**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-0349**

State of Minnesota,
Respondent,

vs.

Melissa Ann Mathre,
Appellant.

**Filed July 8, 2008**
**Affirmed**
**Willis, Judge**

Becker County District Court
File No. K2-05-1159

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Joseph Evans, Becker County Attorney, P.O. Box 476, Detroit Lakes, MN 56502 (for respondent)

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

Considered and decided by Willis, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

**WILLIS,** Judge

Appellant challenges her convictions of fourth-degree assault and obstructing legal process, arguing that the district court abused its discretion by admitting evidence of a prior felony assault conviction and by failing to give a requested jury instruction. Appellant also contends that the prosecutor committed misconduct during closing argument. We affirm.

## FACTS

On August 6, 2005, appellant Melissa Ann Mathre and her boyfriend, Leslie Thompson, attended a music festival in Detroit Lakes. After the final concert of the night, Mathre and Thompson decided to go skinny-dipping in a lake near the festival's campground. As they swam, Thompson lost sight of Mathre, and he began to call out for her. Apparently alarmed by Thompson's calls, someone reported to police that a swimmer was missing.

When Mathre reached the other side of the lake, she got out of the water and walked toward a cabin in hope of finding some clothes. Mathre approached a man near the cabin, asked for help, and repeatedly told the man, "My boyfriend is after me." Soon thereafter, a squad car driven by Detroit Lakes police officer Todd Glander entered the cabin's driveway, at which point Mathre ran back into the lake. The man explained to Officer Glander that a naked woman had come to the cabin and had asked for help because her boyfriend was "after" her.

A state-patrol helicopter soon arrived on the scene, and the pilot reported to Officer Glander that a woman was under a swimming raft in the lake. Officer Glander got into a

nearby boat and went out to investigate. When the boat reached the raft, Officer Glander saw Mathre "suspended vertically under the raft, motionless, her arms were just hanging down." Mathre then swam away from the raft, and Officer Glander told her that he was a police officer and that he was "here to help" her. Mathre refused assistance, splashed water on Officer Glander, and started swimming back toward the spot where she had first entered the lake with Thompson.

Officer Glander returned to shore and picked up additional officers who had arrived on the scene. They followed Mathre in the boat as she swam. Mathre spat at and splashed the officers, shouted profanities, and made obscene gestures to the helicopter and the officers. When Mathre reached the shore, she told the officers that she was fine and that they could leave. Believing that she was in danger from her boyfriend, the officers did not leave but rather followed Mathre, who had now put on a shirt and shorts, to a campsite. When an officer grabbed her arm, Mathre became combative, struggling with the officers and cursing and screaming.

During the struggle, Mathre bit one of the officers and attempted to bite other officers. After Mathre was put in handcuffs, she refused to stand and wrapped her legs around one of the officers. At some point during the arrest, Mathre called the officers "pigs" and "perverts." As officers removed Mathre from the campground, she spat on them multiple times, attempted to head-butt and bite them, and continued to resist and scream. When they reached the front gate of the campground, officers placed a "spit hood" on Mathre, restrained her legs, and put her into a squad car.

Mathre was charged with fourth-degree assault, in violation of Minn. Stat. § 609.2231, subd. 1 (2004) (assault on a peace officer involving the transfer of bodily fluids), and obstructing legal process, in violation of Minn. Stat. § 609.50, subds. 1, 2 (2004). At trial, Mathre testified in her own defense. The jury found her guilty, and she was sentenced to a stayed prison term of one year and one day and ordered to complete three years of probation. As a condition of probation, the district court ordered Mathre to serve 90 days in jail. Mathre appeals.

## D E C I S I O N

### I. The district court did not abuse its discretion by ruling that Mathre's prior assault conviction was admissible for impeachment purposes.

Mathre contends first that the district court abused its discretion by ruling that Mathre's 1999 felony assault conviction could be introduced for impeachment purposes. A district court's ruling on the admissibility of impeachment evidence "will not be reversed absent a clear abuse of discretion." *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998) (quotation omitted).

