STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0592

State of Minnesota,
Respondent,

vs.

Daryl H. Lange,
Appellant.

Filed July 21, 2009
Affirmed in part and remanded
Stauber, Judge

Nicollet County District Court
File No. 52CR06227

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

Michael K. Riley, Sr., Nicollet County Attorney, 326 South Minnesota Avenue, Box 360, St. Peter, MN 56082 (for respondent)

Lawrence J. Hammerling, Special Assistant Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

STAUBER, Judge

On appeal from his conviction of two counts of first-degree criminal sexual conduct, appellant argues that the district court erred by: (1) refusing to suppress appellant's confession which was made during a custodial interrogation and after appellant invoked his right to counsel; (2) giving jury instructions that effectively constituted a directed verdict; (3) closing the courtroom to the public during jury selection; and (4) ruling that appellant could be impeached with a prior conviction. Because appellant was not in custody during his confession, the jury instructions were not an abuse of discretion, and the prior conviction was admissible for impeachment purposes, we affirm. But because the district court did not make specific findings when closing the courtroom during voir dire, we remand for additional findings.

FACTS

Appellant Daryl H. Lange was a mentor in the Mankato YMCA Brother/Sister Program. In April 2002, he was matched with six-year-old R.C.M. In May 2006, after participating in a "good touch/bad touch" discussion at school, R.C.M. indicated to his mother that appellant had touched him, but he was afraid of losing future time with appellant.

Criminal investigator Kip Olson, of the Nicollet County Sheriff's Department, began investigating allegations of sexual contact between appellant and R.C.M. On June 12, 2006, Olson spoke with appellant by telephone and said that he would like to talk to him regarding allegations of child maltreatment. They arranged for a meeting on June

14, 2006, at the sheriff's department. Appellant came to the meeting with his mother. Olson told appellant that he would be read his *Miranda* rights, and he could contact an attorney or refuse to do the interview. Appellant agreed to do the interview with Olson. Detective Wayne Terry was also present during the interview. The recorded interview began with Olson advising appellant of his *Miranda* rights.

During the interview, appellant confessed to engaging in oral sex and other sexual contact with R.C.M. Appellant was placed under arrest following the interview. Believing that he had been denied his right to counsel during the interview, appellant filed a motion to suppress his confession. The district court ruled that appellant was not subject to a custodial interrogation and thus not denied his right to counsel.

Prior to trial, the district court ruled that evidence of a prior conviction was admissible for impeachment purposes. Appellant had been convicted in 2007 of felony interference with the privacy of a minor (the conviction included spying on boys in the bathroom of the school where he worked as a janitor). The district court found that the prior conviction met the requirements under Minnesota Rules of Evidence Rule 609(a) and that the probative value of admitting the evidence, if appellant testified, outweighed its prejudicial effect.

During voir dire, the district court closed the courtroom due to "the sensitive nature of the questions." The rest of the trial remained open. Following a five-day trial and testimony from thirteen witnesses, the jury found appellant guilty of two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.342, subd. 1(a);

609.341, subds. 11(c), 12 (2004). The court imposed a presumptive 144-month sentence for count one and a consecutive 96-month sentence for count two. This appeal follows.

D E C I S I O N

I. Confession

A. Custodial interview

Appellant argues that the district court erred in ruling that he was not in custody because a reasonable person in appellant's position would have believed he was in custody. In support of his argument, appellant notes that he was interrogated behind closed doors in the sheriff's office by two officers with firearms displayed on their waistbands, he was only told on the phone that the officer wanted to talk to him about an allegation of child maltreatment (not specifically that the allegation was against him), and he was never told he was free to leave at any time.

> Whether a defendant was in custody at the time of an interrogation is a mixed question of law and fact, requiring the appellate court to apply the controlling legal standard to historical facts as determined by the trial court. The appellate court reviews the district court's findings of fact under the clearly erroneous standard of review but reviews de novo the district court's custody determination . . . .

