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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2445**

State of Minnesota,
Respondent,

vs.

Kemar Aloyuius Guy,
Appellant.

**Filed June 9, 2009
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-07-025811

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

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Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and
Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. 6, § 10.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges his conviction following a jury trial and argues that the district court abused its discretion when it ruled that appellant could be impeached with a prior conviction if he testified and asserted self-defense. Although the district court erred by conditioning the admissibility of the prior conviction on the content of appellant's testimony, the error did not affect the fairness, integrity or public reputation of the judicial proceeding. And the district court properly ruled that the probative value of the impeachment evidence outweighed its prejudicial effect. We affirm.

FACTS

On April 18, 2007, appellant Kemar Aloyuius Guy received a call from his ex-girlfriend, S.W., who requested that he help her move; appellant agreed to assist. S.W. and appellant met at the transit station in Brooklyn Park and rode the bus together toward S.W.'s home. After appellant and S.W. got off the bus, the two argued. S.W. testified that appellant tugged on her coat, grabbed her by the throat, and threw her purse in the street. S.W. retrieved her purse and swung at appellant with it. S.W. told appellant she did not want to see him again, and she walked home alone. When S.W. arrived at home, she informed her mother, R.L., and stepfather, A.L., that appellant "put his hands on [her]." R.L. and A.L. wanted to confront appellant and, with S.W., they got into a van and went to look for appellant. When they saw appellant, all three got out of the van. After an exchange of words, A.L. punched appellant in the lip and appellant fell down. Appellant started to reach for something, and S.W. believed it was a gun. S.W. grabbed

appellant and the two fell to the ground. S.W. saw the gun in appellant's hand. Appellant was pointing the gun at A.L. Appellant fired the gun six times. A.L. ran behind the van. S.W. remained on the ground as appellant got up and ran toward the van, firing the gun. Appellant continued to shoot behind him as he ran away. The Brooklyn Park police were dispatched to the scene of the shooting and spoke with S.W., R.L., and A.L. After S.W., R.L., and A.L. returned home, they reported that appellant called them and made threatening statements. The police obtained the telephone number from which the calls originated and called the number. The unidentified male who answered spoke of obtaining another gun with additional ammunition.

On April 20, 2007, the police went to appellant's home and, with permission from appellant's mother and stepfather, searched their home and discovered a gun inside a vacuum. Six spent shell casings were found in the gun. Neither DNA nor identifiable fingerprints were found on the gun, and the gun was neither reported stolen nor registered to appellant.

Appellant was charged with seven offenses relating to the events of April 18, 2007: one count of prohibited person in possession of a firearm; three counts of attempted second-degree murder (one count each for S.W., R.L., and A.L.); and three counts of second-degree assault (one count each for S.W., R.L., and A.L.). The discovery of the gun on April 20, 2007, resulted in a second count of prohibited person in possession of a firearm.

Appellant proceeded to a jury trial. The district court reviewed the *Jones* factors with regard to the admissibility of appellant's prior conviction for felony possession of a

pistol without a permit as impeachment evidence against appellant. The district court ultimately determined that if appellant were to testify that he shot in self-defense, proof of appellant's prior conviction would be allowed into evidence for impeachment purposes; but if appellant were to testify that he was not in possession of a firearm, the court would not allow the conviction into evidence for impeachment purposes "because it would be too close to [inadmissible character evidence]." The district court clarified that appellant did not have to decide whether he would testify until after the state concluded its case. Appellant chose not to testify.

Appellant was acquitted of one count of attempted second-degree murder involving S.W. Appellant was found guilty of one count of being a prohibited person in possession of a firearm in violation of Minn. Stat. §§ 624.713, subds. 1(b), (2)b, 609.11 (2006), and two counts of second-degree assault (against A.L. and R.L.) in violation of Minn. Stat. §§ 609.222, subd. 1, 609.101, subd. 2, 609.11 (2006). Appellant was found not guilty of firearm possession on April 20, 2007, attempted second-degree murder of A.L. and R.L., and second-degree assault of S.W.¹ Appellant was sentenced to 60 months for the firearm-possession offense, 54 months for one second-degree assault charge, and 36 months for the remaining second-degree assault charge. The district court stated that the 54-month sentence was to be concurrent with the 60-month firearm-possession sentence, and the 36-month sentence was to be consecutive to the 54-month

¹ Before the case was sent to the jury, the district court granted appellant an acquittal on the attempted second-degree murder charge relating to S.W.

sentence. The district court pronounced a total sentence of 90 months. This appeal follows.

