STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0887

State of Minnesota,
Respondent,

vs.

Richard Alan Lommel,
Appellant.

Filed July 21, 2009
Affirmed
Minge, Judge

Dakota County District Court
File No. 19-K5-07-003173

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Timothy Kuntz, Inver Grove Heights City Attorney, Ann O'Reilly, David Gates, Assistant City Attorneys, 633 South Concord Street, Suite 400, South St. Paul, MN 55075 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sharon Jacks, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

MINGE, Judge

Appellant challenges his convictions of obstructing legal process, arguing that the district court plainly erred when it did not sua sponte (1) provide a jury instruction that defined "intent"; (2) prohibit testimony that allegedly infringed on the function of the jury; and (3) prohibit the prosecutor from informing the jury that a police witness, who was a former lawyer, was an "officer of the court." Appellant also argues that the district court erred when it instructed the jury to disregard any suggestion that the arresting officer testified in a certain way because of his experience as a prosecuting attorney. We affirm.

FACTS

In September 2007, an Inver Grove Heights police officer and a Dakota County probation officer went to the residence of appellant Richard Allen Lommel to conduct an unannounced alcohol-compliance check. Appellant was on probation because of an alcohol-related offense. The terms of his probation prohibited consumption of alcohol and required submission to random alcohol-concentration testing. The officers found appellant outside, shirtless and apparently intoxicated. A breath test revealed an alcohol concentration of .19. The officers informed appellant that he had violated his probation, arrested him, and told him that he was going to jail.

Because appellant was shirtless, the officers offered him the opportunity to get a shirt before going to jail. At the door of his house, appellant told the police officer to wait outside. The police officer told appellant that he was coming in with him, and

appellant then turned, forcefully shoved the officer with both hands, and moved toward the door of the house. After the police officer recovered his balance, he grabbed appellant's arm and told him to get down to the ground. Appellant, however, continued to resist, using his free arm to swing punches, but appellant was ultimately subdued and taken into custody.

At trial, appellant testified that he had not resisted arrest. A jury found appellant guilty of misdemeanor obstructing legal process under Minn. Stat. § 609.50, subd. 1(1-2), 2(3) (2006) and gross misdemeanor obstructing legal process under Minn. Stat. § 609.50, subd. 1(1-2), 2(2). The district court dismissed the misdemeanor charge and sentenced appellant to a year in jail on the gross misdemeanor charge. This appeal follows.

D E C I S I O N

At trial, appellant did not object to any of the errors asserted on appeal. In its discretion, this court may review and correct an unobjected-to, alleged error only if: (1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if the error is clear or obvious. *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). "Usually [plain error] is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A plain error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Griller*, 583 N.W.2d at 741. If those three prongs are met, this court may correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 742 (quotation omitted).

I.

The first issue is whether the district court plainly erred when it did not define "intent" in the jury instructions. "[A] failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998); Minn. R. Crim. P. 31.02.

"An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). The district court need not provide detailed definitions of all of the elements of the offense if the jury instructions "do not mislead the jury or allow it to speculate over the meaning of the elements." *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979); *see also State v. Clobes*, 417 N.W.2d 735, 738 (Minn. App. 1988) (concluding that the district court did not err by failing to define "specific intent" in an assault case when the "jury instructions, viewed in their entirety, explained the law of the case fairly and accurately"), *rev'd on other grounds*, 422 N.W.2d 252 (Minn. 1988); *State v. Heinzer*, 347 N.W.2d 535, 537 (Minn. App. 1984) (finding that the term "resist'" did not need to be defined for the jury and stating, "[W]ords of common usage within the ordinary understanding of a juror need not be defined by the [district] court."), *review denied* (Minn. July 26, 1984).

Here, the instructions to the jury set forth the elements of obstructing legal process as is provided in CRIMJIG 24.26, including the element of intent. *See* 10A *Minnesota Practice* CRIMJIG 24.26 (2006). Appellant argues that intent should have been specifically defined but provides no authority that requires this, and the CRIMJIG does not include it. Moreover, there is nothing in the record to suggest that, by not explicitly

defining "intent," the jury was misled or left to speculate unduly on its meaning to the detriment of appellant. Consequently, we conclude that the district court did not err in instructing the jury without defining intent.

