STATE OF MINNESOTA
IN COURT OF APPEALS
A09-190

State of Minnesota,
Respondent,

vs.

Christopher George Gaiovnik,
a/k/a Christopher George Gaiounik,
Appellant.

Filed April 13, 2010
Affirmed
Peterson, Judge

Ramsey County District Court
File No. 62-K8-07-004501

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Shumaker, 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 a conviction of simple robbery and theft from a person, appellant argues that (1) the evidence introduced at trial was insufficient to prove that he aided the commission of a simple robbery because the state failed to prove that force or the threat of imminent force was used to take the property; (2) the cumulative effect of multiple trial errors denied appellant a fair trial; and (3) the district court erred by ordering appellant to pay $19,200 in restitution when the record shows that no "victim" ever requested restitution under Minn. Stat. § 611A.04 (2006) and the state followed none of the restitution statute's procedural requirements. We affirm.

FACTS

In December 2007, two employees of a clothing store in the Rosedale Mall, M.S. and K.R., were responsible for bringing the store's bank deposit to the bank. K.R. carried the deposit in her purse, and they rode in M.S.'s car from the mall to the bank. When M.S. worked, she routinely parked her car in the same area on the second level of a parking ramp next to the mall.

B.B., a manager in training who was familiar with the store's procedure for making bank deposits, described the procedure to a friend, M.R. B.B. told M.R. that the deposit on Monday, December 10, 2007, would be particularly large. M.R. told appellant Christopher George Gaiovnik what she had learned from B.B. M.R. and appellant talked about how easy it would be to steal a deposit. Appellant was short of money and had a mortgage payment to make.

On Friday, December 7, appellant, M.R., and C.L. went to Rosedale and met with B.B. when she finished work. B.B. showed them where M.S. parked her car. Appellant commented that a robbery would be difficult because only one ramp led away from where M.S. parked. Appellant asked if M.S. and K.R. would chase after a thief. B.B. said that employees had been instructed not to chase a thief. When appellant, M.R., and C.L. left the mall, they talked about how a robbery might be committed.

B.B. was upset that M.R. had told appellant about the store's deposit procedure. On Saturday, December 8, B.B. sent a text message to M.R. warning her and appellant not to commit the robbery and threatening to turn them in if they did. B.B. wanted her ex-husband to commit the robbery if anyone did. M.R. contacted appellant, who agreed that the robbery was off.

On Monday, the deposit amount was $19,200. M.S. and K.R. went to make the deposit before stores in the mall opened for business. When M.S. and K.R. got to the parking ramp, there were two men walking toward M.S.'s car. Initially, the men were ahead of M.S. and K.R., but then they got behind the women. The men were both wearing sun glasses and hoods over their heads. One of the men, who was wearing a red and black flannel shirt, grabbed K.R.'s arm and took her purse from her.

The women got into M.S.'s car, intending to move to another parking place in case the robbers came back, but the valve stem on the left front tire had been cut. M.S. and K.R. ran into the store and told their manager about the robbery.

B.B. was in the store when K.R. and M.S. reported the robbery. She called M.R. and told her about it. Shortly after 10:00 a.m. on Monday morning, M.R. sent a text

message to appellant that said "please tell me you didn't do that . . . this morning." Appellant denied committing the robbery but expressed concern that he would be blamed for it. Appellant told M.R. that he had been working that morning.

Appellant and C.L. had been scheduled to work for appellant's brother at a construction site in North Branch. No one was at the job site when the brother got there between 9:00 and 10:00 a.m. The brother called appellant, who said he would be there in about ten minutes. The brother had somewhere else to go and did not wait for appellant to arrive.

When K.R.'s purse was taken, M.S. was standing about five feet away from the robber and looking directly at him. In a sequential photo line-up, M.S. identified appellant as the person who had taken K.R.'s purse. As soon as M.S. saw appellant's photo, her lips quivered and her body began to shake. At trial, M.S. testified that when she identified appellant in the photo line-up, she was "pretty sure" but not positive that he was the robber. M.S. was certain that she recognized appellant because he had committed the robbery and not because she had seen him elsewhere.

During a photo line-up, K.R. was not able to identify the man who took her purse. The man had been at K.R.'s side, so she did not get a good look at him.

Appellant was charged with one count each of simple robbery in violation of Minn. Stat. §§ 609.24, .05, subd. 1 (2006); and theft in violation of Minn. Stat. §§ 609.52, subds. 2(1), 3(2) (2006 & Supp. 2007), .05, subd. 1 (2006). The case was tried to a jury.

