STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1659

State of Minnesota,
Respondent,

vs.

Delbert K. Sybrandt,
Appellant.

Filed November 10, 2008
Affirmed
Bjorkman, Judge

Chisago County District Court
File No. CR-06-2330

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

Janet Reiter, Chisago County Attorney, 313 North Main Street, Room 373, Center City, MN 55012 (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 Hudson, Presiding Judge; Bjorkman, Judge; and Huspeni, 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

BJORKMAN, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that the district court (1) erred by not giving an accomplice-testimony jury instruction, and (2) abused its discretion by ruling that the state could impeach him with his prior felony convictions if he testified. We affirm.

FACTS

On October 3, 2006, James Newburgh and Jeffrey Erickson went to A.I.'s residence to confront him about a firearm that he had stolen from Erickson. Erickson and Newburgh brought A.I. back to Erickson's residence, and appellant Delbert Sybrandt arrived approximately one hour later. The men remained at Erickson's residence with A.I. for several hours, during which time "everybody" smoked methamphetamine.

At some point, Newburgh and Erickson heard a gunshot and saw A.I. fall to the floor. A.I. had been shot in the leg. Newburgh and Erickson both saw Sybrandt holding a .22 caliber firearm immediately after the shooting. They also saw Sybrandt eject a shell from the firearm. After A.I. reported the incident, police searched Erickson's residence and seized several firearms, including a .22 caliber firearm and used and live ammunition.

Sybrandt was charged with several offenses, but the state later dismissed all charges against him except for possession of a firearm by an ineligible person. Newburgh and Erickson also were charged with multiple offenses. Both agreed to testify at Sybrandt's trial and to submit *Alford* pleas to aiding and abetting second-degree assault

and controlled-substance offenses, in exchange for significantly reduced sentences. A jury found Sybrandt guilty and this appeal followed.

D E C I S I O N

I. Accomplice-testimony instruction

Sybrandt argues that the district court erred by not giving an accomplice-testimony instruction to the jury. "The decision to give a requested jury instruction lies in the discretion of the [district] court and will not be reversed absent an abuse of that discretion." *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005). We review a district court's refusal to give a requested accomplice-testimony instruction under a harmless-error analysis. *State v. Shoop*, 441 N.W.2d 475, 479-80 (Minn. 1989).

A defendant may not be convicted based on the testimony of an accomplice unless the accomplice's testimony is "corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04 (2006). A district court must give an accomplice-testimony instruction if a witness testifying against the defendant might reasonably be considered an accomplice. *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002); *Shoop*, 441 N.W.2d at 479. When it is unclear whether a witness is an accomplice or not, it generally becomes a question for the jury. *State v. Reed*, 737 N.W.2d 572, 582 (Minn. 2007). But when the facts of a case are undisputed and only one inference can be drawn as to whether the witness is an accomplice, it is a question for the district court to decide. *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008).

An accomplice is one who could have been charged with and convicted of "the crime with which the accused is charged." *Palubicki*, 700 N.W.2d at 487. To find a witness is an accomplice "it should appear that a crime has been committed, that the person on trial committed the crime, either as principal or accessory and that the witness co-operated with, aided, or assisted the person on trial in the commission of that crime either as principal or accessory." *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006) (quotation omitted). Mere presence at the scene, inaction, knowledge, and passive acquiescence are not enough, *Palubicki*, 700 N.W.2d at 487, nor is an accessory after the fact an accomplice, *State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001).

Sybrandt argues that Erickson and Newburgh were accomplices, citing *State v. Davis* for the proposition that a person can be criminally liable for aiding and abetting possession of a firearm by an ineligible person. 685 N.W.2d 442, 445 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). In *Davis*, we concluded that an accomplice-testimony instruction was necessary because there was a fact question as to whether a witness who admitted handing the defendant a firearm intentionally aided the defendant and therefore could have been indicted or convicted of illegal possession of a firearm. *Id.*

Here, neither Newburgh nor Erickson admitted any involvement in Sybrandt's possession of the firearm. There was no testimony or other evidence at trial as to how Sybrandt came to possess the firearm. A significant fact in *Davis*—that the witness admitted giving the ineligible defendant a firearm—is absent here. There is no evidence Newburgh or Erickson contributed to Sybrandt's possession of the .22.

