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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2322**

State of Minnesota,
Respondent,

vs.

Emmett Benjamin Hutchinson,
Appellant.

**Filed November 30, 2010
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. 62-CR-08-12337

Lori A. 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, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Stauber,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his convictions of possession of a firearm by an ineligible person and fifth-degree controlled-substance possession, arguing that the district court abused its discretion by allowing the state to impeach him with two unspecified felony convictions. Appellant also claims that the prosecutor engaged in prejudicial misconduct during closing arguments. Because the admission of evidence regarding appellant's unspecified felony convictions constitutes harmless error and the prosecutor did not engage in misconduct, we affirm.

FACTS

Appellant Emmett Benjamin Hutchinson was charged with possession of a firearm by an ineligible person and fifth-degree controlled-substance possession. The case was tried to a jury. At trial, Officer Jason Neubrand testified that on September 26, 2008, he responded to a call regarding activity at a vacant house in St. Paul. Upon arrival, Officer Neubrand noticed that a light was on upstairs in the house. He also heard music and voices coming from inside the house.

Officer Neubrand, Officer John Keating, and Officer Steven Smith knocked on a locked, second-story door to the house. Someone inside asked who was there, and Officer Neubrand responded: "It's the police." At that time, Officer Neubrand heard the sound of a semiautomatic handgun being charged or racked, i.e., the sound of the top slide being pulled back to load a bullet into the chamber. The door opened suddenly, and Officer Neubrand, with his flashlight pointed inside, observed a man standing with a

silver handgun in his hand. The man, later identified as Hutchinson, wore a white shirt with brown horizontal stripes and blue shorts. He was slender and approximately 5 feet, 8 inches to 5 feet, 10 inches tall. The man stuck the handgun in his waistband and ran down an interior hallway.

The evidence at trial showed that Officers Keating and Smith secured the front of the house, while Officer Neubrand went to a location behind the garage. A few minutes later, two men and three women left the house. The men were both wearing dark blue shirts and jeans. Hutchinson was the last person to leave the house. Officer Neubrand recognized his clothing and build immediately, and he was taken into police custody. When Officer Neubrand searched Hutchinson at the police department, he found ten pills containing ecstasy.

After Hutchinson was taken into custody, Officer Neubrand and other officers secured the house. In the basement, Officer Neubrand found a silver nickel-plated handgun. The gun's condition indicated that it had been racked or charged.

Sergeant Shelia Lambi testified that she interviewed Hutchinson the day after his arrest. Sergeant Lambi asked Hutchinson why he was in custody, and he responded that he had been caught with pills that he had purchased at a night club. Hutchinson said that he did not know anything about the gun found in the basement of the vacant house. Sergeant Lambi explained that a sample of his DNA would be compared to a sample from the gun and that if he had not touched the gun, then the DNA samples would not match. At that point, Hutchinson put his head in his hands and appeared upset. When he raised his head, Hutchinson had tears in his eyes.

A forensic scientist from the Minnesota Bureau of Criminal Apprehension testified that a DNA sample from the gun matched Hutchinson's DNA profile. She further testified that "[t]he probability of selecting an unrelated individual at random from the general population that would match . . . the profile obtained from the swabbing of the gun, is one in 760 million."

Hutchinson testified at trial. Prior to his testimony, the district court ruled, over his objection, that the state could impeach him with evidence of his two prior felony controlled-substance convictions. But because Hutchinson was on trial for a controlled-substance crime, the court ordered the state to refer to the convictions only as "felony" convictions and prohibited disclosure of the underlying offense or the controlled substance involved.

Hutchinson testified that he arrived at the vacant house around 2:30 a.m. He had a laptop bag that contained his laptop computer, a cell phone, jewelry, papers, DVDs, and CDs. He placed the bag on the floor, against the wall, in a room upstairs. Hutchinson lost sight of the bag for a couple of minutes and did not return to it until the police arrived. At that time, he noticed that the bag had been tipped over, and a man was stepping away from it. Hutchinson looked in the bag and found a firearm. The man asked Hutchinson to leave the firearm in the bag until after the police had left. Hutchinson refused, and the man reached into the bag and went downstairs. When Hutchinson acknowledged his prior felony convictions, the district court immediately provided the jury with a limiting instruction. The jury convicted Hutchinson as charged, and this appeal follows.

DECISION

I.

A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear abuse of discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Hutchinson argues that the district court abused its discretion by allowing the state to impeach him with two unspecified felony convictions.

Under Minn. R. Evid. 609(a)(1), for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting the evidence outweighs its prejudicial effect. This court examines five factors to determine if the probative value outweighs the prejudicial effect:

(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 crime to impeach), (4) the importance of defendant's prior testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). The Minnesota Supreme Court has held that "a district court should demonstrate on the record that it has considered and weighed the *Jones* factors." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006).

Hutchinson does not assert that the district court failed to properly consider these factors. Instead, Hutchinson argues that the district court abused its discretion by

ordering the state to refer to the priors only as “felony” convictions, without identifying the underlying offenses, in an attempt to neutralize any negative impact resulting from the fact that the prior offenses are similar to one of the charged offenses. Hutchinson cites *State v. Utter* for this proposition. 773 N.W.2d 127 (Minn. App. 2009).

In *Utter*, “[t]he question before [the court] on appeal [was] whether the probative value of admitting evidence of an unspecified prior felony conviction outweighs its prejudicial effect so that the evidence is admissible under rule 609(a)(1).” *Id.* at 131. This court answered the question in the negative, holding that “the district court abused its discretion in admitting evidence of appellant’s unspecified prior conviction.” *Id.* at 132. The court reasoned that “[b]y shielding the jury from the nature of appellant’s prior conviction, the district court allowed the jury to speculate that the prior crime had much greater impeachment value than it may actually have had.” *Id.* Based on this precedent, the district court here abused its discretion by allowing the state to impeach Hutchinson with evidence of two unspecified felony convictions.