Minnesota Rules of Evidence 609(a) provides:

> 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 . . . 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.

To determine whether the probative value of a prior conviction that is offered for impeachment outweighs its prejudicial effect, a district court considers the following 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 (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach); (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *See State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978).

Although the district court here allowed the prosecution to introduce Mathre's 1999 assault conviction for impeachment purposes, it did not make a record of its consideration of the *Jones* factors. It is error for a district court to "fail to make a record of its consideration of the *Jones* factors." *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007) (citing *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006)). But the error is harmless, and we will affirm, "if the conviction could have been admitted after a proper application of the *Jones*-factor analysis." *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). We, therefore, independently review the admissibility of Mathre's 1999 conviction in light of the *Jones* factors.

**A. Impeachment value.**

The first *Jones* factor is the impeachment value of the prior crime. *Jones*, 271 N.W.2d at 538. Even crimes that do not directly involve truth or falsity have impeachment value by allowing the jury to "see the whole person and thus to judge better the truth of" her testimony. *See State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (quotation omitted). Mathre's prior assault conviction, although not directly related to her veracity, allows the jury to see the whole of her person and judge better the truth of her testimony. *See Swanson*, 707 N.W.2d at 655-56 (allowing the admission of prior assault convictions

because they assisted the jury in assessing the defendant's credibility). This factor weighs in favor of admitting the evidence.

Mathre argues that this court should "reject the 'whole person' rationale because it is inconsistent with traditional notions of fairness and with the more modern understanding of how jurors treat propensity evidence." Because Mathre did not make this argument before the district court, we decline to address it on appeal. *See id*. at 656 (refusing to consider a challenge to the "whole person" doctrine when that issue was not raised in the district court).

**B. Age of the conviction.**

The second *Jones* factor is the age of the conviction. *See Jones*, 271 N.W.2d at 538. Mathre was convicted of assault in 1999, six years before this assault charge. Because the conviction is less than ten years old, the age of the conviction does not weigh against its admission. *See Swanson*, 707 N.W.2d at 655; *see also* Minn. R. Evid. 609(b) (providing that convictions more than ten years old are presumptively inadmissible).

**C. Similarity of the past crime with the charged crime.**

Under the third *Jones* factor, "[t]he 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." *See Swanson*, 707 N.W.2d at 655 (citing *Jones*, 271 N.W.2d at 538). "[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." *Gassler*, 505 N.W.2d at 67. Here, the prior assault conviction is similar to the charged assault, and, therefore, this factor weighs in favor of exclusion.

### D. Importance of Mathre's testimony and the centrality of her credibility.

"If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior conviction[]." *Swanson*, 707 N.W.2d at 655; *see also Ihnot*, 575 N.W.2d at 587 (stating that the fourth and fifth *Jones* factors are satisfied when the defendant chooses to testify and the "thrust" of her testimony is to deny the allegations because credibility becomes the central issue in the case). Here, the evidence consisted primarily of witness testimony, including Mathre's testimony denying the allegations against her and maintaining that she was acting in self-defense. The case's central issue, therefore, involved a credibility determination: whether the jury should believe Mathre's testimony or the contradictory testimony of the state's witnesses. Because Mathre's credibility is a central issue, "'a greater case can be made for admitting the [1999 assault conviction], because the need for the evidence is greater.'" *See Ihnot*, 575 N.W.2d at 587 (quoting *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980)). These factors, therefore, weigh in favor of admitting the evidence.

Because four out of five *Jones* factors support the district court's decision, we conclude that the district court did not abuse its discretion by admitting Mathre's prior assault conviction into evidence. *See Swanson*, 707 N.W.2d at 656 (concluding that the district court did not abuse its discretion when only one factor weighed against admission).

## II. The district court did not abuse its discretion by refusing to give the jury a limiting instruction when the evidence was admitted.