In re Welfare of D.S.M., 710 N.W.2d 795, 797 (Minn. App. 2006) (quotation and citation omitted). This court applies an objective test to decide whether a person is in custody: "[W]hether the circumstances of the interrogation would make a reasonable person believe that he was under formal arrest or physical restraint akin to formal arrest." *Id.* at 797–98. Although there is no bright-line rule for determining whether a defendant was "in custody," the behaviors exhibited by both the defendant and the law enforcement

officers involved in the encounter are considered. *See State v. Wiernasz*, 584 N.W.2d 1, 2–3 (Minn. 1998). The Minnesota Supreme Court has noted that one or more of the following circumstances may indicate that a suspect was not subject to custodial interrogation:

> questioning taking place in the suspect's home; police expressly informing the suspect that he or she is not under arrest; the suspect leaving the police station at the close of the interview without hindrance; the brevity of questioning . . . ; the suspect's freedom to leave at any time; a nonthreatening environment; and the suspect's ability to make phone calls.

State v. Staats, 658 N.W.2d 207, 212 (Minn. 2003).

Here, the district court ruled that "a reasonable person in [appellant]'s situation would not have believed he was in custody when he provided his statement." The district court reasoned that the interview occurred in one of the officer's offices, and both officers in the room were casually dressed. Appellant was invited to provide a statement at his convenience and came to the department on his own volition, setting up an appointment and following through two days after he was contacted by law enforcement. He was told he did not have to provide a statement and was left alone with his mother in the lobby to discuss whether he should provide one. He was free to leave at any time. The district court specifically stated in its order, citing to *Staats*, 658 N.W.2d at 212, that a "statement that starts as a non-custodial interrogation remains a non-custodial interrogation throughout, assuming no circumstances have changed," and that this interrogation began as non-custodial and remained non-custodial. We agree. Applying the factors in *Staats* here, appellant was allowed to make phone calls, he was free to leave

at any time, and he was questioned at the sheriff's department rather than his own home, he came in on his own volition, setting up an appointment at a time convenient to him after police contacted him for a statement. *See Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977) (noting that an interrogation is not custodial simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect).

B. Right to counsel

Appellant also argues that his right to counsel was violated because he unequivocally invoked his right to counsel yet the interview continued. The right to have counsel present during all custodial interrogations is undisputed and necessary to protect the suspect's right to remain silent. *State v. Ray*, 659 N.W.2d 736, 741 (Minn. 2003); *Staats*, 658 N.W.2d at 213. This court defers "to a district court's factual determination of whether a defendant invoked the right to counsel during an interrogation unless that determination is clearly erroneous." *State v. Bradford*, 618 N.W.2d 782, 796 (Minn. 2000). "A request for counsel is considered to be unequivocal if it is articulated sufficiently clearly that a reasonable police officer, in the circumstances, would understand the statement to be a request for an attorney." *Ray*, 659 N.W.2d at 742 (quotation omitted).

First, and as noted above, the interview here was not custodial, so appellant was not entitled to have counsel present. Also, appellant did not unequivocally invoke his right to counsel. Appellant was discussing his relationship with R.C.M. and the types of activities the two would do together as part of the Brother/Sister program when Detective

Terry asked if appellant would be willing to take a polygraph.

> WT: You know, sometimes in our investigations, we use a tool called a polygraph to help guide our investigations. Would you be willing to take a polygraph?
> DL: Well, I think I'd like to talk to a lawyer then.
> WT: Mmhmm (to indicate yes). About taking a polygraph?
> DL: (Heard no response). (Nodding his head up and down).
> WT: Okay, if you took one, what do you think the results would be?
> DL: Probably negative.
> WT: Probably negative? Do you mind if Kip and I stepped out of the room for a minute and talked?
> DL: (Heard no response).
> KO: Okay, yup, that's fine. We'll be right back, right back with you.
>
> (Left room).

Once appellant indicated a desire to talk to a lawyer, the officers clarified what appellant meant, by asking if his comment was specific to a polygraph. *See State v. Risk*, 598 N.W.2d 642, 650 (Minn. 1999) ("[W]hen an accused makes an ambiguous or equivocal statement that can reasonably be interpreted as a request for counsel, the police must stop all questioning at that time except for narrow questions designed to clarify the accused's intentions."). When the officers determined that appellant's request was an equivocal statement pertaining solely to the polygraph, they stepped out of the room and upon their return pursued a different line of questioning. Later in the interview, when appellant stated unequivocally, "Maybe I should have a lawyer," the officers immediately stopped the interview. Because the interview was noncustodial and appellant did not unequivocally invoke his right to counsel until the end, we affirm the district court's

denial of appellant's motion to suppress.

