STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2091

State of Minnesota,
Respondent,

vs.

Gerald Duane Skolte,
Appellant.

Filed October 21, 2019
Affirmed
Connolly, Judge

Otter Tail County District Court
File No. 56-CR-18-2662

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

Rolf Nycklemoe, Fergus Falls City Attorney, Joseph R. Ellig, Assistant City Attorney, Fergus Falls, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of fifth-degree assault and disorderly conduct. He argues that the district court committed plain error by allowing two officers to testify as to their opinion that he was the aggressor in the fight, based on their viewing of a surveillance video of the fight. Because the district court did not plainly err in permitting the officers' testimony, we affirm.

FACTS

Appellant Gerald Duane Skolte, an inmate at the Otter Tail County Detention Facility, was involved in a fight with another inmate, K.H., in September 2018. K.H. sustained injuries to his face as a result of the fight. K.H. testified at trial that appellant suddenly attacked him after K.H. said, "It's not your house," when appellant became upset about a table being moved.

Respondent State of Minnesota introduced further evidence that appellant had initiated the fight through the testimony of two officers. First, correctional officer Mark Olson responded after the fight began and separated the two men. He then determined who had instigated the fight by reviewing the surveillance video. Based on his review, he testified as to which inmate started the fight:

> OLSON: Something happened and that [appellant] got aggressive and started initiating a fight with [K.H.].
> STATE: And when you say "initiating a fight," how would you describe [appellant's] actions in relation to [K.H.'s] actions?
> OLSON: [Appellant] was the aggressor in the situation. He struck first with a backhanded swing and then initiated another

> right punch, right-handed punch, towards [K.H.'s] face. [K.H.] threw his hands up in defense and was trying to get away, and [appellant] followed him into the corner of the unit and proceeded to attack him. [K.H.] then pushed [appellant] away to get away in defense. And before we—and that is when we entered the unit and was able to separate them.
> STATE: And up until that point, Mr. Olson, you're describing what you viewed on the surveillance video; is that right?
> OLSON: Correct.

Appellant did not object to this testimony at trial.

Police officer Dustin Kitzman testified that he went to the jail on a report of assault. At the jail, he viewed the surveillance video and spoke with two correctional officers, including Olson, and K.H. The state introduced the video into evidence and played it for the jury, while Kitzman described what was happening. Afterwards, Kitzman explained to the jury his decision to charge appellant with assault and disorderly conduct:

> My determination was, after watching the video, speaking with the corrections officers, that [appellant] was the aggressor in the incident. [K.H.] was standing there, did not make any moves towards [appellant] prior to the incident. [Appellant] approached [K.H.] and started swinging his fists and hands. [K.H.] turned away and was trying to get away from [appellant], but [appellant] kept approaching him, kept moving towards him being the primary aggressor. And the only thing I see from [K.H.] is [K.H.] trying to push [appellant] away from him, which is him trying not to, not to get hit.
>
> So in that—in viewing that, I viewed [appellant] as the aggressor. That's why I charged him with Assault and Disorderly Conduct. The Assault was for the bodily harm of all the scratch marks on the face and nose and the Disorderly Conduct for his, for his conduct that morning.

Appellant did not object to this testimony at trial.

The jury returned a verdict, finding appellant not guilty of fifth-degree assault—fear (Minn. Stat. § 609.224, subd. 1(1) (2018)), guilty of fifth-degree assault—harm (Minn. Stat. § 609.224, subd. 1(2) (2018)), and guilty of disorderly conduct—brawling (Minn. Stat. § 609.72, subd. 1(1) (2018)). This appeal follows.

D E C I S I O N

Appellant argues that the officers' testimony that he was the aggressor in the fight was inadmissible expert testimony. Because he did not object to this testimony at trial, we review the case under a plain-error standard. Minn. R. Crim. P. 31.02. There are three requirements for a defendant to show plain error: (1) there must be an error, (2) the error must be plain, and (3) the error must affect substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the defendant satisfies those three prongs, then we will order a new trial only if it is "necessary to ensure fairness and the integrity of judicial proceedings." *Id.* at 742. If we conclude that any prong is not satisfied, then we "need not consider the other prongs." *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

A witness may testify as a lay witness or an expert. A lay witness can testify in the form of an opinion only when the opinions are "(a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge." Minn. R. Evid. 701. In contrast, an expert witness may testify in the form of an opinion only when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. For both lay and expert witnesses, opinion testimony "is not objectionable

because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704.

