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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0722**

State of Minnesota,
Respondent,

vs.

Peter Alexander Zagrzebski,
Appellant.

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

Dakota County District Court
File No. K8-06-1844

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800,
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appellant)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's decision at trial that he could be impeached with a prior felony conviction if he chose to testify and the district court's refusal to grant his motion for a downward dispositional departure of his sentence after he was convicted. Because the district court did not abuse its discretion in making either of those decisions, we affirm.

FACTS

On June 10, 2006, Sara Brenner arranged for her 14-year-old sister C.A.B. to babysit her daughter while she spent the night out with friends. On that night, Brenner dropped C.A.B. off at the Zagrzebski residence at 9:30 p.m. C.A.B. testified that appellant Peter Zagrzebski was at the residence that evening with some friends. After C.A.B. went to bed in an upstairs room with her niece, appellant entered her room, pulled out a knife, threatened to slit her throat, and forced her into the bathroom with him. At that time, appellant forced her to remove her shirt, bra, pants, and underwear. He attempted to insert his finger into her vagina, but she refused and he eventually ceased trying. He then forced her to masturbate him.

Appellant was charged with attempted criminal sexual conduct in the third degree, criminal sexual conduct in the fourth degree, and false imprisonment. Following a jury trial at which the district court ruled that appellant could be impeached with a prior felony conviction of terroristic threats if he chose to testify on his own behalf, appellant was found guilty on all counts. Appellant requested a downward dispositional departure

based on his condition of bipolar disorder. The district court denied his request and sentenced him to the maximum presumptive sentence under the sentencing guidelines. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by ruling that, if appellant testified, he could be impeached with his prior conviction.

Appellant argues that the district court abused its discretion by finding that he could be impeached with his 2000 felony conviction of terroristic threats.¹ Appellant argues that his testifying was necessary to fully present his defense and that his constitutional right to testify was unfairly chilled by the district court's decision. Respondent contends that the district court properly exercised its discretion.

“A district court's ruling on the admissibility of prior convictions for impeachment of a defendant is reviewed under a clear abuse of discretion standard.” *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006). Whether the probative value of the prior convictions outweighs their prejudicial effect is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985).

The admissibility of a prior conviction used to impeach a witness's credibility is governed by Minn. R. Evid. 609 which reads as follows:

(a) General Rule. 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

¹ Appellant demanded money from his brother at knifepoint.

this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence 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.

The district court should consider five factors in determining the admissibility of prior convictions. *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). These factors 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.

*Id.*²

The district court thoroughly discussed these five factors and determined that the terroristic threats conviction could be admitted for impeachment purposes if appellant chose to testify.³

² In *State v. Ihnot*, the Minnesota Supreme Court stated that “[a]lthough *Jones* was decided before Rule 609 became effective, we conclude that these factors remain suitable and we reaffirm their application in determining whether the probative value outweighs the prejudice under the rule.” 575 N.W.2d 581, 586 (Minn. 1998).

³ There is no dispute that the terroristic threats conviction was a felony that carried a sentence of over one year. Therefore, the pertinent analysis focused on whether the probative value of allowing the admission of impeachment evidence outweighed its prejudicial effect.

A. The impeachment value of the prior crime

The district court concluded that the impeachment value of the prior crime was such that it should be admitted. The court stated that “whenever a witness defendant or a non-defendant gives testimony, one of the first things that jurors or anyone else wants to ask, mentally or otherwise, is what sort of individual is asking me to accept their word.” The district court determined that the value of the prior conviction was important “because it is used not for character and not to prove that the charged offense was committed by the defendant, but whether they are to be believed.” The district court held that the prior conviction shed light on appellant’s propensity for truthfulness such that it could help the jury evaluate his credibility.

Appellant argues that because the prior conviction for terroristic threats involved violence, and not a crime of dishonesty, it is not helpful to the jury in determining the issue of credibility. Appellant cites to *State v. Gassler* for this proposition. 505 N.W.2d 62, 66-67 (Minn. 1993). This reliance is misplaced. It is true that the court in *Gassler* did state that “[g]enerally, convictions for violent crimes lack the impeachment value of *crimen falsi*.” *Id.* That court goes on to say, however, that “trial courts have great discretion in determining what prior convictions are admissible under the balancing test of Rule 609(a)(1). Moreover, the fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value.” *Id.* at 67 (citations omitted). Furthermore, “[i]mpeachment by prior convictions aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony.” *State v. Heidelberger*, 353 N.W.2d 582, 589 (Minn. App. 1984) (quotations omitted), *review denied* (Minn.

Sept. 12, 1984). Therefore, it was within the district court's broad discretion to conclude that this prior conviction had impeachment value.

