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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2307**

State of Minnesota,
Respondent,
vs.

Gordon Charles Warren,
Appellant.

**Filed February 4, 2013
Affirmed
Peterson, Judge**

Becker County District Court
File No. 03-CR-11-851

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Michael D. Fritz, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle Rene Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of felon in possession of a firearm, appellant argues that because his prior convictions for terroristic threats and aggravated robbery

lacked impeachment value and adequate other impeachment evidence existed, the district court erred when it ruled that the state could impeach appellant with evidence of his prior convictions. We affirm.

FACTS

On April 21, 2011, while appellant Gordon Charles Warren and J.D. were at the residence of appellant's girlfriend A.B. in White Earth, J.D. saw a sawed-off shotgun in appellant's pants. Appellant left, and, a few minutes later, J.D. heard gunshots. A short time after that, appellant called A.B. and asked her to pick him up at M.J.'s apartment. J.D. and A.B. picked up appellant, and they drove up County Road 21 to N.E.'s driveway and then drove down the driveway. Appellant got out of the car and ran into the woods. J.D. did not see the gun at M.J.'s apartment or on appellant's person when they picked him up but did see appellant bend down when he ran into the woods.

Becker County Sheriff's Deputy Tyrone Warren was dispatched to respond to a report of shots fired in White Earth near the "old projects." The dispatcher reported that a green car had been seen in the area. A short time later, Warren received a report that the green car was traveling north on County Road 21 and had a loud muffler. Warren located the car and stopped it.

J.D. was driving, and he admitted that he had been drinking but refused a field sobriety test. The deputy told J.D. that he was facing potential driving-while-impaired charges and stated that they might "be able to work something out" if J.D. provided information. J.D. stated that he knew the location of the firearm and, after the officers

indicated that they were not interested in holding J.D.'s car, J.D. went with them and showed them the general area, near N.E.'s driveway, where the gun was located.

As Becker County Sheriff's Deputy Shane Richard walked down the driveway, he saw distinct footprints in the gravel. Richard saw a shotgun and a shotgun shell a couple of feet away from the footprints. The officers compared the footprints to J.D.'s and appellant's shoes. The footprints did not match J.D.'s shoes but appeared to match appellant's shoes.

Susan Gross, a forensic scientist for the Minnesota Bureau of Criminal Apprehension, compared photographs of the footprints found near the shotgun to J.D.'s and appellant's shoes. Gross determined that J.D.'s shoes did not match the footprints. Although Gross could not conclusively determine whether appellant's shoes made the footprints, appellant's shoes were consistent with the footprints.

M.J. gave a statement to Warren. M.J. told Warren that, on the night of April 21, M.J. was awakened when appellant came to his apartment. M.J. told appellant that he could spend the night there and went back to bed. A short time later, M.J. woke up and saw appellant standing in his bedroom. M.J. saw a gun lying on the floor and a shotgun shell on the dresser. After telling appellant to remove the gun, M.J. noticed J.D. and a woman that M.J. did not recognize standing in the hallway. Appellant picked up the gun and shotgun shell and left with J.D. and the woman.

J.D. gave a statement to Becker County Sheriff's Deputy Scott Blane. J.D. told Blane that he and appellant were at A.B.'s house on the night of April 21. Appellant showed J.D. a shotgun, said he needed to take care of some business, and left the house.

A short time later, J.D. heard shots fired, and then appellant called and said he needed to be picked up at M.J.'s apartment. When J.D. and A.B. picked up appellant, he said that he needed to "dump" the shotgun. J.D. drove down a gravel road, and appellant got out of the car.

Appellant was charged with being a felon in possession of a firearm. The case was tried to a jury. Appellant did not testify.

At trial, M.J. claimed that he was sleepy and drunk when appellant came to his apartment on April 21. M.J. testified that he woke up and saw a weapon that appeared to be a gun lying on the floor. M.J. recalled seeing a man in the hallway and a woman coming out of the bathroom and telling appellant that they had to leave. M.J. testified that he did not know who took the gun but that it was gone when everyone left.

J.D.'s trial testimony was consistent with his statement to Warren.

A.B. testified at trial on appellant's behalf. A.B. denied seeing appellant with a gun. She claimed that when they were near N.E.'s driveway, J.D. left the car, went to the trunk of the car, and then returned to the car.

The jury found appellant guilty as charged. This appeal followed sentencing.

