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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-1449**

State of Minnesota,  
Respondent,

vs.

Michael Darnell Hampton,  
Appellant.

**Filed August 27, 2018  
Affirmed in part and remanded  
Reilly, Judge**

St. Louis County District Court  
File No. 69DU-CR-17-137

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

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

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

Considered and decided by Reilly, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

**UNPUBLISHED OPINION**

**REILLY**, Judge

Appellant Michael Darnell Hampton challenges his conviction of domestic assault by strangulation, arguing that he is entitled to a new trial because the district court plainly

erred in admitting unnoticed expert-witness testimony and prejudicial, inadmissible hearsay testimony. In the alternative, appellant argues that his sentence should be reversed and remanded because the district court incorrectly calculated his criminal-history score. We affirm appellant's conviction but remand for resentencing.

## **FACTS**

In January 2017, police responded to a domestic assault call involving appellant and A.P. The state later charged appellant with one count of felony domestic assault by strangulation and misdemeanor domestic assault. At trial, A.P., the responding officer, and appellant testified. The district court admitted into evidence recordings from the officer's body camera and photographs the officer took. Appellant's counsel stated on the record that he did not object to the introduction of the exhibits, and in closing, argued that the exhibits supported appellant's version of events. The jury found appellant guilty of felony domestic assault by strangulation but not guilty of misdemeanor assault. The district court convicted appellant on the felony count, and sentenced appellant to serve 36 months in prison, stayed for four years, granting appellant's motion for a downward dispositional departure.

This appeal follows.

## **D E C I S I O N**

### **I. The district court did not plainly err in allowing police testimony about the appearance of strangulation injuries on photographs and video.**

At trial, the responding officer testified that A.P.'s injuries were more obvious on visual inspection than they appeared on the body-camera video and photographs admitted

into evidence. He also testified that strangulation injuries often appear less distinct in photographs and videos than to the naked eye. He based this general opinion on his experience with hundreds of domestic-violence calls and investigations, and also referenced training received at an out-of-state course on domestic assault by strangulation. Although appellant objected at trial to the prosecutor's question about the *reasons* that injuries are not always visible, which objection was sustained, appellant did not object to the officer's testimony that injuries do not appear well on photographs and video. Appellant now argues that the district court plainly erred in allowing the officer to testify as an expert about the appearance of injuries on photographs and video.

Because appellant did not object to this testimony, we apply the plain-error doctrine. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error doctrine, appellant may be entitled to a new trial if he establishes (1) an error; (2) that is plain; and (3) that affected his substantial rights. *Id.* If the first three prongs are satisfied, this court “may correct the error only if it ‘seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.’” *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quoting *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997)).

A lay witness may testify in the form of opinions or inferences if such testimony is rationally based on the perception of the witness, helps the jury to understand a fact issue, and is not based on scientific, technical, or other specialized knowledge. Minn. R. Evid. 701. Conversely, a witness qualifies as an expert through “knowledge, skill, experience, training, or education” and may testify in accordance with their background in the form of

an opinion. Minn. R. Evid. 702. Although police officers possess specialized training and experience, they do not always testify as experts. *State v. Ards*, 816 N.W.2d 679, 683 (Minn. App. 2012).

Here, the officer testified that “there’s lenses with cameras that sometimes have glare and at times there are injuries from an assault, especially a strangulation assault, that don’t tend to show up . . . when you take digital photographs or any photographs of these injuries.” Later, the prosecutor asked how the officer formulated his opinion that strangulation injuries were difficult to photograph. The officer responded that he received training in domestic assault by strangulation at the Institute on Strangulation Prevention in San Diego. He also testified that he had responded to about 50 calls involving claims of domestic assault strangulation, and that injuries frequently did not appear well in photographs in those cases.

