STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1051

State of Minnesota,
Respondent,

vs.

Justin Raymon Wainner,
Appellant.

Filed July 12, 2021
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-18-8166

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

John J. Choi, Ramsey County Attorney, Jeffrey A. Wald, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Hooten, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

After a bar fight during which the bouncer was assaulted, the jury found appellant guilty of second-degree riot under Minn. Stat. § 609.71, subd. 2 (2018). Appellant

challenges his judgment of conviction, arguing that the district court committed reversible error "by allowing two police officers to testify about their opinions on the issue of [appellant's] intent as part of the alleged group criminal activity that was the basis for the charged offenses." Because appellant did not object to the challenged testimony during the jury trial, we review the issue for plain error. We conclude that the district court did not plainly err by admitting the lay and expert testimony and, alternatively, that any error was harmless. As a result, we affirm.

FACTS

In an amended complaint, respondent State of Minnesota charged appellant Justin Raymon Wainner with five counts: aiding third-degree assault for the benefit of a gang under Minn. Stat. §§ 609.229, subd. 2, .05, subd. 1 (2018) (count one); aiding third-degree assault under Minn. Stat. § 609.223, subd. 1 (2018), Minn. Stat. § 609.05, subd. 1 (count two); threats of violence under Minn. Stat. § 609.713, subd. 1 (2018) (count three); second-degree riot committed for the benefit of a gang under Minn. Stat. §§ 609.71, subd. 2, .229, subd. 2 (count four); and second-degree riot under Minn. Stat. § 609.71, subd. 2 (count five).

All counts involve the assault of the bouncer at the Saloon Bar (bar) in St. Paul on November 9, 2018. The state's theory, as argued in closing, was that Wainner was a gang member who stood on the perimeter of the fight while other gang members assaulted the bouncer in retaliation for being asked to remove gang clothing. The defense theory, as argued in closing, was that Wainner was "merely present" during the fight, and that "mere presence is not enough . . . to show intent."

Wainner is a member of the Hells Outcast Motorcycle Club (Hells Outcast). The bar has a dress code that prohibits Hells Outcast members from entering the bar while wearing their leather vest with insignia (club vest), also known as "colors." Earlier in 2018, there was an incident at the bar involving a Hells Outcast member, J.P., who entered the bar wearing his club vest. The bouncer told J.P. to take off his vest. The bouncer later testified that J.P. was "kind of upset" about the incident, but he left the bar and returned without his club vest.

The bar has many surveillance cameras and the district court received into evidence several recordings depicting events at the bar before and after the assault; the recordings were played for the jury. No audio recording was made. The video showed that J.P. entered the bar at about 11:05 p.m. while the bouncer was working. J.P. was not wearing his club vest and sat at the bar. Two more Hells Outcast members entered the bar and sat next to J.P; both men were wearing their club vests. The bouncer approached J.P.'s two companions and asked them to remove their club vests.

A camera posted outside the bar showed Wainner parking his pickup truck at about 11:14 p.m. Shortly after, three men, including J.J. and P.M., entered the bar, both wearing club vests; they surrounded the bouncer, who was still speaking with J.P. and the two men sitting at the bar. Wainner then entered the bar wearing a Hells Outcast sweater with a club vest. Wainner stood nearby. J.J. looked up and then "sucker punche[d]" the bouncer. J.P., J.J., and P.M. threw the bouncer to the ground and continued punching him.

Wainner remained standing nearby. He looked around and did not hit the bouncer. He picked up a stool that was knocked over during the fight and picked up P.M.'s hat.

Within minutes, all Hells Outcast members, including Wainner, left the bar. One bar patron later told police that he heard Wainner threaten to "shoot this [bar] up" as he left.

At about the same time that the Hells Outcast members were leaving, the bartender called 911 and, at 11:15 p.m., reported an assault by the Hells Outcast gang. The audio recording and transcript were received into evidence and the recording was played for the jury. During the call, the bartender conveyed the license-plate number for a pickup that drove away with the gang members.

A St. Paul police officer stopped Wainner's pickup because it matched the license-plate number given by the bartender. When asked about weapons, Wainner said he had two firearms and a license to carry. The officer removed two firearms, a knife, and a blackjack from Wainner's pickup. The officer then arrested Wainner.

Wainner later gave a *Mirandized* statement to Sergeant Arnold; the recording and transcript were received into evidence. Wainner admitted that he belonged to the Hells Outcast club. He said he went to the bar to play pull tabs and did not plan to meet the Hells Outcast members. He said that after he entered the bar, he did not talk to anyone, recognize any members of Hells Outcast, and did not see a fight. He added that "something happened, I don't know what it was. But then I was kicked out. That's all I know." He denied making any threats.

The state charged Wainner, J.J., P.M., and J.P. with offenses arising out of the assault. P.M. and J.P. pleaded guilty. In November 2019, Wainner and J.J. proceeded to a joint jury trial. The jury found J.J. guilty of all counts but acquitted Wainner of count three,

threats of violence. The jury deadlocked on the other charges against Wainner and the district court declared a mistrial.