We provided a detailed summary of the admissibility of opinion testimony in *State v. Patzold*:

> "[U]ltimate conclusion testimony which embraces legal conclusions or terms of art" is not considered helpful to the jury. *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). The district court may also exclude testimony on the ultimate issue "when the testimony would merely tell the jury what result to reach." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005) (quotation omitted). But the supreme court has allowed police officers to express opinions concerning who killed a victim when the conclusion "was factual rather than legal and was offered in response to leading questions," and the officer avoided legal terminology. *DeWald*, 463 N.W.2d at 744. We have also held that a 911 operator's lay opinion testimony that the caller was being assaulted was admissible because it "was 'rationally based' on her perceptions and was helpful to the jury." *State v. Washington*, 725 N.W.2d 125, 137 (Minn. App. 2006), *review denied* (Mar. 20, 2007).

917 N.W.2d 798, 808 (Minn. App. 2018), *review denied* (Minn. Nov. 27, 2018).

Police officers, like other witnesses, may testify in the form of a lay opinion when that opinion is rationally based on their perception. Such testimony is not an expert opinion simply because the officers have specialized training or experience. *State v. Ards*, 816 N.W.2d 679, 682-83 (Minn. App. 2012). We have held that officers' testimony that an assault occurred was a lay opinion, not an expert opinion, because it was rationally based on the officers' perceptions during their investigation of the incident. *Patzold*, 917 N.W.2d at 808. The opinion testimony was helpful to the jury because the officers "testified about the facts and evidence revealed by their investigation that indicated an assault," and the

jury "heard and saw this very same evidence." *Id.* Similarly, a deputy could testify as to his opinion that an assault had occurred based on his observations of the crime scene. *State v. Pak*, 787 N.W.2d 623, 629 (Minn. App. 2010). The fact that the deputy was not present at the time of the assault did not bar this lay opinion, since it was still based on the deputy's rational perception. *Id.*

Appellant assumes that Olson's and Kitzman's testimony that he was the aggressor in the jailhouse fight was an expert opinion. This assumption is erroneous because Olson and Kitzman provided lay opinions rationally based on their perceptions. As *Ards* makes clear, a police officer's testimony is not an expert opinion just because the officer has specialized training and experience. Here, the state did not even attempt to designate Olson or Kitzman as experts. Olson testified that he had no degree in law enforcement and merely said how long he had worked for the Otter Tail County Detention Facility. Kitzman stated that he had a peace officer's license for Minnesota and said how long he had worked for the police department and the jailhouse, but he did not testify as to any other qualifications.

More importantly, the officers' opinions did not require specialized knowledge. Rather, they were based on the officers' perceptions. Appellant argues that the opinions were inadmissible in part because the officers did not witness the fight firsthand and reached their opinions only after watching the surveillance video. But the fact that the officers did not witness the entire incident firsthand is irrelevant. *See Patzold*, 917 N.W.2d at 808; *Pak*, 787 N.W.2d at 629. Olson and Kitzman provided their opinions that appellant was the aggressor based on their investigations of the incident.

Furthermore, the officers' opinions were helpful to the jury. Like the officers in *Patzold*, Olson and Kitzman provided more than their opinions; they also testified as to the facts and evidence that led to those opinions, and the jury heard and saw all of this evidence. Both officers relied heavily on the surveillance video, and Kitzman described what was happening while the video played. Olson and Kitzman explained which evidence in the video caused them to believe that appellant was the aggressor. Olson testified that appellant struck the first punch and continued to attack K.H., and that K.H. tried to get away from appellant to defend himself. Kitzman described how K.H. did not make any moves before appellant approached him and started swinging his fists. Kitzman's opinion was also helpful in explaining his decision to charge appellant with assault and disorderly conduct.

Therefore, Olson's and Kitzman's statements that appellant was the aggressor in the fight were admissible lay opinions because they were rationally based on the officers' perceptions, helpful to a clear understanding of the testimony, and not based on specialized knowledge. Since the testimony was admissible, appellant has failed to satisfy the first prong for plain error—that there was an error. Accordingly, we need not consider the other prongs for plain error. *Brown*, 815 N.W.2d at 620.

Appellant raises several arguments in his pro se supplemental brief.[1] He argues that (1) the jury should have received an instruction that he acted in self-defense based on K.H.'s harassment during the preceding weeks, (2) he should have been allowed to ask

[1] In his brief, appellant admits that he "lost it and back-handed" K.H.

K.H. on cross-examination why he was in jail, (3) the court should have dismissed the entire jury pool because one prospective juror claimed during jury selection that he knew K.H., (4) he was subject to double jeopardy because the jailhouse sentenced him to 60-days lockdown before the state charged him with assault, and (5) Olson lied on the stand regarding the location of K.H.'s injuries. We have carefully considered all of these arguments and find them to be without merit.

Affirmed.