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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1141

State of Minnesota,
Respondent,

vs.

Arthur Gacheru Ngacah,
Appellant.

Filed August 11, 2009
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-07-025065

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Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and Willis, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving 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

JOHNSON, Judge

A Hennepin County jury convicted Arthur Gacheru Ngacah of domestic assault inflicting bodily harm based on evidence that he slapped the face of a woman who was reported to be his girlfriend. The state's case included the testimony of two eyewitnesses who saw and heard the assault as well as the testimony of two police officers who responded to a 911 call. On appeal, Ngacah argues that the district court erroneously admitted a police officer's testimony that a mark on the victim's face was consistent with a mark that would be caused by being slapped in the face. We conclude that the district court did not commit plain error in its evidentiary ruling and, therefore, affirm.

FACTS

The incident that gives rise to this case occurred in April 2007 at a multi-unit apartment building in the city of Minnetonka. The state charged Ngacah with one count of gross-misdemeanor domestic assault causing fear, in violation of Minn. Stat. § 609.2242, subds. 1(1), 2 (2006), and one count of gross-misdemeanor domestic assault inflicting bodily harm, in violation of Minn. Stat. § 609.2242, subds. 1(2), 2 (2006).

The case was tried on two days in February 2008. The victim did not testify, but two neighboring residents who were nearby at the time of the assault testified about what they saw and heard. N.S. testified that he was in Apartment 208, which he shared with his fiancée, D.D., when both of them heard an argument in the hallway outside their apartment. N.S. went to the peephole in the apartment door to observe. N.S. testified that, through the peephole, he saw Ngacah slap a woman in the face while they stood in

the doorway of Apartment 205, which is across the hall. In addition, both N.S. and D.D. testified that they heard the sound of a slap.

The woman who was slapped then knocked on the door of N.S. and D.D.'s apartment and asked them to call the police. D.D. did so by calling 911. Officer Trevor Johnson of the Minnetonka Police Department responded to the call. When he arrived, Ngacah approached Officer Johnson outside the apartment building and identified himself.

Meanwhile, Officer Alison Mickman also responded to the call. When she saw Officer Johnson speaking with Ngacah, she went inside the building and spoke with the victim. According to Officer Mickman's trial testimony, the victim was very upset, nervous, and distracted. Officer Mickman also testified that the victim had a mark "right above her cheekbone near her eye, and I would say maybe two inches across and an inch down. There was no bruising yet but it was very red." The prosecutor then asked the officer, "And in your opinion, based on your training and experience, was that consistent with someone who had just been hit?" Officer Mickman answered, "Yes." Ngacah did not object to this part of the examination.

The jury found Ngacah guilty of domestic assault inflicting bodily harm and not guilty of domestic assault causing fear. The district court sentenced Ngacah to 365 days in the workhouse but stayed 275 days of the sentence and placed Ngacah on probation for four years. Ngacah appeals.

D E C I S I O N

Ngacah argues that the district court erred by admitting Officer Mickman's testimony that the mark on the victim's face was consistent with the mark that would be present on a person who had just been hit. Rulings concerning the admissibility of evidence are subject to an abuse-of-discretion standard of review. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Because Ngacah did not object to the testimony at trial, the issue is reviewed for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an 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 it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Ngacah contends that Officer Mickman's testimony is expert opinion testimony that is inadmissible on the ground that it goes to an ultimate issue. The state, in response, contends that the officer's testimony does not go to an ultimate issue and, even if it does, is not inadmissible for that reason. Before analyzing the arguments, we question Ngacah's premise that Officer Mickman's testimony is expert opinion testimony rather

than lay opinion testimony. The state made no effort to establish her qualifications as an expert witness, and we do not regard the substance of her testimony to be a matter of "scientific, technical, or other specialized knowledge," Minn. R. Evid. 702. It also is possible to question the premise that the testimony is opinion testimony rather than fact testimony, *see* Minn. R. Evid. 701, 1977 comm. cmt. ("the distinction between fact and opinion is frequently impossible to delineate"), but we nonetheless will analyze Ngacah's arguments based on an assumption that the testimony at issue is opinion evidence. Regardless how the testimony is characterized, the district court did not commit plain error by admitting it.

To begin, Ngacah's argument -- that Officer Mickman's testimony is expert opinion testimony that is inadmissible because it goes to an ultimate issue -- is not based on an accurate statement of law. In fact, Ngacah's argument is contrary to the text of the rules of evidence: "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. The comments to rule 704 explain that the admissibility of opinion testimony depends on whether "the opinion would be helpful to or assist the jury as provided in Rules 701-703." Minn. R. Evid. 704, 1977 comm. cmt. Thus, an objection that opinion testimony goes to an ultimate issue is, by itself, "not sufficient." *In re Estate of Olson*, 176 Minn. 360, 370, 223 N.W. 677, 681 (1929). Rather, a party objecting to such testimony must show that, in the case of expert opinion testimony, the testimony "will [not] assist the trier of fact to understand the evidence or to determine a fact in issue," Minn. R. Evid. 702, or, in the case of lay opinion testimony,

the testimony will not be "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," Minn. R. Evid. 701(b).