In March 2020, Wainner's second jury trial began on the remaining counts. The evidence presented at the second trial is summarized above. The state offered testimony by, among others, the bouncer and a bar patron who testified that although he had previously identified Wainner, "sitting here today, that doesn't look like the guy that was there." The state also called three law-enforcement officers: the responding officer who stopped Wainner in his pickup; Sergeant Arnold; and Officer Michener, a motorcycle-gang expert.

Wainner testified that he joined Hells Outcast about five years before the assault because "it was fun to share [his] love for motorcycles with guys that had the same interests." He repeated his earlier statement about going to the bar to play pull tabs and testified that he did not plan to meet Hells Outcast members. After he entered the bar, he saw the fight and "got out of the way." He denied setting up a perimeter, but admitted picking up the stool and hat. He left when he was "kicked out" and denied making any threats. Wainner also offered testimony by P.M., who admitted that he hit the bouncer after J.J. started the fight.

At the end of the second trial, the jury found Wainner guilty of count five, second-degree riot, and acquitted him of counts one, two, and four. The district court sentenced him to one year and one day in prison but stayed execution for three years.

Wainner appeals.

DECISION

Wainner seeks a new trial and argues that the district court committed plain error by admitting lay and expert opinion testimony about his intent, even though he did not object to either witnesses' testimony during trial. The state argues that the district court did not commit plain error because the challenged witnesses did not testify to Wainner's intent and the testimony received was helpful to the jury.

A district court has broad discretion in deciding whether to admit or exclude evidence, and its rulings will not be disturbed unless it misapprehends the law or abuses its discretion. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989). When a defendant fails to object to testimony at trial, he generally forfeits any right to appellate relief on the issue. *State v. Webster*, 894 N.W.2d 782, 786 (Minn. 2017). Even so, appellate courts have "discretion to consider an error not objected to at trial if it is plain error affecting substantial rights." *State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006); *see also* Minn. R. Crim. P. 31.02.

"When prosecutorial misconduct is not alleged, the defendant has the burden of proving (1) an error, (2) that is plain, and (3) affects substantial rights." *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). If these three elements are satisfied, the appellate court "assess[es] whether [it] should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (quoting *Griller*, 583 N.W.2d at 740) (quotation omitted). The appellate court will correct the error "only if the fairness, integrity, or public reputation of the judicial

proceeding is seriously affected." *Jackson*, 714 N.W.2d at 690 (quoting *State v. Morton*, 701 N.W.2d 255, 234 (Minn. 2005)) (quotation omitted).

Before considering Wainner's specific arguments, we briefly summarize the challenged testimony. The state called the investigating officer, Sergeant Arnold, as a lay witness with 32 years of experience as a police officer. Arnold's testimony identified different people involved in the assault as the surveillance recording was played for the jury, depicting events from several angles. Arnold testified that Wainner was "posted on one side" of the fight and stated the assault was a "coordinated attack" where people were "standing around intimidating, keeping people from rendering aid to this person, keeping people from getting involved." Arnold testified that Wainner was "intimidating people while this assault went on so nobody would get involved."

The state also called Officer Michener as an expert on gangs; he worked for two years on the state gang unit and focused on motorcycle gangs in his training. Michener testified that the bar-surveillance recording showed a "typical . . . motorcycle gang fight," which includes the members "mov[ing] in as a pack," with some participating in the assault and the others running "perimeter security," "watching the rest of the bar, making sure nothing will interfere, [and] making sure there's no threats to the people in the gang." When describing Wainner's role in the assault, Michener testified that Wainner had his "colors on," was "off to the side," was "looking, scanning the bar, looking for possible threats," and was therefore part of the assault. With this summary of the evidence in mind, we consider Wainner's arguments.

Wainner first argues that the district court improperly admitted lay and expert opinion testimony on his intent, which was an ultimate issue and the "key factual dispute." Minnesota's evidence rules cover the admission of opinion testimony by lay and expert witnesses. 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. An expert witness may testify in the form of an opinion if the expert's "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.

The primary consideration in admitting lay and expert opinion testimony is whether the testimony will help the jury resolve the factual questions presented. *See* Minn. R. Evid. 701 (allowing lay-opinion testimony if "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue"); *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984) (discussing rule 702). Expert testimony is *not* helpful if it "is within the knowledge and experience of a lay jury" and "will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience." *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980); *see also Jackson*, 714 N.W.2d at 691 (stating that expert opinion testimony on gang behavior "must add precision or depth to the jury's ability to reach conclusions about matters that are not within its experience").

The rules on opinion testimony specifically address whether the testimony may embrace an "ultimate issue." Rule 704 provides that "[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 (emphasis added). Caselaw recognizes that opinion testimony on an ultimate issue is admissible if helpful to the fact-finder. *See, e.g.*, *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (approving expert testimony about a victim's physical and emotion condition because it was helpful).

Generally, a district court does not abuse its discretion under rule 704 when it allows an expert to offer opinion testimony about "factual rather than legal" observations. *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990) Opinion testimony on an ultimate issue is unhelpful, however, if it "embraces legal conclusions or terms of art" and thus is inadmissible. *See, e.g.*, *id.* (affirming conviction because expert opinion testimony was factual); *Saldana*, 324 N.W.2d at 231 (rejecting expert testimony that a victim had been "raped" because it was a legal conclusion).