DECISION

Appellant argues that the district court abused its discretion when it ruled that he could be impeached with evidence of a prior conviction if he testified and asserted self-defense. Appellant maintains that testifying was necessary to fully present his defense, and his constitutional right to do so was unfairly chilled by the district court's decision. A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). But this grant of discretion is limited by a criminal defendant's right to fundamental fairness, including a "meaningful opportunity to present a complete defense." *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quotation omitted). The admissibility of prior convictions to impeach a witness's credibility is governed (in part) by Minn. R. Evid. 609(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.

The district court should consider five factors in determining the admissibility of prior convictions. *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). These factors are

(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.

*Id.*²

Initially, we note that appellant raises a general challenge to the district court's use and analysis of the *Jones* factors. Specifically, appellant argues that the district court's analysis of the *Jones* factors failed to recognize that the probative value of the conviction was substantially outweighed by its prejudicial effect. But appellant overlooks the fact that using the *Jones* factors is the proper means to determine if admitting a prior conviction would be more probative than prejudicial, and therefore the district court was in fact balancing the probative value versus the prejudicial effect when it applied the *Jones* factors. Appellant also seems to imply that the district court prohibited him from testifying altogether. We disagree. The district court only ruled that if appellant testified that he shot in self-defense, his prior conviction could be used to impeach his credibility.³

We now move to a substantive review of the *Jones* factors.

² In *Ihnot*, the Minnesota Supreme Court stated that “[a]lthough *Jones* was decided before Rule 609 became effective, we conclude that these factors remain suitable and we reaffirm their application in determining whether the probative value outweighs the prejudice under the rule.” 575 N.W.2d at 586.

³ Appellant also argues that the district court erred when it considered appellant's prior misdemeanor as potential impeachment evidence “[a]bsent any information that the offense involved dishonesty or false statement.” But the record indicates that the district court considered only one conviction—appellant's felony possession-of-a-pistol-without-a-permit conviction. The trial transcript indicates that the district court wanted to “[flesh] out the record on the admissibility of [appellant's] prior conviction for felony possession of a pistol without a permit.” This statement by the district court indicates that the court was considering only the felony conviction, not both the felony and the misdemeanor.

Jones factors

1. Impeachment value

The district court ruled that the impeachment value of appellant's prior conviction weighed in favor of admissibility because it showed lack of trustworthiness and a bias against the law. A prior conviction need not relate directly to truth or falsity to have impeachment value. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979). Rather, Minnesota adheres to the "whole person" doctrine, which recognizes that a crime does not need to involve dishonesty to have impeachment value. *See, e.g., State v. Pendleton*, 725 N.W.2d 717, 728 (Minn. 2007) (permitting impeachment with prior terroristic-threats and fleeing-a-peace-officer convictions in trial for first-degree premeditated and felony murder).

Appellant argues that his felony conviction for possession of a weapon without a permit had little or nothing to do with his likelihood to tell the truth. Appellant further argues that the district court lacked sufficient information about the offense (other than the date and title) to make a proper determination of its impeachment value, and that more detailed information about the circumstances of the prior offense was required to support the district court's broad assertion that appellant was a person with a "bias against the law." But appellant cites no authority to support his contention. Although the impeachment value of appellant's prior conviction is somewhat diminished because it was not a crime of dishonesty, this factor nevertheless weighs slightly in favor of

We therefore do not address whether the district court abused its discretion in regard to appellant's misdemeanor conviction.

admission. It was within the district court's discretion to conclude that appellant's prior felony conviction had impeachment value.