Applying these criteria, the Minnesota courts sometimes have concluded that opinion testimony going to an ultimate issue is inadmissible; likewise, the same courts sometimes have concluded that opinion testimony going to an ultimate issue is admissible. *See* Peter N. Thompson, 11 *Minnesota Practice* § 704.01, at 420-21 & nn. 8-12 (3d ed. 2001) (citing cases). One commentator has stated, "The appellate decisions on this issue are very fact specific and difficult to reconcile." *Id.* at 421. The admissibility of opinion testimony going to an ultimate issue often is determined by the "distinction . . . between opinions as to factual matters," which are helpful, "and opinions involving a legal analysis or mixed questions of law and fact," which are not helpful. Minn. R. Evid. 704, 1977 comm. cmt.; *see also* Thompson, *supra*, at 422 (recognizing "distinction . . . between an opinion about the facts in the case and an opinion of the witness as to how the factfinder should apply the law to the facts in the case").

In light of this analytic framework and the trial record, the pertinent question is whether Officer Mickman's testimony that the mark on the victim's face was "consistent with someone who had just been hit" is "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701(b). We believe that the officer's testimony could reasonably be deemed helpful to the jury. If Officer Mickman had said only that the victim had a mark on her face, without any clarifying testimony about the type of mark, the jury might have wondered why the evidence was being offered, or the jury would have been forced to speculate whether the mark was

caused by the slap that was described by other witnesses. The officer's testimony cannot be deemed unhelpful on the ground that it was relevant to a question of law or a mixed question of law and fact. Rather, the officer's testimony related to a simple question of fact, whether the victim had been slapped in the face. *See* Minn. R. Evid. 704, 1977 comm. cmt. Ngacah does not challenge the requirement that lay opinion testimony be "rationally based on the perception of the witness." Minn. R. Evid. 701(a). Thus, the district court did not err by admitting the officer's testimony. *See State v. Washington*, 725 N.W.2d 125, 137 (Minn. App. 2006) (holding that district court did not err by admitting 911 operator's testimony that, in her opinion, caller was being assaulted), *review denied* (Minn. Mar. 20, 2007).

Ngacah relies on three cases in which opinion testimony was held to be inadmissible: *State v. Chambers*, 507 N.W.2d 237 (Minn. 1993), *State v. Provost*, 490 N.W.2d 93 (Minn. 1992), and *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982). The cases are distinguishable. All three cases concern the testimony of an expert witness, not a lay witness. *See Chambers*, 507 N.W.2d at 238 (pathologist); *Provost*, 490 N.W.2d at 95 (psychiatrist); *Saldana*, 324 N.W.2d 227 at 229-30 & nn. 1-4 (rape-trauma-syndrome expert). In two of the cases, the court explicitly reasoned that the opinion testimony concerned a mixed question of law and fact, specifically, whether the defendant had the requisite intent to commit the charged offense. *See Chambers*, 507 N.W.2d at 238-39; *Provost*, 490 N.W.2d at 101. In the third case, the opinion testimony concerned the question whether sexual contact between the defendant and the alleged victim was consensual or nonconsensual, which the court apparently deemed to be a mixed question

of law and fact. *Saldana*, 324 N.W.2d at 230-31. The *Saldana* court also based its conclusion on additional concerns relating to the witness's qualifications and the factual basis of her testimony. *Id.* at 231 (noting that witness was not physician and did not examine victim until ten days after incident). In short, the three cases cited by Ngacah are substantially different from the present case and, thus, do not support his argument that Officer Mickman's testimony is inadmissible.

Even if Ngacah could satisfy the first two requirements of the plain-error test by establishing that the testimony is inadmissible and plainly so, he could not establish the third requirement by establishing that admission of the testimony affected his substantial rights. Officer Mickman's testimony was not the only evidence that the victim was slapped, and it was not the strongest evidence of that fact. N.S. testified that he saw Ngacah slap the victim. N.S. and D.D. testified that they heard the sound of a slap. Thus, even without Officer Mickman's testimony, there was ample evidence that the victim was assaulted. Consequently, Ngacah has not demonstrated that there is a "reasonable likelihood that the absence of the [alleged] error would have had a significant effect on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted); *see also State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998) (holding that erroneous admission of two lay witnesses' testimony that they believed appellant had killed victim did not affect appellant's substantial rights).

In sum, the district court did not commit plain error by admitting Officer Mickman's lay opinion testimony concerning a mark on the victim's face.

Affirmed.