STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0113

State of Minnesota,
Respondent,

vs.

Jermaine Perry,
Appellant.

Filed May 20, 2008
Affirmed
Peterson, Judge

Ramsey County District Court
File No. K7-06-1109

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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

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

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

PETERSON, Judge

In this appeal from a conviction of motor-vehicle theft, appellant argues that (1) the evidence was insufficient to prove beyond a reasonable doubt that he committed the offense and (2) the district court erred in allowing the state to introduce evidence of two prior felony drug convictions for impeachment purposes. We affirm.

FACTS

A blue 2001 Ford Ranger truck was taken from the parking lot of a hotel in Bloomington on February 21, 2006. The truck's owner was at a conference at the hotel when his coat, which contained the keys to the truck, was taken from a coat stand outside the conference room. When he discovered that his coat was missing, he went to the parking lot and discovered that his truck had been stolen.

Around 6:00 p.m. on March 17, 2006, police officers responded to a 911 call reporting a single-car accident on Burgess Street in Saint Paul. Before they arrived at the scene, officers Eric Meyers and Patrick Daly received information that the license-plate number of the vehicle involved in the accident matched that of the blue 2001 Ford Ranger that had been stolen in Bloomington four weeks earlier. At the scene, the officers saw appellant looking inside the hood of a blue Ford Ranger with significant front-end damage and, after verifying the license-plate number of the truck, they arrested appellant. Appellant told the officers that his friend "Roy" had been driving the truck and left immediately after the accident. The officers saw no other person when they arrived.

Because there was a significant amount of fresh snow on the ground, the officers searched for tracks in the snow that would indicate that someone had left the scene. But they found no tracks, and they did not locate anyone named Roy. While investigating the accident, Meyers noticed that the floor mats on the driver's side of the truck were wet and the floor mats on the passenger's side were dry.

Appellant was charged with theft of a motor vehicle in violation of Minn. Stat. § 609.52 subds. 2(17), 3(3)(d)(v) (2004 & Supp. 2005). At appellant's trial, the state called three witnesses who lived near the accident site. The first of these witnesses, Mark Olson, was sleeping on the couch in his front room when he heard a loud crash. Olson estimated that it took him 30 seconds to move from the couch to his front door, where he saw the front end of a pickup smashed into a tree on the boulevard directly in front of his home on Burgess Street. By the time Olson stepped onto his front porch, the truck had backed onto the street and traveled a short distance before breaking down. Olson testified that at that moment, he had an unobstructed view and was able to identify appellant as the driver of the truck. He saw no footprints in the snow around the crash site and saw no one fleeing the scene.

The second witness, Tamara Meisel, was in the upstairs bedroom of her home on Burgess Street when she heard a loud crash. Meisel estimated that it took her approximately two seconds to move to the bedroom window, where she saw from an unobstructed view that a truck had crashed into a tree on the boulevard below and was attempting to quickly back out. She ran downstairs and into the street, which she estimated took a minute or less, and followed the now-moving truck on foot until it

eventually died further down on Burgess Street. She testified that upon reaching the truck, she saw appellant leaning outside the truck.

The third witness, ten-year-old R.M., was standing with her dog outside the gate to her yard when she saw a truck with only one occupant swerving as it drove down the block. She was ten to 15 feet from the truck when she saw it hit the boulevard tree. After witnessing the crash, R.M. immediately put her dog inside the fence, which she estimated took roughly 30 seconds. She saw no one leave the truck and saw no footprints in the snow.

The defense called two witnesses, Jeanette Stevenson and Tiffany Janusiak, who both testified that they saw a short, black male run from the truck following the crash. Stevenson, who was two blocks from the scene and remained there for only a minute, testified that the short male got out of the vehicle and ran through a park. Janusiak testified that she was walking home from a friend's house on Burgess Street when she witnessed the crash and saw a short male get out of the driver's side of the truck and run from the scene after roughly 30 seconds. She stated that the accident occurred on Farrington Street, rather than Burgess Street. Stevenson did not speak with an investigator until two weeks after the crash, and Janusiak was not contacted by an investigator until about five months after the accident.

The defense next called Roy Crawford, who testified that he was not in the truck with appellant on March 17, 2006. Crawford also testified that he had previously signed a paper stating that he was the driver of the vehicle, and he acknowledged that this had been a mistake. On cross-examination, Crawford testified that he had signed the paper

because he was already facing prison time and appellant offered him money if he "took the case for him." Crawford stated that he later changed his mind because appellant did not make the agreed-on payment.

Appellant testified that he had known Roy Crawford for one and one-half months and asked him for a ride on March 17, 2006. He testified that Crawford told him that the truck belonged to Crawford's boss and that he saw nothing that indicated that the truck had been stolen. Appellant testified further that after Crawford hit the tree, he left to call AAA. He stated that he did not move the truck after the accident and never felt the need to leave the scene, despite his previous felony convictions for two drug offenses and for fleeing police in a motor vehicle. The district court had earlier ruled that the state could introduce evidence of these convictions for impeachment purposes but could not introduce evidence of a conviction for motor-vehicle theft.

The jury found appellant guilty of motor-vehicle theft, and appellant was sentenced to the presumptive executed term of 21 months in prison. This appeal followed.

D E C I S I O N

I.

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 the light most favorable to the conviction, is sufficient to support the verdict reached by the jury. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438

N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Accordingly, we 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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

To secure a conviction for theft of a motor vehicle, the state must prove beyond a reasonable doubt that the defendant (1) took or drove a motor vehicle without the consent of the owner or an authorized agent of the owner and (2) knew or had reason to know that the owner or an authorized agent of the owner did not give consent. Minn. Stat. § 609.52 subd. 2(17) (Supp. 2005). Appellant argues that the state failed to satisfy its burden of proving both of these elements beyond a reasonable doubt.

