STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1665

State of Minnesota,
Respondent,

vs.

Billy D. Harrell,
Appellant.

Filed November 4, 2008
Affirmed
Harten, Judge*

Ramsey County District Court
File No. K8-06-3659

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; 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, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving 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

HARTEN, Judge

Appellant challenges his conviction of second-degree aggravated robbery, arguing that the evidence was insufficient and that the district court abused its discretion by admitting evidence of three of appellant's most recent felony convictions; he also challenges his sentence on the ground that the upward departure was an abuse of discretion. Because the evidence was sufficient to convict appellant and because we see no abuse of discretion in the admission of evidence or in the sentence, we affirm.

FACTS

On 3 July 2006, S.L. was assaulted and robbed. Appellant Billy Harrell (appellant) and Jerry Harrell (Harrell), who are not related, were charged with aiding and abetting first-degree aggravated robbery.

Appellant rejected a plea agreement that would have recommended a low-end presumptive guideline sentence (92 months) in exchange for his guilty plea to the crime charged. Respondent State of Minnesota then notified him that it would seek to have him sentenced as a dangerous offender. The charge was amended to second-degree aggravated robbery. Appellant rejected a second plea agreement that would have involved a lower-end presumptive guideline sentence (49 months). Respondent reminded appellant that it would seek to have him sentenced as a dangerous offender.

A jury found appellant guilty of second-degree aggravated robbery. He waived a jury trial on sentence-enhancing factors, and the court found him to be a dangerous offender. He was sentenced to 162 months' imprisonment, a 50% upward departure.

Appellant challenges the sufficiency of the evidence to support his conviction and argues that the district court abused its discretion in admitting evidence of his prior felonies and in ordering the upward departure.

D E C I S I O N

1. Sufficiency of the Evidence

Appellant's conviction was based on circumstantial evidence. Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The testimony of four witnesses provided circumstantial evidence.

The victim testified that, as he was approaching the second-floor apartment of an acquaintance, Harrell approached him and attempted to hit him with a piece of wood. They struggled outside the apartment; the door opened, and they went in. The victim fell onto a couch with his head down, so he could not see. He testified that another man then entered the apartment, that this man kicked him and put a chair on his leg, and that, at Harrell's direction, the man rifled through the victim's pockets and removed his wallet and his keys. The victim testified further that, later when he received his checking account statement, he noticed unauthorized charges totaling $226 made at a cell phone store and that a woman who identified herself as appellant's girlfriend telephoned him

after the robbery and said that he would be reimbursed for the $226 if he would drop the charges against appellant.

The clerk at the cell phone store testified that two men, whom he identified from photos as Harrell and appellant, entered the store about 7 p.m. and that appellant made a purchase in the victim's name.

The tenant of the apartment and her daughter testified that, when they saw Harrell attacking the victim, they went to get someone to break up the fight, found appellant, and asked him to go to the scene; that appellant went to the apartment and later left the apartment with Harrell; and that after Harrell and appellant left, they found the injured victim in the apartment.

The testimony of the victim, the clerk, the tenant, and her daughter provided sufficient evidence, without more, for the jury to conclude that appellant and Harrell committed an aggravated robbery of the victim. But appellant also took the stand.

Appellant testified that he witnessed Harrell and another man rob the victim, that the other man left with Harrell, and that appellant was holding only a cell phone when he left the apartment. This testimony conflicts with that of other witnesses. When resolution of a case depends on conflicting testimony, this court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Here, the jury was free to disbelieve appellant's testimony.

Appellant also argues that the victim did not see the second man who participated in the robbery and therefore could not identify him as appellant. But appellant does not

dispute evidence that, shortly after the robbery, he used the victim's charge card to make a purchase and that the victim received a phone call from appellant's girlfriend offering reimbursement in exchange for dropping the criminal charges against appellant. Sufficient evidence supports the verdict.

