

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1090**

State of Minnesota,
Respondent,

vs.

Kevin Jackson Brown,
Appellant.

**Filed May 27, 2014
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-11-37946

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Kirk, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant contends that the district court abused its discretion by ruling that the state could impeach him with a prior felony conviction, thereby forcing him to waive his right to testify, and coerced the jury to reach a unanimous decision. We affirm.

FACTS

Angie Brown and appellant Kevin Brown married in July 2012 but had dated on and off for many years. They were separated around Thanksgiving of 2011 when Angie asked Brown to help her purchase a car. After purchasing a Cadillac Eldorado together, Angie and Brown returned to Angie's residence to discuss the status of their relationship. During this conversation, Angie informed Brown that she was "holding" a gun for her brother-in-law and showed it to Brown. Brown did not touch any part of the handgun except the magazine, which Angie had released from the body of the gun. Brown then got upset with Angie and left.

Later that evening, Angie placed the handgun in the Eldorado between the center console and the driver's seat. Angie drove the Eldorado to her friend's place because she did not have an extra parking space at her residence. She gave her friend the keys in the event that her friend needed to move the car. She never gave Brown the keys.

On December 6, 2011, Officer John Kaczmarek was on patrol in Robbinsdale when he noticed a Cadillac Eldorado traveling faster than the posted speed limit. Officer Kaczmarek stopped the car and approached the driver, later identified as Brown. Brown

told Officer Kaczmarek that he had just purchased the car and that the title was with his wife.

Officer Kaczmarek smelled a strong odor of alcoholic beverages emanating from Brown's breath and person, observed that Brown's eyes were bloodshot and watery, and heard Brown slurring his speech. Brown eventually admitted that he had had a couple of beers. Based on his performance on field sobriety tests, Officer Kaczmarek suspected that Brown was intoxicated and arrested him.

Before taking him into custody, Officer Kaczmarek asked Brown if he needed anything out of the car. Brown responded that he wanted his house keys. Brown also indicated that there was nothing that the officers needed to know about the car.

Brown submitted to a breath test that indicated an alcohol concentration of .12. During the course of an inventory search of the car, a community service officer found a loaded handgun on the floor in between the center console and the driver's seat. Brown was charged with third-degree driving while impaired (DWI) in violation of Minn. Stat. § 169A.26, subd. 1(a) (2010), and possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2010).

Before trial, Brown stipulated to having a third-degree criminal-sexual-conduct conviction in 2004, a crime of violence for purposes of the firearm-possession charge, and waived his right to have a jury consider that element. But Brown moved to prevent the state from using that conviction to impeach him. In the alternative, Brown asked that the state refer to it as an unspecified felony in the event that the district court concluded that the state could impeach him. After considering the relevant factors, the district court

determined that the state could impeach Brown with the conviction by referring to it as an unspecified felony conviction.

At trial, a forensic analyst testified that DNA found on the handgun produced a profile consistent with being a mixture of four or more individuals, with the predominate profile being female. Brown was excluded as a contributor. A latent print examiner testified that he found a fingerprint on the gun's magazine and a second latent print examiner testified that the print matched that of Brown's left ring finger.

Brown waived his right to testify, but Angie testified that she owns the Eldorado, that she put the gun in the car, and that Brown did not know that the gun was in the car. An investigator testified that the firearm was not registered to Brown. During closing arguments, Brown's counsel conceded that Brown had been driving while intoxicated, and Brown later agreed on the record that this was a part of his trial strategy.

The jury began deliberating on the afternoon of Friday, February 15, 2013, continued until 4:30 p.m., and then resumed on Tuesday, February 19 at 9:00 a.m. At 1:24 p.m., one of the jurors asked, "What do we do now as a hung jury?" Around 2:15 p.m., the district court responded, "[A]t this point, I've consulted with the lawyers and at this point I'm just going to ask you to continue to deliberate. Okay? Thank you very much."

The jury found Brown guilty of both counts. The jury signed the DWI verdict form on February 15 at 4:30 p.m. and the possession-of-a-firearm-by-an-ineligible person verdict form on February 19 at 2:31 p.m. The district court sentenced Brown to the

legislatively mandated sentence of 60 months' imprisonment for the firearm-possession conviction. This appeal follows.

DECISION

I.

