STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0200

State of Minnesota,
Respondent,

vs.

Frederick Douglas Brown,
Appellant.

Filed January 21, 2014
Affirmed
Stauber, Judge

Stearns County District Court
File No. 73CR126354

Lori A. Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Young Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Minge, 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

STAUBER, Judge

On appeal from his conviction of felony domestic assault, appellant argues that the district court committed reversible error by allowing the state to present expert testimony when the state failed to prove that the complainant was the victim of battered women's syndrome and that the evidence was irrelevant to the particular facts of his case. We affirm.

FACTS

On July 3, 2012, the police responded to a report of a domestic assault in progress. When the police arrived at the scene they spoke with the victim, V.P., who stated that appellant Frederick Douglas Brown had assaulted her. V.P. and appellant had been in a romantic relationship for the past four years. V.P. told the police that appellant had been drinking at her apartment and that she asked him to leave. When she tried to take his bottle of liquor, appellant broke V.P.'s kitchen drawer and grabbed a book bag and struck her with it. When V.P. tried to leave the apartment, appellant hit her on the head with a large umbrella. A police officer observed a large bump on V.P.'s head. V.P. told the police that she was afraid of appellant and that he "would not mind killing her." The police searched for appellant, but he had fled the apartment.

On July 9, 2012, appellant was charged with one count of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2010). Appellant had two prior domestic assault convictions from 2009. The complaint was later amended to add a second count of felony domestic assault for "intent to cause fear in another of immediate bodily harm."

At trial, V.P.'s 911 call was introduced into evidence and played for the jury. During the call, V.P. stated that someone "busted my head with a[n] umbrella." She said she did not know where the assailant went, but that he had been in her apartment, and that she was calling from her neighbor's house.

The neighbor also testified, stating that he heard a scream, and that V.P. entered his apartment holding an umbrella. The neighbor testified that V.P. looked "scared" and "distraught," and observed that she had a large bump on the back of her head. After the neighbor escorted V.P. back to her apartment, he observed that the front part of the kitchen drawer was broken off. The neighbor testified that the drawer was not broken a few nights earlier when he had dinner at V.P.'s apartment. The neighbor also testified that he believed someone had struck V.P. with the umbrella because of the way she had it in her hand, but V.P. did not tell him who hit her.

Officer Trent Fischer testified that he was the first police officer on the scene. Officer Fischer observed that V.P. was crying and that she had a large lump on her head. Officer Fischer took V.P.'s statement. A recording of that statement and a transcript were admitted into evidence. In that statement, V.P. told Officer Fischer that appellant hit her on the head with an umbrella. She also stated that she and appellant were in a romantic relationship and that appellant had been living with her for the past several weeks. She said that appellant got angry when she tried to take his liquor bottle and that he broke her drawer to "scare" her. She said that she grabbed the umbrella first, and then appellant hit her with a book bag and grabbed the umbrella and struck her with it. She said she was afraid of appellant at that time and indicated that she believed he would not

mind killing her. She also said that appellant had done this type of thing before, and that he always calls her names like "crack head bitch." Officer Fischer testified that he smelled alcohol on V.P., but he had no concerns about her level of intoxication. Officer Fischer did not observe any illegal drugs in the apartment.

V.P. testified that she and appellant had a significant romantic relationship for several years, that he occasionally lived with her, and that she still cared about him. She said that she could not clearly remember what happened on the day of the assault because she was "very intoxicated that day," and was high on "marijuana, cocaine, alcohol." She said she could remember arguing with appellant, but she could not remember calling the police or why she had an umbrella in her hand. She testified that she probably called the police to get appellant in trouble because she did not want him to leave and because she was angry with him. She also said she did not remember saying she was afraid of appellant, and she denied ever feeling afraid of him. She testified that she, not appellant, had broken the drawer in her kitchen. She said she woke up on July 4th with a bump on her head, but she could not remember how it got there. She also said that she had threatened to call the police numerous times when appellant was being verbally abusive. She testified that appellant was "very verbally and emotionally abusive," which was very hurtful, but that appellant never physically hurt her. She testified that she invited appellant to spend the July 4th holiday with her and that they went to a barbeque together and watched the fireworks. She informed appellant that there was a warrant out for his arrest because of her police report and that appellant did not get angry with her, but asked "[i]s your anger worth five years of my life?"

