STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0410

State of Minnesota,
Respondent,

vs.

James Demetrius Redd,
Appellant.

Filed June 2, 2009
Affirmed
Peterson, Judge

St. Louis County District Court
File No. 69DU-CR-07-2215

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

Melanie S. Ford, St. Louis County Attorney, 100 North Fifth Avenue West, Suite 501, Duluth, MN 55802-1298 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi F. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and Peterson, 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 second- and third-degree controlled-substance crime, appellant argues that (1) the district court abused its discretion by permitting the state to impeach appellant with prior convictions for the same crime as the current charges and (2) the introduction of bad-character evidence that appellant was involved in domestic violence and had spent time in jail was plain error that affected his substantial rights. We affirm.

FACTS

D.G. assisted Duluth Police Investigators Nicholas Lukovsky and Rodney Wilson in making a controlled-substance purchase from appellant at a candy shop that appellant owned. D.G. had assisted officers in previous controlled buys and was paid for her services. On this occasion, police had agreed to pay D.G. $1,000 if she was successful in purchasing crack cocaine from appellant.

After calling appellant and arranging to buy an eight-ball (3.5 ounces) of crack cocaine for $150, D.G. went to police headquarters, where she was fitted with an electronic monitoring device and given $150. Police officers brought D.G. to a prearranged location near the candy shop, and she walked from there to the candy shop. When D.G. got to the candy shop, there were customers there, so she waited until they left before discussing the crack cocaine purchase.

An audiotape recording of the conversation between appellant and D.G. at the candy shop was played to the jury. Appellant talked about getting some minutes for a

cell phone that he planned to give to D.G. because he did not trust pay phones, which D.G. had been using to contact him. Appellant then made some comments about some people who were in jail because they had been set up. Appellant stated that he would be able to get out of jail on bail and that he would be back.

Appellant and D.G. drove to a gas station to buy minutes for the cell phone. When appellant came out of the gas station, the following discussion took place:

> [Appellant]: You got the money?
> [D.G.] (Inaudible) what I wanted (inaudible) ball. Hundred – hundred and fifty –
> [Appellant]: I know what the hell it is and I know what you wanted.
> [D.G.]: Really?
> [Appellant]: (Inaudible.)
> [D.G.]: So, then I have to – I have to –
> [Appellant]: (Inaudible) ball from.

D.G. testified at trial that she gave appellant the money at the gas station and that he gave her crack cocaine when they got back to the candy shop. D.G. turned over 2.8 grams of crack cocaine to police.

Later the same day, D.G. contacted appellant and asked to buy more crack cocaine. Appellant told her to meet him in the alley behind the candy shop. Police again fitted D.G. with an electronic transmitting device and gave her another $150 to buy an eight-ball of crack cocaine. When D.G. met appellant, he used some type of wand to check her for a wire. D.G. told appellant to leave her alone, saying that she was in a hurry because she had a ride waiting and was paranoid because police were out there. Appellant persisted in trying to determine whether D.G. was equipped with a wire, so D.G. left without buying any crack cocaine.

About 15 to 20 minutes later, D.G. made another attempt to buy crack cocaine from appellant, this time equipped with a digital recorder but no wire. D.G. called appellant and arranged to meet him in an alley near the candy shop. D.G. met appellant in the alley and gave him the $150. Appellant said that he wanted to see if D.G. was wired and instructed her to lift up her blouse. When she did, appellant searched her chest and stomach area and then gave her the crack cocaine. D.G. turned over 3.3 grams of crack cocaine to police.

A jury found appellant guilty of second- and third-degree sale of a controlled substance in violation of Minn. Stat. §§ 152.022, subd. 1(1), .023, subd. 1(1) (2004). The district court sentenced appellant to an executed term of 98 months in prison. This appeal followed.

D E C I S I O N

I.

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 also 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. *Ihnot*, 575 N.W.2d at 584; *see also State v. Graham*, 371

N.W.2d 204, 208 (Minn. 1985) (stating that determination whether probative value of prior convictions outweighs prejudicial effect is committed to district court's discretion).

The district court ruled that if appellant testified, the state could impeach him with three prior convictions for controlled-substance crimes and one prior conviction for receiving stolen property.