To the extent the officer testified based on specialized training rather than on his own experiences and observations as an officer, his statements constituted expert testimony for which advance disclosure was required. And because the state did not disclose his expert testimony, allowing such testimony was error, and any error was plain. See Minn. R. Crim. P. 9.01, subd. 1(4)(c) (requiring advance disclosure of summary of expert testimony). Turning to the third *Griller* prong, an error affects substantial rights if it is prejudicial and affects the outcome. See *Griller*, 583 N.W.2d at 741. The appellant bears a “heavy burden” of persuasion on this prong. *Id.*

In light of the other evidence presented in this case, we cannot conclude that this error affected the outcome. The body-camera video shows interviews of A.P. and appellant

shortly after the alleged assault. A.P. testified that appellant put his arms around her throat and picked her up off her feet, she could not breathe, she clawed her way out of his grasp and escaped outside, where a friend called 911. Appellant also testified about the alleged assault. The officer testified that the exhibits did not show A.P.'s injuries very well. Appellant had the opportunity to cross-examine the officer about this testimony as well as his testimony that such discrepancies are common. Instead, appellant argued in closing that the photographs and video support his version of events. The jury was entitled to make credibility determinations in light of all of the evidence presented. On this record, appellant has not satisfied the "heavy burden" of persuasion that his substantial rights were affected by the challenged testimony. The district court did not plainly err in admitting the officer's testimony about his own observations and experience about the appearance of the victim's strangulation injuries on the photographs and video.

## **II. A.P.'s recorded statement was not inadmissible hearsay.**

Appellant argues that the district court plainly erred in admitting into evidence the unredacted body-camera video recording, which contained A.P.'s statement that just before the assault, appellant "told me he was going to choke me or that he wanted to choke me out." Appellant did not object at trial, but now argues that this statement is inadmissible hearsay. As with appellant's expert-witness argument, our review is for plain error. *See Griller*, 583 N.W.2d at 740.

Hearsay is defined as an out-of-court statement offered as evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c). "The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full

discussion of admissibility be conducted at trial.” *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). A statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness. Minn. R. Evid. 801(d)(1)(B). “Before the statement can be admitted, the witness’s credibility must have been challenged, and the statement must bolster the witness’s credibility with respect to that aspect of the witness’s credibility that was challenged.” *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). It is undisputed that A.P.’s credibility was at issue, and that she testified before the video was offered. Appellant argues that A.P.’s statement is not consistent with her testimony and thus is not admissible under Minn. R. Evid. 801(d)(1)(B). We disagree.

Trial testimony and the challenged statement “need not be verbatim.” *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). But the challenged statement must be “reasonably consistent” with the trial testimony. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). A.P.’s trial testimony was somewhat less detailed than her statement to the police officer at the scene, but her recorded statement that appellant said he wanted to, or would, choke her is reasonably consistent with her trial testimony that the interaction was heated but she did not remember the exact verbal exchange leading up to being lifted off the ground by her neck. We cannot conclude that the recorded statement was clearly or obviously inadmissible hearsay. Thus, the district court did not err in admitting the body-camera recording without redaction.

Because appellant has not shown error, we need not consider the remaining prongs of the plain-error doctrine.

**III. Appellant's criminal-history score appears to have been miscalculated.**

The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). A defendant's criminal-history score includes points for each prior felony conviction. Minn. Sent. Guidelines 2.B (2017); *see State v. Oberg*, 627 N.W.2d 721, 723 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). But a defendant may be assigned a point for a felony conviction only if he was sentenced for that conviction. *Oberg*, 627 N.W.2d at 724. Put another way, multiple convictions that result in a single sentence are properly calculated as a single criminal-history point. *See id.*

At sentencing, the district court applied a criminal-history score of six to appellant's convictions. The district court calculated appellant's criminal-history score using five prior felony convictions and one custody status point. Appellant's criminal-history score included three points for three felony convictions entered on the same day in 2004. The record indicates that appellant received a single sentence of eight years for these convictions. Thus, it appears that appellant's criminal-history score was miscalculated. A determination of which 2004 conviction resulted in a sentence could impact the overall calculation. Accordingly, we reverse appellant's sentence and remand to the district court for recalculation of his criminal-history score and resentencing.

**Affirmed in part and remanded.**