STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0144

State of Minnesota,
Respondent,

vs.

Robert Allen King,
Appellant.

Filed May 12, 2009
Affirmed
Peterson, Judge

Douglas County District Court
File No. 21-KX-05-001165

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

Christopher D. Karpan, Douglas County Attorney, Douglas County Courthouse, 305 Eighth Avenue West, Alexandria, MN 56308 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

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

PETERSON, Judge

In this appeal from convictions of criminal damage to property and terroristic threats, appellant argues that (1) the evidence was insufficient to support his convictions because two alibi witnesses testified that appellant was elsewhere during part of the time he was alleged to have been threatening the victim and the victim's trial testimony was inconsistent, (2) appellant's right to testify was chilled by the district court's ruling that appellant could be impeached with evidence of a prior controlled-substance crime, and (3) appellant should not have been convicted of both offenses when the criminal damage to property arose out of the same behavioral incident as the terroristic-threats offense. We affirm.

FACTS

The victim was appellant's supervisor at the company where they both worked. The victim and appellant got along well and occasionally would go out for a drink at a local establishment known as the K-Town Bar. On September 21, 2005, the two of them went to the K-Town Bar after work at about 10:30 or 11:00 p.m. Two people in the bar were making "smart remarks," so the victim left and went home.

At about noon the next day, the victim was at home having lunch when he saw appellant walk into his yard. The victim thought that appellant had come to visit and was expecting him to walk around the house and knock on the back door. Instead, appellant threw a large object through the front window of the victim's house, breaking the window glass.

Deputy Gregory Johnson responded to the victim's call to the Douglas County Sheriff's Office. Johnson noticed a chunk of tar at the base of the window. The tar had glass fragments embedded in it, which indicated that it was the object that had been thrown at the victim's house. Johnson spoke to appellant by telephone. Initially, appellant was pleasant. But when Johnson brought up the window incident, appellant became sarcastic, hung up on Johnson, and did not answer his telephone again.

At about 6:30 p.m., the victim was driving through town when he saw appellant. The victim stopped and rolled down the passenger window and told appellant that he had to pay for the window or he would not have a job. Appellant responded by swearing at the victim, using a racial epithet, and threatening that damage would occur to the victim's home and the workplace. The victim described appellant as red in the face and screaming. As the victim drove away, appellant kicked the passenger door of the victim's car, causing a dent.

At about 8:30 p.m., appellant and another individual drove by the victim's house three or four times, yelling racial epithets each time. The victim could hear the epithets clearly and recognized appellant's voice saying them. The victim called the sheriff's office again, and Deputy Brandon Chaffins responded to the call. The victim gave a statement to Chaffins about the 6:30 and 8:30 p.m. incidents.

At about 12:30 a.m. on September 23, 2005, the victim heard a loud noise coming from the side of his house. Because the victim was afraid of what appellant might do, he had placed an unloaded shotgun by his front door. When the victim heard the noise, he grabbed the shotgun and ran outside and found appellant in his front yard. The victim

pointed the shotgun at appellant and told him to get on the ground, but appellant did not do so. Instead, appellant yelled racial epithets at the victim and chased him back to the house. The victim went inside and called the police.

Appellant was charged with one count of terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2004), and one count of criminal damage to property in the fourth degree in violation of Minn. Stat. § 609.595, subd. 3 (2004).

K-Town Bar bartenders S. M. and J. B. testified at trial for the defense. S. M. testified that at about 10:30 p.m. on September 21, 2005, appellant and the victim were in the bar, and the victim was pestering appellant to buy him a drink. S. M. testified that the victim normally asked appellant to buy him a drink. S. M. testified that the victim became upset and that as the victim was leaving, he said to appellant something like, "You'll pay for this. I'm going to get you." The victim denied asking appellant to buy him drinks on September 21 and also denied that it was a common practice for him to ask appellant to buy him drinks.

Initially, J. B. testified that on September 22, 2005, appellant came to the bar at about 5:30 p.m. and again at 8:00 or 8:30 p.m. to buy off-sale liquor and then came back a third time at about 10:30 p.m. After reviewing an earlier statement to an investigator, J. B. testified that appellant came to the bar at 8:00 or 8:30 p.m. and stayed until 12:30 a.m. On cross-examination, J. B. admitted that he did not recall what time appellant had been at the bar on September 22.

