STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0888

State of Minnesota,
Respondent,

vs.

Brian K. Trimble,
Appellant.

Filed September 9, 2008
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 05070686

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (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 Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

SCHELLHAS, Judge

Appellant challenges his convictions of second-degree unintentional murder and first-degree manslaughter on the grounds that (1) the evidence was insufficient to convict him because it did not rule out the rational hypothesis that unknown assailants committed the assault, and (2) the district court clearly abused its discretion in admitting his prior convictions for impeachment purposes. Because the record contains sufficient evidence to support the convictions and the district court did not abuse its discretion, we affirm.

FACTS

On November 2, 2005, T.D. worked in downtown Minneapolis and went out for "happy hour" after work with a group of friends. The group broke up around 11:00 p.m., when they left a bar in the warehouse district. One of the group members understood that T.D. was going to walk roughly one block to Washington Avenue to find a cab stand. T.D. lived in southeast Minneapolis roughly three miles from downtown, and sometimes he biked or walked home from work, though walking took a long time. He did not usually take cabs because he did not usually carry cash. But on the evening of November 2, T.D. had cash; he was seen giving cash to a woman to help pay for her cab fare home. T.D.'s whereabouts between 11:00 p.m. and 1:15 a.m., November 3, remain unknown.

At about 1:15 a.m., on November 3, a driver of a black Mercedes honked his horn to get a Minneapolis police officer's attention and told the officer that there was a "man down." The officer went directly to the parking lot near 10th Street North and Washington Avenue without obtaining any further information from the driver. When

the officer arrived at the scene, appellant Brian Kidd Trimble was leaning over T.D., who was lying on the ground and bleeding from his head. T.D. had suffered a significant head injury and was having trouble breathing. Upon the officer's arrival at the scene, appellant told the officer that two men had "just jumped" T.D. and run away, and pointed toward the west. The officer looked to the west and did not see anyone. A two-foot-long piece of wood was lying near T.D.'s head, and a briefcase with a broken strap was lying near T.D., who was wearing a suit torn in the knees with pants pockets turned inside out.

When the officer decided to detain appellant, "a significant struggle" ensued. After the struggle, the officer searched appellant and found several items belonging to T.D., including his checkbook, credit cards, driver's license, and other papers. Appellant was also found to be in possession of a crack pipe and a wallet with an identification card of James Gaston. Appellant told the officer that he had taken T.D.'s wallet and that he only took T.D.'s checkbook after it fell out of one of T.D.'s pockets. Appellant also said that he had taken James Gaston's wallet and identification after finding them lying next to T.D. T.D. was "effectively brain dead" from his injuries on November 3, but he did not die until November 5, when his family made the decision to discontinue extraordinary measures to keep him alive.

Appellant was taken to jail but was released after booking and questioning. Appellant's urine sample tested positive for cocaine, cocaine metabolites, the hallucinogen PCP, and suggested alcohol had been used at the same time as cocaine. A blood sample also revealed the presence of cocaine and suggested cocaine and alcohol had been used together. The blood sample suggested that appellant might have ingested

cocaine within roughly eight hours of 3:20 a.m., on November 3, 2005, the approximate time the blood sample was taken. At trial appellant could not remember taking PCP or using alcohol the night of November 2, but he admitted to smoking crack that evening.

After his release from jail on November 3, appellant met with Sergeant Erika Christensen, who asked him about Gaston's wallet and identification card. Appellant said that he did not know Gaston and that he had assumed the wallet belonged to T.D. Appellant also told Sergeant Christensen that the wallet had been on the ground next to T.D. with T.D.'s checkbook and that he had turned T.D. over and Gaston's wallet had been under T.D. Sergeant Christensen proceeded to investigate whether Gaston could be a suspect. But Sergeant Christensen's further investigation revealed that Gaston's wallet had been left in an apartment at 2126 Dupont Avenue North, after Minneapolis police executed a search warrant and arrested Gaston. The apartment was boarded up after the search warrant was executed. Sergeant Christensen also learned that on November 2 and 3, Gaston was residing in a chemical dependency treatment facility and his DNA sample did not match any DNA found at the crime scene. Sergeant Christensen also learned that two people had been in the Dupont Avenue apartment after it was boarded up, Elton Singleton and appellant. Singleton had an alibi for the time of the crime, and his DNA sample did not match any DNA found at the crime scene. Appellant had been found sleeping in the apartment on November 2, at 7:00 or 8:00 p.m., and Sergeant Christensen suspected that he had found Gaston's wallet and was the source of the wallet at the crime scene.

Appellant's DNA was matched with samples found at the crime scene. His DNA was found in samples from T.D.'s pants pockets. His DNA was not found on the piece of wood that was lying near T.D.'s head nor was the source of DNA found in T.D.'s left pants pocket identified. Although the police undertook efforts to locate the driver of the Mercedes, who alerted the police officer to T.D.'s location on November 2, the witness was never found.

