STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0039

State of Minnesota,
Respondent,

vs.

Michael-Paul Aaron Smith,
Appellant.

Filed December 14, 2020
Affirmed
Gaïtas, Judge

Beltrami County District Court
File No. 04-CR-19-1942

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Gaïtas, Judge.

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

GAÏTAS, Judge

Appellant Michael-Paul Aaron Smith challenges his felony fifth-degree assault conviction and seeks a new trial, arguing that the district court abused its discretion in allowing a witness for the state to provide opinion testimony. Specifically, Smith alleges

that the district court erred in allowing a police officer, who was also an eyewitness to the charged offense, to testify that Smith's conduct appeared to be intentional, when Smith's intent was the ultimate issue to be decided by the jury. The record shows, however, that the disputed testimony was rationally based on the officer's own perceptions as a fact witness. We therefore conclude that the district court did not abuse its discretion in overruling Smith's objection to the officer's testimony. And, even if the testimony was erroneously admitted, any error was harmless given the strength of the other trial evidence. We affirm.

FACTS

On June 27, 2019, at around 9:30 p.m. Bemidji Police Officers Joseph Lorenzi and G.Z. responded to an assault call at a residence. The officers encountered and detained two males, one of whom was identified as Smith. Both men had minor injuries. Lorenzi noted that Smith appeared "highly intoxicated." Medical professionals soon arrived and took Smith to the hospital. The officers stayed behind and continued to investigate the alleged assault, which purportedly involved Smith and the other man.

A few hours later, the officers went to the hospital to arrest Smith. They found him lying in a hospital bed, asleep and snoring. When hospital staff cleared Smith for release, the officers woke him and told him he was under arrest for assault. At that point, Smith's "demeanor changed"; he grew confrontational. He refused to get up, keeping his eyes closed, but no longer snoring. Given his reluctance, the officers wheeled Smith to their squad car on a gurney.

At the squad car, both officers tried to gain Smith's cooperation. They gave several loud commands for him to get up from the gurney. When that did not work, they tried shaking his body. Smith did not respond. The officers believed Smith was feigning sleep and purposefully ignoring their requests. G.Z. eventually tried to lift Smith's feet from the gurney. Smith began kicking his legs. While kicking, Smith pulled one leg inward toward his chest and released a kick to G.Z.'s chest, causing G.Z. to stumble backwards and lose his breath. Smith continued kicking and threw his hands in G.Z.'s direction. The officers tried to physically restrain him, and ordered him to stop struggling, warning that they would use their stun guns.

Suddenly, Smith acted startled, yelled profanities, and said "stop." He asked the officers what had just happened. Smith then stood up and the officers directed him into the backseat of the squad car. The officers closed the car door behind him. Smith banged his head and hands against the car window. The officers drove Smith to the jail.

Following this incident, the state charged Smith with two counts of felony fifth-degree assault, Minn. Stat. § 609.224, subd. 4(b) (2018),[1] one for the initial assault at the residence (count one), and the other for the incident involving G.Z. at the hospital (count two).[2] Smith pleaded not guilty and demanded a speedy jury trial.

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[1] We note that Smith was charged with a felony under subdivision 4(b), rather than with a misdemeanor under subdivision 1 or a gross misdemeanor under subdivision 2(b), because he had two or more prior convictions for assaultive offenses. *See* Minn. Stat. § 609.224, subds.1, 2(b), 4(b) (2018).

[2] The original complaint charged Smith with felony fifth-degree assault (count one) and gross misdemeanor fourth-degree assault on a peace officer (count two), but the state amended count two a few months later to felony fifth-degree assault on a peace officer.

On day one of trial, the state dismissed count one due to witness unavailability. The trial proceeded on count two—the alleged assault against G.Z. at the hospital. The state's theory was that Smith intentionally kicked G.Z. while on the gurney. During the trial, the prosecutor called both arresting officers as witnesses and published footage from their body-worn cameras for the jury. As a defense, Smith claimed that his actions were involuntary because he was sleeping immediately before the alleged assault and reacted reflexively when awakened. Smith testified and offered one exhibit, a photograph showing the abrasions to his face before he was treated at the hospital.