Recordings of phone calls made on December 14 and 18 between M.R. and appellant were played at trial. During the phone calls, appellant admitted going to the

mall on Friday evening and helping plan the robbery. Appellant told M.R. to stall on talking to police and instructed her to plead the Fifth if she was charged with anything. When M.R. said that the victim whose purse was stolen had been hurt in the robbery, appellant laughed and said, "Nobody's hurt." Appellant acknowledged that his situation "was really grim" at the time of the robbery and indicated that the only reason he would have committed the robbery was because he was unable to make two house payments and was "completely going under" financially.

When M.R. said that a surveillance camera showed someone wearing flannel and asked appellant if he or C.L. had been wearing flannel on Monday, appellant did not respond directly. M.R. then asked appellant what he wore on Monday, saying that the police would be asking, and appellant responded, "Tell them a black jacket. I always wear a black jacket." M.R. asked what C.L. was wearing, and appellant said, "I don't really pay no attention to what he's wearing. But he doesn't have nothing flannel."

M.R. said that it was unfair that she did not get any money from the robbery and that appellant should at least give her some money for an attorney. Appellant said: "I'll pay whatever you need. I just don't want nothing said, you know." Appellant avoided M.R.'s questions about how much money was left from the robbery and whether she was going to get a share. M.R. then asked: "So there's at least 17 hundred bucks left for a lawyer? I don't have that freakin money." Appellant replied, "I'm sure there is. I, that's not a problem. That can be covered. No problem at all. . . . I have a credit card."

The jury found appellant guilty as charged. The district court sentenced appellant on the aiding and abetting simple robbery conviction to an executed term of 48 months in

prison, the presumptive sentence for an offender with six criminal-history points, and ordered appellant to pay $19,200 in restitution. This appeal challenging the conviction and restitution order followed.

D E C I S I O N

I.

Appellant argues that the evidence was insufficient to prove the force element of robbery. 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). 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).

Minn. Stat. § 609.24 (2006) states:

> Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery . . . .

The supreme court has stated:

> [T]he comments to Minn. Stat. § 609.24 state that ordinary theft from the person without the use of force or fear, as where a defendant snatches a woman's purse or picks a man's pocket, is theft from the person. But the comments add that if a woman hangs on to her purse and the defendant uses force to overcome her resistance or if a defendant pushes a victim against a wall and takes his wallet, then the defendant has committed robbery, not theft from the person.

State v. Nash, 339 N.W.2d 554, 557 (Minn. 1983) (citation omitted); *see also State v. Oksanen*, 311 Minn. 553, 554, 249 N.W.2d 464, 466 (1977) (concluding that grabbing victim and pushing him, causing him to fall, when taking wallet was sufficient to prove force or threat of use of force) (citing Advisory Committee Comments to Minn. Stat. 609.24).

M.S. testified, "[W]hen the one grabbed . . . [K.R.'s] arm and tried to take the purse, or took the purse from her, he was like 'give me this. I need this.' So he had a hold of her arm and saying that." In the call to 911, M.S. stated: "[T]hey just like walked around us and then all of the sudden they grabbed my friend by the arm, and her purse, and like, was like, 'give me the purse. Give me the purse.' And like, she just, like, let go." On cross-examination, M.S. testified: "[A]t first, [K.R.] fought for it. Just like jerked back. Because you could see in her face that she did not understand what was going on. And then you can see, and it dawned on her what's going on. Her arm extends. He takes the purse."

K.R. testified: "They grabbed the strap and started pulling on it. I didn't realize what was happening. I kind of pulled away. Then they like yanked my arm out and took it off." K.R. also testified:

> Q: When the purse was taken, you describe the force the other person used to take it from you.
> A: They like pulled my arm out. It was like sitting kind of on my shoulder then fell down to like my elbow. They pulled it out so they could take it off.
> Q: This person who was pulling on the purse, were they grabbing your arm pulling on the purse itself?
> A: Both. One arm was on the purse straps, and the strap on the other was on my arm.

Under *Nash* and *Oksanen*, appellant's act of grabbing or yanking K.R.'s arm and pulling on it when she resisted him taking her purse was sufficient to prove that appellant used force to overcome K.R.'s resistance, or to compel acquiescence in, the taking of her purse. *See also State v. Nelson*, 297 N.W.2d 285, 286 (Minn. 1980) (upholding district court's refusal to instruct jury on lesser-included offense of theft when defendant and accomplice forcefully pulled on victim's coat, and victim responded by slipping out of jacket and running away).

II.

A.