A jury found appellant guilty as charged. The district court sentenced appellant to an executed term of 24 months in prison on the terroristic-threats conviction and entered a conviction on the criminal-damage-to-property offense. This appeal followed.

D E C I S I O N

I.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Accordingly, we will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant's challenge to the sufficiency of the evidence goes only to witness credibility, not to the elements of the offenses of which he was convicted. Appellant argues that the testimony of S. M. and J. B. established that appellant was at the K-Town Bar when the offenses were committed. The argument is not supported by the evidence in the record. Appellant cites S. M.'s testimony about the victim asking appellant to buy

him drinks and becoming upset when appellant refused. That testimony, however, was about an alleged incident that occurred when the victim and appellant were at the K-Town Bar after work on September 21, the evening before the events resulting in appellant's convictions occurred. S. M. did testify that she saw appellant at the K-Town Bar when she was having lunch there on September 22, but she did not recall the exact time, and testified only that bar employees usually eat lunch sometime between 11:00 a.m. and 1:00 p.m. As to J. B.'s testimony about appellant being in the bar on September 22, J. B. admitted that he could not recall what time appellant had been there.

Appellant also cites inconsistencies and conflicts in the victim's testimony regarding when he was at the K-Town Bar on September 22 and the timing of a call to police. The victim testified that he called police after confronting appellant at about 6:30 p.m., but there is no record of the call. The victim testified that he did not report the confrontation and only called to report appellant's location to police. When the victim's testimony is considered in light of Johnson's testimony that the victim reported appellant's location when Johnson returned to the victim's house shortly after the brick was thrown through the window, it appears that the victim was mistaken as to when he reported appellant's location to police. Regarding when the victim went to the K-Town Bar on September 22, the victim initially estimated that he went there to buy cigarettes at about 8:00 p.m. But after testifying about the drive-by incident, the victim recalled that he did not go to the bar until about 10:00 p.m. Inconsistencies in testimony and conflicts in evidence do not require reversal; they are merely factors to consider when making

credibility determinations, which is the jury's role. *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

Appellant also argues that the victim's lack of recollection about a prior conviction, with which the victim was impeached at trial, tends to cast doubt on the credibility of the victim's testimony. But "judging the credibility of witnesses is the exclusive function of the jury." *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995).

Finally, appellant argues that the victim's testimony that he left without going inside the bar because he saw appellant in the bar conflicts with the victim's testimony that he was sitting in the bar around 10:30 or 11:00 p.m. when appellant arrived on his bicycle. Appellant's argument misrepresents the record. The victim testified that he was in the bar around 10:30 or 11:00 p.m. on September 21 and that he left without going inside the bar on September 22.

In sum, S. M. and J. B. did not recall the exact times when appellant was in the bar on September 22. The inconsistencies in the victim's testimony were minor, and his testimony regarding the offenses committed by appellant was consistent with his earlier statements to police and with the officers' trial testimony. Appellant had the opportunity to present his arguments regarding credibility to the jury, and it was the jury's role to determine credibility. The evidence was sufficient to support appellant's convictions. *See State v. Bolstad*, 686 N.W.2d 531, 540 (Minn. 2004) (declining to depart from presumption favoring jury's resolution of witness credibility where circumstances surrounding witness's changed story were presented to jury).

II.

Appellant argues that the district court erred in ruling that appellant could be impeached with a 2002 felony conviction of fifth-degree controlled-substance crime if he testified. Appellant did not object to the ruling at trial.

"[T]his court has discretion to consider an error not objected to at trial if it is plain error that affects substantial rights." *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). To establish plain error, the defendant must prove (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

Minn. R. Evid. 609(a)(1), (b), allows evidence of a felony conviction to be admitted for impeachment purposes provided that ten or fewer years have elapsed since the conviction and that the probative value of the evidence outweighs its prejudicial effect. *See State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998) (listing factors to consider when determining whether probative value outweighs prejudicial effect) (quoting *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978)). The district court's ruling on the impeachment of a witness by prior conviction is reviewed under a clear-abuse-of-discretion standard. *Id.* at 584; *see also State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985) (stating that whether probative value of prior convictions outweighs prejudicial effect is committed to district court's discretion).

