STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0468

State of Minnesota,
Respondent,

vs.

Don Durand Johnson,
Appellant.

Filed February 4, 2013
Affirmed
Hudson, Judge

St. Louis County District Court
File No. 69HI-CR-11-475

Lori Swanson, Attorney General, Karen B. Andrews, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and Worke, Judge.

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

HUDSON, Judge

Appellant challenges his convictions of felony domestic assault, arguing that the prosecutor committed reversible error by eliciting vouching testimony from a police-

officer witness and asking the officer's opinion about appellant's claim of self-defense. We conclude that, although plain error occurred when the prosecutor elicited testimony that the officer believed the complainant was telling the truth and disbelieved appellant's assertion of self-defense, the state met its burden to show that these errors did not affect appellant's substantial rights, and we affirm.

FACTS

After an altercation occurred between appellant Don Durand Johnson and his wife, L.J., a jury found appellant guilty of one count of felony domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2010), and one count of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2010). At appellant's jury trial, L.J. testified that she argued with appellant after he accused her of infidelity, she pushed him, and he hit her hard on the face. She testified that she took a cell phone into the bedroom to call 911, but appellant threw the phone against the wall and then grabbed the front of her neck with two hands so that she had trouble breathing. She testified that she was afraid of appellant.

A Hibbing police officer, who responded to a call from a neighbor, testified that he heard a heated argument from outside the couple's apartment and entered to prevent a possible physical altercation. He observed that L.J. was very upset, with a marked reddening along her chest and neck and a small amount of blood at the corner of her mouth. The state introduced photos showing red marks on L.J.'s neck, which the officer testified were consistent with someone who had been grabbed and possibly choked.

During the officer's testimony, the prosecutor asked at what point he made the decision to arrest someone; the officer replied that he conferred with his partner and decided to arrest appellant. The prosecutor then asked, "Why did you arrest him and not her?" The officer responded,

> After talking to both of them separately, getting each of their stories, um, and that coupled with the injuries that were present on [L.J.], it appeared that she was telling the truth. It corroborated quite well as far as how she was grabbed, the injuries that were present on her. That's usually the factors that we use to decide these things. We're not there, so we didn't—we don't see these things in most cases, so we have to kind of come to some sort of conclusion, just based on the evidence that's both physical evidence and evidence that's provided in statement form by the parties involved.

On cross-examination, in response to questioning by defense counsel, the officer stated that appellant had informed the officer that he slapped L.J. in self-defense. On redirect, the prosecutor asked the officer, "Who told you they were acting in self-defense?" The officer responded, "[Appellant] stated that he had acted in self-defense." The prosecutor continued,

> Q: So he's indicated after he got pushed down that he came back and hit her, is that correct?
>
> A: That's correct.
>
> Q: Is that self-defense?
>
> A: I would say no.
>
> Q: Why?
>
> A: Well, there was no action there to defend.
>
> Q: What do you mean by that?

> A: Well, to come up and to defend yourself would be to try and get away, maybe to --
>
> DEFENSE COUNSEL: Judge, I'm going to object. That calls for a legal conclusion.

The district court sustained the objection. The prosecutor then asked the officer whether, absent injury to either party, he would have arrested L.J. for any offense. The officer indicated that it was possible that L.J. could have been arrested for assault, if appellant had been fearful of her. The officer continued,

> Through asking and questioning both parties involved and corroborating what we got, we end up having to arrest. When we know there is going to be an arrest made, we arrest what's called the predominant aggressor, and the predominant aggressor is the party that when both parties are left alone, which individual would be cause for the most damage to the other party. That's one of the things that we base our arrests off of.

He then testified that appellant did not indicate at the scene that he was fearful of L.J. and did not provide any reason for police to arrest L.J. and that L.J.'s injuries appeared recent.