II. Jury Instructions

Appellant argues that the district court's jury instructions effectively constituted a directed verdict on the criminal sexual contact charge because the court affirmatively told the jury that appellant had sexual contact with R.C.M. District courts are allowed considerable latitude in selecting the language in jury instructions and will not be reversed absent an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Where instructions fairly and correctly state the applicable law, an appellate court will not grant a new trial. *Alevizos v. Metro. Airports Comm'n*, 452 N.W.2d 492, 501 (Minn. App. 1990), *review denied* (Minn. May 11, 1990).

Appellant did not object to the jury instructions at trial. For an appellate court to review an unobjected-to error, an appellant must show (1) error; (2) that is plain; and (3) that affected the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it is clear or obvious." *State v. Jones*, 753 N.W.2d 677, 694 (Minn. 2008). Generally, this degree of error "is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "[A]n error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

Appellant has not established that there was plain error. In instructing the jury, the district court said:

> The elements of criminal sexual conduct in the first degree are:
>
> First, the defendant intentionally had sexual contact with a person under the age of 13. Sexual contact occurs when the defendant intentionally touched [R.C.M]'s bare genitals or anal opening with his bare genitals or anal opening, or [R.C.M.]'s bare genitals or anal opening touched the bare genitals or anal opening of the defendant, and that the contact occurred with a sexual or aggressive intent.
>
> . . . .
>
> The elements of criminal sexual conduct in the first degree are:
>
> First, the defendant intentionally sexually penetrates or had sexual contact with a person under the age of 13. Fellatio constitutes sexual penetration, if there is any contact between the penis of one person and the mouth, tongue, or lips of another person. Sexual contact occurs when the defendant intentionally touched [R.C.M]'s bare genitals or anal opening with his bare genitals or anal opening, or [R.C.M]'s bare genitals or anal opening touched the bare genitals or anal opening of the defendant, and that the contact occurred with sexual or aggressive intent.

Appellant argues that the last half of each instruction, beginning with "*when* the defendant intentionally touched [R.C.M]'s bare genitals or anal openings" amounts to a directed verdict because the district court was affirmatively instructing the jury that appellant had sexual contact with R.C.M.

While the jury instructions issued by the district court were a slight departure from the pattern jury instruction for criminal sexual conduct in the first degree, the specific portion that appellant argues amounts to a directed verdict is basically the same, "[*f*]*irst*, the defendant intentionally touched [the victim]'s bare genitals or anal opening . . ." 10

Minnesota Practice, CRIMJIG 12.07 (2006). The only difference is *when* versus *first.* The semantics here are not plain error.

Even if the language was plain error, appellant has not shown that such error affected his substantial rights. The jury was still charged with determining guilt or innocence beyond a reasonable doubt, counsel argued whether the intentional touching had been proven, and nothing in the record indicates that the evidence was insufficient to support a finding of guilty.

III. Closed Courtroom

Appellant argues that the district court erred when it imposed an absolute and unconditional closure of the courtroom during jury selection because there was no evidence that the jurors were unwilling to participate in public jury selection or identify what specific questions would be unduly sensitive. When the court started to call in the first juror for questioning during voir dire, the prosecutor asked that the courtroom be closed because the juror questionnaire included a question about whether a potential juror had ever been sexually assaulted or abused.

> Prosecutor: Your Honor, I believe that the defendant's niece is present in the courtroom. When talking about confidential matters, I would ask that everyone, except for the defendant and court staff, be excluded from the courtroom.
>
> Court: Any objection to that?
>
> Defense Counsel: Other than it's a public courtroom, Your Honor.
>
> Court: It is a public courtroom. But for the basis of these jurors, and the sensitive nature of the questions, and the limited purpose of this, I'm going to ask that you leave the

> courtroom. And the bailiff is instructed not to let anyone else enter the courtroom.

A "court may on its own initiative or on request of the defense or the prosecution, advise the prospective jurors that they may request an opportunity to address the court in camera, with counsel and defendant present, concerning their desire to exclude the public from voir dire when the sensitive questions are asked." Minn. R. Crim. P. 26.02, subd. 4(4)(a). Here, the prosecutor did not ask to advise the jurors regarding the right to request closure, but asked outright for the closure. The court made the decision without informing the jurors that they had the right to request it, so the jurors were not aware they had such a privacy right.

> In considering the request to exclude the public during voir dire, the court shall balance the juror's privacy interests, the defendant's right to a fair and public trial, and the public's interest in access to the courts. The court may order closure of voir dire only if it finds that there is a substantial likelihood that conducting the voir dire in open court would interfere with an overriding interest, including the defendant's interest in a fair trial and the juror's legitimate privacy interests in not disclosing deeply personal matters to the public.