When we examine the challenged evidence under the applicable rules, we conclude that the district court did not plainly err by admitting either officer's opinion testimony for three reasons. First, the state offered the challenged evidence to prove required elements of the offense of conviction. Importantly, as mentioned above, Minn. R. Evid. 704 does not altogether prohibit testimony on an ultimate issue, so long as the evidence is helpful. *Saldana*, 324 N.W.2d at 230. To convict Wainner of second-degree riot, the state needed to prove that Wainner assembled with others and disturbed the public peace "*by an intentional act or threat of unlawful force or violence* to person or property." Minn. Stat. § 609.71, subd. 2 (emphasis added).

We specifically reject Wainner's view that the challenged testimony included an opinion about Wainner's intent. Neither Arnold nor Michener testified to a legal

conclusion, such as an opinion that Wainner intended to participate in riot. Both witnesses testified about Wainner's behavior, from which the jury could determine his intent. Intent is generally proven using circumstantial evidence from which the jury may infer intent. *See, e.g.*, *State v. Caldwell*, 815 N.W.2d 512, 517 (Minn. App. 2012), *review denied* (Minn. June 27, 2012) (expert gang testimony was helpful because it implied that the actor "was motivated by the gang's concept of punishment for disrespect").

Second, the district court did not abuse its discretion by admitting Arnold's observations about Wainner's behavior from the surveillance recording. Arnold testified about his trained and rational perceptions of a fast-moving bar fight. *See, e.g.*, *State v. Washington*, 725 N.W.2d 125, 137 (Minn. App. 2006) (determining that 911 operator's opinion was admissible under Minn. R. Evid. 701 because the testimony was "rationally based" on her perceptions and helpful to the jury), *review denied* (Minn. Mar. 20, 2007). Admitting an expert or lay witness's factual observations is well within the district court's discretion. *See DeWald*, 463 N.W.2d at 744; *Saldana*, 324 N.W.2d at 231.

Third, the district court did not abuse its discretion by allowing Michener's expert testimony about typical gang behavior during the bar fight. Wainner does not challenge Michener's qualifications but focuses on the substance of his opinions. Michener testified that motorcycle gangs will coordinate an assault, including having some members provide "perimeter security," because doing so intimidates others from intervening during the assault. Because motorcycle-gang behavior during an assault is not within the experience of a lay juror, the district court's decision to admit Michener's testimony was within its discretion. Like the expert testimony about gang behavior that was upheld in *Jackson*,

Michener's testimony was helpful to the jury because his specialized training "add[ed] precision or depth to the jury's ability to reach conclusions about matters that are not within its experience." *See Jackson*, 714 N.W.2d at 691.

Wainner's final argument is that the challenged testimony was not helpful because the fight was recorded. We disagree. Arnold's and Michener's opinion testimony, based on their specialized training and experience and rational perception, was helpful for the jury because it provided context for the jury to assess the surveillance recording.

We also conclude that, if there was any error, it was not plain. An error is "plain" if it is "clear or obvious." *Sontoya*, 788 N.W.2d at 872. "Typically this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id.* The admission of Arnold's and Michener's opinion testimony was a reasonable exercise of discretion under Minnesota's evidence rules and caselaw; it is not clear or obvious that this testimony would not help the jury understand Wainner's behavior in a fight that happened in a few minutes.

Finally, we also conclude that even if the admissions were erroneous, any error was harmless and did not affect Wainner's substantial rights. An error impacts substantial rights if "the error was prejudicial and affected the outcome of the case." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014) (quotation omitted). Wainner's substantial rights were not affected for many reasons. Arnold's and Michener's testimony was cumulative of the surveillance footage that was shown to the jury. The jurors used their own judgment in evaluating the recordings of the assault. Wainner's attorney also had the opportunity to cross-examine both witnesses and respond during closing argument. Indeed, Wainner's attorney repeatedly pointed out throughout the trial that Wainner did not physically stop

anyone from intervening in the assault. And the jury acquitted Wainner of the benefit-of-a-gang offenses for which Arnold's and Michener's testimony was most relevant.[1] Thus, any error did not affect Wainner's substantial rights. *See State v. Valtierra*, 718 N.W.2d 425, 438 (Minn. 2006) (stating that error that did not substantially influence the jury's decision does not require reversal).

In sum, we conclude that the district court did not plainly err by admitting the opinion testimony of Sergeant Arnold and Officer Michener and, if there was any error, it was harmless.

Affirmed.

[1] The state argues, and we agree, that the challenged testimony was relevant to other counts that the jury rejected. Intent was a required element for the other charged counts: aiding and abetting third-degree assault for the benefit of a gang, aiding and abetting third-degree assault, and second-degree riot for the benefit of a gang. Thus, the state had to prove that when Wainner committed the underlying benefit-of-a gang crimes, he had the "intent to promote, further, or assist in criminal conduct by gang members." Minn. Stat. § 609.229, subd. 2. Michener's testimony, in particular, was offered to prove this element.