In April 2006 appellant was arrested and charged with second-degree murder and was tried before a jury in January 2007. Appellant waived his right to remain silent and testified that on the evening of November 2, 2005, he got high on crack, borrowed a bicycle, rode it downtown to panhandle around 8:30 or 9:30 at night, wandered around seeking money and looking for crack, had no luck, and left on the bike around 1:00 a.m., on November 3, to panhandle at a gas station after the bars closed. Appellant testified that on his way to the gas station as he approached Tenth Avenue, he saw three men: the first he saw "dart across the street," and another who was standing over T.D., who was on his knees with his arm in the air. Appellant claimed that he heard T.D. say, "Oh, God, please," and that he kept pedaling, looking back to see if the two men were gone and T.D. was alone and then headed to T.D. and the car honked at him. Appellant testified that when he reached T.D., he was lying on his chest and moaning, and appellant turned him over at which point T.D.'s wallet and checkbook were revealed. Appellant took T.D.'s wallet and checkbook and testified that as he stood up to put the items in his pocket, he saw the police car. As for Gaston's wallet, although appellant admitted being found at the apartment at 2126 Dupont Avenue North after it was boarded up, it was not on the

night of November 2, and appellant denied that he ever took Gaston's wallet from the apartment. Appellant testified that he did not know exactly how he got Gaston's wallet, but he thought that either T.D. had Gaston's wallet or one of T.D.'s assailants had left it near T.D. and that maybe he picked it up when he picked up T.D.'s wallet and checkbook on November 3. As for his DNA that was found in T.D.'s pockets, appellant testified that he could have gone into T.D.'s pockets, but could not remember doing it. He also testified that T.D.'s blood got on his hands when he turned T.D. over. Appellant claimed that he had tried to flag down the officer when the officer was with the Mercedes. But the officer testified that appellant tried to flag him down after he had driven away from the Mercedes and had turned his headlights on appellant, alerting appellant to his presence. The officer testified that appellant's back was to the intersection where the Mercedes driver had honked at him.

The district court admitted three of appellant's felony convictions for impeachment purposes, two 2004 convictions of fifth-degree drug possession and a 2002 conviction of fleeing a police officer.

The jury found appellant not guilty of second-degree intentional murder, guilty of second-degree unintentional murder, and guilty of first-degree manslaughter. This appeal follows.

D E C I S I O N

I.

"In reviewing a claim of sufficiency of the evidence we must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a

jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Ulvinen*, 313 N.W.2d 425, 428 (Minn. 1981). "The evidence must be viewed in the light most favorable to the prosecution and it is necessary to assume that the jury believed the state's witnesses and disbelieved any contrary evidence." *Id.*

"[C]ircumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt." *State v. Jacobsen*, 326 N.W.2d 663, 666 (Minn. 1982) (quotation omitted). While the supreme court has said that circumstantial evidence "must point unerringly to the accused's guilt," *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004) (quotation omitted), the court has recently clarified that this language does not mean that the evidence needs to point "inescapably" to the defendant's guilt. *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008). "[T]he State's burden is not to remove *all* doubt, but to remove all *reasonable* doubt." *Id.* at 313. "[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995). Further, "[t]he stricter standard of appellate review of a conviction based on circumstantial evidence still recognizes a jury is in the best position to evaluate the circumstantial evidence surrounding the crime, and its verdict is entitled to due deference." *State v. Race*, 383 N.W.2d 656, 662 (Minn. 1986).

Appellant was found guilty of unintentional second-degree murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2004), which is committed when a person causes the

death of another without intent to cause the death but while committing or attempting to commit a felony. Appellant also was found guilty of first-degree manslaughter in violation of Minn. Stat. § 609.20 (2) (2004), which is committed when a person causes the death of another while committing fifth-degree assault under Minn. Stat. § 609.224. Fifth-degree assault under section 609.224 is committed when a person commits an act intended to cause fear of immediate bodily harm or death or intentionally inflicts or attempts to inflict bodily harm. Minn. Stat. § 609.224, subd. 1(1)-(2) (2004).

The evidence supports the inference that appellant committed the assault that caused T.D.'s death as well as felony robbery. Appellant was found standing over T.D. in possession of T.D.'s wallet and checkbook with T.D.'s blood on his hands.

The persuasiveness of appellant's alternative hypothesis at trial was dependent on the believability of his testimony. Appellant's credibility was damaged by conflicts between his account of his actions and the evidence presented by the state. For example, a significant problem with appellant's account was his claim that he found Gaston's wallet at the scene of the crime and his suggestion that one of the assailants left it there. To the contrary, the evidence strongly suggested that appellant brought the wallet to the scene. Another example of a difficulty in appellant's account was his claim that he tried to flag down the police officer when the officer was still with the Mercedes. To the contrary, the officer testified that appellant's back was to him while he was with the Mercedes and that appellant became aware of his presence only after he turned his headlights on him. While appellant claimed to recall certain details with much clarity, he could not recall going through T.D.'s pants pockets, where samples of his DNA were

found. And, appellant's testimony about his controlled substances use on November 2 was in conflict with the evidence presented by the state, which revealed more controlled substances in appellant's system at the time of the crime.