Appellant testified in his own defense that he and L.J. both had intimate relationships with others and that on the day before the incident, L.J. became angry when he received a text message from the woman he was seeing and temporarily locked him out of the apartment. He stated that the next day, when she continued yelling at him, he walked into the bedroom, but she followed him and ran into him, and he fell into a wall. He testified that he instinctually backhanded her on the face, and she tried to hit him with the cell phone, but it flew out of her hand. He testified that when L.J. started coming at him, his hand landed around her neck, and he was concerned that she would come at him

again and hurt him with the phone. He stated that he only momentarily pushed L.J. and that he hit L.J. in the face "to subdue her from assaulting [him]."

The district court instructed the jury on a theory of self-defense, and at closing, both attorneys argued the applicability of that theory. This appeal follows.

D E C I S I O N

In reviewing claims of unobjected-to prosecutorial misconduct, this court applies a modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). To meet this test, the defendant must establish that the misconduct amounted to error and that the error was plain. *Id.* An error is plain "if [it] contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). If plain error is established, the state has the burden to show that it did not prejudice the defendant's substantial rights. *Id.* This burden is satisfied if the state can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. "Finally, if all three prongs . . . are satisfied, the court determines whether to address the error to ensure fairness and integrity in judicial proceedings." *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010).

Appellant argues that the prosecutor committed plain error affecting appellant's substantial rights by (1) eliciting the officer's vouching testimony that L.J. was telling the truth and asking the officer how he decided whom to arrest; and (2) asking for the officer's opinion as to whether appellant acted in self-defense. Prosecutors may not elicit vouching testimony from trial witnesses. *See Van Buren v. State*, 556 N.W.2d 548, 551 (Minn. 1996). Improper vouching testimony is testimony that another witness is telling

the truth or that one believes one witness over another. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). "Bolstering a witness's credibility exceeds the proper bounds of aiding the jury to reach conclusions about matters not within its experience. Witness credibility determinations are strictly the domain of the jury." *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005); *see also Van Buren*, 556 N.W.2d at 551–52 (concluding that the district court committed plain error by allowing testimony that witnesses believed the complainant's story regarding sexual assaults).

Appellant first argues that the prosecutor committed plain error by eliciting the officer's testimony that "it appeared that . . . [L.J.] was telling the truth." We agree. The officer's statement directly expressed his opinion about L.J.'s credibility. *See State v. Burrell*, 697 N.W.2d 579, 601 (Minn. 2005) (expert's opinion as to whether witness has "made up" his statements or was being "truthful" was vouching); *see also State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (noting concern relating to police officer's testimony that he "had no doubt whatsoever that [he] was taking a truthful statement"). Prosecutors have a duty to prepare witnesses so that they do not give improper testimony. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). Although the state argues that the defense "opened the door" to the officer's testimony on truthfulness by arguing in opening statements that L.J., not appellant, was the aggressor, defense counsel's mere recitation of this theory did not invite the officer's direct testimony endorsing L.J.'s credibility. *Cf. State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (limiting the opening-the-door doctrine to situations where excluding the testimony would result in a "distorted representation of reality").

To amount to reversible error, however, the testimony must have affected appellant's substantial rights. *See Ramey*, 721 N.W.2d at 302. Under this analysis, the state has the burden to show that no reasonable likelihood exists that the misconduct had a significant effect on the jury's verdict. *Id*. An appellate court reviewing this issue "consider[s] the strength of evidence against the defendant, the pervasiveness of improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *Cao*, 788 N.W.2d at 717 (quotation omitted).

Appellant argues that the vouching statement may have unduly influenced the jury because the witness was a police officer. *See, e.g., State v. Hogetvedt*, 623 N.W.2d 909, 915 (Minn. App. 2001) (concluding that officer's objected-to testimony that he told the complainant that he believed the defendant had assaulted her "may have unduly influenced the jury" because of witness's status as a police officer and amounted to reversible error), *review denied* (Minn. May 29, 2001). Nonetheless, we conclude that the state met its burden under the third prong of *Ramey*. The evidence against appellant was strong. L.J. testified that appellant hit her on the face and neck; her version of events was corroborated by photographs taken after the incident that showed red marks in those areas. *See, e.g., Koskela*, 536 N.W.2d at 630 (concluding that the officer's improper statement on truthfulness did not result in prejudice to the defendant when it merely corroborated other witnesses' testimony and crime-scene evidence). And appellant had the opportunity to rebut the officer's statement in closing argument; defense counsel emphasized the volatile nature of the couple's relationship and noted that, at the time of the incident, L.J. was not taking prescribed anti-anxiety medication. Therefore, we

conclude that the error did not affect appellant's substantial rights because there is no reasonable likelihood that the vouching testimony had a substantial effect on the verdict.

