STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2439

State of Minnesota,
Respondent,

vs.

Brandon K. Benson,
Appellant.

Filed April 22, 2008
Affirmed in part and reversed in part
Ross, Judge

Scott County District Court
File No. CR-06-9091

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

Patrick J. Ciliberto, Scott County Attorney, Michael J. Groh, Assistant County Attorney, 200 Fourth Avenue West, Shakopee, MN 55379 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson, Judge.

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

ROSS, Judge

Brandon Benson appeals from his convictions of and sentence for domestic assault by strangulation and fifth-degree assault. He argues that the district court abused its discretion by admitting evidence of past domestic abuse and by ruling that the state could introduce four felony convictions to impeach Benson if he chose to testify. He also contends that the district court erroneously convicted him both of domestic assault by strangulation and fifth-degree assault because the latter is a lesser included offense of the former. We hold that the district court acted within its discretion in making its evidentiary rulings. But because fifth-degree assault is a lesser included offense of domestic assault by strangulation, we reverse Benson's conviction of fifth-degree assault. The district court's judgment is otherwise affirmed.

FACTS

According to P.N., on April 6, 2006, P.N. was cooking in the home that she shared with Brandon Benson when Benson apparently was offended that P.N. declined his offer to help. Benson reacted by forcefully clasping P.N. around the neck, applying enough pressure to prevent her from speaking and to restrict her breathing. After Benson stopped choking her, he apologized but questioned, "[W]hy [do] you have to make me hurt you?" P.N. reported the assault to police. The state charged Benson with domestic assault by strangulation and fifth-degree assault.

Before trial, the district court ruled that if Benson testified, the state could introduce prior felony convictions of theft, burglary, receipt of stolen property, and criminal-sexual

conduct, to impeach Benson's credibility. At trial, the district court admitted P.N.'s testimony of Benson's four prior acts of domestic abuse against her. Benson did not take the stand, but his friend testified in support of Benson's alibi defense that he and Benson were together elsewhere when P.N. claimed that the strangulation had occurred in her home.

P.N. testified to the strangulation and also to four recent incidents of domestic abuse. She testified that in the prior year, Benson had tied her down and sexually penetrated her anally; forced her to the passenger side of a car that she was driving and fled into the woods when police attempted to intervene; kicked in the door to her apartment, punched a hole in a wall, dragged her by her hair, and punched her in the head; and, two days before the strangulation, slapped her, pulled her hair, and threatened to kill her after he saw her with another man.

An agent of the department of corrections interviewed P.N. the day after the strangulation. That agent testified that P.N.'s trial testimony corroborated her statements in that interview. She also testified that P.N. told her about two of Benson's most recent acts of domestic abuse, including the death threat.

The jury convicted Benson of domestic assault by strangulation and fifth-degree assault. The district court sentenced him to 24 months' incarceration. He appeals.

D E C I S I O N

I

Benson argues that the district court abused its discretion by admitting evidence of his prior domestic abuse of P.N. We defer to a district court's evidentiary rulings and

will not reverse them unless they show a clear abuse of discretion. *State v. Woelfel*, 621 N.W.2d 767, 773 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001). Past incidents of similar domestic assault by the accused against the victim are admissible under Minnesota Statutes section 634.20 unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury. Minn. Stat. § 634.20 (2004); *see State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (noting that the supreme court has "on numerous occasions recognized the inherent value of evidence of past acts of violence committed by the same defendant against the same victim").

Benson maintains that evidence of his prior abusive acts unfairly prejudiced his defense. He acknowledges that by "unfair prejudice" we are concerned only about "evidence that persuades by illegitimate means, giving one party an unfair advantage." *Bell*, 719 N.W.2d at 641 (quoting *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005)). But we are not persuaded by his contention that admission of the evidence here was unfair. Benson argues that prior-abuse evidence may be admitted under section 634.20 only to illuminate the relationship between a victim and the accused, and that the state unfairly relied on the abuse evidence to show that Benson acted in conformity with his propensity to assault P.N. He points to the state's alleged repetitive references to this conduct throughout the trial and to the state's alleged closing argument that Benson acted in conformity with his bad character. Benson's argument is not convincing.

Benson mischaracterizes the state's closing argument by implying that the prosecutor directed the jury to focus on his pattern of abuse to show bad character.

