STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1423

State of Minnesota,
Respondent,

vs.

Benjamin Lee Merriman,
Appellant.

Filed January 20, 2009
Affirmed in part, reversed in part, and remanded
Shumaker, Judge

Ramsey County District Court
File No. K9-06-4108

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Blvd. West, Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

SHUMAKER, Judge

Appellant argues that the district court abused its discretion by finding that he could be impeached with his prior felony convictions if he testified. Appellant also argues that the district court made factual determinations as to his criminal-history score and thereby violated *Blakely v. Washington*. Because the district court properly exercised its discretion in ruling that appellant's prior felony convictions were admissible, but abused its discretion when it computed appellant's criminal-history score based on its own findings, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

A jury found appellant Benjamin Lee Merriman guilty of committing first-degree criminal sexual conduct against seven-year-old T.A.J. in September 2006. Merriman contends that the district court abused its discretion in ruling that his prior felony convictions would be admissible if he testified. He also raises a sentencing-related issue.

Merriman did not testify. The evidence against him consisted primarily of the testimony of T.A.J. and her mother, T.J. T.J. stated that Merriman had been an overnight guest in her apartment. In the morning, she found him lying in bed next to T.A.J. and J.T.'s one-year-old son. T.A.J. was naked from the waist down. When T.J. asked Merriman why he was in the children's bedroom, he said he wanted to lie down.

T.A.J. testified that Merriman pulled down her pajamas and her underwear and he "put his thing in me."

T.A.J. was ultimately diagnosed as having gonorrhea. A woman with whom Merriman had been intimate before this incident testified that she contracted gonorrhea from him, although a test of Merriman after the incident was not positive for the disease, and another woman testified that she had intercourse with Merriman but did not contract gonorrhea.

In addition to the evidentiary issue Merriman raises, he contends that the district court violated his Sixth Amendment rights, as interpreted in *Blakely v. Washington*, in computing his criminal-history score for sentencing. The state concedes this error.

D E C I S I O N

Evidentiary Issue

The district court ruled that, if Merriman testified, the state would be allowed to impeach him with four misdemeanor convictions of giving false information to the police; two controlled-substance felony convictions; a felony conviction of fleeing the police in a motor vehicle; and a felony theft conviction. Merriman concedes the admissibility of the misdemeanor convictions as crimes of dishonesty or false statement under Minn. R. Evid. 609(a)(2). He challenges the admissibility of the felony convictions and argues that the court's ruling as to their admissibility caused him to forgo testifying, thus depriving him of the opportunity to present a complete defense.

"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 its determination, the court must balance probative value against possible prejudicial effect. Minn. R. Evid. 609(a)(1). Whether

the probative value of a prior conviction outweighs its likely prejudicial effect is a matter within the court's discretion. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985).

As a guideline for exercising its discretion to admit or exclude evidence of a prior conviction for impeachment, the court is to consider five factors:

> (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 the defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978).

The district court indicated that *Jones* contains a "non-exhaustive list of considerations" regarding the admissibility of felony convictions for impeachment and then the court analyzed the *Jones* factors in the context of the case before it.

Merriman concedes that the convictions at issue were not stale and were not similar to the crime charged. He also concedes that his credibility was important to the case. But, he argues, the impeachment value of the convictions "was minimal, at best, and [his] testimony was essential to his defense."

Because Minn. R. Evid. 609(a)(1) allows evidence of a felony conviction solely for "the purpose of attacking the credibility of a witness . . . ," there can be little doubt that a crime that indisputably reflects upon an accused's veracity—one of *crimen falsi*—would be clearly relevant to the rule's purpose and would have readily apparent "impeachment value." More problematic is a crime that does not apparently involve a veracity component, such as, here, controlled-substance crimes and fleeing the police in a

motor vehicle. Merriman argues that those crimes in particular have little or nothing to do with the question of his testimonial truthfulness and simply invite the jury to draw the broader character inference that he is just a "'bad man' who is worthy of conviction."

Merriman's argument has merit but conflicts with Minnesota's approach to the issue of "impeachment value." Premised on the idea that the jury should know about the sort of person whose word the jury is asked to accept, Minnesota caselaw has endorsed the so-called "whole person" approach:

> Moreover, the fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value. We have stated 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. Gassler, 505 N.W.2d 62, 67 (Minn. 1993) (quoting *St. Paul v. DiBucci*, 304 Minn. 97, 100, 229 N.W.2d 507, 508 (1975) (citation omitted)).

Gassler also emphasized that "trial courts have great discretion in determining what prior convictions are admissible under the balancing test of Rule 609(a)(1)." *Id.* We note that none of the cases addressing this issue appear to mandate the application of the "whole person" approach but rather simply make that application permissible in the court's exercise of its broad discretion in performing the rule 609(a)(1) balancing test. The court here applied the "whole person" approach and did not err in doing so. *See State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007) (applying "whole person" approach when determining whether to admit impeachment evidence); *see also State v. Pendleton*, 725 N.W.2d 717, 728 (Minn. 2007) (affirming court's admission of convictions of fleeing an officer and making terroristic threats in a trial for first-degree murder); *State v.*

Swanson, 707 N.W.2d 645, 653 (Minn. 2006) (affirming court's admission of convictions of theft of a motor vehicle, assault, criminal vehicular operation, and possession of stolen property in a trial for murder, kidnapping, and false imprisonment); *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998) (affirming court's admission of 1984 conviction of criminal sexual conduct in a trial for first-degree criminal sexual conduct); *State v. Flemino*, 721 N.W.2d 326, 329 (Minn. App. 2006) (affirming court's admission of convictions of burglary and drug possession in a trial for first-degree aggravated robbery).

