STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1016

State of Minnesota,
Respondent,

vs.

Gregory John Odeneal,
Appellant.

Filed May 16, 2011
Affirmed
Crippen, Judge[*]

Hennepin County District Court
File No. 27-CR-09-49908

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, III, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi Elstan Forte Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Worke, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

Appellant Gregory Odeneal disputes his conviction for third-degree criminal sexual conduct, claiming denial of self-representation and improper impeachment by a prior conviction. Because the district court did not abuse its discretion in the context of either claim, we affirm.

FACTS

In October 2009, appellant was charged with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2006), and kidnapping in violation of Minn. Stat. § 609.25, subd. 1(2) (2006). The charges were based on the victim's claim that appellant raped her in his bedroom three years earlier, on the morning of September 10, 2006. Appellant pleaded not guilty, and the case proceeded to a jury trial.

On January 27, 2010, appellant appeared for trial with his public defender. Prior to jury selection, a discussion was held between the district court and the attorneys regarding whether prior convictions could be used to impeach witnesses. The district court preliminarily ruled that for purposes of impeachment both sides could use prior convictions.

At the beginning of the second day of trial, appellant complained about his public defender's representation and told the court that he did not want to be represented by the public defender. The district court told appellant that he could choose either to represent himself with his public defender as advisory counsel or go to trial with his court-appointed attorney. Appellant told the court that he wanted to represent himself, but that

he needed more time to prepare for trial.[1] The district court denied appellant's motion for a continuance and again asked him whether he wanted to represent himself or go to trial with his court-appointed attorney. Appellant stated that he would represent himself, but told the court that he refused to pick a jury and wanted to return to his cell. After a brief recess, the court denied appellant's request to represent himself and ordered him to proceed with counsel.

Following a jury trial, appellant was found guilty of third-degree criminal sexual conduct but was acquitted of kidnapping. The district court sentenced appellant to an executed term of 76 months in prison.

D E C I S I O N

1. Right of Self-Representation

Appellant argues that his right to self-representation was violated when the district court denied his request to represent himself. Under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has a constitutional right to represent himself in a state criminal proceeding. *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990) (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975)). "When a criminal defendant asks to represent himself, the court must determine (1) whether the request is clear, unequivocal, and timely, and (2) whether the defendant knowingly and intelligently waives his right to counsel." *Richards*, 456 N.W.2d at 263 (footnote omitted). As to timeliness, the right to self-representation is unqualified only until trial

[1] Immediately before trial, appellant stated complaints about his attorney but did not suggest acting without counsel. He asked for a continuance but did not question that he and his attorney were prepared to proceed to trial.

begins, which occurs at the onset of jury voir dire. *State v. Christian*, 657 N.W.2d 186, 191, 193 (Minn. 2003). Upon the commencement of voir dire, the district court has discretion "to balance the defendant's right of self-representation against the potential for disruption and delay." *Id.* at 193-94 (citing *United States v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir.1986)). We review a district court's denial of a defendant's request to represent himself for clear error. *Id.* at 190. "If the defendant's right to self-representation is violated, he is entitled to a reversal and new trial." *State v. Blom*, 682 N.W.2d 578, 613 (Minn. 2004).

Appellant contends that his request for self-representation was timely because it was made prior to the start of trial. But the record shows that appellant's request to represent himself was made after the commencement of jury voir dire. Because appellant's request for self-representation was made after jury selection had begun, the district court had discretion to balance appellant's right of self-representation against the potential for disruption and delay.[2]

The record shows that the district court properly considered this standard. The court explained to appellant that "[t]he law says I have to exercise my discretion, and I have to balance your legitimate interest in representing yourself against the potential disruption and possible delay of proceedings already in progress." The district court

[2] This court has gone further and ruled that a motion for self-representation "is untimely where the request is not made a reasonable time before trial and there is no good cause justifying its lateness." *State v. VanZee*, 547 N.W.2d 387, 391 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. July 10, 1996). Because the record supports the district court's denial of appellant's request for self-representation under the eighth-circuit standard set out in *Wesley*, 798 F.2d at 1155-56, we do not need to go further in this case.

considered appellant's argument in favor of self-representation and then noted concerns of disruption and possible delay because appellant's request was made on the second day of trial. Specifically, the court stated that "we have a jury that's now been here for two days. Twenty-nine people from the community that are missing their jobs in order to fulfill their civic duty. I have two lawyers that have been here for some time and we've all put time in on your case." Given these circumstances, the district court did not abuse its discretion by denying appellant's request for self-representation as untimely.