Evidence of prior domestic abuse under section 634.20 is relevant to assist the jury "by providing a context with which it could better judge the credibility of the principals in the relationship." *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Evidence of a defendant's relationship with the victim "puts the alleged criminal conduct of the defendant in context, may help the jury in assessing the defendant's intent and motivation, and may serve other valid purposes." *State v. Henriksen*, 522 N.W.2d 928, 929 (Minn. 1994). When the prosecutor referred to the evidence in his closing remarks, he expressly informed the jury that the evidence should provide only the relationship context, the specific legitimate use for which the district court had admitted the evidence. And the prosecutor cautioned the jury that it must decide whether the state proved the charged assaults beyond a reasonable doubt. The record does not establish that the jury improperly applied the evidence.

We are also not persuaded by Benson's suggestion that the state referenced the prior-abuse evidence so frequently that prejudice is apparent. Benson carries the burden to show, not merely to assert, that the evidence was unfairly prejudicial. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) ("On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced."). Benson has not met this burden.

Although we may agree with Benson's characterization of the incidents of his prior abuse of P.N. as "outrageous," he demonstrates only that the evidence is damaging to his defense, not that it must be barred because its probative value is overcome by a significant likelihood of unfairness. This deficiency alone prevents reversal on this issue,

but we add that even if there was a showing of unfair prejudice, the prejudice was adequately addressed by the cautionary remarks to the jury.

Cautionary instructions generally mitigate any unfairly prejudicial impact of the prior incidents. For example, in *State v. Waino*, we upheld a conviction over the defendant's challenge to the admission of evidence of prior incidents of domestic violence, specifically noting that the trial court's cautionary instruction mitigated any unfairly prejudicial effects of the evidence. 611 N.W.2d 575, 579–80 (Minn. App. 2000). Before P.N.'s testimony and again during formal instructions, the district court advised the jury that Benson was not on trial for the prior incidents. The court also instructed the jury regarding the proper use of the prior-abuse evidence. We assume that a jury follows the district court's instructions. *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998). In its closing, the state reminded the jury that Benson was not on trial for his prior acts and explained the legitimate purpose of the evidence.

Benson has shown no unfair prejudice, and any concern about unfair prejudice was remedied by the cautionary jury instructions. We discern no abuse of discretion by the district court's admission of prior incidents of domestic abuse under section 634.20.

II

Benson argues that the district court abused its discretion by ruling that if Benson testified, the state could introduce four prior felony convictions to impeach his testimony. We review a district court's ruling on the admissibility of prior convictions also for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Evidence of prior convictions is admissible if the convictions were punishable by death or

imprisonment for more than a year and if the district court determines that the probative value of admitting the evidence outweighs its prejudicial effects. *See* Minn. R. Evid. 609(a)(1). A district court must consider five factors on the record when deciding whether to admit evidence of prior convictions: (a) the impeachment value of the prior conviction, (b) the date of the conviction and defendant's subsequent history, (c) the similarity of the prior conviction with the charged crime, (d) the importance of the defendant's testimony, and (e) the centrality of the credibility issue. *State v. Jones*, 271 N.W.2d 534, 537–38 (Minn. 1978).

The district court applied the *Jones* factors when it considered whether to admit evidence of Benson's convictions for receiving stolen property, burglary, third-degree criminal sexual conduct, and theft. Benson argues that only the second of the five *Jones* factors weighs in favor of admitting evidence of his prior convictions. He argues that because the other four factors weigh against admitting the convictions, the district court abused its discretion by admitting the evidence. We therefore review whether the district court properly considered the evidence under the remaining four factors.

Benson maintains that the cases applying *Jones* have reduced the first factor—the impeachment value of a prior crime—to a mere "rubber stamp for admissibility." Specifically, Benson is concerned that evidence of any prior crimes might *always* be admitted, noting the supreme court precedent that "impeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (quotation omitted). The district court expressly relied on *Gassler*, but Benson urges us to apply *Jones* without

Gassler's "whole person" rationale. We decline to reject binding precedent. *See Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n.1 (Minn. App. 1986) (emphasizing that Minnesota Supreme Court precedent binds this court), *review denied* (Minn. Nov. 19, 1986). The district court appropriately followed *Gassler* and did not abuse its discretion when, in doing so, it concluded that the first factor favors admission of the evidence.

Benson argues that the third *Jones* factor, regarding the similarity of past convictions, weighs against admitting the evidence of his prior convictions. He acknowledges that his convictions for receiving stolen property, burglary, and theft, "are dissimilar to the charged offenses." But he argues that because there is always a potential for a jury to punish a defendant for past convictions, this factor weighs against admission of those convictions. Accepting this argument would require district courts to apply a rubber stamp *against* admission of conviction evidence in every case. Our assumption that jurors will follow instructions and properly consider the evidence of prior convictions leads us to reject the argument. This leaves us to consider the third *Jones* factor in relation to evidence of Benson's prior conviction of criminal-sexual conduct.

