STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2083

State of Minnesota,
Respondent,

vs.

Melvin Peters,
Appellant.

Filed December 15, 2009
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. 62-KO-08-001070

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

Susan Gaertner, Ramsey County Attorney, Thomas E. Lockhart, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Leslie Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

Appellant challenges his conviction of third-degree burglary, arguing that (1) the district court abused its discretion by admitting evidence of his prior felony conviction for impeachment, and (2) he was deprived of his right to a fair trial when the prosecutor committed misconduct. Because we conclude that appellant's prior conviction was properly admitted and that the prosecutor did not commit misconduct, we affirm.

FACTS

We are asked to decide whether the district court abused its discretion in allowing the prosecutor to impeach appellant Melvin Peters with a prior conviction during his burglary trial, and whether the prosecutor engaged in misconduct by allegedly stating his personal opinion about certain aspects of the case in his rebuttal argument and by eliciting evidence regarding Peters's *Miranda* warning.

Peters had been in a relationship with D.H. At about 3:30 p.m. on March 20, 2008, Peters went to D.H.'s mother's residence, where he sometimes stored tools that he used in his work as a handyman. D.H. was at the residence and she told Peters to leave. She also called the police, and Peters left after the police arrived.

At about 8:45 that evening, D.H. heard someone, whom she assumed to be Peters, knocking at the door. There was additional knocking at 10:15 and 11:15. D.H. then called the police and gave them a description of Peters. The officers decided to stay in the area and look for Peters.

Later, in an alley in the neighborhood, the officers saw a man who fit the description of Peters. He was carrying a large saw. The officers stopped Peters, who identified himself, and then they asked about the saw. Peters said it was his saw and that he had gotten it from the address of D.H.'s mother. After further discussion, Peters said that he had actually gotten the saw from a friend on the street. The officers then put Peters into their squad car, and they noticed a partially opened door to a garage in the alley near where Peters had been standing.

One of the officers contacted the owner of the garage, and she went with the officer into the alley. She indicated that she had not left the garage open and, after checking, she said a miter saw was missing. The police then showed her the saw Peters had been carrying, and she identified it as the one that had been in the garage. The police returned to D.H.'s residence and asked D.H. if the saw belonged to her or to Peters. She said it belonged to neither. The police arrested Peters.

After the arrest, a police sergeant interviewed Peters at the police station. Peters explained that he had been doing some odd jobs and while he was walking down the street a man in a car stopped and offered to sell the saw for $20. When Peters told him that he had only $10, the man agreed to sell the saw for that price. Peters was unable to describe the man because he said he was legally blind.

The state charged Peters with burglary and, at the jury trial, Peters testified as a witness in his defense. During the trial, the prosecutor offered as impeachment evidence Peters's prior felony conviction of violating an order for protection that D.H. had obtained. Peters objected to this evidence.

During final argument, defense counsel challenged the adequacy of the police investigation, noting that there were no photographs or fingerprints or footprints to show that Peters was in the garage from which the saw had been taken. To rebut this argument, the prosecutor stated that Peters "was caught red-handed" near the scene of the crime and had in his hand the only item stolen from the garage.

After the jury found Peters guilty of burglary and the district court imposed sentence, he appealed.

D E C I S I O N

Prior Conviction for Impeachment

Peters's first claim is that the district court abused its discretion in allowing character evidence that was "unduly prejudicial" when it admitted impeachment evidence of Peters's prior conviction of violating an order for protection that D.H. had obtained against him. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). As Peters acknowledges, even if an evidentiary ruling was erroneous, the error is considered harmless when there is no reasonable likelihood that the improperly admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

Subject to certain exceptions, general character evidence is not admissible to show that a defendant acted in conformity with his character or character trait. Minn. R. Evid. 404. But rule 609 permits a subset of character evidence, namely evidence of certain prior criminal convictions "[f]or the purpose of attacking the credibility of a witness . . . ." Minn. R. Evid. 609(a).

When the admissibility of a prior conviction is challenged, the district court is called upon to engage in an analysis of the issue through the prism of the *Jones* factors, considering:

> (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 the 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). Additionally, if the conviction was of a felony within rule 609(a)(1), as was Peters's conviction, the court must determine whether "the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid 609(a)(1).

Noting the importance of his own testimony to explain why he was carrying a stolen saw in close proximity to the burglarized garage from which the saw had been stolen, Peters contended in the district court, and contends on appeal, that the probative value of the evidence did not outweigh its prejudicial effect. He argues that the prior and current crimes "had too many similarities" in that the victim was the same in each. He also urges that the prior conviction "was not sufficiently egregious or relevant to be probative." Finally, he cites several authorities for the proposition that prior-crime impeachment evidence is universally unfairly prejudicial and is but a subterfuge for inviting the jury to treat it as propensity evidence, which is forbidden by Minn. R. Evid. 404(a).

There is nothing similar between the crimes of burglary and violation of an order for protection. And the victim was not the same for the two crimes. D.H. was the victim of the violation of an order for protection but someone else was the victim of the burglary. D.H. merely testified as to whether she or Peters owned the saw. Thus, the third *Jones* factor does not favor exclusion of the prior crime.