B. The date of the conviction and the defendant's subsequent history

Appellant was convicted of felony terroristic threats in 2000. The district court determined that this conviction could be admitted under Minn. R. Evid. 609(b) because it occurred less than ten years ago. Appellant concedes that this factor favors admission.

C. 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)

The district court concluded that the terroristic threats conviction was sufficiently dissimilar to the sexual conduct and false imprisonment charges to warrant its admission. The court reasoned that if the prior crime had been a sex crime or had involved false imprisonment, it would have been sufficiently similar to the present crime and would have been excluded. But because the prior conviction was distinguishable, it was properly admissible.

Appellant argues that because both crimes involved violence, they were too similar to properly allow impeachment. Once again, the district court has wide discretion in deciding the admissibility of prior convictions. Although the prior conviction was similar in that it also involved appellant threatening someone with a knife, the purpose behind both attacks were dissimilar. Because the prior conviction did not involve sexual conduct, the crimes appear sufficiently dissimilar such that the district court did not abuse its discretion in deciding that this factor favored admission.

D. The importance of defendant's testimony

The district court determined that this factor favored allowing the prior conviction into evidence for impeachment purposes. The district court found “that while the defendant’s testimony is important, it’s also subject to being tested.” The district court did not take away appellant’s right to testify; it only determined that appellant’s testimony should be subjected to the same thorough and vigorous cross-examination as all other testimony.

Appellant argues that the district court improperly focused on the fact that appellant’s testimony would need to be tested, rather than the importance of appellant’s need to testify. This court has stated that “[t]he 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.” *Heidelberger*, 353 N.W.2d at 590. In this case, however, the court concluded that appellant’s version was put before the jury through his statements to the police and arguments by his attorney. Therefore, as in *Heidelberger*, appellant’s testimony, although no doubt desirable to appellant, was not necessary to present his theory of defense. *See id.* (“Appellant’s version was put before the jury and was argued by his counsel. The contention that appellant was not able to get his version before the jury is not shown.”).

E. The centrality of the credibility issue

The district court concluded that credibility was central to this case. This is no doubt because the case would rise or fall on whether the jury believed appellant or his

alleged victim. The district court therefore determined that if appellant chose to testify, he could be cross-examined concerning his conviction for terroristic threats. The district court stated that “centrality of credibility being particularly true in this case, it also weighs in favor of admitting [the impeachment evidence].”

Appellant argues that had he testified, he would not have solely relied on his credibility. Rather

[a]ppellant’s testimony would have been corroborated by the complainant’s not having immediately called the police, by the animosity between Sara and [the home owner] and [the home owner] and the complainant, by Sara having left her infant with a fourteen-year-old all night when she was not supposed to have done so, and by the lack of physical evidence that the complainant had been attacked.

Appellant seems to imply that the district court prohibited him from testifying altogether. This is incorrect. The district court only ruled that if appellant testified, his prior conviction could be used to impeach his credibility. Nothing would have prohibited him from making the foregoing points under direct examination. They simply would not have been made in a vacuum.

Lastly, appellant argues that the district court determined that the impeachment evidence would be more probative than prejudicial by merely concluding that the standard had been met, rather than by analyzing the issue. We disagree. Appellant misses the fact that using the *Jones* factors is the proper means to determine if admitting a prior conviction would be more probative than prejudicial. Based on its thorough and reasoned analysis of these factors, the district court did not abuse its discretion by

allowing impeachment evidence of appellant's prior felony conviction to be admitted if he testified.

II. The district court did not abuse its discretion by denying appellant's motion for a downward dispositional departure.

Appellant argues that his illness⁴ constitutes a substantial and compelling circumstance warranting probation instead of incarceration. Respondent argues that it was within the district court's discretion to deny a request for a downward dispositional departure.

A trial court has broad discretion to depart from the presumptive sentence under the sentencing guidelines. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). Departures from presumptive sentences are reviewed under an abuse of discretion standard, but there must be "substantial and compelling circumstances" in the record to justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996) (citations omitted). Only in a "rare case" will a reviewing court reverse a district court's imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Respondent requested that appellant be sentenced at the upper range of the presumptive sentence, but did not ask for an upward departure. The district court

⁴ Appellant suffers from bipolar disorder.

accepted the state's recommendation and sentenced appellant to 34.5 months in prison, which was at the upper end of the range but not a departure.

Appellant now argues, however, that he had been diagnosed with bipolar disorder, and if not properly medicated, was at risk of becoming mentally ill and engaging in binge behaviors. Furthermore, appellant asserted that he had a problem with alcohol, drugs, and gambling. Therefore, he argued that he needed treatment for his bipolar disorder, chemical dependency, and gambling which would be better served by inpatient therapy, followed by outpatient treatment, not prison. Although these factors may have been grounds to grant a downward dispositional departure, the district court chose not to do so. This was within its discretion.

Affirmed.