II.

The second issue is whether the district court plainly erred when it permitted the officers to testify that appellant's conduct was resistant, forceful, and intentional. The district court has broad discretion to admit or exclude evidence. *State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007). This court affords deference to the district court's evidentiary rulings and typically will not overturn them barring an abuse of discretion. *State v. Yang*, 627 N.W.2d 666, 673 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

A competent witness may testify to matters of which she has personal knowledge. Minn. R. Evid. 601; 602. Also, a lay witness may provide "testimony in the form of *opinion or inferences* which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701 (emphasis added). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an *ultimate issue* to be decided by the trier of fact." Minn. R. Evid. 704 (emphasis added).

The Minnesota Supreme Court analyzed the application of rules 701 and 704 in *State v. Salazar*, 289 N.W.2d 753, 755 (Minn. 1980). There, a prosecutor had asked a witness whether the defendant "was defending himself against an attack when he stabbed the victim." *Id.* at 755. The supreme court denied the defendant's claim that the

prosecutor was impermissibly seeking to elicit a legal opinion on the issue of self-defense, holding that, under Minn. R. Evid. 701 and 704, the prosecutor properly elicited testimony as to whether the witness saw the victim do anything which prompted the defendant to stab him. *Id.* The supreme court later explained its comment in the *Salazar* decision:

> In *Salazar*, the witness would not have been permitted to opine that the defendant did or did not act in self-defense within the legal test of self-defense, because an opinion of that nature would not be of use to the jury. *See* Advisory Committee Comment to R. 704. However, the witness was not asked to give a legal opinion; rather, she was simply asked whether the defendant in that case was defending himself against an attack when he stabbed the other person. The word 'defending,' as used in the prosecutor's question, was used in the sense that a lay person would use it, not to elicit a legal opinion but merely to elicit testimony as to what the witness saw.

State v. Post, 512 N.W.2d 99, 102 (Minn. 1994) (finding that it was error to prohibit a witness from testifying that the victim was the "aggressor"). This court also dealt directly with the issue of whether it is improper for a prosecutor to ask a witness whether a defendant's "acts appeared to be intentional." *State v. Witucki*, 420 N.W.2d 217, 222 (Minn. App. 1988), *review denied* (Minn. Apr. 15, 1988) (declining to reverse when a witness testified that he perceived certain conduct as intentional).

Here, the officers testified about their observations and inferences, not about subjects involving "scientific, technical, or other specialized knowledge" or about the legal status or criminal nature of appellant's conduct. *See* Minn. R. Evid. 702. The descriptions of appellant's conduct as "forceful" or "resistant" recount the officer's

personal observations. Although the terms "force" or "resist" may have technical, legal definitions, the testimony here used the words in their ordinary way to describe appellant's conduct.

As for the term "intent," the prosecutor asked the probation officer whether appellant's actions resulted from a mistake, misunderstanding, or "clear intention." The probation officer answered that "[i]t was [appellant's] clear intention to not follow the directions." From the record, it appears that this testimony was part of characterizing the contact between appellant and the police officer as a shove rather than an accidental bump. Neither officer testified that he knew appellant's state of mind when he shoved and swung punches. In fact, on cross-examination, appellant's attorney directly asked the police officer, "You don't know what [appellant's] intention was when he was interacting with you; is that correct?" The officer replied by attempting to rephrase and then answering the question: "As was I in his mind knowing exactly what he was thinking? No." This answer counters any notion that the police officer claimed special knowledge of appellant's mental state.

We conclude that under Minn. R. Evid. 602, 701, and 704, as interpreted by *Salazar*, *Post*, and *Witucki*, the challenged testimony was not clearly impermissible and that the district court did not plainly err when it did not prohibit the testimony sua sponte.

III.