Appellant argues that the district court erred in ruling that if appellant testified, the state could impeach him with a 1996 felony conviction for receiving stolen property, a 2006 gross-misdemeanor theft conviction, and a 2008 felony theft conviction. The district court also ruled that appellant could be impeached with a 1997 felony conviction for a false motor-vehicle-title application, but appellant is not challenging admission of that offense.

Felony conviction for receiving stolen property

Evidence of a felony conviction is admissible 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. Minn. R. Evid. 609(a)(1), (b); *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). 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).

1. 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 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.* (quotation omitted)

Appellant argues that the whole-person rationale has been criticized and that jurors tend to misuse prior convictions as propensity evidence. Nevertheless, admission of prior convictions 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); *see also State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998) (stating that it is not this court's role to review supreme court decisions); *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 conviction for receiving stolen property had impeachment value.

Timeliness

Evidence of a prior conviction is admissible if the offense for which the defendant is on trial occurred within ten years of the conviction or the witness's release from confinement imposed for that conviction. Minn. R. Evid. 609(b). Although appellant does not directly concede that he was discharged from confinement for the receiving-stolen-property conviction within ten years of the current offense, he has made no showing to the contrary. An appellant claiming that the district court abused its discretion by ruling evidence admissible bears the burden of proving that the ruling was

both erroneous and prejudicial. *See State v. Rhodes*, 627 N.W.2d 74, 84 (Minn. 2001) (applying standard to challenge to admission of evidence).

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[.]" *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978).

Appellant cites no authority to support the position that receiving stolen property and simple robbery are similar offenses. But even if the third *Jones* factor weighs against admission, it does not preclude admission. *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).

Importance of Appellant's Testimony

Appellant does not dispute that the jury heard his version of events in the recorded phone conversations with M.R., text messages exchanged with her, and cross-examination of the state's witnesses. Therefore, this factor does not weigh 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).

Centrality of Appellant's Credibility

When a defendant's credibility is central, this factor weighs in favor of admission. *State v. Smith*, 19 N.W.2d 19, 29 (Minn. 2003); *see also 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 does not dispute that his credibility was central.

2006 gross-misdemeanor theft conviction

Minn. R. Evid. 609(a)(2) permits impeachment with any conviction involving "dishonesty or false statement." When deceit is not an element of the crime, the crime may still involve dishonesty or false statement if it was committed in a manner using deceit. *State v.* Ross, 491 N.W.2d 658, 659 (Minn. 1992). The complaint in the 2006 case alleges that appellant entered a bar with two other people, and the three sat at a back booth and had a couple drinks. After several employees left the bar, appellant left the booth, walked into a back hallway, pried open the door to a room where night-deposit bags were kept, and took six bags. Appellant then went to the bathroom before returning to the booth. When he reached the booth, the other two people immediately stood up, and the three walked out of the bar and avoided the surveillance-camera angles as they left. The ruse of being a bar patron was deceit used to commit the theft.

2008 theft conviction

Appellant asserts that this was a gross-misdemeanor offense and does not address the application of the *Jones* factors to it. But appellant was charged with attempted theft in violation of Minn. Stat. § 609.52, subds. 2(1), 3(3)(a) (2006), a felony offense that is

punishable by imprisonment for not more than five years or payment of a fine of not more than $10,000, or both. Minn. R. Evid. 609(a)(1) applies to convictions for all crimes "punishable by death or imprisonment in excess of one year[.]" "The rule addresses the maximum sentence possible at the time of conviction, not the sentence which was actually given nor any subsequent alteration of the defendant's record." *State v. Skramstad*, 433 N.W.2d 449, 453 (Minn. App. 1988), *review denied* (Minn. Mar. 13, 1989).

The district court did not err in ruling that appellant's prior convictions were admissible for impeachment purposes.

B.

Appellant did not object to the no-adverse-inference instruction, so the plain-error standard of review applies to appellant's claim that giving the instruction without his express consent was error. A court should not instruct the jury about a criminal defendant's right not to testify unless the defendant specifically requests such an instruction on the record. *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002). "If the defendant requests the instruction, the court or the defendant's counsel must make a record of the defendant's clear consent and insistence that the instruction be given." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006) (quotation omitted). Appellant's clear consent is not part of the record, so giving the instruction was plain error. But "[g]iving the no-adverse-inference instruction without consent, absent a showing of prejudice, is harmless." *Id.* A defendant who fails to object to the no-adverse-inference

instruction bears a heavy burden of showing that substantial rights have been affected. *Gomez*, 721 N.W.2d at 880-82.

