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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2039

State of Minnesota,
Respondent,

vs.

Lamart McKissic Coleman,
Appellant.

Filed September 7, 2010
Affirmed
Schellhas, Judge
Concurring specially, Shumaker, Judge

Hennepin County District Court
File Nos. 27-CR-08-64468; 27-CR-09-5023

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Gurdip Singh Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of third-degree criminal sexual conduct, arguing that the district court abused its discretion when it permitted the prosecution to

impeach him with a prior fifth-degree controlled-substance conviction when he testified in his own defense. We affirm.

FACTS

On August 12, 2008, S.W. and her 14-year-old daughter, T.W., reported to police that T.W. had been involved in a sexual relationship with appellant Lamart McKissic Coleman, age 32. Initially, T.W. refused to provide police with any details, but, on January 5, 2009, T.W. agreed to give police a statement. T.W. testified that she first met appellant in the spring of 2007, while she was outside her church dance class. Appellant, who was sitting in his car, started to talk to T.W. about babysitting his young daughter. T.W. was not able to babysit due to her schedule, but she ran into appellant again the following month. Appellant told her he wanted her to call him and gave her his mobile phone number. T.W. called appellant and the two met. Appellant eventually took T.W. to at least two residential locations in Minneapolis, where they engaged in sexual intercourse. T.W. was not certain how many times she and appellant had sex, but she testified that she would meet appellant fairly regularly until she ended the relationship in November 2008.

In the summer of 2008, S.W. began to suspect something was amiss when she and her boyfriend found T.W. being dropped off near her home by a man in a distinctive car. When S.W. asked T.W. about the situation, T.W. lied to her mother and did not tell her about the relationship. S.W. later observed the car and wrote down its license-plate number. Police verified that appellant owned the car. T.W. eventually revealed her relationship with appellant to her pastor.

Respondent State of Minnesota charged appellant with third-degree criminal sexual conduct.[1] Prior to trial, the district court ruled that the state could not impeach appellant with two of his prior convictions, a 1995 second-degree murder conviction and a 1992 second-degree assault conviction. The district court also denied the state's motion to admit other pending charges against appellant as *Spreigl* evidence. But the court granted the state's request to impeach appellant with his 2007 felony conviction of fifth-degree controlled-substance crime.

At trial, the state presented testimony from T.W., S.W., S.W.'s boyfriend, T.W.'s pastor, T.W.'s friend, who witnessed T.W. engaging in sex with appellant on one occasion, and the two police officers who took T.W.'s initial report and investigated the offenses. Appellant testified in his own defense, and at the beginning of his testimony, his attorney asked him the following questions:

> Q Were you sometime in 2007 convicted of a marijuana drug charge here in Hennepin County?
> A Yes.
> Q And that was a charge you pled guilty to. I believe it was a marijuana sale charge; is that right?
> A Correct.

At the end of trial, the district court gave the jury the following instruction:

> Impeachment. In deciding the believability and weight to be given the testimony of a witness you may consider . . . evidence that the witness has been convicted of a crime. You may consider whether the kind of crime committed indicates the likelihood the witness is telling or not telling the truth. In the case of the defendant you must be especially careful to

[1] The state also charged appellant in two other cases for offenses which he allegedly committed around the same time as the third-degree criminal sexual conduct offense, File Nos. 27-CR-64468, 27-CR-09-6022.

> consider any previous conviction only as it may affect the weight of the defendant's testimony. You must not consider any previous conviction as evidence of guilt of the offense for which the defendant is on trial.

The jury found appellant guilty of third-degree criminal sexual conduct involving T.W.,[2] and the district court sentenced appellant to 129 months' imprisonment.

This appeal follows.

D E C I S I O N

A district court's decision to admit evidence of a defendant's prior convictions as impeachment evidence is reviewed for an abuse of discretion. *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009). Rule 609 of the Minnesota Rules of Evidence generally provides that any felony conviction may be used to impeach a witness if the conviction is not stale and if the probative value of the evidence outweighs its prejudicial effect. When determining whether the probative value of impeachment evidence outweighs its prejudicial effect, a district court must consider the following five 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; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue." *Williams*, 771 N.W.2d at 518 (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

[2] Approximately one month later, appellant entered into a plea agreement on the other two cases. He agreed to plead guilty to second-degree criminal sexual conduct in one case, File No. 27-CR-08-64468, and the state agreed to dismiss the charges in the other case, File No. 27-CR-09-6022. Appellant listed File No. 27-CR-08-64468 in his notice of appeal, although he has raised no issues in that case on appeal.

1. Impeachment Value of Prior Conviction

Appellant argues that his prior conviction of controlled-substance crime did not involve dishonesty and had little bearing on his veracity or honesty. He challenges the district court's reliance on the "whole person" rationale for admitting this evidence, citing a case from Michigan, *People v. Allen*, 420 N.W.2d 499, 505 (Mich. 1988), which outlines the problems with admitting a prior conviction as impeachment evidence and discusses the "likelihood that innocent persons may be convicted" based on the jury's misuse of this type of evidence.