Mathre argues next that the district court abused its discretion "when it refused to give a limiting instruction immediately" after the fact of Mathre's 1999 conviction was

admitted as evidence at trial. After Mathre's counsel preemptively asked Mathre about her prior conviction, her counsel requested a limiting instruction informing the jury of the "limited relevance" of the prior conviction "either now or at the close" of evidence. The district court stated that it was "not prepared" to give the instruction then, but that it would take Mathre's request for a limiting instruction at the close of evidence "under advisement." After the parties finished presenting the evidence, the district court instructed the jury that:

> [i]n deciding the believability and weight to be given the testimony of a witness, you may consider evidence that the witness has been convicted of a crime. You may consider whether the kind of crime committed indicates the likelihood the witness is telling or not telling the truth.
>
> In the case of the defendant, you must be especially careful to consider any previous conviction, only as it may effect [sic] the weight of the defendant's testimony. You must not consider any previous conviction as evidence of guilt of the offense for which the defendant is on trial.

A district court's refusal to give a requested jury instruction will not be reversed absent an abuse of discretion. *State v. Blasus*, 445 N.W.2d 535, 542 (Minn. 1989). To support her argument that the district court was required to give an immediate instruction, Mathre cites *State v. Bissell*, 368 N.W.2d 281, 283 (Minn. 1985). There, the supreme court stated that a district court, on its own, "should give a limiting instruction both when the [prior crimes] evidence is admitted and as part of the final instructions to the jury." *Id*. But in *Bissell*, the supreme court ultimately rejected the defendant's challenge to the district court's refusal to give a cautionary instruction immediately after the testimony because (1) the district court properly gave such an instruction in its final jury instruction and (2) "no one suggested that the evidence should be used for any purpose other than determining [the]

defendant's credibility as a witness." *Id*. Here, as in *Bissell*, the district court's final instruction on the limited relevance of the evidence was proper and no one suggested that the evidence should be used for a purpose other than determining Mathre's credibility as a witness. Moreover, Mathre asked for a limiting instruction "either now or at the close [of evidence]." The district court did not abuse its discretion by doing what Mathre asked it to do.

## III. The prosecutor did not commit misconduct during his closing argument.

Mathre claims next that the prosecutor committed misconduct during his closing argument by (1) "appeal[ing] to the passions of the jury," (2) "harp[ing] on a theme of accountability," and (3) "disparag[ing] the defense and defense counsel." At trial, Mathre did not object to the statements that she now contends were misconduct. Prosecutorial misconduct that was not objected to is analyzed under the plain-error standard, which requires that a defendant establish that an error occurred and that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). If a defendant does so, the burden then shifts to the state to establish that the misconduct did not prejudice the defendant's substantial rights. *Id*. at 300.

### A. The prosecutor did not improperly inflame the passions of the jury.

Mathre claims that the prosecutor made two statements in his closing argument that improperly inflamed the passions of the jury. The first was:

> Being a law enforcement officer can be a thankless job. Getting called to a scene to investigate a report or a call concerning a missing person, or potential drowning victim, and going there to attempt to provide assistance and the reward the officers get for their conduct in this instance, was to be assaulted, to be kicked,

> to be pinched, and to be spit on. Instead of receiving thanks for doing their job, doing what they were called to do, they are called perverts and pigs.

The second was:

> It's a thankless job. They get up in the morning, they put on their uniform to do their duty, protect and serve. And they go to work, many times they're underappreciated. They're spit on, they're called perverts, they're called pigs. They're kicked, they're bit and they're assaulted. But the next day, they get back up, they put their uniforms right back on. The legislature said enough is enough. We're not going to take it and they shouldn't have to take that sort of abuse. If we didn't have that every time an officer attempted to arrest somebody, we would have pure chaos. The law respects them in that regard to say that.