The jury found Smith guilty of fifth-degree assault. Following the verdict, the district court sentenced Smith to 36 months in prison. Smith appeals.

D E C I S I O N

Smith argues that his conviction should be reversed because the district court allowed inadmissible testimony that improperly prejudiced the jury. We will only reverse a district court's evidentiary ruling where the district court abused its discretion. *Moore v. State*, 945 N.W.2d 421, 428 (Minn. App. 2020), *review denied* (Minn. Aug. 11, 2020). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). Even where the district court mistakenly admits improper testimony, the error "is harmless if there is no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Swinger*, 800 N.W.2d 833, 838 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Sept. 28, 2011).

Smith's argument on appeal is based on the following exchange, which happened when the prosecutor questioned Lorenzi about the video from his body-worn camera:

> PROSECUTOR: Now, Officer Lorenzi, I'm just pausing the video at this point to get your impression of what we're observing. Um, what did you observe happen just then?
> LORENZI: Um, well I observed, uh, Officer [G.Z.] moving Mr. Smith's legs over. And if you notice, he brought his left leg back. In my opinion, it was to have a better –
> DEFENSE COUNSEL: Objection. Officer is limited to the facts he saw not his opinion.
> THE COURT: Overruled.
> LORENZI: Um, I believe, Mr. Smith was moving his leg back to have a better angle to strike Officer [G.Z.].

Moments later Lorenzi testified, "I believe [Smith] was trying to hit [G.Z.]." There were no other objections to this line of testimony.

Smith contends that Lorenzi "essentially told the jury that Smith intentionally applied force to Officer [G.Z.] without his consent, the mental state required to convict Smith of assault-harm." He argues that this particular testimony was not allowed under relevant caselaw and significantly influenced the jury's verdict. We disagree.

I. The district court did not abuse its discretion in allowing the testimony.

First, we conclude that the district court did not abuse its discretion in overruling defense counsel's objection and allowing Lorenzi's answer. Although a police officer may sometimes testify as an expert witness, Lorenzi did not. Instead, as an eyewitness to the incident underlying Smith's charge, he testified as a lay witness. Thus, Minnesota Rule of Evidence 701, which addresses the opinions of lay witnesses, guides our analysis.

Under rule 701, a lay witness may testify "in the form of opinions or inferences" so long as the subject matter is (a) rationally based on their perception, (b) helpful to

understanding the testimony or a fact in issue, and (c) not based on expert or specialized knowledge. Minn. R. Evid. 701. Opinion testimony from either a layperson or an expert has limits, however. For example, witness opinions on the ultimate issues in a case are often unhelpful and thus inadmissible. *See, e.g.*, *State v. Provost*, 490 N.W.2d 93, 101-02 (Minn. 1992) (rejecting expert psychiatric opinion for embracing issue of criminal intent); *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990) (explaining that testimony should not embrace "legal conclusions or terms of art"). At the same time, "[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[,]" which in this case was the jury. Minn. R. Evid. 704. Even a lay witness

> will not be precluded from giving an opinion merely because the opinion embraces an ultimate fact issue to be determined by the jury. 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.

Id., 1977 comm. cmt.

Smith argues that Lorenzi's "opinion" exceeded the limits imposed by rules 701 and 704. He asserts that Lorenzi improperly gave the jury his opinion on the ultimate issue in the case, Smith's state of mind—or mens rea—when he kicked G.Z. According to Smith, caselaw, including *State v. Chambers*, 507 N.W.2d 237, 239 (Minn. 1993); *DeWald*, 463 N.W.2d at 744; and *State v. Hogetvedt*, 623 N.W.2d 909, 915 (Minn. App. 2001), *review denied* (Minn. May 29, 2001), prohibits such testimony.