At trial, appellant admitted that he has a criminal history that includes three prior felony offenses since 2009. Appellant testified that he had not been drinking on the day of the incident and that he attended an AA meeting that day. He stated that he had been sober for 18 months. Appellant testified that he believed V.P. was using drugs that night. He said that V.P. was putting a towel down at the bottom of the door to her apartment to keep the smell of drugs from escaping, and as she stood up she struck her head on the door latch. Appellant said that he left when he realized she was using drugs because he was on parole and did not want to be around drugs. Appellant testified that he did not notice V.P. was holding an umbrella and did not hear about the umbrella until the next day.

Scott Miller, a forensic interviewer and trainer for the Domestic Abuse Intervention Programs and First Witness Child Abuse Resource Center in Duluth, testified for the government as an expert in victim behaviors and domestic violence. He stated that he did not know anything about the facts of this case, nor did he know the parties. He also said that, although he does not do therapy groups for women, only male batterers, he does focus groups with women to "figure out better ways for the system to respond." Miller gave a lengthy PowerPoint presentation on the characteristics that "might cause a victim of domestic assault to either recant her testimony or stay in a relationship longer than we might think that she ought to." One slide showed "six F's" that keep victims from leaving their abusers: fear, finance, fantasy, father, family, and faith. Miller discussed "fear" and "fantasy" in detail, but added that not every "F" is required, and that "[t]hese are just simply very common characteristics that happen with

some women." He also testified that physical abuse is not the only aspect of battery, but that a batterer typically uses a "whole lot of emotional abuse[,] . . . psychological abuse, name calling, constant blaming her for what's gone wrong in the house." The prosecutor skipped a few slides in the presentation, and asked Miller to discuss an image of a wheel with the words "power and control" at the center and surrounded by bullet points with phrases like "[c]ontrolling what she does," and "[m]aking her afraid by using looks, actions, gestures." Miller testified that the bullet points on the wheel were collected from focus groups with women who were battered. Miller discussed the reasons why women do not leave abusive relationships, including that a woman who leaves her batterer is 75% more likely to be killed, that she may not have the means to leave, or that she is afraid she will be arrested if she is on probation or has a warrant out for her arrest. Miller also testified that when he speaks to prosecutors around the country they typically comment that witness recantation rates in battery cases are "80 to 90 percent," and that "it is very, very common." Although appellant initially objected to the admission of Miller's testimony on the basis of relevancy, he did not make any foundation objections during the course of his testimony, thus failing to challenge the unsubstantiated statistics.

The jury convicted appellant on both counts of felony domestic abuse. Appellant was sentenced to 36 months in prison. This appeal followed.

D E C I S I O N

I. Admissibility of expert testimony

"The admission of expert testimony is within the broad discretion accorded a [district] court, and rulings regarding materiality, foundation, remoteness, relevancy, or

the cumulative nature of the evidence may be reversed only if the [district] court clearly abused its discretion." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (citation and quotations omitted). The admission of expert testimony is reviewed for clear error and subject to harmless-error analysis. *State v. Blanche*, 696 N.W.2d 351, 372 (Minn. 2005). "Reversal is warranted only when the error substantially influences the jury's decision." *Id.* at 374 (quotation omitted). "When determining whether a jury verdict was surely unattributable to an erroneous admission of evidence, the reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant." *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

Minn. R. Evid. 702 provides for the admissibility of testimony by experts: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." When seeking to admit expert testimony on counterintuitive behaviors by victims of crime,

> the State must establish that the proffered expert testimony . . . is relevant and . . . (1) the witness must be qualified as expert; (2) the expert's opinion must exhibit foundational reliability; (3) the expert testimony must be helpful to the jury; and (4) if the testimony involves novel scientific theory, it must satisfy the *Frye–Mack* standard.

State v. Obeta, 796 N.W.2d 282, 294 (Minn. 2011). "The basic consideration in admitting expert testimony under Rule 702 is the helpfulness test—that is, whether the

testimony will assist the jury in resolving factual questions presented." *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997). A court must also consider whether the probative value of expert testimony is outweighed by its prejudicial effect. *Id.* at 196 (citing Minn. R. Evid. 403).