1. Impeachment Value

The district court found that the prior conviction had "some" impeachment value. The supreme court has concluded that Minn. R. Evid. 609 "clearly sanctions the use of felonies . . . not directly related to truth or falsity for purposes of impeachment, and thus necessarily recognizes that a prior conviction, though not specifically involving veracity, is nevertheless probative of credibility." *State v. Brouillette*, 286 N.W.2d 702, 708 (Minn. 1979). "[I]mpeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *Id.* at 707 (quotation omitted). "Lack of trustworthiness may be evinced by [an] abiding and repeated contempt for laws [that one] is legally and morally bound to obey . . ." *Id.*

Although admission of evidence of controlled-substance offenses under the whole-person rationale has been criticized, it remains within the district court's discretion. *See State v. Flemino*, 721 N.W.2d 326, 329 (Minn. App. 2006) (in upholding admission of controlled-substance offense for impeachment, court noted that, despite widespread criticism of "whole person" rationale, rule 609 reflects a broader credibility concept and court of appeals lacks authority to alter rule adopted by supreme court); *State v. Norregaard*, 380 N.W.2d 549, 554 (Minn. App. 1986) (noting that use of prior drug conviction to impeach is disfavored but nonetheless affirming admission of such conviction), *aff'd as modified*, 384 N.W.2d 449 (Minn. 1986).

Under the whole-person rationale, the impeachment-value factor favors admission of appellant's prior conviction.

2. Date of Conviction and Subsequent History

The district court did not consider and the state cites no evidence regarding appellant's subsequent history.

3. Similarity of Crimes

"The danger when the past crime is similar to the charged crime is that the likelihood is increased that the jury will use the evidence substantively rather than merely for impeachment purposes." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). The greater the similarity, the greater the reason for not permitting use of the prior crime to impeach. *Jones*, 271 N.W.2d at 538. The controlled-substance offense was not similar to the charged crimes, so this factor weighs in favor of admission.

4. Importance of Appellant's Testimony

Because appellant's defense that he was elsewhere when the offenses occurred was presented through the testimony of alibi witnesses and because no offer of proof was made as to any additional testimony appellant would have added if he had taken the stand, this factor weighs in favor of admission. *See State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993).

5. Centrality of Appellant's Credibility

Although appellant had alibi witnesses testify for him, appellant's credibility was central because the alibi witnesses' testimony was uncertain as to the times when appellant was at the bar. Accordingly, this factor weighs in favor of admission. *See Bettin*, 295 N.W.2d at 546 (stating that if defendant's credibility is the central issue in the

case, a greater case can be made for admitting impeachment evidence because the need for the evidence is greater).

Appellant has failed to establish that the district court's ruling on the admissibility of his prior conviction was plain error. *See State v. Hochstein*, 623 N.W.2d 617, 624-25 (Minn. App. 2001) (affirming admission of prior conviction when first *Jones* factor was neutral, second and third factors weighed against admission, and fourth and fifth factors weighed in favor of admission). Appellant's claim of plain error based on insufficient findings on the *Jones* factors also fails. *See State v. Swanson*, 707 N.W.2d 645, 654-655 (Minn. 2006) (stating that ruling on admissibility of prior conviction for impeachment purposes may be upheld despite insufficient findings on *Jones* factors if appellate review of those factors shows error was harmless).

III.

Citing Minn. Stat. § 609.04, subd. 1 (2004), appellant argues that the district court erred in entering a conviction on the criminal-damage-to-property offense because the terroristic-threats and criminal-damage-to-property offenses both arose out of a single behavioral incident.

Minn. Stat. § 609.04, subd. 1, states that a person "may be convicted of either the crime charged or an included offense, but not both." "That statute forbids two convictions . . . of one offense and a lesser included offense on the basis of the same criminal act." *State v. Gayles*, 327 N.W.2d 1, 3 (Minn. 1982). Minn. Stat. § 609.04, subd. 1, does not apply when the second offense is not an included offense. *Id.* On

appeal, appellant concedes that the criminal-damage-to-property offense was not an included offense of the terroristic-threats offense.

Under Minn. Stat. § 609.035, subd. 1 (2004), "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." "Minn. Stat. § 609.035 allows multiple convictions for different incidents (counts) arising out of a single behavioral incident, but prohibits multiple sentences for conduct that is part of a single behavioral incident." *State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002) (quotation marks omitted). Under Minn. Stat. § 609.035, subd. 1, even if the terroristic-threats and criminal-damage-to-property offenses arose from a single behavioral incident, the district court properly entered a conviction for the criminal-damage-to-property offense. *See id.* (applying Minn. Stat. § 609.035).

Affirmed.