

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A25-1579**

State of Minnesota,
Respondent,

vs.

David Lee Kingbird,
Appellant.

**Filed July 27, 2026
Affirmed
Bentley, Judge**

Beltrami County District Court
File No. 04-CR-25-730

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

David L. Hanson, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bentley,
Judge.

NONPRECEDENTIAL OPINION

BENTLEY, Judge

In this direct appeal from a judgment of conviction for possession of a firearm by
an ineligible person, appellant argues that the district court erred by omitting the definition

of constructive possession from the jury instructions. Kingbird also makes several additional arguments in a self-represented supplemental brief. We affirm.

FACTS

The following facts derive from the testimony and evidence admitted in a jury trial. In March 2025, Beltrami County law enforcement responded to a report that a man dressed in black had shot a dog. The responding officers observed a deceased dog with a single gunshot wound and saw “quite fresh” foot tracks in the snow nearby. Officers followed the tracks through a nearby wooded area to an ATV trail, where the officers saw a “male party kind of dressed in black” who did not respond when they called out to him. In the area where the man was spotted, officers found a black jacket “that looked like it kind of had been thrown into the bushes.” An identification card for a person, C.H., was found in the pocket of the jacket.¹ Officers continued to follow the foot tracks until the tracks stopped outside a nearby home. After obtaining a warrant to search the home, officers entered and found appellant David Lee Kingbird inside and dressed in “dark clothing.” Kingbird’s pant legs were wet, and a pair of shoes on the floor near him were also wet and had a similar tread pattern to the foot tracks officers had followed. Kingbird was arrested.

An officer with a canine searched the area where the jacket was found and located an “old .22 rifle” that was “just off the trail” and looked “[k]ind of like it had just been thrown.” The top of the firearm was “dry” despite a recent snowfall.

¹ We refer to the witnesses and officers by their initials instead of their full names in accordance with our rules of public access. *See* Minn. R. Pub. Access to Recs. of Jud. Branch 8, subd. 2(b) (recommending that appellate opinions limit disclosure of witness identities “to what is necessary and relevant”).

Deputy F. drove Kingbird to jail, gave him a *Miranda* warning, and attempted to take a statement. According to Deputy F.’s testimony, Kingbird made a “spontaneous statement,” while still in the squad car outside the jail, that Kingbird “didn’t think that there [were] any witnesses . . . that saw him. That he had shot a dog, and he was inquiring why wasn’t [he] being charged with shooting a dog.” The conversation was not captured on Deputy F.’s body-worn camera.

Respondent State of Minnesota charged Kingbird with possession of a firearm by a person convicted of a crime of violence, Minn. Stat. § 609.165, subd. 1b(a) (2024), and fleeing a peace officer by means other than a motor vehicle, Minn. Stat. § 609.487, subd. 6 (2024).²

A jury trial was held in May 2025. The state presented testimony of four of the responding officers, C.H., an evidence technician, and three forensic scientists with the BCA. It also introduced exhibits including body-worn camera footage of the pursuit through the woods, a photograph of the dog, and a photograph of the rifle. C.H. testified that he had lost his identification “[m]aybe a week or so before the 17th” and that he owned a black coat but it “went missing” from his home. A BCA forensic scientist testified that the rifle was swabbed for DNA and they “obtained a mixture of DNA from 5 individuals” but “[t]he major male DNA profile obtained from the swabs . . . matched the DNA profile from [Kingbird].” Deputy F. testified about Kingbird’s confession in the squad car. The

² The state also charged Kingbird with overworking or mistreating animals—cruelty, in violation of Minn. Stat. § 343.21, subd. 7 (2024). The state dismissed this count at trial.

defense presented an intake employee from the county jail to testify about the identification card found in the jacket. Kingbird did not testify.

While discussing jury-instruction language, the state requested, and Kingbird agreed, to include only the definition of actual possession and to refer to it simply as the definition of “possession.” The state also requested an instruction on exclusive versus joint possession because of the mixed DNA evidence found on the firearm, which the district court granted over Kingbird’s objection. The district court instructed the jury on possession as follows:

Elements: First, the defendant knowingly possessed a firearm. Knowingly requires only that the defendant believe that he possessed the item. . . . A person is in possession of an item if the person has the item on the person or is . . . exercising direct physical control over the item at a given time. The law also recognizes that possession may be either exclusive or joint. If one person alone has actual or constructive possession of an item, possession is exclusive. If two or more persons share actual or constructive possession of an item, possession is joint. Possession, as that term is to be used in these instructions has been proven, if you find beyond a reasonable doubt that the defendant had actual or constructive possession of the item, whether exclusively or jointly with others.

