STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1183

State of Minnesota,
Respondent,

vs.

Samuel Lee Miller, Jr.,
Appellant.

Filed December 16, 2008
Affirmed
Minge, Judge

Benton County District Court
File No. 05-CR-06-1737

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert Raupp, Benton County Attorney, Karl Schmidt, Assistant County Attorney, Courts Facility, P.O. Box 189, Foley, MN 56329 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, 540 Fairview Avenue South, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant challenges his conviction of second-degree controlled substance sale under Minn. Stat. § 152.022, subd. 1(1) (2006), arguing that the district court erred by allowing the state to introduce evidence of a prior conviction of third-degree burglary and evidence that appellant previously had worked with the St. Cloud Police Department as a confidential informant. We affirm.

FACTS

In June 2006, D.C. arranged with a Stearns County deputy sheriff to make two controlled buys of crack cocaine from appellant Samuel Lee Miller, Jr. A St. Cloud police officer, Investigator Rathbun, participated in surveillance of appellant's house. At trial, the prosecutor asked Investigator Rathbun whether he was sure that the person that he saw talking to D.C. was appellant. Investigator Rathbun stated that he was "very familiar" with appellant because appellant had worked as a confidential informant in 2005. Although defense counsel objected to this testimony, the district court overruled the objection. The confidential-informant relationship between Investigator Rathbun and appellant came up again during direct questioning of appellant by defense counsel.

Appellant testified in his own defense. The district court granted the state permission to introduce impeachment evidence that appellant had been convicted of third-degree burglary in 1997. Defense counsel chose to raise the impeachment evidence of the burglary conviction on direct examination. The only evidence the jury heard regarding the conviction was that appellant was convicted of a burglary in August of

1997, and the district court immediately read the standard cautionary instruction to the jury. Neither party brought the issue up again.

The jury found appellant guilty of second-degree controlled substance sale. Appellant was sentenced to the presumptive executed term of 88 months. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court abused its discretion by ruling that the state could introduce impeachment evidence of appellant's 1997 burglary conviction. The admissibility of a prior conviction used to impeach a witness's credibility is governed by Minn. R. Evid. 609, the pertinent portion of 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 this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.
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> (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.

Minn. R. Evid. 609.

Because appellant's conviction was less than ten years old and was a felony that carried a sentence of more than one year, the question is whether the probative value of allowing the admission of the impeachment evidence outweighed its prejudicial effect. Whether the probative value of 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). "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). In making the initial decision and in our review of that decision, a five-factor test is used. *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998); *State v. Jones*, 271 N.W.2d 534, 538 (Minn.1978). Each factor is considered below.

A. Impeachment Value of Prior Crime

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 his testimony." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (quotation omitted); *but cf. State v. Leecy*, 294 N.W.2d 280, 282 (Minn. 1980) (holding that an aggravated assault conviction had "nothing to do with defendant's credibility"). A burglary conviction, although not a crime of dishonesty or false statement, sheds some light on a defendant's character. Burglary is a serious crime that strikes fear into a neighborhood. The perpetrator typically acts in a stealthy manner and misleads the community into believing he has honorable intentions when he actually is planning to

invade resident's homes. By disclosing this crime when committed by a witness, we inform the jury about the witness's attitudes toward society. This enables the jury to judge better the truth of the witness's testimony. *See Swanson*, 707 N.W.2d at 655-56 (allowing the admission of prior assault convictions in part because they assisted the jury in assessing the defendant's credibility). The district court found that this factor weighed in favor of admitting the evidence. Appellant cites nothing in the record to suggest that this finding was inappropriate, that the district court improperly instructed the jury, or that the jury misused this evidence. It was well within the district court's discretion to conclude that this prior conviction had impeachment value and that this factor weighed in favor of its admission.