Thus, the district court found that all of Merriman's convictions had impeachment value—a determination that was not clearly erroneous under caselaw—and that Merriman's credibility was a central issue in the case. The only witness against him with direct knowledge of the crime was a seven-year-old girl, although the girl's mother, who testified, provided inculpatory circumstantial evidence. Merriman concedes that that centrality factor weighs "in favor of admitting the prior convictions." Caselaw also supports admissibility when the centrality factor is shown:

> . . . [T]he general view is that if the defendant's credibility is the central issue in the case—that is, if the issue for the jury narrows to a choice between defendant's credibility and that of one other person—then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater.

State v. Bettin, 295 N.W.2d 542, 546 (Minn. 1980).

Another consideration is the possible preclusive effect of a ruling in favor of admissibility. As the court in *Bettin* stated, "a judge might exclude even a relevant prior

conviction if he determines that its admission for impeachment purposes will cause defendant not to testify and if it is more important in the case to have the jury hear the defendant's version of the case." *Id.* Merriman contends that, but for the court's ruling to admit evidence of his prior felonies, he would have testified and would have been able to reconcile inconsistencies in the case. Furthermore, and more importantly, according to Merriman, he would have been able to refute the gonorrhea issue.

As to the alleged inconsistencies, Merriman argues that T.J.'s trial testimony was inconsistent with her statement to the police. It appears that the inconsistency with which Merriman is concerned was that T.J. testified that she found Merriman in bed with her children but told the police he was sleeping on the floor in the children's room when she found him. He also contends that T.A.J.'s version was different from either version related by T.J., but the record shows that T.A.J. consistently stated that Merriman came into her room and sexually penetrated her. Thus, T.A.J.'s own version remained the same in all material respects. It is not apparent what inconsistency Merriman might have cleared up through his testimony, as the only witness with firsthand knowledge of the actual commission of the crime remained consistent in her statements. Furthermore, any material inconsistencies could be, and were, brought out and ultimately argued by defense counsel irrespective of whether Merriman testified.

T.A.J. apparently contracted gonorrhea. The state's allegation was that she contracted it from Merriman. But medical records in evidence showed that less than two months after the incident he tested negative for gonorrhea, and a sexual partner of his from August until October 2006 testified that she had not contracted a sexually

transmitted disease, thus providing evidence tending to negate the state's contention that T.A.J. became infected through Merriman's sexual contact with her.

Merriman was able to provide additional evidence in his defense, through the testimony of his brother, as to a possible motive for T.J. to make a false accusation against him. Furthermore, some of Merriman's own statements denying the charge came into evidence through the testimony of the police sergeant who interviewed him after his arrest. So, Merriman was not left with a bare denial of the charge communicated solely through his defense attorney. He was able to present some evidence in support of his own position and in derogation of the case against him.

Perhaps ideally, and hypothetically, juries should hear defenses to crimes, at least in part, through the actual, live testimony of those accused. All similarly situated criminal defendants are faced with the same dilemma that confronted Merriman: do not testify and risk the possibility that the jury will draw a negative inference from the silence of the accused, or testify and risk the possibility that the impeachment evidence will influence the jury to doubt the credibility of the testimony.

There is also a dilemma for the trial judge when performing the *Jones* balancing exercise. If the defendant's testimony is important, that factor weighs against admissibility of the conviction. *Jones*, 271 N.W.2d at 538. On the other hand, if the credibility issue is central to the case—which would seem to make the defendant's testimony vitally important—that factor weighs in favor of admissibility. *Bettin*, 295 N.W.2d at 546. Perhaps this dilemma exists only if the judge, inadvisably, uses the *Jones* factors as a scorecard rather than as guidelines to be considered in the broader context of

the particular facts of the case. A guidelines approach not only enables the judge to apply the *Jones* factors but also to weigh them in a case-specific posture.

The record shows that the court here considered the *Jones* factors prior to its ruling. It also shows that the court did not use *Jones* as a perfunctory checklist. Instead, the court announced that *Jones* provides a "non-exhaustive list" of factors to consider, thus evincing a broader approach to the balancing required by rule 609(a)(1). We hold that the court properly exercised its discretion in its rule 609(a)(1) rulings.

Criminal-History Score

In determining Merriman's criminal-history score so as to be able to apply the sentencing guidelines, the court assigned 1.5 points for an Illinois controlled-substance conviction that Merriman received as a juvenile. To arrive at the score of 1.5 points, the court necessarily made factual determinations.

Although it was appropriate for the court to use a conviction from another jurisdiction in computing his criminal history, Merriman had a right under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to have a jury determine whether he would have been prosecuted as an adult in Minnesota for the juvenile offense he committed in Illinois. The state concedes Merriman's argument, and we agree. It was error for the court to have made a factual determination as to which Merriman had the right of jury trial, and this issue must be remanded for further appropriate proceedings.

Finally, we note that a sentencing court may sometimes engage in limited fact-finding as to convictions from another jurisdiction without violating *Blakely* or *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). *State v. Outlaw*, 748 N.W.2d 349,

355 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). But such fact-finding is permissible only if "the findings [a]re based on admitted or stipulated facts or facts proved beyond a reasonable doubt in another jurisdiction." *Id.* Because both parties to this appeal agree that the district court made impermissible findings of fact and thus have not shown that the court engaged in the permissible limited fact-finding recognized in *Outlaw*, we acknowledge that authority but conclude that it does not control on this record.

Affirmed in part, reversed in part, and remanded.