IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JESSE LEE BARRON-KATAIROAK JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12214 Trial Court No. 4FA-13-1193 CR MEMORANDUM OPINION No. 6511 — August 16, 2017

Appeal from the District Court, Fourth Judicial District, Fairbanks, Patrick S. Hammers, Judge.

Appearances: Glenda J. Kerry, Law Office of Glenda J. Kerry, Girdwood, for the Appellant. Risa C. Leonard, Assistant District Attorney, Fairbanks, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

Jesse Lee Barron-Katairoak Jr. was convicted of fourth-degree assault for assaulting his girlfriend, Georgiann Gordon. On appeal, Barron-Katairoak argues that he is

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

entitled to a new trial because the district court committed plain error by allowing the investigating officer to (1) mischaracterize the evidence, (2) offer expert opinion on the manner of the assault, and (3) vouch for Gordon's credibility. For the reasons explained here, we conclude that none of these claims rise to the level of plain error and we therefore affirm Barron-Katairoak's conviction.

Facts and proceedings

On May 6, 2013, Fairbanks Police Officer David Elzey was dispatched to investigate a disturbance at Sophie Station, a hotel in Fairbanks. When the officer arrived, he encountered an intoxicated and bloodied Georgiann Gordon in a hallway of the hotel. Gordon had blood on her nose, face, and clothing, and she was crying and very upset. Gordon told Officer Elzey that she had been assaulted by her boyfriend, Jesse Barron-Katairoak, and that she was afraid for her life.

When Officer Elzey contacted Barron-Katairoak, he provided a different story— he said he hit Gordon once by accident. Barron-Katairoak said that Gordon woke him and that he hit her when he reflexively threw up his hand.

The State charged Barron-Katairoak with one count of fourth-degree assault.[1] At his trial, the State called Officer Elzey as a witness. Elzey testified in general terms about how to determine in a domestic situation whether there was a primary aggressor who should be arrested for assault. The prosecutor then asked Elzey if, in this case, he "use[d] [his] experience to determine the primary aggressor?" The defense attorney objected, and the judge sustained that objection but invited the prosecutor to rephrase the question. This examination followed, without further objection from the defense:

> *Prosecutor*: When you spoke with the defendant, did the defendant's statement match your observation?

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[1] AS 11.41.230(a)(1).

Officer Elzey: Somewhat, yes.

Prosecutor: And can you explain?

Officer Elzey: He said he had hit her, she had told me he had hit her. My estimate of what I saw from her was that I honestly believe that she was hit more than once, in a nutshell. ... [S]he said it was multiple hits, he said it was one accidental hit. I believe that she was probably hit more than one time.

Prosecutor: And why do you believe that?

Officer Elzey: Several reasons. I saw — and me looking at it on the scene I saw the mark on her face. Over here there was a little up above her eye. The — the nose injury to me was a little more extensive than somebody doing an over-the-shoulder kind of backhand thing. I also factored in that if you're laying on the ground and you're kind of hitting up, it's extremely hard to get any kind of power or — or punch or any sort of real power behind that if you're laying on the ground. It's very difficult to do that and really hurt somebody. So I factored in all those things and I made the arrest based on my observations of everything and what everybody had said.

Later, Officer Elzey emphasized that his decision to arrest Barron-Katairoak was based on the entire situation — "What he said, what she said, what I observed in the room, what I observed on her physical body, all of it."

At trial, Gordon testified that she couldn't remember what happened because she was too intoxicated. Barron-Katairoak took the stand in his defense and reiterated that he reflexively threw up his arm when Gordon woke him up, and that he hit her only once by accident. The jury rejected Barron-Katairoak's defense and convicted him of fourth-degree assault.

Barron-Katairoak now appeals, arguing on several grounds that the court committed plain error by allowing Officer Elzey to testify as he did. Barron-Katairoak concedes that he did not object to this testimony at trial and therefore must show plain error.[2]

Why we conclude that Barron-Katairoak's claims do not constitute plain error

Barron-Katairoak first argues that the court should have *sua sponte* excluded Officer Elzey's testimony that Gordon told him that Barron-Katairoak hit her multiple times. Barron-Katairoak argues that this testimony mischaracterized the evidence.

We disagree that this testimony was so obviously a mischaracterization of the evidence that the trial court should have excluded it *sua sponte*. We note that in her initial statement to Officer Elzey, Gordon said she couldn't remember how many times she'd been hit. But later during the police contact, Gordon told Elzey that Barron-Katairoak "kept hitting me." Gordon also told Elzey that she had been assaulted in several rooms, and Elzey took photographs of "blood pretty much everywhere" throughout those rooms.

The jury never heard the audio recording that included Gordon's statements that Barron-Katairoak hit her repeatedly because the district court excluded those statements as hearsay. The court ruled that, because the recording was made later in the thirty-minute police contact, after Gordon had calmed down somewhat, the statements were not admissible under the "excited utterance" exception to the hearsay rule.

