STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0717

State of Minnesota,
Respondent,

vs.

Scott Michael Steele,
Appellant.

Filed June 10, 2008
Affirmed
Poritsky, Judge[*]

Scott County District Court
File No. CR-06-21802

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

Patrick Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Scott County Justice Center, Suite 340, 200 West Fourth Avenue, Shakopee, MN 55379 (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Poritsky, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

PORITSKY, Judge

Appellant challenges his convictions of first-degree aggravated robbery, Minn. Stat. § 609.245, subd. 1 (2006), and first-degree burglary, Minn. Stat. § 609.582, subd. 1(a)-(c) (2006), arguing that the district court erred when it ruled that the state could impeach him with evidence of his prior convictions if he were to testify. In his pro se supplemental brief, appellant argues that (1) his trial counsel was ineffective and (2) the evidence is insufficient. We affirm.

FACTS

Around midnight on August 30, 2006, three masked men entered the apartment of S.M. and R.B. S.M. had been smoking marijuana and was watching television in his room while he waited for two women, K.P. and L.C., to come over, ostensibly to buy marijuana from him; R.B. was asleep. Neither S.M. nor R.B. was able to get a good look at the intruders, whose faces were concealed under white bandannas. As an additional precaution, the intruders ordered S.M. to lie down and pull the bed covers over his face and sprayed R.B. with mace.

K.P. and L.C. arrived while the intruders were searching through S.M.'s and R.B.'s possessions. One of the robbers, referred to as "Q" or "Quincey," answered the door. Despite his mask, K.P. and L.C. immediately recognized the robber as Jeremy Queen by his voice and the shape of his head. Queen pulled K.P. into the apartment and ordered her and L.C. upstairs. Once inside, both women immediately recognized appellant Scott Steele despite the mask; as with Queen, they knew him well, and were

able to recognize Steele's voice and bearing. K.P. also immediately recognized the third robber as Adam Foth, with whom she had been, at one time, romantically involved. But L.C. was less certain of Foth's identity.

The robbers ordered K.P. and L.C. to lie down on the floor of S.M.'s room. Queen, Steele, and Foth rifled through their purses, taking a wallet and their cell phones. L.C., feeling safe because she knew the masked men, attempted to get up from the floor. She was sprayed with mace and thrown back down.

When the robbers left, K.P. and S.M. each called the police. Although S.M. gave a statement to the responding officers, he was unable to identify the intruders. The women, K.P. and L.C., however, gave statements identifying Queen, Steele, and Foth. As a result of this identification, Steele was charged with one count of first-degree aggravated robbery, Minn. Stat. § 609.245, subd. 1 (2006), and three counts of first-degree burglary, Minn. Stat. § 609.582, subd. 1(a)-(c) (2006). The jury found him guilty of all charges, and this appeal followed.

D E C I S I O N

I.

Steele challenges the district court's pretrial ruling permitting the state to impeach him with evidence of his prior convictions.[1] 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

[1] Although Steele did not testify, the issue is nonetheless preserved for appeal. *State v. Jones*, 271 N.W.2d 534, 537 (Minn. 1978) (holding that defendant is not required to testify and be impeached in order to preserve the issue for appeal.).

evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a). To determine whether the probative value of the evidence outweighs the prejudicial effect, a district court must consider:

> (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.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). This court will affirm a district court's ruling on the admissibility of prior convictions for impeachment purposes absent a clear abuse of discretion. *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006).

Before trial, the state moved to admit Steele's eight prior felony convictions should he choose to testify. After considering the *Jones* factors, the district court concluded that if Steele were to testify, the state could impeach him with the following convictions: a 1998 unauthorized use of a motor vehicle; two convictions of theft, from 1999 and 2000; a 2003 conviction of receiving stolen property; and two convictions of third-degree assault, from 2003 and 2005. The district court excluded Steele's two burglary convictions.

Regarding the first *Jones* factor, Steele argues that the convictions admitted had little impeachment value because they had no bearing on his truthfulness. This argument is unpersuasive. Minnesota adheres to the "whole person" doctrine, which recognizes that a crime does not need to involve dishonesty to have impeachment value. *See, e.g.*, *State v. Pendleton*, 725 N.W.2d 717, 728 (Minn. 2007) (permitting impeachment with

prior terroristic-threats and fleeing-a-peace-officer convictions in trial for first-degree premeditated and felony murder). This 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).

