STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1869

State of Minnesota,
Respondent,

vs.

Michael F.A. Wind,
Appellant.

Filed February 12, 2008
Affirmed
Hudson, Judge

Cass County District Court
File No. 11-K5-05-1185

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Earl E. Maus, Cass County Attorney, Cass County Courthouse, 300 Minnesota Avenue, P.O. Box 3000, Walker, Minnesota 56484-3000 (for respondent)

John M. Stuart, State Public Defender, Leslie J. Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Hudson, Judge.

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

HUDSON, Judge

In this appeal from a conviction of second-degree felony murder, appellant argues that (1) the evidence was insufficient to prove that he had the requisite intent to harm the

victim; (2) the district court abused its discretion by admitting appellant's prior convictions for impeachment purposes without properly analyzing their admissibility under the *Jones* factors and the admission of his prior convictions impermissibly chilled appellant's constitutional right to testify in his own defense; and (3) the jury selection was improper. Because there was sufficient evidence to support appellant's conviction, the district court did not abuse its discretion by admitting evidence of appellant's prior convictions and appellant did not show that jury selection was improper, we affirm.

FACTS

On the evening of September 24, 2005, two girls went for a walk in Cass Lake, Minnesota, accompanied by one of the girls' dogs. At one point, the girls were approached by appellant Michael Wind, who was walking his own dogs. The girl's dog moved towards appellant's dogs and appellant yelled at the dog to leave his dogs alone. Appellant then began kicking the girl's dog in the stomach and head. One of the girls yelled at appellant in an attempt to get him to stop hitting the dog, and appellant told her that he was going to get his shotgun and "come back and shoot you and your friend and your dog." The girls called for help and appellant returned to his house.

When appellant reemerged from his house a few minutes later, he was carrying a large knife, approximately seven inches long. As appellant tried to attack the girl's dog, Warren Tibbetts (the victim), the father of one of the girls, picked up a long mop handle and held it out in front of himself in an attempt to prevent appellant from hurting the dog. The victim's wife later testified that appellant swung at her husband with the knife and hit the mop handle causing her husband to drop it, "[a]nd that's when he lunged at [the

victim] and stabbed him." The victim fell to the ground but got back up and ran into his house; he died shortly thereafter. Appellant ran into some nearby woods.

Law enforcement officials arrived shortly after the incident and tracked appellant to the edge of the woods located near the houses. A Cass County sheriff's deputy arrested appellant and placed him in the rear of his squad car. The deputy later stated that, in his opinion, "[appellant] certainly knew what was going on. He seemed aware of everything and he seemed to know if I said anything what I said." The deputy did not detect the odor of alcohol on appellant.

Cass County charged appellant with one count of intentional second-degree murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2004); one count of unintentional second-degree murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2004), with the underlying felony of second-degree assault in violation of Minn. Stat. § 609.222, subd. 2 (2004); and one count of animal fights in violation of Minn. Stat. § 343.31, subd. 1(1) (Supp. 2005). Appellant pleaded not guilty to all three charges.

The district court denied appellant's motion for change of venue and held a pretrial hearing regarding the admissibility of evidence of appellant's prior convictions for impeachment purposes. Appellant's prior convictions included (1) attempted first-degree DWI in 2003; (2) third-degree burglary in 2003; (3) fourth-degree assault in 2000; (4) attempted use of a motor vehicle without consent in 1999; (5) first-degree criminal damage to property in 1998; and (6) second-degree assault in 1994. The district court heard arguments but reserved its ruling until the close of the state's case during the jury trial.

During trial, the jury heard the testimony of more than ten witnesses. One witness stated: "[The victim] was just standing there and [appellant] stepped back, swung the knife at him and hit him in the chest." Another witness stated that when appellant stabbed the victim "the dog was behind [the victim], so it's not like he was going to get the dog." A third witness stated that after appellant stabbed the victim, "[appellant] continued to chase the dog around the house like he totally ignored what he just did and set his mind back on the dog." The victim's daughter, who was standing about five feet away from her father, saw appellant stab her father in the chest and could "hear the knife go into [her] dad" and heard "when the handle hit [her] dad in the chest." The victim's wife also testified that the knife "made a big loud thud from hitting the handle against his chest."

The medical examiner testified that the victim bled to death as the result of a stab wound to his chest. The medical examiner stated that the knife "went in with enough force, it went right up to the hilt so that the handle touched the skin and made [a] mark," and, in his opinion, "there was a great deal of force used."

During a break in the presentation of the state's case, the district court ruled that it would allow the introduction of appellant's criminal record if he chose to testify. But the district court also stated it would "restrict it to the fact that there were convictions and the type of convictions, not the crime. In other words that there was a felony on such and such a date, or there was gross misdemeanor on such and such a date." Appellant chose to exercise his right not to testify.