Parties have considerable latitude in determining the content of their closing arguments and are free to make all legitimate arguments on the basis of all proper inferences from the evidence introduced. *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). But a prosecutor's closing argument should be based on the evidence and should not be calculated to inflame the passions and the prejudices of the jury. *State v. Clark*, 296 N.W.2d 359, 371 (Minn. 1980). And when credibility is a central issue, courts must "pay special attention to statements that may inflame or prejudice the jury." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). Here, the prosecutor's arguments were based on evidence in the record. The officers testified that they had responded to a call to help a potential drowning victim. And there was evidence, including admissions by Mathre that she "sort of bit" one of the officers, spat on the officers, and called them "pigs" and "perverts." The prosecutor's arguments were based on the evidence, and we conclude that they were not calculated to improperly inflame the passions of the jury.

### B. The prosecutor did not commit misconduct by emphasizing the theme of "accountability."

Mathre claims next that the prosecutor committed misconduct by improperly emphasizing the theme of accountability during closing argument. Mathre identifies two statements to support this claim:

> Now ladies and gentlemen, I'm not going to stand up here and say Ms. Mathre is public enemy number one in Becker County. However, I am going to tell you she committed two crimes, and she should be held accountable for those.
> . . . .
> I ask you ladies and gentlemen, to held [sic] her accountable. I ask you to make her take responsibility for her actions. That she cannot resist law enforcement officers.

It is proper for a prosecutor to "talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985). But a prosecutor may not "emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving [the] defendant guilty beyond a reasonable doubt." *Id*. And a prosecutor's closing argument may not "ask[ ] the jury to teach the defendant a lesson." *See State v. Gates*, 615 N.W.2d 331, 341 (Minn. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

We conclude that the prosecutor's argument here was proper. He did not invite the jury to teach Mathre a lesson; he attempted to convey to the jury that the law requires that Mathre be held responsible. *See State v. Ford*, 539 N.W.2d 214, 228 (Minn. 1995). Additionally, the statements were proper because they related directly to what the victims—

the police officers—suffered as they were bitten, spat on, and yelled at. *See Montjoy*, 366 N.W.2d at 109. Finally, the comments were brief, consisting of three short references in a closing argument of nearly 20 pages. *Cf. State v. Morton*, 701 N.W.2d 225, 238 (Minn. 2005) (holding that a prosecutor's brief reference to the concept of accountability was not misconduct). Because we conclude that the prosecutor's use of the word accountability did not, on these facts, divert the jury's attention from its true role, the prosecutor did not commit misconduct.

### C. The prosecutor did not disparage the defense.

Mathre argues finally that the prosecutor "disparaged the defense and defense counsel" by characterizing a portion of Mathre's closing argument as a "red herring" and a "smoke screen" and by arguing that Mathre's counsel "hopes . . . you ignore the elements, and you ignore the law and that you don't apply it."

The Minnesota Supreme Court has warned that it is improper to disparage the defense during closing argument. *See State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997). "Disparaging the defense" is usually defined as a prosecutor's effort to belittle a particular defense in the abstract, for example, by implying that the offered defense is used when nothing else will work. *See State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993); *see also State v. Bettin*, 309 Minn. 578, 579, 244 N.W.2d 652, 654 (1976) (holding that it was improper for a prosecutor to state that a claim of insanity is a "push button" defense that defendants raise when they "cannot think of anything" else). But a "prosecutor is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument." *Salitros*, 499 N.W.2d at 818; *see also State v. Ashby*, 567

N.W.2d 21, 28 (Minn. 1997) (holding that it was not improper for a prosecutor to say that a defendant's allegations are easily made, but that the jury must look at the evidence).

The prosecutor here was commenting on Mathre's particular argument, that is, that the events preceding her assault of the officers explained her actions. Because the prosecutor did not attack a defense in the abstract, but rather described how the defense's closing statement obscured the elements of the offenses, we conclude that the prosecutor did not commit misconduct. *See State v. Moseng*, 379 N.W.2d 154, 156 (Minn. 1985) (holding that a prosecutor's use of the term "red herring" to characterize defense counsel's argument was not disparaging the defense); *State v. Wright*, 371 N.W.2d 238, 240 (Minn. App. 1985) (holding that it was not improper for a prosecutor to argue that defense counsel put a "smoke screen" on the real events), *review denied* (Minn. Sept. 13, 1985).

**Affirmed.**