The egregiousness of a prior conviction offered for impeachment is not a factor in the *Jones* analysis. Hypothetically, it might be a consideration in the rule 609(a)(1) balancing test or perhaps in the first *Jones* factor regarding the impeachment value of the conviction. However, Peters has not developed this argument.

Under a strict approach to rule 609(a)(1) and *Jones*, it is not readily apparent that the crime of violation of an order for protection has any impeachment value. We strain to imagine how such a conviction can reflect on the likelihood that a witness will testify truthfully. But we cannot fault the district court for allowing this impeachment evidence because Minnesota generally has chosen to follow an impeachment rule that likely is at odds with rule 609(a)(1). In *St. Paul v. DiBucci*, 304 Minn. 97, 100, 229 N.W.2d 507, 508 (1975), a case decided before the adoption of the code of evidence, the supreme court held that the rationale for allowing evidence of a prior conviction for impeachment is that the jury is entitled to see the "whole person" of the witness. That certainly appears to be a character-evidence rationale, for it invites the jury to see the witness as a criminal who committed a previous crime, or maybe crimes, and has done so again. In contrast, rule 609 permits the jury to see a "limited person," that is, a person who has committed a crime that logically and reasonably shows something of the person's ability, capacity, or

disposition for truth telling. Despite our view, *DiBucci* remains the law in Minnesota, and Peters's prior conviction of violation of an order for protection shows something of his "whole person" and does not run afoul of that law. The district court did not abuse its discretion in allowing the prior conviction into evidence for impeachment.

Alleged Prosecutor Misconduct

Peters contends that the prosecutor engaged in misconduct by interjecting his own opinion during rebuttal argument as to why the police did not follow certain investigative procedures and in eliciting evidence that Peters made statements while in custody and after having been informed of his *Miranda* rights. He did not object at trial to either of these alleged instances of misconduct.

Where allegedly improper trial conduct has occurred without objection, we will review it on appeal only if it constitutes plain error that affected the defendant's substantial rights. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006).

In his final argument, defense counsel urged that the state failed to prove the burglary charge because it failed "to show that [Peters] was actually in that garage . . . that he was ever at Wilson Avenue at that garage." Counsel then assailed the police investigation:

> When you go back and you're deliberating, ask yourself this question: Why didn't the state take fingerprints? Why didn't the state go and take photographs, right then and there and then while they had Mr. Peters in the squad car, of his shoe? There's fresh snow . . . . Why didn't they just take a picture of this shoe that would have matched up?

In his rebuttal argument, the prosecutor sought to answer defense counsel's questions about the investigation, saying:

> The defendant was caught red-handed. That's what this is. He was . . . he had the only thing stolen from that garage in his hand feet away from the scene of the crime . . . . And the owners of that saw hadn't given anyone permission to move it, and he was caught before anyone even knew it had been moved, feet from that garage, with the saw in his hand.
>
> That's why the police didn't do all of those things. They're not going to waste their time and your money trying to do it.

In final argument, a prosecutor is entitled to argue the evidence that was presented during trial, to analyze it, and to note all proper inferences to be drawn from it. *State v. Outlaw*, 748 N.W.2d 349, 358 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). A prosecutor may not, however, state his personal opinion as to the credibility or weight of the evidence. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984).

The prosecutor in rebuttal pointed out the evidence that the state had presented, showing that Peters was at the scene of the burglary with the stolen item in his possession, and drew the inference that no further investigation was necessary. This was not an expression of the prosecutor's personal opinion but was a description of an inference that reasonably could be drawn from the evidence. There was neither prosecutorial misconduct nor error in the rebuttal argument. We do caution prosecutors however, not to personalize a case for the jury by indicating that the police are not "going to waste . . . your money" on an unnecessary investigation. Any error from that reference, however, was inconsequential in view of the entire case and entire argument. *See Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (stating that in evaluating a

prosecutor's argument, we look at the argument as a whole rather than isolating select remarks).

Finally, Peters argues that the prosecutor impermissibly elicited evidence regarding his custodial *Miranda* warning.

After Peters's arrest, the police took him to the police station where a sergeant interviewed him. The prosecutor asked that sergeant about Peters's statement:

> Q. Okay. What did Mr. Peters tell you about what he had been doing the night he was arrested?

The witness replied nonresponsively:

> A. I started out the interview giving him his rights. So he fully understood his rights and he chose to speak with me.

The prosecutor did not ask the witness about a *Miranda* warning, but did elicit the fact that the interview took place at the police station after Peters had been arrested.

Peters cites no authority for his argument that it was improper for the prosecutor to show that he had been arrested and taken into custody. This evidence was not improper.

Peters cites authorities that condemn comment on an arrested person's silence after having received a *Miranda* warning. But that did not happen here; Peters chose to answer police questions. He argues that the evidence that the police warned him of his right to remain silent "focused the jury's attention on the fact of [Peters's] arrest and the fact that the police had determined that [Peters] was a suspect and had to have *Miranda* warnings administered." This focus, Peters contends, "served only to erode [Peters's] right to be presumed innocent at trial." Peters cites no authority for the notions that the

disclosure of a person's arrest and of the fact that he is suspected of a crime somehow erodes his ultimate presumption of innocence. The argument is devoid of merit. There was no prosecutorial misconduct in the elicitation of evidence from the police sergeant who interviewed Peters.

Affirmed.