Appellant argues that any timeliness argument made on appeal must be rejected because the district court made no findings that his request was untimely. Contrary to appellant's assertion, the court explicitly stated that "because of the timing of [appellant's] motion to represent [him]self, I'm going to deny it." Moreover, appellant does not support this assertion with argument or any authority that requires a district court to make specific findings if a motion is denied as untimely. "Assignment of error based on 'mere assertion' and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." *State v. Oulette*, 740 N.W.2d 355, 361 (Minn. App. 2007), *review denied* (Minn. Dec. 23, 2007). No such prejudice is apparent here, and as such appellant's argument is waived.

2. Impeachment

Appellant argues that the district court erred in ruling that appellant could be impeached with a 2005 felony conviction of terroristic threats if he testified. Appellant did not object to the ruling at trial; he testified and was impeached.

"[T]his court has discretion to consider an error not objected to at trial if it is plain error that affects substantial rights." *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). To establish plain error, the defendant must prove (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Atkinson*, 774 N.W.2d 584, 595 (Minn. 2009). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

A felony conviction may be admitted for impeachment purposes provided that less than ten years have elapsed since the conviction and the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). Whether the probative value of a prior conviction outweighs its prejudicial effect is a matter within the district court's discretion. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985). The district court's ruling on the impeachment of a witness by a prior conviction is reviewed under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). The district court must consider the five *Jones* factors to determine whether probative value outweighs 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 prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue."

Id. at 586 (quoting *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978)).

The district court did not address the *Jones* factors, simply stating that it would allow the state to impeach appellant with the prior conviction. The court errs when it fails to demonstrate consideration of these factors, *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006), but "the error is harmless if the conviction could have been admitted after a proper application of the *Jones*-factor analysis." *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). An appellate court may conduct its own review of the *Jones* factors in determining whether this type of error is harmless. *Swanson*, 707 N.W.2d at 655-56 (conducting review of *Jones* factors in absence of district court analysis and concluding that district court did not abuse its discretion under Minn. R. Evid. 609(a)(1)).

Appellant argues that his 2005 felony conviction of terroristic threats should have been excluded because it is not probative of his credibility. But 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). "[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.'" *Id.* at 707 (quoting *City of St. Paul v. DiBucci*, 304 Minn. 97, 100, 229 N.W.2d 507, 508 (1975)).

Appellant argues that commentators and courts in other jurisdictions have criticized the whole-person rationale and have also recognized that jurors tend to misuse prior convictions as propensity evidence, but we do not have the liberty to disregard

established Minnesota law on the subject. *See State v. Williams*, 771 N.W.2d 514, 518-19 (Minn. 2009) (declining invitation to abrogate the whole-person test and affirming its underlying rationale—that impeachment by prior conviction allows jury to better evaluate credibility of testifying witness); *see also State v. Flemino*, 721 N.W.2d 326, 328-29 (Minn. App. 2006) (noting that despite widespread criticism of whole-person rationale, rule 609 reflects broader credibility concept and court of appeals lacks authority to alter rule adopted by supreme court). Moreover, appellant did not challenge the whole-person rationale before the district court, which permits the conclusion that the argument is waived. *See State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (declining to consider argument regarding rule 609 analysis when it was not raised in district court); *Swanson*, 707 N.W.2d at 656 (refusing to address a similar challenge to application of rule 609 when raised for first time on appeal).

Proceeding to other impeachment factors, appellant concedes that his prior conviction occurred in 2005, about one year before the charged offense. Even though appellant's prior conviction was not for a sex offense, he argues that it is similar to the charged crime because it involved a crime of violence. But the district court instructed the jury about its consideration of the impeachment evidence, reducing the risk that the jury would improperly use the prior-conviction evidence. *State v. Pendleton*, 725 N.W.2d 717, 729 (Minn. 2007). Finally, it is undisputed that credibility was a central issue in this case. The jury needed to determine whether to believe the testimony and prior statements of the victim or the testimony of appellant, in which he denied the allegations of criminal sexual conduct. "If credibility is a central issue in the case, the

fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Swanson*, 707 N.W.2d at 655.

On the weight of the *Jones* factors, appellant has failed to establish that admission of his prior conviction was plain error. *See State v. Hochstein*, 623 N.W.2d 617, 624-25 (Minn. App. 2001) (affirming admission of prior conviction when first *Jones* factor was neutral, second and third factors weighed against admission, and fourth and fifth factors weighed in favor of admission). The district court's failure to explicitly address the five *Jones* factors is harmless error, and the court did not clearly abuse its discretion by admitting evidence of appellant's terroristic-threats conviction for impeachment purposes.

Affirmed.