2. The conviction date and appellant's subsequent history

The district court ruled that the conviction date was relatively recent and, therefore, this factor weighed in favor of admissibility. Under Minn. R. Evid. 609(b) a felony conviction is admissible if it occurred within ten years of the current offense. Appellant concedes that this factor favored admission of the conviction.

3. Similarity of prior conviction to the offense charged

The heart of this appeal is the district court's application of what respondent refers to as a "bi-level" analysis in regard to the third *Jones* factor.⁴ When considering the similarity of a prior conviction to the charged offense, the district court must take into account the increased probability that "when the past crime is similar to the charged crime[,] . . . the jury will use the evidence substantively rather than merely for impeachment purposes." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). Here, the district court stated that appellant's prior conviction was

very similar . . . to the ineligible person in possession . . . and . . . that would weigh against admissibility if [appellant] were to testify that he was not in possession of a firearm. . . . [O]n the other hand, if [appellant] were to testify that he shot in self-defense, then this factor . . . would weigh in favor of admissibility because he would be admitting possession of the firearm.

⁴ For the sake of simplicity, we will adopt respondent's characterization of the district court's reasoning as a "bi-level" analysis.

Appellant argues that the district court abused its discretion by considering the content of appellant's potential testimony because regardless of how he testified, his prior conviction should have been inadmissible given the similarity between the prior conviction and the current ineligible-person-in-possession charge. Appellant argues that his right to testify in his own defense was unfairly chilled by the district court's bi-level analysis. The state argues that because appellant failed to object at trial to the bi-level analysis, appellant has waived this issue on appeal.

Absent an objection to the district court, an appellate court may only review for "plain error." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001); *see also* Minn. R. Crim. P. 31.02 ("Plain errors or defects affecting substantial rights may be considered by the court . . . on appeal although they were not brought to the attention of the trial court"). Plain error exists "only if the [district] court's failure seriously affected substantial rights and only if the error was prejudicial error." *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990). Under a review for plain error, an unobjected-to alleged error will only be corrected upon a finding of the following: (1) error; (2) that is plain; and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the three-prong test is satisfied, the error should be corrected only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997) (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046 (1985)) (quotations omitted). Because appellant did not specifically object to the district court's bi-level analysis, we review the district court's ruling for plain error.

The right to testify on one's own behalf is protected by both the Due Process Clause of the Federal Constitution and Minnesota law. *Faretta v. California*, 422 U.S. 806, 819, n.15, 95 S. Ct. 2525, 2533, n.15 (1975); *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979); Minn. Stat. § 611.11 (2008). But “[t]he mere fact that a [district] court would allow impeachment evidence if a defendant chooses to testify does not necessarily implicate his constitutional right to testify in his own defense.” *State v. Gassler*, 505 N.W.2d 62, 68 (Minn. 1993). Thus, to prevail on this argument, appellant must show that the district court abused its discretion when it ruled that the probative value of the impeachment evidence outweighed its prejudicial effect. “[I]t is only when a [district] court has abused its discretion under Rule 609(a)(2) [or under *Jones*] that a defendant’s right to testify may be infringed by the threat of impeachment evidence.” *Id.*

We conclude that the district court erred by using a bi-level analysis in considering the admissibility of appellant’s prior conviction under the third *Jones* factor. The district court may, of course, determine that certain evidence is conditioned on the offering of other evidence or the establishment of certain facts. Minn. R. Evid. 104(b). But prior-conviction impeachment evidence is relevant to a witness’s general credibility, not to the specifics of his testimony. Minn. R. Evid. 609(a). Therefore, the relevancy-conditioned-on-fact analysis, which is proper under Minn. R. Evid. 104(b), is improper when determining the admissibility of prior convictions under Minn. R. Evid. 609(a). Stated otherwise, the relevance of a prior conviction for impeachment purposes should not depend on the substance of a witness’s testimony. Rather, the relevance of a prior conviction for impeachment purposes is the impact it has on the general credibility of the

witness who testifies. We recognize that the district court may have been attempting to protect appellant from the risk of an improper character inference from the prior conviction. But the resulting bi-level ruling impinged on appellant's choice of defense in a way that rule 609(a) does not contemplate.