Steele asserts that "[i]t is time for the Minnesota courts to reexamine the 'whole person' rationale" under the first *Jones* factor because "not all prior crimes bear on credibility." But Minnesota caselaw has upheld this doctrine notwithstanding criticism:

> Although credibility might be most directly and concretely assessed through considerations of past dishonesty that not only rose to the level of a crime but that also were established beyond a reasonable doubt, credibility in evidence law is broader than just those types of crimes. Bias, prior inconsistent statements, contradiction, and faulty perception or inaccurate recollection all implicate credibility, even though they might not involve dishonesty. The broader credibility reflected in the felony category of impeachment prompts the question . . . of whether a person who violates the law in a serious way can be trusted to tell the truth in the matter at issue.

State v. Flemino, 721 N.W.2d 326, 329 (Minn. App. 2006) (citations omitted). Moreover, Steele did not challenge the "whole person" doctrine before the district court, and by failing to do so, has waived the argument. *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007). In any event, even if the issue were properly before us, the "task of extending existing law falls to the supreme court or the legislature," not this court.

Tereault v. Palmer, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

The second *Jones* factor concerns the dates of the prior convictions and the defendant's subsequent history. Here, Steele had a series of eight felonies (including the two burglary convictions that the court excluded) between 1998 and 2005. The trial was held in December 2006. *See Pendleton*, 725 N.W.2d at 728 (acknowledging impeachment value where "the crimes were recent, were within a short time of one another, and would assist the jury in getting a picture of the whole person" (quotation omitted)). This factor weighs in favor of admitting evidence of the prior convictions.

With regard to the third *Jones* factor, the district court must consider the similarity of the prior convictions in light of the increased probability that "when the past crime is similar to the charged crime[,] . . . the jury will use the evidence substantively rather than merely for impeachment purposes." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). Steele argues that his prior convictions of unauthorized use of a motor vehicle, theft, and receiving stolen property are prejudicially similar to the charges in this case because they "all involve Steele being found in possession of items that did not belong to him." But when, as here, the claimed similarity exists only at an abstract and conceptual level, the concern underlying this *Jones* factor is less pressing. *See, e.g.*, *Flemino*, 721 N.W.2d at 329 (rejecting defendant's argument that prior burglary conviction was similar to defendant's robbery charge because "both involved entering a residence and committing a crime therein"). Steele further argues that his prior assault convictions were prejudicially similar "because the burglary/robbery was alleged to have been executed

with a firearm." But the fact of any prior use of a firearm would not have been presented to the jury because prior-crime evidence of an accused "must be limited to the fact of conviction, the nature of the offense, and the identity of defendant." *State v. Williams*, 297 Minn. 76, 84, 210 N.W.2d 21, 25 (1973). Moreover, any risk to Steele could have been reduced by cautionary instructions, which we presume the jury follows. *Flemino*, 721 N.W.2d at 329.

The fourth *Jones* factor—the importance of the defendant's testimony—generally weighs in favor of excluding the defendant's prior convictions. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) ("[The defendant's] version of the facts may be centrally important to the result reached by the jury. If so, this fact would support exclusion of the impeachment evidence if by admitting it, [the defendant's] account of events would not be heard by the jury.") Here, Steele argues that his testimony was "critical to his case because the jury needed to hear him explain where he was" when the burglary/robbery occurred and to explain why three witnesses who knew him well, including an ex-girlfriend, "would all say that [Steele] admitted some involvement with this offense." Because his prior convictions would be admitted if Steele decided to testify, he decided not to do so. This factor weighs in favor of excluding the prior convictions.[2]

[2] We note, however, that the state's theory of the case was that Steele, Queen and Foth were all involved in the offense. A witness, J.H., testified that he was with Queen on the evening of the robbery, until about 12:30 the following morning, much of the time at J.H.'s recording studio in White Bear Lake. J.H.'s testimony tended to contradict the state's theory that Steele, Queen, and Foth committed the robbery/burglary together. Although Steele chose not to testify because of his prior convictions, he was not precluded from presenting other exculpatory evidence.

To the extent that Steele would have testified and asked the jury to accept his testimony, he would be asking the jury to weigh his credibility directly against L.C.'s and K.P.'s testimony, thus implicating the fifth *Jones* factor—the centrality of Steele's credibility. This factor weighs in favor of admitting the prior convictions.