The jury found Kingbird guilty of both the firearm-possession and fleeing-a-peace-officer counts. The district court convicted Kingbird of both counts and sentenced him to 71 months’ imprisonment for the firearm-possession count.

Kingbird appeals.

DECISION

Kingbird argues in his principal brief that the district court erred by referring to “exclusive or joint constructive possession” in the jury instructions but failing to define

“constructive possession.” In a self-represented supplemental brief, Kingbird also argues that the self-incriminating statement he made to police was admitted in violation of his *Miranda* rights, that he received ineffective assistance of counsel, and that a prejudicial photo was erroneously admitted at trial. We begin with his jury instruction challenge before turning to the arguments in his supplemental brief.

I

Jury instructions “must define the crime charged and explain the elements of that crime to the jury.” *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted). Reviewing courts give “broad discretion and considerable latitude” to the district court in choosing the language of the instructions. *Id.* (quotation omitted).

The issue on appeal involves the instruction on the possession element of the offense. The state may prove that a defendant possessed a firearm through actual or constructive possession. *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). Actual possession involves “direct physical control.” *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quoting *Jacobson v. Aetna Cas. & Sur. Co.*, 46 N.W.2d 868, 871 (Minn. 1951)). Constructive possession, in contrast, is established when there is a strong inference that the defendant “at one time physically possessed” the firearm and “did not abandon [their] possessory interest in the [item] but rather continued to exercise dominion and control over it up to the time of the arrest.” *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975). Kingbird argues that the district court erred by failing to define constructive possession and that the jury’s verdict would have been different if it had been properly instructed.

We first address our standard of review. Kingbird maintains that a proper objection was made to the possession instruction at trial, and so we should review for an abuse of discretion. The state, in contrast, contends that Kingbird failed to object, and we should instead apply plain-error review. Based on our review of the record, Kingbird’s trial attorney objected to the joint-possession instruction, but the objection was not related to the omission of the definition of constructive possession. Rather, counsel objected to the joint-possession instruction because it was inconsistent with the state’s theory of the case.

Because there was no objection to the lack of constructive-possession instruction at trial, we apply plain-error review. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002); *see also State v. Kelley*, 832 N.W.2d 447, 450-51 (Minn. App. 2013) (applying plain-error review when a party objected to a jury instruction at trial but challenged the instruction for a different reason on appeal), *aff’d on other grounds*, 855 N.W.2d 269 (Minn. 2014). To establish plain error, “an appellant must show (1) an error (2) that is plain (3) that affects a defendant’s substantial rights.” *State v. Beganovic*, 991 N.W.2d 638, 655 (Minn. 2023). If all three prongs are met, an appellate court must then “assess whether reversal is required to ensure the fairness, integrity, or public reputation of judicial proceedings.” *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016) (quotation omitted).

Because the state does not address the first two prongs of the plain-error test, we assume without deciding that the district court’s omission of the instruction was an error that was plain, and we proceed directly to the question of whether the error affected Kingbird’s substantial rights. “An error affects a party’s substantial rights when there is a reasonable likelihood that the error influenced the verdict.” *State v. Bey*, 975 N.W.2d 511,

521 (Minn. 2022). When reviewing the potential omission of an element of a crime in a jury instruction, we may consider, “among other factors, whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the State submitted overwhelming evidence to prove that element, and (3) the jury’s verdict nonetheless encompassed a finding on that element.” *State v. Watkins*, 840 N.W.2d 21, 28-29 (Minn. 2013).

We are not persuaded that Kingbird’s substantial rights were affected by the omission of the definition of constructive possession because the state presented overwhelming evidence proving actual possession. As explained by the state several times at trial, the state’s sole theory of the case was that Kingbird had *actual* possession of the firearm, not constructive. Kingbird argues that, because he was not found holding the firearm, the state did not prove that he actually possessed it. But actual possession may be proven by circumstantial evidence even if the item was “not in a defendant’s physical possession at the time of apprehension.” *Barker*, 888 N.W.2d at 354.