There was strong evidence of appellant's guilt. Appellant was involved in planning the robbery, even going so far as to visit the mall on Friday. M.S.'s identification of appellant as the robber was corroborated by her physical reaction to his photo. Appellant's statements to M.R. in phone conversations indicated his involvement in the robbery. Appellant was under financial strain before the robbery, and afterwards assured M.R. that he could pay for an attorney for her and also traveled to Las Vegas. Appellant claimed that he had been working when the robbery occurred, but appellant's brother testified that appellant was not at the work site shortly before the robbery occurred. Appellant has not met the burden of showing that his substantial rights were affected by the no-adverse-inference instruction.

C.

Appellant argues that the district court erred in failing to sua sponte instruct the jury that it could only use M.R.'s statements to put appellant's statements in context. Ordinarily it is not plain error for the trial court to fail to sua sponte give an instruction.

> In the absence of a request for a cautionary instruction, courts are hesitant to sua sponte give an instruction because an instruction may draw additional attention to potentially prejudicial issues. Moreover, a defendant may choose not to request an instruction for strategic reasons.

State v. Vance, 714 N.W.2d 428, 443 (Minn. 2006) (citation omitted). Under *Vance*, the district court did not err in failing to sua sponte give a limiting instruction regarding M.R.'s statements. *See id.* at 443-44 (holding that district court did not commit plain

error in failing to give limiting instruction on police officers' statements during interview with defendant when defendant did not object to officer's testimony or to admission of police statements and did not request limiting or cautionary instruction).

III.

Appellant argues that the district court erred in awarding restitution because it did not follow the procedure set forth in Minn. Stat. § 611A.04, subd. 1(a) (2006), which states:

> A victim of a crime has the right to receive restitution as part of the disposition of a criminal charge . . . against the offender if the offender is convicted . . . . The court . . . shall request information from the victim to determine the amount of restitution owed. The court . . . shall obtain the information from the victim in affidavit form or by other competent evidence. Information submitted relating to restitution must describe the items or elements of loss, itemize the total dollar amounts of restitution claimed, and specify the reasons justifying these amounts, if restitution is in the form of money or property. . . . In order to be considered at the sentencing or dispositional hearing, all information regarding restitution must be received by the court administrator of the appropriate court at least three business days before the sentencing or dispositional hearing. . . . The issue of restitution is reserved or the sentencing or dispositional hearing or hearing on the restitution request may be continued if the victim's affidavit or other competent evidence submitted by the victim is not received in time. At the sentencing or dispositional hearing, the court shall give the offender an opportunity to respond to specific items of restitution and their dollar amounts in accordance with the procedures established in section 611A.045, subdivision 3.

Citing *State v. Jola*, 409 N.W.2d 17, 19 (Minn. App. 1987), the state argues that a district court is not required to follow the procedure in Minn. Stat. § 611A.04 when awarding restitution. In *Jola*, the victims were a car dealership and its insurer. 409

N.W.2d at 19. Under the definition of "victim" in Minn. Stat. § 611A.01(b) (1984) when *Jola* was decided, only a natural person could request restitution. *Id.* at 19. But Minn. Stat. § 609.10(5) (1984) provided:

> Upon conviction of a felony and compliance with the other provisions of this chapter the court, if it imposes sentence, may sentence the defendant to the extent authorized by law as follows:
>
> . . .
>
> (5) To payment of court-ordered restitution in addition to either imprisonment or payment of a fine, or both.

Id.

The *Jola* court stated, "Chapter 611A deals with rights of victims to request restitution and has no effect on the court's ability to order restitution to a company under Chapter 609." 409 N.W.2d at 19. The definition of "victim" in Minn. Stat. § 611A.01(b) was amended in 1987 to include a corporation and in 1996 to include any other entity authorized to receive restitution under Minn. Stat. §§ 609.10 or 609.125. 1987 Minn. Laws ch. 254, § 10 at 916; 1996 Minn. Laws ch. 408, art. 7, § 5 at 675. Consequently, because appellant's victim is within the current Minn. Stat. § 611A.01(b) definition of victim, *Jola* could be interpreted as meaning that to receive restitution, the victim must make a request under chapter 611A.

But even if the district court needed to follow the procedures for awarding restitution under Minn. Stat. § 611A.04, we will not reverse the restitution award because appellant failed to challenge the award in a timely manner. Minn. Stat. § 611A.045, subd. 3(b) (2006), provides:

> An offender may challenge restitution, but must do so by requesting a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later. Notice to the offender's attorney is deemed notice to the offender. The hearing request must be made in writing and filed with the court administrator. A defendant may not challenge restitution after the 30-day time period has passed.

The record demonstrates that appellant objected to restitution at the sentencing hearing, but it does not indicate that appellant challenged the restitution award in the district court after the award was made.

Affirmed.