were plainly visible, it is unreasonable to infer that LeClair did not notice them before entering the car. Again, the only reasonable inference from the circumstances proved is that LeClair possessed the methamphetamine. Thus, the trial evidence was sufficient to support LeClair's conviction.

II. The district court did not plainly err when it failed to give a specific-unanimity jury instruction because the two acts of drug possession that the state alleged at trial occurred during a single behavioral incident.

We next consider whether the district court erred by not instructing the jury on the requirement for specific unanimity. The district court instructed on the requirement for general unanimity, informing the jury that the "verdict must be unanimous." But LeClair contends that a specific-unanimity instruction was necessary because the state relied on two distinct theories of possession to prove a single count of fifth-degree controlled-substance possession. The state alleged that LeClair actually possessed the

methamphetamine on his person. In addition, or alternatively, the state alleged that LeClair constructively possessed the methamphetamine in the car.

At trial, neither party requested a specific-unanimity instruction. We review an unobjected-to error under the “plain error test.” *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). “In order to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant’s substantial rights.” *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). “An error is plain if it is ‘clear’ or ‘obvious,’ which is typically established ‘if the error contravenes case law, a rule, or a standard of conduct.’” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quoting *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). If LeClair satisfies all three factors of the plain-error test, we “may correct the error only if it ‘seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.’” *State v. Huber*, 877 N.W.2d 519, 522-23 (Minn. 2016) (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (other quotation omitted)).

A. A specific-unanimity instruction is not required where, as here, two acts of possession occurred during a single behavioral incident.

A unanimous verdict is required in all criminal cases. Minn. R. Crim. P. 26.01, subd. 1(5); *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007). This means that a jury must unanimously agree that the state proved each element of the offense beyond a reasonable doubt. *Pendleton*, 725 N.W.2d at 730-31. But a jury need not unanimously agree on the facts underlying each element of an offense if different facts show “equivalent blameworthiness or culpability.” *Id.* at 731; *see also State v. Hager*, 727 N.W.2d 668, 674

(Minn. App. 2007). A jury, therefore, must unanimously agree on which acts a defendant committed if different acts could satisfy a single element. *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). However, unanimity is not required as to the “alternative means or ways in which the crime can be committed.” *Id.* at 354 (quotation omitted).

Instructions that allow for the possibility of significant disagreement among jury members as to the specific act committed violate a defendant’s right to a unanimous verdict. *Id.* at 354. “Because the very act of possession [is] an element of the crime, rather than just a means of proving the element of possession, the jury [is] required to reach a unanimous verdict on which act constituted the offense.” *State v. Dalbec*, 789 N.W.2d 508, 512 (Minn. App. 2010) (citing *Stempf*, 627 N.W.2d at 357), *rev. denied* (Minn. Dec. 22, 2010).

The concept of alternate acts of possession is well illustrated by the factual circumstances in *Stempf*. There, the state charged a single count of fifth-degree drug possession for drugs found in the appellant’s workplace and drugs found in the appellant’s truck. *Stempf*, 627 N.W.2d at 354. The jury found the appellant guilty. *Id.* On appeal, we concluded that the appellant was denied jury unanimity because the district court failed to instruct the jury that it was required to agree on the specific act of possession that the appellant committed. *Id.* at 359. We reasoned that the two alleged acts of possession lacked “unity of time and place,” and that the drugs in the workplace and in the truck were two “separate and distinct culpable acts.” *Id.* at 358-59. But we declined to decide whether “a different result would be warranted when the separate acts constitute a continuing course of conduct.” *Id.* at 358 (citing *Langdon v. State*, 375 N.W.2d 474, 476-77 (Minn. 1985)).