But our analysis is not yet complete. As in *Utter*, “[h]aving concluded that the district court erred in admitting evidence of appellant’s unspecified prior conviction[s], we next consider whether the error was harmless.” *Id.* at 133. In conducting a harmless-error analysis, the reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.*

Hutchinson argues that the error was not harmless for three reasons: (1) the district court's jury instruction regarding the prior-conviction evidence was incomplete, (2) he was impeached with two unspecified felony convictions rather than one, and (3) his credibility was central to the case.

With regard to the jury instruction, Hutchinson argues that "the district court's final instructions omitted the requirement that the jury not consider the prior conviction evidence as evidence of guilt." Instead, the district court informed the jurors that they could not use the prior convictions as evidence of Hutchinson's character or conduct. But Hutchinson did not object to this jury instruction. "Failure to object to jury instructions generally results in a waiver of the issue on appeal." *State v. Earl*, 702 N.W.2d 711, 720 (Minn. 2005). "Even in the absence of objection at trial . . . [appellate courts] have discretion to review a claim of error on appeal if the jury instructions contain plain error affecting substantial rights or an error of fundamental law." *State v. Laine*, 715 N.W.2d 425, 432 (Minn. 2006). But Hutchinson does not assert that the jury instruction constitutes plain error or an error of fundamental law. Therefore, we will not exercise our discretion to review the instruction in the context of our harmless-error analysis.

And while we agree that impeachment by two unspecified felony convictions is arguably more prejudicial than impeachment by one, on balance, this argument does not tip the scale in Hutchinson's favor. Nor are we persuaded by Hutchinson's assertion that the error was harmful because his credibility was central to the case. To support this assertion, Hutchinson cites *Utter* wherein this court found that the erroneous admission of

an unspecified felony conviction was not harmless because “the jury’s determination of appellant’s credibility was critical to the verdict in this case.” 773 N.W.2d at 133.

In *Utter*, the defendant was charged with violating a harassment restraining order. *Id.* at 129. His defense rested entirely on his denial that he made an impermissible telephone call. *Id.* The victim’s voice identification was the only direct evidence implicating the defendant. *Id.* The defendant’s credibility was therefore central to the case, and his impeachment by a prior unspecified felony conviction likely influenced the jury’s assessment of his credibility. But this case is factually distinguishable from *Utter* because physical evidence refutes Hutchinson’s testimony regarding the gun. Unlike the circumstances in *Utter*, where no physical evidence implicated the defendant, the DNA evidence in this case provided the jury with an independent basis to reject Hutchinson’s testimony regarding the gun. Hutchinson’s impeachment by unspecified felony convictions was therefore not as damaging as the impeachment in *Utter*.

We also note that the evidence showing that Hutchinson possessed the gun is strong. At trial, Officer Neubrand identified Hutchinson as the person that he saw holding the nickel-plated handgun. Officer Neubrand also provided a detailed description of Hutchinson’s physical appearance and clothing at the time of the offense, buttressing his in-court identification. And the jury heard that a DNA sample was recovered from the gun and that this sample matches Hutchinson’s DNA profile. Contrary to Hutchinson’s assertion on appeal, the record does not show that a second DNA profile was recovered from the gun. Lastly, when Sergeant Lambi informed Hutchinson that if he had not touched the gun, then his DNA profile would not match the DNA sample from

the gun, he appeared upset. And with regard to the controlled substance charge, Hutchinson admitted that he possessed the ecstasy pills. On this record, there is no reasonable possibility that Hutchinson's impeachment by unspecified felony convictions significantly affected the verdict. Thus, the error was harmless and does not necessitate reversal.

II.

Hutchinson claims that the prosecutor engaged in misconduct during his rebuttal argument by using a photograph of Mt. Rushmore to improperly appeal to the jury's patriotism and to distort and dilute the state's burden of proof.

"A prosecutor is not permitted to appeal to the passions of the jury during closing argument." *Nunn v. State*, 753 N.W.2d 657, 661-62 (Minn. 2008) (quotation omitted). A prosecutor should likewise not "distract the jury from its proper role of deciding whether the state has met its burden." *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997). But appellate courts have "recognized that the prosecutor has considerable latitude and is not required to make a colorless argument." *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998).

During rebuttal, as the prosecutor discussed the concept of reasonable doubt, he removed pieces of an electronically-displayed photograph of Mt. Rushmore, visually differentiating between proof beyond a reasonable doubt and the absence of all doubt. The prosecutor analogized the presentation of trial evidence to a jigsaw puzzle, explaining that just as one need not complete a jigsaw puzzle to recognize the image it depicts, something less than a completed puzzle may satisfy the reasonable-doubt

standard. But the prosecutor did not refer to the content of the photograph, appeal to the jurors' patriotism, or suggest that they had a duty to convict Hutchinson. Nor did the prosecutor minimize or attempt to shift the state's burden of proof.

And the state's argument did not exceed the scope of permissible rebuttal argument under the Minnesota Rules of Criminal Procedure, which provide that "[t]he prosecutor may make a rebuttal argument limited to a direct response to the defendant's closing argument." Minn. R. Crim. P. 26.03, subdivision 12(j). The prosecutor's argument was a direct response to defense counsel's reasonable-doubt argument. Nothing prohibits a prosecutor from anticipating defense counsel's arguments and preparing to address them. The state's capitalization on an opportunity to discuss the concept of reasonable doubt with a visual aide during its rebuttal argument does not constitute misconduct.

Affirmed.

Dated:

Judge Michelle A. Larkin