Id., subd. 4(c). Upon determining that overriding interests justify closure, then the court must set forth findings for closure that indicate "why the defendant's right to a fair trial and the jurors' interests in privacy would be threatened by an open voir dire and shall also include a review of alternatives to closure and a statement of why the court believes such alternatives are inadequate." *Id*., subd. 4(f). The findings presented here did not balance these interests or include an analysis of alternatives and why such alternatives

would be inadequate. Therefore, the district court clearly did not follow the proper procedure in excluding the public from voir dire.

Appellant argues that because no juror specifically asked for closure and the district court's findings are insufficient, a reversal and order for a new trial is the only way to remedy this error. Respondent argues that a reversal and order for a new trial is unnecessary, but concedes that remand for specific findings regarding the closure during voir dire is appropriate. "If a remand for a hearing on whether there was a specific basis for closure might remedy the violation of closing the trial without an adequate showing of the need for closure, then the initial remedy is a remand, not a retrial." *State v. McRae*, 494 N.W.2d 252, 260 (Minn. 1992) (citing *Waller v. Georgia*, 467 U.S. 39, 49, 104 S. Ct. 2210, 2217 (1984)). Because we agree, we remand for specific findings regarding closure.

IV. Prior Conviction Evidence

Appellant argues that the district court erred when it ruled that he could be impeached with a prior conviction of interference with privacy of a minor. A district court's ruling on the admissibility of prior-conviction evidence is reviewed for a clear abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). "Evidence that a witness has been convicted of a felony is admissible for impeachment if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006)(quotation omitted). When determining whether evidence admissible for impeachment is more prejudicial than probative, a district court must consider the five *Jones* 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 defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). Here, the district court failed to make a record of its *Jones*-factors analysis. *See Swanson*, 707 N.W.2d at 655 (requiring the district court to make a record of its Jones-factors analysis). Therefore, we must independently apply the factors to determine if this error was harmless. *Id*.

a. Impeachment value of the prior crime

Evidence of appellant's prior conviction had some impeachment value because it helped the jury see his "whole person." *Id*. at 655 ("[A] prior conviction can have impeachment value by helping the jury see the 'whole person' of the defendant and better evaluate his or her truthfulness."). This factor weighs in favor of admission to some degree.

b. Date of conviction and subsequent history

Appellant concedes, and the district court found, that the date of his prior conviction weighs in favor of admission.

c. Similarity of the crimes

Appellant's prior conviction is not identical to the first-degree criminal sexual conduct charge, but both crimes did involve minors and exposure of sexually intimate parts. Because the crimes involve similar conduct, this factor weighs against admission. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) ("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.").

d. Importance of appellant's testimony and the centrality of credibility

Courts often combine the fourth and fifth *Jones* factors. *See e.g.*, *Swanson*, 707 N.W.2d at 655. Appellant argues that the admission of prior-conviction evidence prevented him from testifying. Courts should consider whether the admission of evidence will cause the defendant not to testify. *State v. Gessler*, 505 N.W.2d 62, 66 (Minn. 1993) (citing *Bettin*, 295 N.W.2d at 546). Generally, if appellant's version of the facts is centrally important to the result reached by the jury and appellant chose not to testify because of impeachment evidence, then this factor weighs against admission. *Id*. at 67. However, if the appellant's version of the events is presented to the jury through other evidence, and no offer of proof is made as to any additional testimony appellant would have added upon taking the stand, then this factor weighs in favor of admission. *Id*. Here, appellant did not testify at trial, but his version of the facts was presented to the jury via his confession and other evidence. Appellant also did not offer proof regarding any additional testimony he would have added had he taken the stand. This weighs in favor of admission.

Generally, if credibility is a central issue to a case, then the fourth and fifth *Jones* factors weigh in favor of admission. *Swanson*, 707 N.W.2d at 655; *see also Bettin*, 295 N.W.2d at 546 ("[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."). In this case, credibility was a central issue because R.C.M.'s allegations of sexual abuse were un-witnessed and no physical evidence was presented, so appellant's credibility in refuting the allegations was important. This also weighs in favor of admission.

The *Jones* factors indicate that it was not error to admit evidence of appellant's prior conviction. Because only one of the factors weighs against admission and the rest weigh at least to some degree in favor of admission, we affirm.

Affirmed in part and remanded.