The facts of *Barker* are instructive in our consideration of the state’s actual-possession theory. In *Barker*, the defendant purchased controlled substances during a trip to Chicago, and on the drive home, police attempted to stop his car. *Id.* at 355. Barker crashed the car and fled on foot before he was arrested. *Id.* Upon searching his car, officers found the passenger-side window rolled down and large quantities of controlled substances inside. *Id.* at 351, 355. Officers then found several additional bags of controlled substances near the crash site. *Id.* at 351-52, 355. We concluded that these circumstances were

“consistent with the theory that Barker actually possessed the drugs, before they were discarded out of his passenger-side window while Barker was fleeing police.” *Id.* at 355.

Here, the state similarly presented evidence showing that Kingbird physically possessed the gun at an earlier time and that he threw it into the woods while fleeing the police. The DNA evidence obtained from the gun showed that Kingbird matched the major male profile of the collected DNA, indicating that he had physically possessed the gun. That DNA evidence of actual possession was further corroborated by the footprints matching Kingbird’s shoes that police followed from the area of the shooting to Kingbird’s home, as well as Kingbird’s statement to Deputy F. about having shot the dog. As in *Barker*, although Kingbird was not found with the firearm in his possession, the direct and circumstantial evidence presented at trial overwhelmingly shows that Kingbird had actual possession of the firearm before abandoning it in the woods.

This strong evidence of actual possession persuades us that the omission of the definition of constructive possession was unlikely to have affected the outcome of the case. The jury here was instructed on actual possession, and the state presented evidence proving actual possession. Even if the definition of constructive possession were included in the instructions, we do not doubt that Kingbird would have been convicted under a theory of actual possession. We therefore conclude that Kingbird’s substantial rights were not affected by the district court’s omission in the jury instructions, and we need not reach the remaining prongs of the plain-error test. *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (“If a defendant fails to establish that the claimed error affected [their] substantial rights, we need not consider the other factors.”).

II

We next turn to the issues Kingbird raises in his self-represented supplemental brief. We understand Kingbird to make three arguments: (1) the district court erred by not suppressing his self-incriminating statement at an omnibus hearing because the admission of the statement violated his *Miranda* rights; (2) he received ineffective assistance of counsel; and (3) the admission of the photo of the deceased dog at trial was unfairly prejudicial.

Kingbird's first argument is foreclosed because he did not move to suppress the statement in the district court, and no omnibus hearing was held. Consequently, there is no district court decision that this court may review on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented [to] and considered by the trial court in deciding the matter before it." (quotation omitted)).

Turning to his ineffective-assistance-of-counsel claim, Kingbird argues that his counsel was deficient because they did not move to suppress the self-incriminating statement as a violation of Kingbird's *Miranda* rights. Under the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687 (1984), to prove that he received ineffective assistance of counsel in violation of the Sixth Amendment, Kingbird must demonstrate (1) "that counsel's performance fell below an objective standard of reasonableness," and (2) that he was prejudiced by that performance, meaning that "a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotations omitted). Kingbird's argument fails under

the first prong. Had his trial counsel moved to suppress the statement, the motion would likely have been unsuccessful because Kingbird was not being interrogated at the time that he made the statement—per Deputy F.’s testimony, it was “spontaneous.” A *Miranda* violation only occurs if the statement was made during a custodial interrogation. *Charette v. State*, 980 N.W.2d 310, 315 (Minn. 2022). A defendant’s spontaneous and voluntary statements that are not the product of police interrogation are not protected. *State v. Edrozo*, 578 N.W.2d 719, 726 (Minn. 1998). Because Kingbird’s statement was spontaneous and not the result of custodial interrogation, a *Miranda* violation claim was unlikely to succeed, and it follows that counsel’s failure to object did not fall below an objective standard of reasonableness.

Finally, with respect to Kingbird’s argument that the photo of the deceased dog admitted at trial was unfairly prejudicial to his case, he does not support his argument with caselaw and makes only conclusory assertions in his brief. Because we discern no prejudicial error on inspection, we conclude that he forfeited the argument. *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (“An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.” (quotation omitted)).

Affirmed.