STATE OF MINNESOTA
IN COURT OF APPEALS
A10-81

State of Minnesota,
Respondent,

vs.

Brad Robert Grunig,
Appellant.

Filed November 9, 2010
Reversed and remanded
Klaphake, Judge

Steele County District Court
File No. 74-CR-08-2124

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Douglas L. Ruth, Steele County Attorney, Owatonna, Minnesota 55060 (for respondent)

Bradford W. Colbert, L.A.M.P., St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

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

KLAPHAKE, Judge

Appellant Brad Robert Grunig challenges his convictions for three counts of felony check forgery, Minn. Stat. § 609.631, subds. 2(1), 4(3)(b) (2008), arguing that he

was deprived of his right to a fair trial when the district court erroneously permitted the investigating police officer to offer opinion testimony concerning identification.

Because we conclude that the district court erred by admitting this opinion testimony and that appellant was prejudiced thereby, we reverse and remand.

D E C I S I O N

We review the district court's evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The party who challenges an evidentiary ruling has the burden of establishing that the court abused its discretion and that the party was prejudiced by the ruling. *Id.*

Appellant contends that the district court improperly permitted Officer Michael Earl to testify as an expert witness regarding identification and that Earl usurped the jury's role by testifying as to identity, an ultimate factual determination for the jury to decide.

A witness who is qualified as an expert may offer scientific, technical, or specialized knowledge testimony if it will assist the trier of fact to understand the evidence or to determine a fact in issue. Minn. R. Evid. 702. A witness who is not testifying as an expert may offer an opinion if it is "rationally based on the perception of the witness" and if it is "helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue. Minn. R. Evid. 701. Admissible opinion testimony is not objectionable solely "because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. But the rationale for admitting opinion testimony is that it will assist the trier of fact in evaluating evidence or resolving a factual issue.

Minn. R. Evid. 701, 702; *see also State v. Valtierra*, 718 N.W.2d 425, 435 (Minn. 2006) (stating that "the ultimate question of admissibility for expert testimony is whether the expert's testimony will help the trier of fact in evaluating evidence or resolving factual issues").

Earl, who was not qualified by the prosecution as an expert witness, offered a lay opinion on whether appellant appeared in three videotapes taken at the scene of the crimes, based on a comparison of the videotapes with appellant's driver's license photo. The state offered this evidence in part because appellant's appearance changed between the date of the offense and the trial. Curiously, the driver's license photo was not introduced into evidence or displayed to the jury, so the jury could make its own comparison.

Earl's opinion as to identity was not "helpful to a clear understanding of the witness' testimony or the determination of the fact in issue." Minn. R. Evid. 701. The jury, id given access to the videotapes and the driver's license photo, was as qualified to make the determination of identity as Earl was. The type of opinion testimony Earl was asked to provide did not help the jury evaluate the evidence, but rather usurped the jury's identification decision. *See State v. Jackson*, 714 N.W.2d 681, 691 (Minn. 2006) (stating that expert testimony "must add precision or depth to the jury's ability to reach conclusions about matters that are not within its experience" and "may be excluded when it would merely tell the jury what result to reach"). Here, the state should have allowed the jury to examine the driver's license photo and compare it to the videotapes that were

played at trial, thus permitting the jurors to draw their own conclusions as to identification, which was the primary issue at trial.

The state argues that Earl's testimony was offered in order to explain the events triggering the investigation of appellant. But appellate courts have rejected the admission of otherwise inadmissible testimony offered under the guise of explaining the course of an investigation. *See State v. Williams*, 525 N.W.2d 538, 544-45 (Minn. 1994) (rejecting hearsay testimony about beginning an investigation because a tipster stated that defendant was a drug courier); *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985) (rejecting hearsay statements); *State v. Hardy*, 354 N.w.2d 21, 24-25 (Minn. 1984) (noting that "the potential of the evidence being used for an improper purpose outweighed its very limited probative value").

Under these circumstances, we conclude that the district court abused its discretion by admitting Earl's opinion testimony. Further, given the lack of clarity in the videotapes and the fact that the jury was not permitted to view the driver's license photo, we conclude that this trial error substantially influenced the jury's decision, depriving appellant of his right to a fair trial. *See Valtierra*, 718 N.W.2d at 435. We therefore reverse appellant's conviction and remand this matter to the district court for further proceedings.

Appellant also argued that the evidence was insufficient to sustain the jury's verdict. When a criminal conviction is reversed because of trial error, we must consider whether the evidence is legally sufficient; if not, a defendant may not be twice placed in jeopardy. U.S. Const. amend. V; Minn. Const. art. I, § 7; *State v. Cox*, 779 N.W.2d 844,

853 (Minn. 2010). Evidence is legally insufficient if "the government's case was so lacking that it should not have even been submitted to the jury." *Id.* (quotation omitted). Here, the issue was identification of appellant as the offender; the state submitted circumstantial evidence placing appellant in the area and direct evidence of the videotapes. In determining whether retrial is permissible under the Double Jeopardy Clause, we may also consider the erroneously admitted evidence. *Id.* Based on our review of the evidence, there was sufficient evidence identifying appellant as the offender and therefore double jeopardy does not preclude a new trial.

Reversed and remanded.