The supreme court has concluded, however, that if multiple acts are a part of a single behavioral incident, a specific-jury unanimity instruction is not required. *State v. Ihle*, 640 N.W.2d 910, 919 (Minn. 2002) (relying on *Richardson v. United States*, 526 U.S. 813, 817-18 (1999)). “A single behavioral incident is the result of a single motivation directed towards a single criminal goal.” *State v. Infante*, 796 N.W.2d 349, 356-57 (Minn. App. 2011) (holding that two acts of assault that occurred over a short time period, for the purpose of a “single criminal goal,” were a single behavioral incident); *see, e.g., Dalbec*, 789 N.W.2d at 512-13 (holding that no specific-unanimity instruction was required when a defendant committed multiple acts of domestic assault “at the same place” involving “a single victim,” even though the acts occurred over 24 hours); *cf. State v. Eaton*, 292 N.W.2d 260, 267 (Minn. 1980) (holding that appellant’s objective of “one large plan to swindle as much as possible” was too broad to be a single criminal goal, and thus, thefts of two separate checks at two different times were not part of a single course of conduct).

Returning to the circumstances here, we note that LeClair’s two acts of possession were not separate and distinct, as in *Stempf*, but instead were part of a single behavioral incident. The drugs in LeClair’s car seat and in LeClair’s wallet were found during a single traffic stop. There was unity of time and place. Furthermore, in *Stempf*, we were persuaded that the two acts were distinct, in part, because the defendant presented different defenses for each act. 627 N.W.2d at 358. But here, LeClair asserted the same defense to each act of possession.

Both parties cite several nonprecedential opinions supporting their respective positions as to whether the circumstances here involved a single behavioral incident.² We reviewed the cases cited, but they do not change our analysis.³ Because the two acts of possession alleged here were unified in time and place, no specific-unanimity instruction was required.

B. Even if error, the district court’s failure to sua sponte provide a specific-unanimity instruction did not affect LeClair’s substantial rights.

To establish plain error, an appellant must also show that the error affected the appellant’s substantial rights. *Myhre*, 875 N.W.2d at 804. “An erroneous jury instruction affects a defendant’s substantial rights if the error was prejudicial and affected the outcome of the case.” *Huber*, 877 N.W.2d at 525. Such an error “is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury’s verdict.” *Id.* (quoting *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013) (other quotation omitted)).

² See *State v. Kampsula*, No. A17-0990, 2018 WL 6273078, at *1, *5 (Minn. App. Dec. 3, 2018) (holding that multiple acts of theft that occurred over a span of months were not a single behavioral incident), *rev. denied* (Minn. Feb. 27, 2019). Compare *State v. Lubovich*, No. A05-1777, 2006 WL 2529610, at *1, *5 (Minn. App. Sept. 5, 2006) (holding a specific-unanimity instruction was needed when psilocybin mushrooms were found under the driver’s seat, and methamphetamine was found on the side of the road and on the driver’s person, but the defendant was a passenger), with *State v. Boyd*, No. A08-1850, 2009 WL 2591657, at *1 (Minn. App. Aug. 25, 2009) (holding no specific-unanimity instruction was required when controlled substances were found in the passenger’s purse, in a package of water bottles in the backseat, *and* on the defendant-driver himself).

³ Nonprecedential cases are not binding authority but may be persuasive. Minn. R. Civ. App. P. 136.01, subd. 1(c).

The evidence amply established LeClair's guilt of both acts of possession. It is therefore unlikely that a specific-unanimity instruction would have affected the outcome of LeClair's case.

LeClair argues that the prosecutor's closing argument, in conjunction with the district court's failure to instruct on specific unanimity, prejudiced him. He contends that the prosecutor misrepresented the jury's duty to reach a unanimous verdict. The prosecutor stated, "all you need is one. If you don't think all—like if the drugs in the car were the defendant's or the one in the wallet wasn't his, all you need is one." But this statement did not concern the evidence of LeClair's acts of possession. Rather, the prosecutor was referring to the BCA lab results, and how, among the many substances recovered during the traffic stop, the jury needed to find just "one or more mixtures" of methamphetamine. And unlike *Stempf*, where we held that a prosecutor's *express* misstatement of the jury's duty was not harmless error, the prosecutor's comments here did not misstate the jury's duty as to the possession element of the charged offense. 627 N.W.2d at 358. Moreover, as noted, the district court provided a general-unanimity instruction, which explained the requirement for unanimity.

In sum, we conclude that the evidence of LeClair's guilt was sufficient to support his conviction and the district court did not plainly err when it failed to give a specific-unanimity instruction.

Affirmed.