At the end of the trial, appellant moved for a judgment of acquittal. The district court granted the motion as to the charge of animal fights but denied the motion as to the two charges of second-degree murder. The jury returned a verdict of not guilty on the charge of intentional second-degree murder and a verdict of guilty on the charges of unintentional second-degree murder and second-degree assault. The district court sentenced appellant to 258 months in prison. This appeal follows.

D E C I S I O N

I

Appellant argues that the evidence was insufficient to support his conviction because it did not show beyond a reasonable doubt that he intended to assault the victim.

In considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The fact-finder has the exclusive function of judging witness credibility and the weight accorded to each witness's testimony. The reviewing court must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Any inconsistencies in the evidence are resolved in favor of the verdict. *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the

defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

The state must prove "beyond a reasonable doubt all of the essential elements of the crime with which the defendant is charged." *State v. Ewing*, 250 Minn. 436, 442, 84 N.W.2d 904, 909 (1957). A person is guilty of unintentional second-degree murder when he "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting." Minn. Stat. § 609.19, subd. 2(1) (2004). "Assault" is defined by statute as "[a]n act done with intent to cause fear in another of immediate bodily harm or death" or "[t]he intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2004); *see* Minn. Stat. § 609.222, subd. 2 (2004) (defining second-degree assault to include "[w]hoever assaults another with a dangerous weapon and inflicts substantial bodily harm." "Intent may be proved by circumstantial evidence including the defendant's conduct" and "may be inferred from events occurring before and after the crime." *Davis v. State*, 595 N.W.2d 520, 525–26 (Minn. 1999). It may also be inferred that "a person intends the natural and probable consequences of their actions." *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). A careful review of the record in this case shows that there was sufficient evidence to support an inference that appellant intended to inflict bodily harm on the victim.

First, several witnesses to the event stated that when appellant stabbed the victim in the chest, the dog was two or three feet away from the victim, sitting on the ground.

Second, the victim's wife and daughter both testified that the knife hit appellant so hard that it made a loud noise. And the medical examiner testified that the knife struck the victim with such force that the handle of the knife left an impression in his skin and that the wound the victim suffered likely required a "great deal of force." Third, although several witnesses testified that they believed appellant was "high" on something at the time, and one of the law enforcement officials stated that appellant was "pretty intoxicated," the sheriff's deputy who arrested appellant testified that appellant seemed coherent and that "his speech was clear . . . [and he] didn't slur his words or anything to that effect." For all these reasons, we conclude that the evidence was sufficient to prove beyond a reasonable doubt that appellant intended to inflict bodily harm on the victim and to support appellant's conviction for unintentional second-degree murder.

II

Appellant argues that the district court abused its discretion by allowing the state to introduce evidence of appellant's prior felonies for impeachment purposes if appellant chose to testify. Appellant maintains that (1) the district court failed to sufficiently consider and analyze the *Jones* factors, and (2) the district court's decision unfairly chilled his constitutional right to testify in his own defense and violated his right to present a defense.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). A

district court's decision to admit prior-conviction evidence for impeachment purposes is reviewed for a clear abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Evidence that a witness has been convicted of a crime punishable by imprisonment of more than one year may be admitted for impeachment purposes if the district court determines that the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a). To determine whether prior felony convictions are admissible to impeach witnesses, district courts consider the five-factor test set out in *State v. Jones*, 271 N.W.2d 534, 537–38 (Minn. 1978):

> (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 (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

"[A] district court should demonstrate on the record that it has considered and weighed the *Jones* factors." *State v. Swanson*, 707 N.W.2d 645, 654–55 (Minn. 2006).

Here, the district court held a pretrial *Jones* hearing during which the parties presented arguments regarding the use of appellant's prior convictions for impeachment purposes. During trial, the district court ruled on the admissibility of the prior convictions and decided to allow the introduction of appellant's criminal record if he chose to testify. But the district court also decided to restrict the admission of evidence regarding appellant's prior convictions "to the fact that there were convictions and the type of convictions, not the crime."

> I think this strikes a fair balance between giving a full picture of the criminal history, which goes to credibility of the witness, without getting into the particulars of the type of offense which would be unduly prejudicial in this case particularly the assaults. . . . And since they are questions of credibility and the criminal history of a person is part of the credibility, that's why I'm doing it that way.

The district court acknowledged the importance of appellant's testimony and explained that it had "weighed the possible prejudice versus the probative value" of admitting evidence of appellant's prior convictions.

Based on the record, it is clear that the district court considered and weighed the *Jones* factors in making its decision regarding the admission of appellant's prior convictions. And in his supplemental brief, appellant concedes that "it appears that [appellant's] convictions were evaluated using the factors in *State v. Jones*." Moreover, an analysis of the *Jones* factors shows that the district court did not abuse its discretion when it decided to allow the admission of evidence of appellant's prior convictions.