B. Staleness/History

The second *Jones* factor is staleness and the defendant's intervening conduct. *Jones*, 271 N.W.2d at 538. If a conviction is less than ten years old, its date does not weigh against its admission. *See Swanson*, 707 N.W.2d at 655. Appellant was convicted of third-degree burglary in 1997, almost ten years before the drug charge, and appellant was released from custody after he served a short jail sentence. However, the district court in this case found that appellant "had engaged in criminal activity subsequent to that offense, including a misdemeanor criminal damage to property in August of 2005 in Sherburne County, as well as a Controlled Substance Crime in Stearns County in August of 2005." Although the approximately nine-year time lapse in this case does reduce the probative value of the criminal record, the intervening criminal conduct gives the 1997

conviction greater currency. On balance, we conclude that this factor weighs slightly in favor of admission.

C. Similarity

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." *Swanson*, 707 N.W.2d at 655 (citing *Jones*, 271 N.W.2d at 538). The district court found that the prior burglary conviction and the charged offense were "obviously very different crimes." We agree—and appellant concedes—that the two crimes are dissimilar, and, therefore, this factor does not support exclusion.

D. Importance of Appellant's Testimony &
E. Centrality of Credibility Issue

Appellate courts generally analyze the fourth and fifth *Jones* factors together and have held that, "[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; *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 his testimony is to deny the allegations because credibility becomes the central issue in the case). Under the fourth factor, however, if admission of the conviction would cause a defendant to not testify, if it is important for the jury to hear defendant's version of the case, and if the defendant cannot introduce his theory of the case without testifying, admission of the prior criminal record is more prejudicial and the district court should exclude the prior conviction. *Cf. State v. Heidelberger*, 353 N.W.2d 582, 590 (Minn. App. 1984) (noting,

however, that, if the defendant's defenses and version of the case can be brought out through cross-examination of witnesses, the calling of witnesses, and argument, the defendant's version of the case can be heard without his testimony), *review denied* (Minn. Sept. 12, 1984).

After reviewing appellant's potential testimony, the district court stated, "I am not satisfied that the Defendant's testimony is absolutely critical to the defense in this case . . . ." In this case, appellant's defense was that he was merely a drug addict aiding a fellow addict and not a drug-dealer. It appears that the district court concluded that this defense could be presented by the testimony of other witnesses and arguments by appellant's attorney. The district court also stated that "[the defendant's testimony goes] to the centrality of credibility here."

The district court permitted the introduction of the conviction and appellant testified. The focus of appellant's testimony was to deny the characterization of his conduct as drug-dealing; he did not deny the underlying evidence of his involvement in the illegal transactions that the state presented. His attorney also brought up appellant's more benign explanation of the incidents in cross-examination of the state's witnesses and in closing argument. Because this presentation was detailed and specific, we conclude that appellant's personal testimony was not essential to presenting his version of the case.

By asking the jury to accept his theory of the events and not the state's theory, appellant put his credibility at issue; the central issue of the case became whether the jury should believe appellant or the state's witnesses. *See State v. Pendleton*, 725 N.W.2d

717, 729 (Minn. 2007) (finding that credibility was critical because the defendant's "wrong place, wrong time" defense contradicted the consistent story of the state's witnesses). Because appellant's credibility became a central issue, there was greater justification for admitting the 1997 burglary conviction. We conclude that both factors four and five weigh in favor of admitting the evidence.

After individually considering and weighing the *Jones* factors, we conclude that the factors largely support admission of the 1997 conviction and that the district court did not abuse its discretion by permitting admission of the conviction.

II.

The second issue is whether testimony that appellant had worked as a confidential informant was character or prior-bad-act evidence that could not be admitted without applying Minn. R. Evid. 404(b). "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Appellant's argument is that, in the course of the testimony and arguments of counsel challenging the credibility of informant D.C., the jury learned that confidential informants often accept that role with law enforcement to "get rid of charges," that the fact that appellant had once worked as an informant would lead the jury to believe that he had previously been the subject of drug or other serious charges, and that disclosure of his prior work as an informant stigmatized him. Appellant claims that, because the

evidence was essentially that of "prior bad acts," the district court erred by not conducting an analysis under Minn. R. Evid. 404(b)[1] and *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965).