Here, the district court's ruling conditioned the admissibility of appellant's prior conviction on the content of appellant's testimony. This was plain error. While we do not believe that this ruling unfairly chilled appellant's right to testify, it could have compelled him to tailor his testimony. In effect, appellant was encouraged to testify that he was not in possession of a firearm because, if he did so, his prior conviction would not be admitted into evidence. Conversely, appellant was deterred from testifying that he fired in self-defense because, if he did so, his prior conviction would be admitted into evidence. Testimony that appellant fired in self-defense may have fit the facts and provided a better defense than testimony that he was unarmed.

Although the district court committed plain error by conducting its bi-level analysis as to the third *Jones* factor, we conclude that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding. We note first that, while appellant's prior conviction for possession of a pistol without a permit was similar to one of the charges appellant faced at trial, appellant also faced three charges of attempted second-degree murder and three charges of second-degree assault. His prior conviction was sufficiently dissimilar to those charges to warrant admission. Moreover, when other *Jones* factors weigh in favor of admission, the similarity of the prior convictions to the charged offense should not preclude admission. *State v. Frank*, 364

N.W.2d 398, 399 (Minn. 1985); *Brouillette*, 286 N.W.2d at 707; *State v. Vanhouse*, 634 N.W.2d 715, 720 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). Here, as discussed elsewhere in this opinion, the district court properly ruled that the remaining *Jones* factors were either neutral or weighed in favor of admission.

4. & 5. The importance of the defendant’s testimony and defendant’s credibility.

Courts often combine the fourth and fifth *Jones* factors. *E.g.*, *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). The fourth *Jones* factor—the importance of the defendant’s testimony—generally weighs in favor of excluding the defendant’s prior convictions. *Gassler*, 505 N.W.2d at 67. “The [defendant’s] version of the facts may be centrally important to the result reached by the jury. If so, this fact would support exclusion of the impeachment evidence if by admitting it, [the defendant’s] account of events would not be heard by the jury.” *Id.* This court has stated that “[t]he [district] court may exclude a prior conviction if it determines that its admission for impeachment purposes would cause the defendant not to testify and if it is more important for the jury to hear [the] defendant’s version of the case.” *State v. Heidelberger*, 353 N.W.2d 582, 590 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984). But if a defendant’s credibility was the main issue for the jury to consider, it would weigh in favor of admitting the impeachment evidence. *Gassler*, 505 N.W.2d at 67.

The fifth *Jones* factor—the centrality of a defendant’s credibility—weighs in favor of admitting the prior convictions if a defendant’s credibility is an essential issue in the case. *Pendleton*, 725 N.W.2d at 729 (quotation omitted).

Had appellant testified, he presumably would have asked the jury to accept his testimony and to weigh his credibility directly against S.W.'s, R.L.'s, and A.L.'s, thus implicating the fourth and fifth *Jones* factors. In our view, these factors weigh in favor of admitting the prior conviction if appellant chose to testify. The district court, however, found these factors to be “neutral without understanding a little better about what [appellant’s] potential testimony would be.” On this record, we see no abuse of discretion in the district court’s ruling on the fourth and fifth *Jones* factors.

In summary, we note that when other *Jones* factors weigh in favor of admission, factor three (the similarity of a prior conviction to the charged offense) does not necessarily preclude admission. Here the district court properly ruled on factor one (impeachment value), factor two (the conviction date and appellant’s subsequent history), and factors four and five (the importance of appellant’s testimony and appellant’s credibility). Because the district court properly ruled on four out of the five *Jones* factors, we conclude that the district court did not abuse its discretion when it held that appellant’s prior conviction could be introduced into evidence for the purpose of impeachment if appellant testified.

Affirmed.

Dated: _____

Judge Natalie E. Hudson