

COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Annunziata and Overton
Argued at Richmond, Virginia

JOHN FREDERICK HAMM

v. Record No. 0250-96-2

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE NELSON T. OVERTON
JANUARY 7, 1997

FROM THE CIRCUIT COURT OF NOTTOWAY COUNTY
Thomas V. Warren, Judge

Connie Louise Edwards for appellant.

Richard B. Smith, Assistant Attorney General
(James S. Gilmore, III, Attorney General, on
brief), for appellee.

John Frederick Hamm was convicted in a bench trial of attempted sodomy. He appeals, contending that the witness for the Commonwealth improperly gave opinion testimony. We disagree and affirm his conviction.

At Hamm's trial, the sole witness for the Commonwealth was the correctional officer who found Hamm on the floor with another inmate. When the prosecutor asked what they were doing, the officer replied, "They was [sic] in a sexual activity."

Hamm argues that this statement constitutes improper opinion testimony because it relates to the ultimate fact at issue. An element of the charged offense is an ultimate fact at issue in a criminal prosecution. See Jenkins v. Commonwealth, 21 Va. App.

*Pursuant to Code § 17-116.010 this opinion is not designated for publication.

222, 226, 463 S.E.2d 330, 332 (1995). An opinion that the charged offense occurred improperly invades the province of the fact finder. See id.; Cartera v. Commonwealth, 219 Va. 516, 519, 248 S.E.2d 784, 786 (1978).

Assuming that the testimony of the officer qualifies as improper opinion testimony, its admission was harmless error. In testimony both before and after the question and answer objected to, the correctional officer described in objective details the incident that he witnessed. He stated exactly what he saw and demonstrated the positions and movement that he observed. From this testimony the fact finder was able to draw his own conclusions about the ultimate fact at issue.

Accordingly, we affirm the conviction.

Affirmed.