2. Evidence of Prior Crimes

The district court admitted, for the purpose of impeachment, evidence of appellant's 1997 convictions of third-degree and fifth-degree controlled-substance crime, of providing false information to the police, and of his 2005 conviction of sale of a simulated controlled substance.[1] A reviewing court will not reverse the district court's admission of evidence of other crimes or bad acts unless an abuse of discretion is clearly shown. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). Evidence of prior convictions is admissible for impeachment purposes if the district court determines that the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1). The district court makes this determination by considering the five *Jones* factors: (1) impeachment value of the prior crime; (2) date of the conviction and subsequent history; (3) similarity of the prior crime to the charged offense; (4) significance of the defendant's testimony; and (5) importance of the defendant's credibility to the outcome. *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

[1] The district court excluded evidence of two convictions related to firearms as insufficiently probative.

On the first *Jones* factor, appellant argues that the evidence of his reporting false information to the police was insufficient to impeach him and that evidence of controlled-substance convictions is not favored for impeachment, relying on *State v. Zernechel*, 304 N.W.2d 365, 366 (Minn. 1981). *But see State v. Flemino*, 721 N.W.2d 326, 329 (Minn. App. 2006) (admitting evidence of controlled-substance conviction for impeachment); *State v. James*, 638 N.W.2d 205, 210-12 (Minn. App. 2002) (same); *State v. Hochstein*, 623 N.W.2d 617, 624-25 (Minn. App. 2001) (same). But evidence of felonies unrelated to dishonesty is admissible for impeachment because it "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." *Flemino*, 721 N.W.2d at 329.

On the second *Jones* factor, appellant argues that his 1997 convictions were stale and are therefore prejudicial. But appellant's offenses occurred on 3 July 2006; he was discharged from his executed sentence on one offense on 30 March 2002 and his stayed sentence on the other expired on 24 March 1999. Evidence of a prior conviction may be admitted if less than ten years have elapsed between the offense and the date of a prior conviction or release from confinement for that conviction, whichever occurs later. Minn. R. Evid. 609(b). Evidence of appellant's 1997 offenses was not precluded by untimeliness.

On the third *Jones* factor, appellant argues that, although he was not being tried for a controlled-substance offense, there were many references to controlled substances during the trial and evidence of his prior controlled-substance convictions should therefore have been excluded. But the third *Jones* factor is "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)." *Ihnot*, 575 N.W.2d at 586 (quoting *Jones*, 271 N.W.2d at 538). Controlled-substance offenses bear little similarity to aiding and abetting aggravated robbery, the charged crime. This factor does not preclude use of the evidence.

Nor does the fourth factor preclude use of the evidence: its admission did not prevent appellant from testifying. Finally, the fifth factor, the importance of the defendant's credibility, favors admission—as appellant's argument on the sufficiency of the evidence indicates, his credibility was the central issue for the jury.

The district court did not abuse its discretion in admitting evidence of four of appellant's prior convictions.

3. Sentence

Appellant was sentenced as a dangerous offender based on a finding that he is a danger to public safety. The presumptive sentence was 108 months; he was sentenced to a 50% upward departure, or 162 months, which is well below the statutory maximum of 240 months. Appellant asserts that the record does not support the determination that he is a danger to public safety as required by Minn. Stat. § 609.1095, subd. 2 (2006), for sentencing as a dangerous offender and that the state's motion for an upward departure was motivated by vindictiveness.

a. "Danger to Public Safety"

A determination that a defendant is a danger to public safety will be upheld if it is supported by the record. *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998). One basis

for finding that a defendant is a danger to public safety is "past criminal behavior, such as . . . [a] high frequency rate of criminal activity or juvenile adjudications, or long involvement in criminal activity including juvenile adjudications." Minn. Stat. § 609.1095, subd. 2. Sentencing departures for such defendants are determined by criminal history, not by aggravating factors.[2] *Neal v. State*, 658 N.W.2d 536, 546 (Minn. 2003).