Our review of the five *Jones* factors leads us to conclude that it was within the district court's discretion to rule that if Steele were to testify, his prior convictions of unauthorized use of a motor vehicle, receiving stolen property, theft, and third-degree assault would be admissible.

II.

In his pro se supplemental brief, Steele asserts that trial counsel was ineffective because his attorney was "unprepared and had no trial strategy." Specifically, Steele argues that counsel failed to impeach or call various witnesses and denied Steele's request for a contested probable-cause hearing.

Ordinarily, a claim of ineffective assistance of counsel should be raised in a postconviction petition rather than on direct appeal from a judgment of conviction. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (holding that ineffective-assistance-of-counsel claim should be raised in postconviction petition to permit the district court to review "additional facts to explain the attorney's decision"). But when a claim of ineffective assistance of counsel can be decided on the basis of the trial record and therefore a postconviction hearing is not necessary, the claim must be brought on direct appeal. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004).

Steele's claim that his trial counsel was ineffective because he failed to impeach or call various witnesses is precisely the type of claim we can decide on direct appeal based on the trial record. *See, e.g.*, *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (deciding on direct appeal appellant's claim that counsel was ineffective for failing to call certain witnesses). Steele's claim that trial counsel refused his request to challenge probable cause, however, is beyond the scope of the trial record and cannot, therefore, properly be decided on direct appeal. *Gustafson*, 610 N.W.2d at 321.

The appellant bears the burden of proof on a claim of ineffective assistance of counsel. *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003). To satisfy this burden, the appellant must

> affirmatively prove that his counsel's representation "fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)) (citations omitted).

Steele has not satisfied his burden of proving that his trial counsel's representation was ineffective. Decisions about calling and examining witnesses are tactical decisions properly left to the trial counsel's discretion. *State v. Wright*, 719 N.W.2d 910, 919 (Minn. 2006). Such decisions are not subject to appellate review for ineffective assistance of counsel. *Voorhees*, 596 N.W.2d at 255. As such, Steele's claim fails.

III.

Also in his pro se supplemental brief, Steele challenges the sufficiency of the evidence. When reviewing a challenge to the sufficiency of the evidence, we thoroughly examine the record to determine whether the fact-finder could reasonably find the defendant guilty of the offense charged. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the verdict and disbelieved any contrary evidence. *Id.* We will not disturb the verdict if the fact-finder, 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. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Essentially, Steele argues that the evidence was insufficient to support his conviction because the witnesses' identification testimony was not credible, particularly because K.P. and L.C. changed their stories several times, recanting their initial identifications and subsequently recanting those recantations. K.P. met with Foth and Steele the day after the incident in the hopes of recovering her wallet and cell phone. Foth and Steele, however, denied their involvement. And K.P. believed them; apparently Foth and Steele "made [her] feel like they really didn't do it," convincing K.P. that they would not have robbed a friend. K.P. therefore changed her story, telling the police that she "didn't think that they had anything to do with [the burglary/robbery] and they wouldn't do that to [her]." But K.P. later reverted to her original story, which she also reaffirmed at trial, positively identifying Queen, Foth, and Steele as the masked men

Similarly, L.C. testified that Steele admitted that he, Foth, and Queen had been the masked men, but told L.C. that she "didn't have to testify against him, if [she] didn't want to." According to L.C., Steele both tugged on her heartstrings, pleading with L.C. not to separate him from his child, and also offered her money in exchange for recanting her initial identification. L.C. "just kind of went with it" because she "was emotionally messed up [and] didn't know what was going on," but unequivocally identified Steele at trial.

Steele's argument is without merit. "Assessing the credibility of a witness and the weight to be given a witness's testimony is exclusively the province of the jury." *Francis v. State*, 729 N.W.2d 584, 589 (Minn. 2007). The state introduced evidence that K.P. and L.C., both of whom had known Steele for an extended length of time, recognized Steele as one of the masked men by his voice and bearing. Both positively and unequivocally identified Steele at trial. Identification presents a question of fact, which is determined by the jury. *State v. Yang*, 627 N.W.2d 666, 672 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). If K.P. and L.C. made statements prior to trial that were inconsistent with their trial testimony identifying Steele, it was for the jury to weigh the credibility of each. *Id.* Because we must view the facts in the light most favorable to the jury's verdict, we must assume that the jury believed K.P's and L.C.'s trial testimony

identifying Steele and disregarded any inconsistent statements they made earlier. *Chambers*, 589 N.W.2d at 477.

Affirmed.