The admission of evidence of convictions far more similar to the charged offense than in Benson's case have been found not to constitute abuses of discretion. *See, e.g.*, *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (holding no abuse of discretion to refuse to prohibit the use of defendant's prior rape conviction in his trial for criminal sexual conduct); *State v. Brouillette*, 286 N.W.2d 702, 708 (Minn. 1979) (holding no abuse of discretion in refusing to prohibit evidence of defendant's prior conviction for third-degree criminal sexual conduct in trial for fourth-degree criminal sexual conduct).

Although in *Bettin* the supreme court noted that the conviction-charge similarities weighed against admission, it affirmed the district court's decision to admit the evidence. Benson's charges of domestic assault by strangulation and fifth-degree assault are less similar to his prior conviction for third-degree criminal sexual conduct than the conviction-charge pairings in *Bettin* and *Brouillette*. Benson's sexual-conduct conviction is somewhat similar to the offenses charged here only because all are crimes against persons, but they are not so similar that we would deem the district court's comparison of them under the third *Jones* factor to constitute an abuse of discretion.

We will consider the final two *Jones* factors together. "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). Benson argues that his credibility was not central because his alibi witness testified in his defense and because Benson's credibility was no more pivotal to the case than that of any other witness's credibility. Where a criminal defendant presents an alibi defense for which his testimony is the only evidence, credibility is a central issue. *Id.* at 655-56. And another witness's potentially corroborating testimony does not diminish the centrality of the defendant's credibility. In examining whether a defendant's credibility is central, we consider the defendant's defense theory along with what the jury would have heard if the defendant had testified. *State v. Mitchell*, 687 N.W.2d 393, 398 (Minn. App. 2004), *review granted* (Minn. Dec. 22, 2004), *review denied* (Minn. Dec. 13, 2005). In *Mitchell*, the defendant did not testify, but his version of the events was presented to a jury. Because the jury was required to choose between the defendant's version of events and

the state's version, the defendant's credibility was central to the case. *Id.* Similarly, in *State v. Flemino*, 721 N.W.2d 326, 329–30 (Minn. App. 2006), a jury was required to choose between the defendant's version of events and the victim's. In *Flemino*, the defendant was charged with burglary and assaulting his ex-girlfriend. *Id*. at 327. Although he did not take the stand, the state introduced a recording in which the defendant admitted that he was present at but denied participating in the burglary, stating that someone else had struck the victim. *Id*. at 327–28. This court rejected the defendant's argument that his credibility was not central because there was a corroborating witness, reasoning, "There were only two eyewitnesses to the crime of which [the defendant] was convicted, namely, [the defendant and the victim. The defendant's] credibility was a central issue." *Id*. at 329.

Here, as in *Flemino*, according to the victim, only the accused and the victim were present at the scene of the crime of which the accused was convicted. Although Benson offered an alibi witness, Benson's credibility remained central. If the jury disbelieved Benson's testimony that he was not at P.N.'s home at the time of the assault and that he did not assault P.N., his alibi would fail and his conviction would be certain. The district court reasonably assessed the fifth *Jones* factor—the centrality of credibility—to weigh in favor of admitting Benson's prior convictions. *See Swanson*, 707 N.W.2d at 655 ("If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions."). Although the district court concluded that Benson's credibility was central, it also concluded that the fourth *Jones* factor, the importance of his testimony, weighed against admission. Under *Swanson*, because the

district court concluded that Benson's credibility was central, the importance of his testimony would weigh in favor of, not against, admission. *Id.*

From our review of the *Jones* factors as applied by the district court, we conclude that the district court did not abuse its discretion by admitting the evidence.

III

Benson argues that the district court erred by convicting him of both fifth-degree assault and domestic assault by strangulation. There is no dispute on this issue. The state concedes that Benson should not have been convicted of both offenses because fifth-degree assault is an included offense of domestic assault by strangulation.

We agree with the parties that Benson may not be convicted of both offenses. A defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2004). An included offense is a "crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(4); *see State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986) ("A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former."). A person commits domestic assault by strangulation if he "assaults a family or household member by strangulation." Minn. Stat. § 609.2247, subd. 2 (2004). And a person commits fifth-degree assault if he "intentionally inflicts or attempts to inflict bodily harm upon another." Minn. Stat. § 609.224, subd. 1(2). Proving that an assault by strangulation occurred necessarily proves an attempt to harm another, which is an element of the assault charge. It is impossible to commit an assault by strangulation without committing an assault. We therefore hold that fifth-degree assault is an included

offense of domestic assault by strangulation. We reverse Benson's conviction of fifth-degree assault without disturbing his conviction of domestic assault by strangulation.

Affirmed in part and reversed in part.