A. 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); *see also State v. Head*, 561 N.W.2d 182, 186 (Minn. App. 1997) (explaining that under rule 609(a), a crime involving dishonesty or false statement is automatically admissible and admission of other crimes is discretionary with district court). "[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.'" *Brouillette*, 286 N.W.2d at 708 (quoting *St. Paul v. DiBucci*, 304 Minn. 97, 100, 229 N.W.2d 507, 508 (1975)). "Lack of trustworthiness may be evinced by [an] abiding and repeated contempt for laws [that one] is legally and morally bound to obey . . . ." *Id.*

Appellant argues that commentators and courts in other jurisdictions have criticized the whole-person rationale and have also recognized that jurors tend to misuse prior convictions as propensity evidence. Nevertheless, admission of prior convictions, including controlled-substance crimes, for impeachment purposes under the whole-

person rationale remains within the district court's discretion. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (assigning impeachment value to prior convictions under whole-person rationale); *State v. Smith*, 669 N.W.2d 19, 29 (Minn. 2003) (upholding admission of prior controlled-substance offense under whole-person rationale), *overruled on other grounds by State v. Leake*, 669 N.W.2d 312 (Minn. 2005). It is not the role of this court to review decisions of the supreme court. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998); *see Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."). The district court did not err in finding that under the whole-person rationale, appellant's prior convictions had impeachment value.

B. Dates of Convictions and Subsequent History

Appellant does not dispute that this factor weighs in favor of admission.

C. 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). "[T]he 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 parties agree that this factor weighs against admission of appellant's prior controlled-substance convictions and in favor of admission of the receipt-of-stolen-property conviction. Although the third *Jones* factor weighs against admission of the

controlled-substance offenses, it does not preclude admission.[1] *See State v. Hochstein*, 623 N.W.2d 617, 624-25 (Minn. App. 2001) (stating that this factor weighed against admission when prior methamphetamine possession crime was nearly identical to charged crime but affirming admission based on other factors).

D. Importance of Appellant's Testimony

Because appellant did not testify or otherwise present his version of events, this factor weighs against admission. *See State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (stating that if the admission of prior convictions prevents a jury from hearing a defendant's version of events, this weighs against admission of the prior convictions).

E. Centrality of Appellant's Credibility

Because appellant did not make an offer of proof as to what his testimony would have been, this court assumes that the thrust of his testimony would have been to deny the allegations against him, making his credibility central. *See Ihnot*, 575 N.W.2d at 587 n.3. Accordingly, the fifth *Jones* factor weighs in favor of admission. *See Smith*, 669 at N.W.2d at 29 (holding that this factor weighed in favor of including the impeachment evidence when defendant's credibility was central); *Bettin*, 295 N.W.2d at 546 (stating

[1] Appellant relies on unpublished authority to argue that the similarity of the crimes precludes admission. Unpublished opinions are of limited value in deciding an appeal. *See* Minn. Stat. § 480A.08, subd. 3(c) (2008) (stating "[u]npublished opinions of the Court of Appeals are not precedential"); *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) ("stress[ing] that unpublished opinions of the court of appeals are not precedential" and noting that "[t]he danger of miscitation [of unpublished opinions] is great because unpublished opinions rarely contain a full recitation of the facts"). Moreover, the unpublished authority cited by appellant is distinguishable from this case.

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 argues that he could have been adequately impeached by only the receipt-of-stolen-property conviction. This argument is contrary to the whole-person rationale. *See Brouillette*, 286 N.W.2d at 707-08 (explaining whole-person rationale).

The district court did not abuse its discretion in ruling that appellant's prior convictions would be admissible for impeachment purposes. *See Hochstein*, 623 N.W.2d at 624-25 (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).

II.

Appellant argues that the admission of statements in the audio recording by an unidentified individual referring to domestic violence and by appellant referring to his ability to make bail if arrested was plain error.

"Failure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that basis; however, this 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 the three prongs are met, the appellate court may reverse if necessary "to ensure fairness and the integrity of the judicial proceedings." *Id.*

During the audio recording, a person, labeled in the transcript as an unidentified male voice, makes comments about disliking family violence and fighting with his "woman" and about going to fight with someone in a car. There is no plain error because it is not apparent from the record that the jury was likely to have mistaken the unidentified speaker as appellant. Also, the only potentially prejudicial statement was the reference to a possible fight with someone in a car. Appellant has not established that this single reference to a possible fight affected his substantial rights.

Appellant also argues that his comments about bail indicated that he had been in jail in the past. Appellant did refer to something that "just happened," but the reference appears to be to some others who had recently been arrested and were unable to post bail. Admission of the statement was not plain error.

III.

Appellant raises additional issues in a pro se supplemental brief. We have considered those arguments and find them to be without merit.

Citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), appellant argues that D.G.'s testimony was inadmissible because it was not voluntary. But *Schneckloth* addressed the issue of whether a defendant voluntarily consented to a search, not whether a witness voluntarily testified at trial, and is not on point.

During the second meeting with appellant, D.G. told appellant that she was high. Citing this statement, appellant argues that D.G was unreliable. The statement was made in the context of explaining why D.G. did not want appellant searching her and does not indicate unreliability.

Appellant makes no argument and cites no authority supporting his claim that he was denied the right to confront the person who signed the complaint against him. An argument unsupported by argument or legal authority is deemed waived. *State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002).

Affirmed.