With respect to whether appellant drove the truck, R.M. saw a lone driver hit the tree, and Mark Olson and Tamara Meisel saw a lone driver back the truck into the street and travel a short distance. Both Olson and Meisel positively identified appellant as the driver; Olson had an unobstructed view of the driver from his front porch, and Meisel saw the driver after chasing the truck a short distance before it stopped.

Appellant contends that Crawford crashed the truck into the tree before quickly leaving the scene on foot. Appellant argues that because it took Olson roughly 30 seconds to awaken from his nap, Meisel a minute or less to make her way outside, and R.M. 30 seconds to turn back to the scene after putting her dog inside the fence, none of these witnesses saw the entire accident, including Crawford's flight. But even if none of

these three witnesses saw the entire sequence of events, all of them saw a lone occupant driving the truck, and two of them identified appellant as the driver.

There is also circumstantial evidence that appellant was driving the truck. "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). Both Olson and R.M. testified that they saw no tracks in the snow around the crash site. Also, the officers who responded to the 911 call found no tracks in the snow, and one of the officers testified that the floor mats on the driver's side of the truck were wet, while the mats on the passenger's side were dry. This evidence supports an inference that appellant was the only person in the truck.

With respect to whether appellant knew or should have known that he did not have consent to drive the truck, appellant testified that Crawford had been driving the truck and told appellant that the truck belonged to Crawford's boss. But Crawford testified that he was not in the truck on the day of the crash and that appellant asked him to accept blame for the crime in exchange for a payment. When reviewing a conviction, we construe the record most favorably to the state and assume the evidence supporting the conviction was believed, while the contrary evidence was disbelieved. *Pieschke*, 295 N.W.2d at 584. Assuming, as we must, that the jury believed Crawford's testimony and did not believe appellant's testimony, the jury could infer that appellant either knew or should have known that the owner or an authorized agent of the owner did not consent to appellant driving the truck because Crawford did not tell appellant that the truck belonged to Crawford's boss and appellant offered Crawford money in exchange for

Crawford accepting responsibility for the crime. The evidence is sufficient to permit the jury to conclude beyond a reasonable doubt that appellant drove the truck without consent and that appellant knew or had reason to know that the owner did not consent to appellant driving the truck.

II.

Appellant argues that because the prejudicial impact of his 1999 and 2002 third-degree controlled-substance convictions, which both involved the sale of cocaine, outweighed any probative value of the convictions, admitting evidence of the convictions for impeachment purposes was prejudicial error. A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998); *see also State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985) (stating that whether probative value outweighs prejudicial effect is an issue committed to district court's discretion).

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

Minn. R. Evid. 609(a). Some of the factors that the district court should consider when determining whether to restrict the use of prior convictions are:

> "(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."

Ihnot, 575 N.W.2d at 586 (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). The district court should demonstrate on the record that it considered and evaluated the five *Jones* factors. *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). In the present matter, the district court stated its findings regarding these factors on the record.

1. Impeachment Value

The district court determined that because neither of the drug offenses involved inherent dishonesty, this factor weighed against admission.

2. The Date of the Convictions and Appellant's Subsequent History

Evidence of a conviction is generally inadmissible if a period of more than ten years has passed since the date of the conviction, or since the witness was released from the confinement imposed for the conviction, whichever is later. Minn. R. Evid 609(b). Appellant's drug convictions occurred in 1999 and 2002, less than ten years before the current offense, and demonstrate repeated criminal conduct. The second *Jones* factor favors admission of the convictions. *See Ihnot*, 575 N.W.2d at 586 (stating that when pattern of lawlessness exists, prior offenses remain relevant over time).

3. The Similarity of the Prior Convictions to the Offense Charged

Under the third *Jones* factor, the greater the similarity between the charged offense and the offense underlying a prior conviction, the greater the chance that the conviction is more prejudicial than probative. *Id.* The primary concern is that the jury will consider

the prior conviction not only as impeachment evidence, but also as substantive evidence. *State v. Pendleton*, 725 N.W.2d 717, 728-29 (Minn. 2007). However, proper jury instructions will serve to protect the defendant from this possibility. *Id.* at 729.

Here, the district court properly instructed the jury about its consideration of the impeachment evidence. And appellant concedes that the drug offenses are not similar to motor-vehicle theft. The third *Jones* factor favors admission of the drug-offense convictions.

4. & 5.The Importance of Defendant's Testimony and The Centrality of the Credibility Issue

The fourth and fifth *Jones* factors weigh heavily in favor of the admission of evidence of prior convictions if credibility is central to the case. *Swanson*, 707 N.W.2d at 655. Appellant's testimony and credibility were central to his defense. When appellant testified in direct contradiction to Crawford that Crawford was driving the truck and had told appellant that Crawford's boss owned the truck, appellant made his credibility a central issue for the jury. Even though other witnesses testified that they saw a man get out of the truck and run from the scene, those witnesses did not identify the man they saw running. Only appellant identified Crawford as the driver.

The Minnesota Supreme Court has stated:

> "[T]he general view is that if the defendant's credibility is the central issue in the case that is, if the issue for the jury narrows to a choice between defendant's credibility and that of one other person then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater."

Ihnot, 575 N.W.2d at 587 (quoting *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980)). The fourth and fifth *Jones* factors favored admission of evidence about appellant's drug convictions.

Based on its determination that at least four of the five *Jones* factors favored admission, the district court concluded that the probative value of admitting evidence of the drug convictions outweighed any prejudicial effect and allowed the state to use the convictions for impeachment purposes. Appellant has not shown that in reaching this conclusion, the district court clearly abused its discretion.

Affirmed.