Sybrandt also argues that Newburgh and Erickson were accomplices, for purposes of the requested instruction, because they could have been charged under the same statute as Sybrandt. This argument is premised on the assumption that the provision of Minn. Stat. § 624.713 (2006) under which he was convicted (subd. 1(b)—prior conviction of crime of violence) is equivalent to the provision under which Newburgh and Erickson allegedly could have been charged (subd. 1(j)(3)—user of controlled substances). This assumption is erroneous.

The two offenses may bear the same name and statute number, but they are different. To convict Sybrandt, the state was required to prove that he was previously convicted of a crime of violence. Minn. Stat. § 624.713, subd. 1(b). But criminal history is irrelevant to a conviction under subdivision 1(j)(3). Rather, the state is required to prove contemporaneous unlawful use of a controlled substance. Minn. Stat. § 624.713, subd. 1(j)(3). The legislature underscored the significance of this distinction by designating one offense as a felony and the other as a gross misdemeanor. *Compare* Minn. Stat. § 624.713, subd. 2(b) (making a violation under subdivision 1(b) a felony) *with* Minn. Stat. § 624.713, subd. 2(c) (making a violation under subdivision 1(c)-(k) a gross misdemeanor). Possession of a firearm by a person who has been convicted of a crime of violence is categorically different from possession by a person who is using a controlled substance. The district court did not abuse its discretion by refusing to give an accomplice-testimony instruction.

II. Prior-conviction evidence

Sybrandt also argues that the district court abused its discretion by deciding that the state could impeach him with his prior felony convictions if he testified. We review a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Evidence of a witness's prior felony convictions is admissible for impeachment purposes if the district court determines that the probative value of admitting the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1). In determining the probative value of past convictions, courts are to examine:

> (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).

Here, the district court considered each of the *Jones* factors. Sybrandt concedes that the second and third factors—recency and similarity—weigh in favor of admitting the prior-conviction evidence. He asserts that the remaining three factors weigh against admission and, therefore, the district court abused its discretion by ruling that the evidence was admissible.

Sybrandt disputes the impeachment value of his prior convictions, arguing that fleeing a police officer in a motor vehicle and fifth-degree possession of a controlled substance do not bear on truthfulness. But the fact that a prior conviction did not directly

involve truth or falsity does not mean it has no impeachment value. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Rule 609 expressly sanctions the use of felonies that are not directly related to truth or falsity for impeachment purposes. Minn. R. Evid. 609(a); *State v. Flemino*, 721 N.W.2d 326, 329 (Minn. App. 2006). And the supreme court has long recognized that "impeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted). The district court did not abuse its discretion in finding this factor favors admission of the convictions.

Sybrandt also argues that the last two *Jones* factors—the importance of the defendant's testimony and the centrality of the defendant's credibility—favor exclusion of the evidence. In assessing the importance of a defendant's testimony, courts must consider whether the admission of the evidence will cause the defendant not to testify. *Gassler*, 505 N.W.2d at 66. If admission of prior convictions prevents a jury from hearing a defendant's version of events, this factor weighs in favor of excluding the evidence. *Id.* at 67. But "[i]f credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Swanson*, 707 N.W.2d at 655.

Sybrandt emphasizes that his decision not to testify meant that the jury did not get to hear his side of the story, and he suggests that the threat of impeachment caused him not to testify. He acknowledges that, had he taken the stand, he would have testified that he did not possess a firearm at Erickson's residence. Thus, his credibility would have

been a central consideration. The district court did not abuse its discretion by weighing the fourth and fifth *Jones* factors in favor of admitting Sybrandt's prior convictions.

Because all of the *Jones* factors weigh in favor of admitting the evidence, the district court did not abuse its discretion in ruling that the state could impeach Sybrandt with his two prior convictions if he testified at trial.

Affirmed.