While some evidence presented at trial raised the possibility that other assailants committed the assault on T.D., viewing all of the evidence in the light most favorable to the prosecution, and assuming the jury believed the state's witnesses and disbelieved any contrary evidence, appellant's alternative hypothesis is a "possibility of innocence" that does not require reversal under *Ostrem* because the evidence as a whole makes it appear unreasonable. *Ostrem*, 535 N.W.2d at 923.

II.

A witness's credibility may be attacked by evidence that the witness was convicted of a crime, other than a crime of dishonesty, within the last ten years if the crime was punishable by death or imprisonment for more than one year and the probative value outweighs its prejudicial effect. Minn. R. Evid. 609(a), (b). The district court allowed the state to impeach appellant with three prior felonies. "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). Appellant argues that admission of his prior convictions was inappropriate because the probative value of the convictions was substantially outweighed by their prejudicial effect.

When considering if the probative value of prior convictions outweighs their prejudicial effect under rule 609(a), courts consider the following factors:

> (1) [T]he 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.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978).[1] A district court is required to "demonstrate on the record that it has considered and weighed the *Jones* factors." *Swanson*, 707 N.W.2d at 655.

Appellant argues that the district court failed to consider these factors on the record. We agree. The court stated on the record which convictions could be admitted for impeachment purposes, but did not explain its decision. But failure to explicitly consider the *Jones* factors is subject to a harmless-error analysis. *Id.* (concluding that failure to consider the *Jones* factors on the record was harmless where admission was not an abuse of discretion because the factors weighed in favor of admission). Following *Swanson*, in order to determine whether the district court abused its discretion in admitting the convictions, we will examine whether the *Jones* factors support admission of the convictions.

1. Impeachment Value

In *Swanson*, the impeachment value of the prior conviction supported admissibility by helping the jury see the "whole person of the defendant and better

[1] Although *Jones* was decided before rule 609 became effective, the supreme court concluded that the *Jones* factors "remain suitable" and reaffirmed their application "in determining whether the probative value outweighs the prejudice under the rule." *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998).

evaluate his or her truthfulness." *Id.* (quotation omitted). This factor weighs in favor of admissibility in this case as well. Appellant's prior convictions helped the jury to see the "whole person" of appellant by showing that he has committed drug-related crimes and attempted to evade the police in the past.

Appellant argues that this court should reconsider the "whole person" rationale and that this factor only weighs in favor of admission of crimes that speak to a witness's honesty or dishonesty. But under supreme court precedent, convictions aid the jury even when they do not directly involve truth or falsity by allowing the jury to see the "whole person" and "judge better the truth of his testimony." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (quotation omitted). We follow the "whole person" rationale and conclude that this factor supports admission.

2. Timeliness

In *Swanson*, the date of the conviction also supported admission of convictions that were distant but less than ten years old where the convictions showed a "history of lawlessness." 707 N.W.2d at 655 (quotation omitted). In this case, appellant concedes that this factor weighs in favor of admission.

3. Similarity

In *Swanson*, assault convictions were considered similar to the charge of murder at issue in the case and therefore weighed against admissibility. *Id.* Appellant concedes that because the convictions at issue in this case were not similar to the charged offense, this factor weighs in favor of admission.

4.-5. Necessity of Testimony and Credibility as Central Issue

In *Swanson*, the final factors of the importance of the defendant's testimony and the centrality of credibility weighed in favor of admission because the defense at issue, alibi, was a defense for which testimony was the only evidence. *Id.* The jury's task was to determine whether to believe the defendant over other witnesses, which made credibility a central issue. *Id.* at 655-56.

In this case, appellant argues that the fourth factor, the importance of the testimony, weighs against admission because his testimony was the only source of information on the two men he saw attack T.D. and run away. But *Swanson* demonstrates that this factor weighs in favor of admission where a defendant's testimony provides the only evidence for a major issue and credibility is accordingly a central issue. *Id.* Appellant argues that the fifth factor, the centrality of credibility, favors admission only if the prior convictions "shed light on his credibility" and only to the extent the convictions "provide the jury with some useful information about the defendant's truthfulness." But under *Swanson*, because the defendant's testimony establishes the defense and credibility is therefore a central issue, the fourth and fifth factors support admission. *Id.*

Because all of the *Jones* factors support admission of the convictions, the district court did not abuse its discretion in admitting appellant's convictions for impeachment purposes. The district court's error in failing to explicitly consider the *Jones* factors was harmless.

Affirmed.