It does not necessarily follow, however, that the court should have *sua sponte* acted to strike Officer Elzey's testimony that Gordon told him she had been hit multiple times. Barron-Katairoak did not object to Elzey's testimony on hearsay grounds and it is well-settled that a court does not err by admitting hearsay in the absence of an objection.[3]

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[2] *See Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

[3] *Christian v. State*, 276 P.3d 479, 489 (Alaska App. 2012) (citing *Rusenstrom v. Rusenstrom*, 981 P.2d 558, 560-61 (Alaska 1999); *Bird v. Starkey*, 914 P.2d 1246, 1248 n.1 (continued...)

Barron-Katairoak next argues that the court committed plain error by allowing Elzey to testify that, in his view, Gordon's injuries were not consistent with a single backhand strike. Elzey testified that "if you're laying on the ground and you're kind of hitting up, it's extremely hard to get any kind of power or — or punch or any sort of real power behind that if you're laying on the ground. It's very difficult to do that and really hurt somebody." Barron-Katairoak argues that this testimony should have been excluded because Elzey was not qualified as an expert on "the biomechanics of inflicting injury while in a prone position."

This claim also fails. In *Carter v. State*, we explained the difference between "lay" testimony and "expert" testimony, as set out in Alaska Evidence Rules 701 and 702.[4] Evidence Rule 701 states that "if a witness is not testifying as an expert, 'the witness's testimony ... is limited to those opinions [and] inferences which are ... rationally based on the perception of the witness.'"[5] Evidence Rule 702 states that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, then a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify about this specialized knowledge" and render an opinion based on it.[6]

Here, Officer Elzey testified primarily as a lay witness when he said Gordon's injuries did not appear consistent with one backhand hit from a prone position.[7] We note that

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[3] (...continued)
(Alaska 1996); *Savely v. State*, 180 P.3d 961, 962 (Alaska App. 2008); *Douglas v. State*, 166 P.3d 61, 85 (Alaska App. 2007); *Cassell v. State*, 645 P.2d 219, 220-21 (Alaska App. 1982)).

[4] 235 P.3d 221, 224-25 (Alaska App. 2010).

[5] *Id.* at 225 (quoting Alaska Evid. R. 701).

[6] *Id.* (quoting Alaska Evid. R. 702).

[7] *See id.* at 226 (officer's testimony that fresh scratches on victim's neck and lower face (continued...)

the jurors did not need any specialized knowledge to evaluate this testimony; rather, the jurors could rely on their own experience, photographs that documented Gordon's injuries and the blood throughout the hotel rooms, the testimony of other witnesses who observed Gordon immediately following the assault, and Barron-Katairoak's testimony. Given this, we find no merit to Barron-Katairoak's claim that the district court should have *sua sponte* excluded this testimony as improper opinion evidence.

Lastly, Barron-Katairoak argues that it was plain error to allow Officer Elzey to testify that he did not believe Barron-Katairoak's story that he only hit Gordon once. In support of this argument, Barron-Katairoak cites to *Darling v. State*.[8] In *Darling*, the Alaska Supreme Court held that it was improper for a prosecuting attorney to express his personal belief on the reliability of a witness.[9] The court explained that "[t]he vice sought to be guarded against by such a rule is the introduction into evidence of the unsworn testimony of counsel in which he states either explicitly or implicitly that his opinion as to the credibility of a witness is based upon personal knowledge of the witness."[10]

Here, however, Officer Elzey was not the prosecuting attorney but rather a sworn witness. Moreover, Elzey did not base his testimony on any assessment of Barron-Katairoak's credibility; nor does his testimony appear to be the kind of "human lie detector" evidence that this court has previously condemned.[11] Rather, Elzey's testimony appears to

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[7] (...continued)
were indications she had been strangled was lay opinion because the jurors did not need specialized training or experience to understand the basis for this inference).

[8] 520 P.2d 793, 794-95 (Alaska 1974).

[9] *Id.* at 794.

[10] *Id.*

[11] *See, e.g.*, *Kim v. State*, 390 P.3d 1207, 1209 (Alaska App. 2017); *Sakeagak v. State*, 952 P.2d 278, 282 (Alaska App. 1998); *Flynn v. State*, 847 P.2d 1073, 1075-76 (Alaska App. (continued...)

have been based on his observations of Gordon's injuries and his view that those injuries were not consistent with the conduct Barron-Katairoak described. Given this, and given the defense attorney's failure to object to this testimony, we do not find plain error.

Conclusion

We AFFIRM the judgment of the district court.

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[11] (...continued)
1993); *Thompson v. State*, 769 P.2d 997, 1003 (Alaska App. 1989).