But Minnesota courts have rejected past attempts to abrogate the "whole person" test and have generally affirmed the rationale behind the test—that impeachment by prior crime aids the jury by permitting it to better judge the credibility of a testifying witness. *Williams*, 771 N.W.2d at 518 (citing *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979)). Under Minnesota law, a prior conviction need not involve truth or falsity to have impeachment value. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). This factor weighs in favor of admission in this case.

2. Date of Prior Conviction and Appellant's Subsequent History

Appellant's 2007 conviction was not "stale" under rule 609(b). *See Gassler*, 505 N.W.2d at 67 (noting that conviction occurring within ten years of instant prosecution is not stale). Appellant nevertheless suggests that because the controlled-substance offense and the present offense occurred around the same time, there is no "passage of time" to allow any relevance determination to be made. But, as the state notes, the prior conviction is probative because it shows that appellant began having sex with T.W.

approximately one year after he pleaded guilty to fifth-degree marijuana sale and while he was still on probation for that conviction. This factor thus weighs in favor of admissibility.

3. Similarity of Prior Conviction to Charged Crime

"[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively." *Gassler*, 505 N.W.2d at 67. Appellant concedes that his prior controlled-substance conviction is not similar to the charged offense, and that this factor weighs in favor of admissibility.

4. Importance of Appellant's Testimony, and
5. Centrality of Credibility Issue

The last two *Jones* factors are often analyzed together. *See, e.g.*, *Swanson*, 707 N.W.2d at 655-56; *Ihnot*, 575 N.W.2d at 587; *Gassler*, 505 N.W.2d at 67. In this case, appellant's credibility was undisputedly central to his case. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (stating that credibility is central issue when issue for jury "narrows to a choice between defendant's credibility and that of one other person"). When credibility is central, these *Jones* factors tend to weigh in favor of admitting a prior conviction. *Swanson*, 707 N.W.2d at 655-56; *Ihnot*, 575 N.W.2d at 587.

When a defendant is discouraged from testifying due to a ruling that allows impeachment evidence of a prior conviction, the fourth *Jones* factor may weigh against admissibility. *See Gassler*, 505 N.W.2d at 67-68 (noting that a defendant's constitutional right to testify may be violated if the defendant chooses not to testify after the court

wrongfully admits prior-crimes impeachment evidence). But when a defendant decides to testify, as appellant did here, this factor is somewhat nullified. *See State v. Abbott*, 356 N.W.2d 677, 680 (Minn. 1984) (stating that district court's decision to allow admission of prior conviction "did not have the effect of keeping defendant's version of the events from the jury" because he testified and his credibility was at issue).

Appellant nevertheless claims that admission of his prior conviction was cumulative and prejudicial because it added to the perception that he was a bad person with a propensity to commit crimes. He asserts that the state presented testimony from a number of other witnesses who corroborated T.W.'s claims that she was involved in a sexual relationship with him. But appellant's prior conviction was mentioned only twice: once at the beginning of his testimony, and once by the prosecutor during closing arguments. Appellant's own testimony likely had more of a negative impact on his credibility than the admission of his prior conviction. Appellant acknowledged during his testimony that in August 2008, he had become upset and exchanged profanities with S.W. when she confronted him about why T.W. was in his car.

Because the majority of the *Jones* factors weighed in favor of admissibility and none of the factors weighed strongly against admissibility, the district court did not abuse its discretion in ruling that the state could impeach appellant with evidence of his prior conviction of fifth-degree controlled-substance crime.

Affirmed.

SHUMAKER, Judge (concurring specially)

I respectfully concur in the result because, under current Minnesota law, the district court enjoys the discretion to allow into evidence for purposes of impeachment convictions that do not logically implicate a witness's credibility. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (endorsing the "whole person" approach to impeachment by prior conviction). But I write separately to highlight the danger of admitting as impeachment evidence convictions that have little or no bearing on credibility and that carry a substantial risk of misuse when admitted against the accused.

The authority for the type of impeachment employed here is Minn. R. Evid. 609(a), which states in part that, "[f]or the purpose of attacking the credibility of a witness," evidence that the witness has previously been convicted of a qualifying crime may be allowed at trial. Logically implicit in the authority for the admission of evidence of a prior conviction is the requirement that the crime is somehow plausibly related to the witness's capacity and disposition to tell the truth. If the nature of the prior crime or the manner of its commission does not reasonably shed some light on the question of credibility, I suggest that its admission is not within the purview of rule 609(a). Moreover, it presents the risk that the jury will then use the prior crime to draw a general negative character inference, namely, that the accused is a criminal who acted in conformity in the instant case with his criminal nature or propensity. Such an inference is expressly forbidden by Minn. R. Evid. 404(a).

Although caselaw provides the district court with the discretion to allow evidence of a prior crime that has no bearing on credibility, rule 609(a) confines admissibility to

the purpose of "attacking credibility." The district court thus surely has the obligation to follow this rule despite the permissive "whole person" rationale of admissibility. Coleman's prior drug-related conviction does not appear to implicate his credibility. That being so, its purpose was to permit a bad-character inference, or at least that was the risk in allowing it.