The third issue is whether the district court plainly erred when it permitted the prosecutor to elicit testimony that the arresting policeman was an officer of the court. "A prosecutor may not personally endorse the credibility of witnesses." *State v. Fields*, 730

N.W.2d 777, 785 (Minn. 2007) (quotation omitted). But it is equally well established that "the state is free to argue that particular witnesses were or were not credible." *Id.* A prosecutor's statements become improper vouching when he "implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). While it is improper for a prosecutor to express a personal opinion regarding witness credibility, it is not improper to analyze the evidence and argue that particular witnesses were or were not credible. *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006).

During direct examination, the prosecutor asked the police officer to explain his "training, experience, and education with respect to [his] duties as a law enforcement officer." The officer explained that he had worked as a police officer from 1996-1998, gone to law school, worked as a prosecutor for seven years, and returned to work as a police officer. After the officer stated he had been a prosecutor, the prosecutor asked, "You sat in my shoes?" and the officer stated, "Yes, I did." On cross-examination, appellant's attorney asked whether, in his days as a prosecutor, the officer prepared criminal cases for trial and whether, because of his knowledge of trial procedure, he knew "exactly what to say to help [the prosecutor] in proving her case . . . [in] [t]erms of the elements of the offense." The prosecutor objected to the question, and the objection was sustained. On redirect, the prosecutor asked, "As an attorney, you were an officer of the court and still are an officer of the court, as well as being a police officer. Is what you testify to today your clear understanding and recollection of the events? Everything you

testified to is exactly how you recollect?" The officer responded, "Absolutely," and stated "I'm here to tell the truth as I remember it happening and nothing else."

The prosecutor's initial background question was a standard foundational question. While it is somewhat rare that a police officer previously was a prosecutor, the prosecutor did not delve any more into this background. From the context in the record, the prosecutor's "You sat in my shoes?" question appears to be a passing aside not an improper bolstering of the witness's credibility. On redirect, the prosecutor counteracted defense counsel's question by asking the officer to reaffirm that his testimony reflected his understanding and recollections of the events and that he did not change it to make the incident seem better or worse. Only at this point did the prosecutor referred to him as "an officer of the court." The danger here was in suggesting that the witness was sworn to a sort of "super-oath," which could improperly bolster his credibility. However, the term "officer of the court" was technical and never defined or revisited. In the closing argument, the prosecutor did not mention the policeman's being a lawyer or officer of the court. We conclude that the passing reference to the term "officer of the court" on redirect was not plain error.

IV.

The fourth issue is whether the district court plainly erred when it instructed the jury to disregard any suggestion that the arresting officer testified in a certain way because of his experience as a prosecuting attorney. The record indicates that appellant's attorney argued in closing that "[the officer] knows what he's talking about since he was a county attorney and had plenty of jury experience as a prosecutor and knows exactly

what to say to get the jury to believe his side of the story." The prosecutor did not object to this statement when it occurred but afterward requested an off-the-record discussion, and, due to this discussion, the district court instructed the jury, "You are to disregard any suggestion that [the police officer] testified in a certain way because of his experience as a county attorney." After the jury left, the prosecutor put her objection to the statement on the record as an improper attack on the officer's credibility.

The criticism of the police officer's testimony apparently led to the effort of the prosecution to rehabilitate the officer by identifying him as an "officer of the court." When the district court instructed the jury to "disregard any suggestion" about the relationship between the officer's experience as an attorney and his credibility, it offered a facially even-handed instruction that likely focused the jury on more relevant evidence. However, the instruction curbed appellant's attempt at persuading the jury to consider potential bias. Challenging credibility is a commonplace strategy by counsel, and, by instructing the jury to disregard the challenge, we assume for this analysis that the district court erred. Nonetheless, we conclude that any such error was minimal in the overall trial and did not affect the outcome of the case.

Because we conclude that the limiting instruction was not prejudicial error and because the district court did not plainly error when it otherwise instructed the jury, when it did not exclude the characterization by the officers of appellant's conduct as resistant, intentional, and forceful, or when it did not preclude the prosecutor from eliciting testimony that the policeman was an officer of the court, we affirm.

Affirmed.