Appellant argues that the district court committed reversible error by admitting expert testimony on battered-woman syndrome. In *Grecinger*, the Minnesota Supreme Court concluded that expert testimony on battered-woman syndrome can be used to rehabilitate a complaining witness's credibility. 569 N.W.2d at 194. The supreme court stated that such testimony is helpful to the trier of fact in order to explain why a battered woman would delay reporting or recant her accusations, actions that "might otherwise be interpreted as a lack of credibility." *Id.* at 195. But to minimize the prejudicial effect of the expert testimony in accordance with Minn. R. Evid. 403, the testifying expert must not testify as to whether the complainant actually suffers from battered-woman syndrome, whether the complainant is truthful, or whether the defendant actually abused the complainant. *Id.* at 197. The supreme court cautioned that

> An expert with special knowledge has the potential to influence a jury unduly. Special care must be taken by the trial judge to ensure that the defendant's presumption of innocence does not get lost in the flurry of expert testimony and, more importantly, that the responsibility for judging credibility and the facts remains with the jury.

Id. at 193.

Appellant asserts that the admission of the lengthy expert testimony was erroneous because it was irrelevant, the state having failed to show that the victim, V.P., was

suffering from battered-woman syndrome. But V.P. testified that appellant was "very verbally and emotionally abusive." And in a recorded interview taken by police, V.P. stated that appellant struck her with an umbrella and that he had done this type of thing before. Appellant argues that his verbal abuse of V.P. does not show that he was physically abusive, but we find no requirement in the law that the state must demonstrate a history of physical abuse as a prerequisite to the admission of expert testimony on battered-woman syndrome. *See Grecinger*, 569 N.W.2d at 191-93 (allowing expert testimony on battered-woman syndrome although there was no evidence that the abuse was ongoing). We conclude that whether V.P. suffered from battered-woman syndrome is a question to be determined by the trier-of-fact. *See State v. Hennum*, 441 N.W.2d 793, 800 (Minn. 1989).

Appellant relies on *State v. Hanks*, 817 N.W.2d 663 (Minn. 2012), for his argument that the state made an insufficient showing to support the inclusion of expert testimony on battered-woman syndrome. In *Hanks*, the defendant was on trial for the premeditated murder of her boyfriend. *Id.* at 664. The defendant sought to introduce expert testimony on battered-woman syndrome to explain why she planned the murder and why she initially denied shooting her boyfriend. *Id.* at 666. The district court excluded the evidence, concluding that it was irrelevant because the defendant was not claiming self-defense, nor was she trying to explain why she would remain in an abusive relationship. *Id.* at 668. The supreme court affirmed, adding that the defendant failed to show that expert testimony would be relevant because she "never claimed that [the victim] physically abused her or even that she was afraid of [him]." *Id.* at 669. *Hanks* is

distinguishable from the facts of this case. Here, V.P. told police that appellant hit her, that he had done so before, and that she was afraid of him. And expert testimony is admissible under *Grecinger* to rehabilitate a complaining witness who recants her earlier accusation of domestic abuse. *See Grecinger*, 569 N.W.2d at 195. Therefore, *Hanks* is inapposite.

Appellant also argues that the expert testimony was not relevant because V.P. did not display some of the characteristics of battered women testified to by Miller. Specifically, V.P. and appellant do not have children together, V.P. was not financially dependent upon appellant, and V.P. was not religious. But to avoid unfair prejudice to the defendant, expert testimony on battered-woman syndrome must be general, and the expert may not testify as to whether he believes the victim in a particular case suffers from the syndrome. *Grecinger*, 569 N.W.2d at 197. And although V.P. did not display all the characteristics of battered women, she displayed at least some of them. V.P. testified that she suffered from emotional abuse, she told the police that appellant tried to intimidate her by breaking her kitchen drawer and striking her with a book bag and an umbrella, and she said that appellant had hit her before.

Appellant also argues that the expert testimony was not relevant because it focused on "male domestic abusers" and that "most of [Miller's] experience was working with male domestic abusers." The state takes the position that appellant is arguing that there was an insufficient foundation to support the expert's testimony. Because appellant did not make a foundation objection to Miller's testimony, the state argues that his foundation objection should be analyzed under the plain error test. But we conclude that

appellant was merely arguing relevance when he stated that "much of [Miller's] testimony focused on why men abuse and . . . [t]his testimony did not provide insight to the jury on why [V.P.] would recant her original allegation." In any event, certifying Miller as an expert witness was not plain error because appellant stipulated to Miller's qualification as an expert, although he objected to the admission of the testimony overall.