First, knowledge of appellant's history of prior convictions would assist the jury in evaluating appellant's testimony. Prior convictions, even for crimes that do not involve dishonesty, have probative value in allowing the jury to assess witness credibility through the ability to "see the whole person and thus to judge better the truth of his testimony." *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Dec. 11, 2001). The "whole person" doctrine is based on the principle that

> [t]he object of a trial is not solely to surround an accused with legal safeguards but also to discover the truth. . . . When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking

> them to take his word. . . . Lack of trustworthiness may be evinced by [the defendant's] abiding and repeated contempt for laws [that] he is legally and morally bound to obey . . . .

State v. Brouillette, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted); *see, e.g.*, *Swanson*, 707 N.W.2d at 650, 653–55 (holding that prior convictions of motor-vehicle theft, assault, criminal vehicular operation, and possession of stolen property were admissible in trial for first-degree felony murder, second-degree murder, kidnapping, and false imprisonment because they were relevant under "whole person" analysis to better evaluate defendant's truthfulness).

Second, appellant's prior convictions occurred between 1994 and 2003. Appellant's earliest conviction, for second-degree assault, occurred in 1994, but appellant was not discharged for that conviction until 1998. Minnesota Rule of Evidence 609(b) states, in relevant part, that

> [e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Therefore, none of appellant's convictions were precluded for impeachment purposes under the ten-year rule of rule 609(b). And, given appellant's lengthy confinement, none of the convictions was so old that the second *Jones* factor weighed against its admissibility.

Third, the similarity of appellant's past crimes is irrelevant in this case. "The more similar the alleged offense and the crime underlying a past conviction, the more likely it is that the conviction is more prejudicial than probative." *Swanson*, 707 N.W.2d at 655 (citing *Jones*, 271 N.W.2d at 538). But the danger of prejudice can be substantially lessened by preventing the facts underlying the prior conviction from coming into evidence, and by the use of a cautionary instruction. *Vanhouse*, 634 N.W.2d at 720; *Brouillette*, 286 N.W.2d at 708. Here, the district court allowed the state to present evidence of appellant's prior convictions but restricted the state's presentation to the fact that appellant had been convicted, not the nature of those convictions.

Fourth, credibility was a central issue in this case because appellant claimed he did not intend to harm the victim. A court "may exclude a prior conviction if it determines that its admission for impeachment purposes would cause the defendant not to testify and if it is more important for the jury to hear defendant's version of the case." *State v. Heidelberger*, 353 N.W.2d 582, 590 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984). But "[i]f credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Swanson*, 707 N.W.2d at 655. Furthermore, appellant was able to present his defense, voluntary intoxication, to the jury through cross-examination and closing arguments. And the jury was instructed on the defense of voluntary intoxication as it related to appellant's intent. Therefore, the fourth and fifth *Jones* factors also weigh in favor of the admission of evidence of appellant's prior convictions.

We conclude that the district court properly considered the *Jones* factors and did not abuse its discretion by deciding that the state could introduce evidence of appellant's prior felonies for impeachment purposes if appellant chose to testify.

Appellant also argues that the district court's decision to admit evidence of his prior convictions if he chose to testify "chilled [his] exercise of his federal and state constitutional right to testify in his own defense." But the supreme court has stated that "[t]he mere fact that a trial court would allow impeachment evidence if a defendant chooses to testify does not necessarily implicate his constitutional right to testify in his own defense." *State v. Gassler*, 505 N.W.2d 62, 68 (Minn. 1993). "At a minimum, in order to prevail on this argument, appellant would have to show that the trial court abused its discretion in ruling that the probative value of the impeachment evidence outweighed its prejudicial effect." *Id*. We conclude that appellant has not shown that his right to testify in his own defense was violated by the district court's ruling.

III

Finally, in his pro se supplemental brief, appellant argues that jury selection was improper because a member of the jury was his step-cousin, and that a member of the jury was actually struck by the defense during *voir dire*. This court reviews a district court's response to improper seating of a biased juror for abuse of discretion because the district court is best capable of determining the prospective juror's testimony and demeanor. *See State v. Anderson*, 603 N.W.2d 354, 356 (Minn. App. 1999), *review denied* (Minn. Mar. 14, 2000) (stating that this court "will not lightly substitute its own judgment for that of the trial judge" when reviewing a juror bias claim). Appellant has

not alleged any facts that tend show that the jury selection was improper or that he was prejudiced by the jury selection.

In his pro se supplemental brief, appellant also argues that the district court abused its discretion when it denied his motion for a change of venue because he could not obtain an unbiased jury due to the publicity his case had received. This court defers to a district court's discretionary decision to deny a motion for a change of venue. *State v. Berkovitz*, 705 N.W.2d 399, 408 (Minn. 2005). Additionally, an appellant must show that he suffered actual prejudice. *Id*. "To receive a new trial based on the denial of a change venue motion as a result of pretrial publicity, a defendant must show that the publicity affect[ed] the minds of the specific jurors involved in the case." *Id*. (alteration in original) (quotation omitted). Here, appellant has made no such showing.

Affirmed.