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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1435**

State of Minnesota,
Respondent,

vs.

Ramon Jimenez Ruiz,
Appellant.

**Filed September 19, 2011
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-10-7133

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

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

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his criminal convictions and sentence, contending that the district court abused its discretion in allowing the state to impeach appellant with his

prior felony convictions and made multiple sentencing errors. We affirm the convictions, but because the district court improperly imposed a consecutive sentence, we reverse and remand for resentencing.

FACTS

Appellant Ramon Jimenez Ruiz was charged with possession or sale of stolen or counterfeit checks, offering a forged check, aggravated forgery, and theft of a motor vehicle. Before Ruiz took the stand during his trial, the district court ruled that one of Ruiz's four prior felony convictions—for receiving stolen property—was admissible for impeachment purposes. Later, during Ruiz's testimony, the district court admitted a second conviction for impeachment because Ruiz violated a prior court order prohibiting the defense from presenting evidence of a state witness's misdemeanor conviction. The jury found Ruiz guilty of the charged offenses, and the district court sentenced Ruiz to 30 months in prison, consecutive to a sentence he was serving for an Anoka County offense. This appeal follows.

DECISION

I. Any error occasioned by allowing the state to impeach Ruiz with a second prior felony conviction is harmless.

Ruiz first challenges the district court's admission of a second prior felony conviction for impeachment purposes. We review a district court's decision to admit a defendant's prior convictions for impeachment purposes for abuse of discretion. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). A prior conviction that is punishable by imprisonment for longer than one year is admissible as impeachment evidence if the

conviction is less than ten years old and its prejudicial effect is outweighed by its probative value. Minn. R. Evid. 609(a)(1). Whether the probative value of the conviction outweighs its prejudicial effect depends on 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 (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.

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

While the district court must demonstrate that it considered these five factors, *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006), its failure to do so “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). And an appellate court may conduct its own review of the *Jones* factors in determining whether this type of error is harmless. *See 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)).

Prior to Ruiz testifying, the district court analyzed Ruiz's four felony convictions¹ under Minn. R. Evid. 609(a)(1) and the *Jones* factors, articulating its reasoning on the record. The district court determined that the convictions are “relatively recent” and “relevant in terms of the probative value”; the convictions for receiving stolen property

¹ In Minnesota, Ruiz had one prior conviction of felony theft of a motor vehicle and three prior felony convictions for receiving stolen property. The state did not attempt to introduce his out-of-state convictions.

are “sufficiently dissimilar” to the charges before the jury; Ruiz’s testimony and credibility are “central” to the case; and there is impeachment value to the convictions because the “jury is entitled to see the defendant as he is.” The district court concluded that admitting evidence of all four convictions “would be an undue deterrent to the defendant’s right to testify,” but that permitting evidence of one prior conviction for receiving stolen property creates an “appropriate balancing.”

During his testimony, Ruiz referenced circumstances surrounding a state witness’s misdemeanor conviction, discussing the witness’s “criminal cases,” his “gang affiliation,” and who would “testify at his trial.” The district court had previously prohibited the defense from presenting this evidence because the witness’s conviction did not implicate his truthfulness as contemplated by rule 609 and it “potentially opens up a panorama of facts that would distract the jury.” The district court sustained the state’s objection to Ruiz’s testimony and determined that admission of another of Ruiz’s prior felony convictions was an appropriate consequence for the violation. The court stated that its *Jones*/rule 609 analysis is “similar to what it was before except that [Ruiz has] now violated the Court’s order in a very direct and inappropriate way on a matter that’s highly inappropriate and prejudicial.”

Ruiz does not challenge the district court’s initial determination allowing one conviction to be used for impeachment purposes. Rather, Ruiz argues that the “content” of his testimony did not violate the evidentiary ruling and that the district court abused its discretion in allowing a second conviction to be used to impeach him after previously ordering that only one conviction would be allowed. We address each argument in turn.

First, Ruiz's testimony informed the jury that the state's witness was or had been a defendant in a criminal proceeding. We discern the content of this testimony to fall squarely within the district court's prohibition against evidence concerning the witness's misdemeanor conviction.

Second, the district court clearly stated that the state could impeach Ruiz with a second receipt-of-stolen-property conviction because Ruiz violated the evidentiary ruling. Ruiz argues that this punitive motivation is improper. But we need not decide this issue. Even assuming that the district court erred in permitting evidence of a second conviction as a sanction, we conclude that the error is harmless. *State v. Courtney*, 696 N.W.2d 73, 79-80 (Minn. 2005) (stating that even if evidence was erroneously admitted, the verdict may stand if the error is harmless beyond a reasonable doubt, meaning that the verdict is "surely unattributable to the error" (quotation omitted)). The jury heard testimony from the victim, police officers, bank employees, and other witnesses describing how Ruiz took possession of and transferred title to the 2005 Dodge Magnum, and copied the victim's signature using tracing paper to obtain \$4,000 from the victim's checking account. And the district court clearly instructed the jury on the elements of the charged offenses, none of which were the same as the elements of the crimes of which Ruiz had been previously convicted. The district court also cautioned the jury to "be especially careful" in considering evidence of prior convictions to evaluate Ruiz's credibility, and that prior convictions are not "evidence of guilt" of the current charged offenses. On this record, we conclude that the jury's verdict is surely not attributable to admission of a

second, unrelated receipt-of-stolen-property conviction. Accordingly, we affirm Ruiz's convictions.

II. The district court erred by imposing a consecutive sentence.

Ruiz contends that his case must be remanded for resentencing because the district court erred in: (1) finding that he qualified for a custody-status enhancement; (2) running his sentence consecutive to an Anoka County sentence; and (3) failing to reduce his criminal-history score on a presumptive consecutive sentence.

The state concedes that the district court erred in imposing a three-month enhancement for Ruiz's custody-status point. The Minnesota Sentencing Guidelines provide:

An additional three months shall be added to the duration of the appropriate cell time which then becomes the presumptive duration when:

- a. a custody status point is assigned; and
- b. the criminal history points that accrue to the offender without the addition of the custody status point places the offender in the far right hand column of the Sentencing Guidelines Grids.

Minn. Sent. Guidelines II.B.2. The sentencing worksheet indicates that Ruiz has six criminal-history points, placing him in the far right column of the grid. This number includes a custody-status point. When the custody-status point is deducted from the criminal-history points, as the guidelines require, Ruiz no longer qualifies for a three-month enhancement.

The state also concedes that the district court erred in running Ruiz's sentence consecutive to his Anoka County sentence. Presumptive consecutive sentences apply

when the defendant commits a crime while “serving an executed prison sentence, or . . . on supervised release, on conditional release, or on escape status from an executed prison sentence.” Minn. Sent. Guidelines II.F.1. In determining that consecutive sentencing was appropriate, the district court stated that Ruiz was “on probation at the time” he committed the offenses. But the state acknowledges, and the record supports, that Ruiz was not on supervised release, conditional release, or escape status at the time he committed the crimes for which he was being sentenced. Accordingly, presumptive consecutive sentencing does not apply. Further, the state also acknowledges that where consecutive sentencing is not available, use of a consecutive sentence is a departure from the guidelines requiring written reasons in support, and the district court “did not enunciate grounds for departing with a consecutive sentence.” *See* Minn. Sent. Guidelines II.F. On this record, we conclude that the district court erred in imposing a consecutive sentence, and we remand for resentencing.

Because we reverse the district court’s consecutive sentence, we do not need to address Ruiz’s other sentencing arguments.

Affirmed in part, reversed in part, and remanded.