DECISION

Minn. R. Evid. 609(a)(1), (b), allows evidence of a felony conviction to be admitted for impeachment purposes provided that ten or fewer years have elapsed since the conviction and the probative value of the evidence outweighs its prejudicial effect. The district court's ruling on the impeachment of a witness by prior conviction is

reviewed for a clear abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

In considering whether probative value outweighs prejudicial effect, a district court considers five factors: “(1) the impeachment value of the prior crime; (2) the date of the conviction and the defendant’s subsequent history; (3) the similarity of the past crime with the charged crime; (4) the importance of defendant’s testimony; and (5) the centrality of the credibility issue.” *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

Appellant filed a pretrial motion to prevent the state from impeaching him with a 2002 terroristic-threats conviction and a 2004 conviction for being a felon in possession of a firearm. On the first day of trial, the prosecutor stated that the state also intended to impeach appellant with a 1997 aggravated-robbery conviction for which appellant was still in prison within ten years of the current offense. Defense counsel agreed that the terroristic-threats conviction could be used for impeachment purposes, and the district court ruled that the aggravated-robbery conviction was admissible for impeachment purposes but the conviction for being a felon in possession of a firearm was not admissible.

Impeachment Value

Appellant argues that the terroristic-threats and aggravated-robbery convictions had minimal impeachment value because they were not crimes that involved “dishonesty or false statement,” as required by Minn. R. Crim P. 609(a)(2). But appellant acknowledges that crimes that do not involve dishonesty or false statement may be

admissible under the “whole-person” rationale. The Minnesota Supreme Court has ruled that “impeachment by prior crime aids the jury by allowing it to see ‘the whole person’” and better judge credibility because “abiding and repeated contempt for laws [that one] is legally and morally bound to obey” demonstrates a lack of trustworthiness. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotations omitted); *see also State v. Hill*, 801 N.W.2d 646, 651-52 (Minn. 2011) (reaffirming application of whole-person rationale and stating that “*any* felony conviction is probative of a witness’s credibility”). Although the whole-person rationale has been criticized, this court lacks authority to alter a rule adopted by the supreme court. *State v. Flemino*, 721 N.W.2d 326, 328-29 (Minn. App. 2006).

Appellant also argues that the whole-person rationale did not support admission of the prior convictions because appellant’s telephone conversations with his mother while he was in jail would have been sufficient to show his whole person. But the whole-person rationale for admitting evidence of prior convictions is based on the premise that prior convictions show an abiding and repeated contempt for the law that demonstrates a lack of trustworthiness. The record does not indicate that the telephone conversations, which concerned J.D. possibly being an informant, showed that appellant has an abiding and repeated contempt for the law.

Date of Conviction and Subsequent History

“[R]ecent convictions [are considered] to have more probative value than older ones.” *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). Appellant argues that the 1997 date of his guilty plead to aggravated robbery is “the better indicator of the date of

conviction for Rule 609.” But under Minn. R. Evid. 609, the ten-year time limit runs from the date of conviction or of the release of the defendant from the confinement imposed for that conviction, whichever is the later date. Consequently, appellant’s aggravated-robbery conviction is within the ten-year limit.

Appellant concedes that the terroristic-threats conviction was within the rule 609 time limit.

Similarity of Crimes

“[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively.” *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). “[T]he greater the similarity, the greater the reason for not permitting use of the prior crime to impeach.” *Jones*, 271 N.W.2d at 538. Appellant does not dispute the district court’s determination that the terroristic-threats and aggravated-robbery offenses were not similar to the current offense.

Importance of Appellant’s Testimony and Centrality of Credibility

“If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.” *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). If the admission of a prior conviction prevents a jury from hearing a defendant’s version of events and that testimony is important to the jury’s determination, this factor weighs against admission of the evidence. *Gassler*, 505 N.W.2d at 67. If, however, the defendant’s credibility is the main issue for the jury to consider, this weighs in favor of admitting the impeachment evidence. *Id.*

Although appellant's testimony was important to his defense, the fourth factor does not weigh against admitting evidence of the convictions because A.B. presented appellant's version of events, which was that J.D. left the shotgun near N.E.'s driveway, and J.D. was cross-examined about facing DUI charges, his car being sought in connection with the report of shots fired, and his attempt to work out a deal with police. Appellant does not dispute the district court's determination that his credibility was central to his case.

Because none the five *Jones* factors weighed against admission, the district court did not clearly abuse its discretion in ruling that the state could impeach appellant with the terroristic-threats and aggravated-robbery convictions.

Even if the district court erred in ruling that the prior convictions were admissible for impeachment purposes, we conclude that any error was harmless because the error would not have "substantially influence[d] the jury's decision." *State v. Valtierra*, 718 N.W.2d 425, 435 (Minn. 2006). The evidence against appellant was very strong. In statements to police, both J.D. and M.J. identified appellant as being in possession of the shotgun, and J.D.'s trial testimony was consistent with his statement to police. J.D. led police to the gun's location near N.E.'s driveway, and both J.D. and A.B. testified that they had been near N.E.'s driveway with appellant on the night of April 21. Finally, although A.B.'s testimony suggested that J.D. may have possessed the gun, only appellant's shoes were consistent with the footprints found near the gun.

Affirmed.