Before we undertake any analysis pursuant to Rule 404(b), we must determine whether the activity in question actually implicates the defendant's character. The Minnesota Supreme Court has only indirectly addressed whether evidence is character evidence. *See State v. Roman Nose*, 667 N.W.2d 386, 403-04 (Minn. 2003) (holding that a prosecutor's argument that a picture on defendant's wall portraying a human body was evidence of defendant's personality and values was improper character evidence); *State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002) (testimony that drug dealers commonly took steps to avoid forfeiting a new car, hid drugs in obscure places like the air cleaner, and consented to searches was akin to character evidence and was erroneously admitted). Character has been described as "[t]he aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the one's distinguishing attributes; the opinion generally entertained of a person derived from the common report of the people who are acquainted with him," 8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 32.25 (3d ed. 2001) (quotation omitted), and the "generalized description of a person's disposition or of the disposition in respect to a general trait such as honesty, temperance or peacefulness." 11 Peter N. Thompson, *Minnesota Practice*

[1] When prosecuting a defendant for a crime, the state may not introduce evidence of another "crime, wrong, or act" committed by the defendant to prove the defendant's character to show that he acted in conformity with that character. Minn. R. Evid. 404(b).

§ 404.02, (3d ed. 2001) (quoting Charles T. McCormick, *McCormick on Evidence* § 195 (Edward W. Cleary ed., 2d ed. 1972)).

No Minnesota appellate court appears to have defined what a *bad act* is. In 1999, the Maryland Court of Appeals reviewed how a number of jurisdictions construe what a "bad act" is under its counterpart to our Rule 404(b) and formulated the following definition: "[A] bad act is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg v. State*, 735 A.2d 1061, 1071-72 (Md. App. Ct. 1999).

Two years earlier, the Indiana Supreme Court addressed what a bad act is when reviewing a case involving the murder of a ten-year-old boy. *Stevens v. State*, 691 N.E.2d 412, 422-23 (Ind. 1997). During the trial, the prosecutor introduced evidence that, prior to the boy's murder, the defendant videotaped the boy's baseball game, attended a neighborhood Bible study with boys, and took the boy fishing. *Id.* at 423. When defense counsel sought to challenge the evidence as prior bad acts, the court noted that these acts were not bad acts because, by themselves, they did not illustrate any "unsavory character trait with which [the defendant] could have acted in conformity" in murdering the victim. *Id*. at 423. Based on this caselaw, we conclude that conduct constitutes a "bad act" if the jury would attribute negative connotations to appellant's character based on the knowledge that appellant engaged in the conduct.

The state never suggested that a confidential informant is someone with outstanding criminal charges, and the state never introduced testimony that D.C. testified

to reduce pending charges. A review of the record shows that, during his opening statement, the prosecutor stated that D.C. was "working for the police." On direct examination, the deputy sheriff only stated that D.C. told him that he could buy crack from appellant, without elaborating on why D.C. approached him. On direct examination, D.C. did not elaborate on his role as a confidential informant except to say that his sole compensation was $50 per controlled buy. When defense counsel pressed D.C. further to explain his motivation for working with the police, D.C. stated that he also acted as a confidential informant to "help them [the police] out, too." Thus, the record suggests that there are several reasons why an individual could become a confidential informant and that being an informant, at worst, had an ambiguous connotation.

Here, there was no suggestion that defendant's earlier work as a confidential informant was incident to a plea bargain or any offense. In fact, defense counsel elicited testimony from both Investigator Rathbun and appellant that suggested that appellant cooperated with the police voluntarily, worked without any quid pro quo arrangement with police, and quit working with police when he thought that they betrayed him. Furthermore, appellant does not claim, and we do not have a basis for concluding, that there is some broader societal impression that police informants are necessarily unsavory or untrustworthy individuals. Thus, we conclude that the district court did not abuse its discretion by not applying a Rule 404(b) or *Spreigl* bad-act analysis to Investigator Rathbun's testimony.

Affirmed.