Appellant also argues that the prosecutor committed misconduct by asking the officer how he made the decision about whom to arrest, citing *State v. Myrland*, 681 N.W.2d 415 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). In *Myrland*, this court concluded that the district court erred by allowing a school district administrator to testify regarding employment actions taken against a defendant during an investigation of possession of child pornography, noting that the testimony was irrelevant to the criminal charges and could have improperly influenced the jury. *Id*. at 421. But unlike in *Myrland*, the officer's testimony only recounted his observations of the scene and explained why he arrested appellant and not L.J. Therefore, the prosecutor's questioning on this issue did not amount to plain error. *See Ramey*, 721 N.W.2d at 302 (stating that an error is plain if it contravenes caselaw, a rule, or a standard of conduct). And even if we considered this questioning improper, it did not prejudice appellant in view of the strong evidence against him and the defense's opportunity to rebut that testimony.

Appellant also argues that the prosecutor committed prejudicial misconduct by asking the officer whether appellant acted in self-defense by slapping L.J. We agree. Although defense counsel ultimately objected to the prosecutor's questioning the officer about why appellant's conduct was not self-defense, the portion of the testimony in which the officer testified that appellant was not acting in self-defense remained on the record.

Ultimate conclusion testimony that "embraces legal conclusions or terms of art" is inadmissible. *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990); Minn. R. Evid. 704

cmt. (stating that opinions involving legal analysis or mixed questions of law and fact are not helpful to trier of fact). Under this standard, the officer's testimony that he did not believe appellant acted in self-defense amounted to plain error. *See State v. Saldana*, 324 N.W.2d 227, 230–31 (Minn. 1982) (holding that admission of expert's testimony that rape had occurred was error because that testimony was a legal conclusion that was of no use to the jury). Accordingly, we next examine whether the state met its burden to show that the testimony did not affect appellant's substantial rights. *Ramey*, 721 N.W.2d at 302.

A defendant has the initial burden to produce evidence to support a self-defense claim. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). The burden then shifts to the state to disprove, beyond a reasonable doubt, one or more of the elements of self-defense: (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's honest belief that he was in imminent danger of death or great bodily harm, (3) reasonable grounds for that belief, and (4) the absence of a reasonable possibility to retreat. *Id.*; *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). Even if the elements of self-defense are satisfied, a defendant may use only the amount of force "which a reasonable person in the same circumstances would believe to be necessary." *State v. Bland*, 337 N.W.2d 378, 381 (Minn. 1983).

On this record, we conclude that the officer's testimony discounting appellant's assertion of self-defense did not have a significant effect on the jury's verdict. The evidence negating a claim of reasonable force was strong. Appellant, who acknowledged that he was bigger and stronger than L.J., testified as to his version of events, including

that he "pushed [L.J.] back" with his hand around her neck. Photographic evidence showed L.J's injuries. Appellant presented no evidence tending to indicate a threat from L.J. other than his belief that she would hit him with a cell phone.

Even if we were to reach the fourth prong of the applicable test, we would conclude that it is unnecessary for us to address the issue to ensure the fairness and integrity of the judicial proceeding. *See Cao*, 788 N.W.2d at 715. Appellant argues that because the jury found him not guilty of two additional charged offenses—terroristic threats and interfering with an emergency call—it is likely that the jury relied on the officer's improper testimony to convict appellant of domestic abuse by strangulation and felony domestic assault. But "[a] jury, as the sole judge of credibility, is free to accept part and reject part of a witness' testimony." *State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977). The jury was entitled to find that L.J.'s testimony was not credible on issues relating to the emergency phone call and alleged terroristic threats made by appellant, but credible on issues relating to her strangulation and assault.

Affirmed.