Appellant has seven prior felony convictions: (1) 1991, delivery of a controlled substance; (2) 1992 (while on probation for the 1991 offense), felon in possession of a firearm; (3) 1994 (while on probation for the 1992 offense), felon in possession of a firearm; (4) 1995 (before the sentence on 1994 offense expired), attempted felon in possession of firearm; (5) February 1997 (five months after sentence on 1995 offense expired), third-degree sale of cocaine; (6) April 1997 (two months later), fifth-degree possession of cocaine; (7) 2005 (less than three months after release from prison for February 1997 offense), sale of simulated controlled substance. Appellant was released from prison for this last offense on 20 May 2006; the present offense occurred on 3 July 2006. The record supports a determination that appellant has the "high frequency rate of criminal activity" and "long involvement in criminal activity" that provide a lawful basis for finding that he is a danger to public safety.

b. Vindictiveness

Appellant argues that his sentence was the result of vindictiveness because the state sought an enhanced sentence due to appellant's exercise of his right to a jury trial.

[2] Appellant's argument that there were no aggravating factors is irrelevant.

> In limited situations in which action detrimental to the defendant has been taken after the defendant exercises a legal right, a presumption of prosecutorial vindictiveness will arise. A presumption of vindictiveness, however, will arise only in those situations where a realistic likelihood of vindictiveness exists. A mere opportunity for vindictiveness is insufficient to justify imposing an inflexible prophylactic presumption.

State v. Pettee, 538 N.W.2d 126, 132 (Minn. 1995) (citations omitted).

A review of the record dispels the presumption of vindictiveness. At the pretrial conference, the prosecutor stated:

> The State's offer is to plead guilty as charged [i.e., to aiding and abetting first-degree aggravated robbery] and the sentence would be the low end of the box [i.e., 92 months]. I believe that's effectively been rejected. I'm also putting the defense on notice that I will follow through in writing that the State will be requesting a sentencing jury. We believe that this defendant qualifies as a dangerous offender . . . . He is subject to the statutory maximum in this case, which is 20 years.

Four months later, at the threshold of the trial and after the charge had been amended, the prosecutor said:

> The offer . . . was for the defendant to plead guilty to the amended charge of aggravated robbery in the second degree, receiving the time that's prescribed in the low end of the box [i.e., 49 months]. We've also given our notice of intent to seek an . . . aggravated sentence . . . and the statutory maximum for aggravated robbery in the first degree is 20 years. So, we just want the record to reflect and the defendant to at least be sort of specifically advised as to what the state will be seeking if he is convicted . . . .

Thus, appellant was informed long before the state's second offer and before the trial that, if he were convicted, the state intended to seek an enhanced sentence. The state twice offered appellant a sentence significantly lower than the sentence he risked if convicted. It is manifest that the state did not seek an enhanced sentence to punish

appellant for proceeding to trial. Because there was no "realistic likelihood of vindictiveness," no presumption of vindictiveness arises. *See id.*[3]

Sufficient evidence supports appellant's conviction, and the district court did not abuse its discretion either in admitting evidence of appellant's previous convictions or in sentencing him as a dangerous offender.

Affirmed.

[3] Two of the three issues raised in appellant's pro se brief , the sufficiency of the evidence and the admission of his prior convictions, have already been discussed. The third issue, makeup of the jury, was never raised in the district court. Therefore, appellant is not entitled to raise it now. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (this court does not consider matters not raised in the district court). Even if appellant were entitled to raise it for the first time on appeal, this argument lacks merit. Appellant argues that his rights were violated because "[o]f the _____ African Americans living in Ramsey County Minnesota, between _____ and _____, where the jury is pooled from, only _____ were selected for jury pools." This assertion does not meet appellant's burden of showing that a particular group in the community was not fairly represented as the result of systematic exclusion of that group from the jury pool. *See State v. Williams*, 525 N.W.2d 538, 542 (Minn. 1994) (setting out requirement for prima facie case of unfair jury selection).