The caselaw does not support Smith's argument, however. "While it is improper to testify as to the subjective intention or knowledge of another, *it is proper* for the prosecutor

to inquire of the [witness] what was going through his mind when the actions occurred." *State v. Witucki*, 420 N.W.2d 217, 222 (Minn. App. 1988) (emphasis added), *review denied* (Minn. Apr. 15, 1988). "A lay witness's opinion or inference testimony may help the jury by illustrating the witness's perception in a way that the mere recitation of objective observations cannot." *State v. Pak*, 787 N.W.2d 623, 629 (Minn. App. 2010). For these reasons, a witness's explanation of their perceived experience—meaning what that witness heard, saw, felt, and believed at a particular time—is distinguishable from that of a witness who offers a retrospective opinion on events they did not experience firsthand. *Compare Chambers*, 507 N.W.2d at 238-39 (concluding that expert's opinion that victim's stab wounds showed defendant's intent to kill was inadmissible), *and Hogetvedt*, 623 N.W.2d at 915 (reversing conviction where officer, who did not witness altercation, testified that accused "assaulted" the victim), *with State v. Patzold*, 917 N.W.2d 798, 808 (Minn. App. 2018) (holding there was no error in officers' lay opinions that assault occurred because officer testimony was rationally based on perceptions in investigating crime scene), *review denied* (Minn. Nov. 27, 2018), *Pak*, 787 N.W.2d at 629 (determining no error occurred where deputy offered opinion that, based on his own on-scene observations, alleged victim "had been assaulted"), *State v. Washington*, 725 N.W.2d 125, 137 (Minn. App. 2006) (holding 911 operator's lay opinion that caller was being assaulted was admissible because it complied with rule 701), *review denied* (Minn. Mar. 20, 2007), *and Witucki*, 420 N.W.2d at 222.

Here, while viewing his body-worn camera video, Lorenzi explained to the jury what he experienced during his interactions with Smith, including what he believed based

on his perceptions. He "testified only as to what meaning the action conveyed to him under the circumstances." *Witucki*, 420 N.W.2d at 222. This testimony was within the bounds established by caselaw and the rules of evidence, and was not improper. *See id.* (stating that testimony interpreting what the witness perceived was properly admitted where it was "not based on something beyond [the witness's] own knowledge"). Lorenzi's initial choice of words preceding the objection—"in my opinion"—does not change our analysis. His opinion did not concern Smith's state of mind. Rather, it was his interpretation of his own observations, which was admissible evidence.

The challenged testimony was directly and rationally based on Lorenzi's own perception of the struggle with Smith at the hospital; it was not an improper opinion on whether Smith had the requisite intent to commit an assault. The district court did not abuse its discretion in allowing the testimony.

II. Even if presumed erroneous, the challenged evidence did not significantly affect the jury's verdict.

Although we conclude that the district court did not err in allowing Lorenzi's testimony, we also note that the testimony does not warrant reversal of Smith's conviction, even if improper. "Under the harmless error standard, a defendant who alleges an error that does not implicate a constitutional right must prove there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Smith*, 940 N.W.2d 497, 505 (Minn. 2020) (quotation omitted). In considering the effect of erroneously admitted evidence, we examine "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and

whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002).

Smith argues that Lorenzi's testimony undercut his defense, which was that the kick to G.Z.'s chest was not intentional but was a "reflex reaction[]" to being awakened. He also notes that the prosecutor exacerbated the district court's error in allowing the testimony by emphasizing it during closing argument. The state, on the other hand, contends that "there is ample other evidence of [Smith]'s intent to assault Officer [G.Z.]" and any error was therefore harmless.

We agree with the state. The disputed portion of Lorenzi's testimony was fleeting and its persuasive value was sparse compared to the other trial evidence that supports Smith's conviction, including Lorenzi's undisputed testimony, G.Z.'s testimony, and the video evidence.

Smith observes that the prosecutor essentially repeated Lorenzi's testimony in closing argument when he stated: "In the video you can, actually, see Mr. Smith move his leg backward to get a better angle to kick Officer [G.Z.] with." But the prosecutor's argument was a fair inference from the video evidence. *See State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) ("[T]he State may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence in its closing argument." (quotation omitted)). And in discussing this inference, the prosecutor did not reference Lorenzi's testimony.

Smith also had ample opportunity to rebut Lorenzi's testimony. He elected to testify and present evidence at the trial. After assessing witness credibility and weighing the evidence, the jury ultimately rejected Smith's defense.

We conclude that Smith is not entitled to a new trial. Because the district court did not abuse its discretion and there is no reasonable possibility that the challenged evidence substantially influenced the jury's verdict, we affirm.

Affirmed.