Appellant further asserts that Miller should not have been permitted to testify without foundation that "80 to 90 percent of women who alleged abuse later recant their original version." Appellant argues that these numbers are "anecdotal at best and more likely made up" and that the information "interfered with the jury's ability to determine for itself the ultimate issue in this case: whether [V.P.] recanted." But appellant had the opportunity to cross-examine the expert on the source of these figures and to make objections to the parts of Miller's testimony that lacked foundation. We observe that Miller testified at great length regarding the characteristics of battered women, and yet appellant did not once object to any of the substance of his testimony. Appellant cannot now complain that some of Miller's testimony lacked foundation. Moreover, "[t]estimony 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. "If the witness is qualified and the opinion would be helpful to or assist the jury as provided in rules 701-703, the opinion testimony should be permitted." Minn. R. Evid. 704 1977 comm. cmt. And Miller's opinion that most abused women later recant does not resolve an ultimate issue in the case; his statement left it up to the jury to decide whether V.P. was abused, and whether she was telling the truth.

Appellant also argues that Miller's testimony was unduly prejudicial because it would cause jurors to "assume that [V.P.] had been the previous victim of physical violence and potentially sexual assault by [appellant], otherwise Miller's testimony would have no relevancy whatsoever." But as previously explained, Miller was required to testify generally and hypothetically so as to avoid undue prejudice to appellant. *See Grecinger*, 569 N.W.2d at 197. The prosecution also clarified for the jury that Miller did not know anything about the case or the parties, that each situation is different, and that some of Miller's testimony would not be relevant to the facts of the case.

Appellant further argues that Miller's testimony was unduly prejudicial because the state's case was weak, and Miller's testimony unfairly bolstered the prosecution's case. Appellant points out that V.P. recanted her statement to the police, and that both appellant and V.P. testified at trial that V.P. stumbled and hit her head against a door. But Miller's testimony was not the only incriminating evidence in the case. There was also Officer Fischer's testimony, V.P.'s neighbor's testimony, the 911 call, and V.P.'s recorded statement. Given the significant evidence tending to show appellant's guilt, it is unlikely that Miller's testimony alone shifted the outcome of the case.

II. Appellant's pro se supplemental brief

Appellant argues in his pro se supplemental brief that his conviction should be reversed because he was innocent, which is shown by the fact that he would not have stayed in V.P.'s apartment while she was using drugs because he was on parole. But these facts were submitted to the jury, and the jury weighed the credibility of the testimony at trial and concluded that appellant's version of what happened was not to be

believed. *See State v. Dahlin*, 695 N.W.2d 588, 596 (Minn. 2005) (stating that "credibility determinations and the weighing of evidence are tasks reserved to the jury"). And a claim of actual innocence requires clear and convincing proof, such as "evidence that renders it more likely than not that no reasonable jury would convict." *Riley v. State*, 819 N.W.2d 162, 170 (Minn. 2012).

Appellant also argues that V.P. was bribed by court personnel to accuse appellant of assaulting her, that someone else actually hit V.P, and that large sections of the trial transcript were deleted in order to cover up admissions by V.P. and the prosecutor that they conspired to set up appellant. But appellant presents no evidence supporting these assertions, nor is there evidence in the record on these points. Arguments not raised to the district court cannot be considered on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Appellant also argues that Miller improperly diagnosed V.P. as having battered-woman syndrome. But the record reflects that Miller at no time said that V.P. suffered from battered-woman syndrome, and Miller testified that he did not know the parties.

Finally, appellant argues that evidence in the form of surveillance tapes were improperly excluded and that the tapes would have shown where appellant was on the day of the incident and that V.P. was engaged in drug trafficking. But appellant's whereabouts were not in dispute because appellant admitted that he was at V.P.'s apartment when she was injured. And V.P. admitted to using drugs; whether she was engaged in drug trafficking was not relevant to the charge of domestic violence.

Affirmed.