A 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). Evidence of a conviction punishable by imprisonment in excess of one year may be admitted for purposes of attacking a witness's credibility if the district court determines that the probative value of admitting the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1). In making this determination, a district court must consider what are known as the *Jones* 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. Swanson, 707 N.W.2d 645, 654 (Minn. 2006) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). The district court may allow a party to impeach a witness with an unspecified felony conviction if it finds that the prejudicial effect of disclosing the nature of a felony conviction outweighs its probative value. *State v. Hill*, 801 N.W.2d 646, 652–53 (Minn. 2011).

As a preliminary matter, the state contends that Brown “got what he asked for and should not be allowed to claim error on this basis,” invoking the “invited error doctrine.”

“The invited error doctrine prevents a party from asserting an error on appeal that he invited or could have prevented in the court below.” *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). A defendant cannot raise his own trial strategy as a basis for reversal on appeal. *Id.*

The invited-error doctrine does not apply here. Brown appeals from the district court’s decision admitting the conviction as impeachment evidence. Brown did not invite the district court to admit the conviction—he specifically requested that it not be admitted. He requested a limitation *in the event* that the district court allowed the conviction to be used as impeachment evidence. Brown did not waive this issue.

1. Impeachment value

“[A] prior conviction can have impeachment value by helping the jury see the ‘whole person’ of the defendant and better evaluate his or her truthfulness.” *Swanson*, 707 N.W.2d at 655. “[I]t is the general lack of respect for the law, rather than the specific nature of the conviction, that informs the fact-finder about a witness’s credibility” *Hill*, 801 N.W.2d at 652.

The district court found that this factor weighs in favor of admission because it met “the whole person standard.” Brown contends that the district court erred by “summarily [holding] that factor[] one [was] met merely because the jury had a right to know the ‘whole person.’” But in *State v. Williams*, we rejected a similar argument that “the ‘whole person’ analysis makes the first *Jones* factor an ‘anything goes’ test.” 757 N.W.2d 504, 509 (Minn. App. 2008), *aff’d*, 771 N.W.2d 514 (Minn. 2009). Moreover, the supreme court has consistently determined that a district court does not abuse its

discretion when considering that this factor weighs in favor of admission based on a whole-person analysis. ‘See, e.g., *Williams*, 771 N.W.2d at 518–19; *State v. Pendleton*, 725 N.W.2d 717, 728 (Minn. 2007). Because “[t]his court, as an error correcting court, is without authority to change the law,” and because there is clear precedent for the “whole person” analysis of the first *Jones* factor, we decline to adopt Brown’s request for a change in the law. *Lake George Park, L.L.C. v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998).

Brown asserts that because he stipulated to the previous conviction, “the district court had no basis to allow any impeachment.” In *State v. Davidson*, the supreme court concluded that a defendant charged with being a felon in possession of a firearm “should be permitted to remove the issue of whether he is a convicted felon by stipulating to that fact.” 351 N.W.2d 8, 11 (Minn. 1984). But the supreme court added, “Prior convictions would still be useable under Minn. R. Evid. 609 to impeach the defendant if he testified.” *Id.* *Davidson* makes clear that when a defendant stipulates to having a prior crime of violence, the state may still impeach him with it. The district court did not abuse its discretion by determining that this factor favors admission.

2. Date of the conviction and defendant’s subsequent history

Convictions occurring within ten years of trial are presumptively not stale. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Brown was convicted of third-degree criminal sexual assault in 2004. Trial commenced in 2012, making the conviction less

than ten years old. The district court found, “Under the timeliness standards [the *Jones* factors] are met. This offense was within ten years.”

Brown contends that the district “court failed to reason why [Brown’s previous conviction] was not stale when it was nine years old—too close to the limit to be probative.” But Brown not only fails to recognize the presumption that convictions less than ten years old are presumptively not stale, he also fails to support this contention with argument or authority. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (“An assignment of error in a brief based on ‘mere assertion’ and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection.”), *aff’d*, 728 N.W.2d 243 (Minn. 2007). Because there is no prejudicial error to Brown upon mere inspection, this argument is waived. The district court did not abuse its discretion by determining that this factor favors admission.

3. Similarity of the offenses

The greater the similarity of the alleged offense to the prior conviction, the more likely it is that the conviction is more prejudicial than probative. *Jones*, 271 N.W.2d at 538. “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).

The district court found that the “crimes are not similar.” The prior conviction is third-degree criminal sexual conduct, which makes it a crime for an individual to engage in sexual penetration when certain circumstances exist. *See Minn. Stat. § 609.344* (2004). The present offense is possession of a firearm by an ineligible person, which

forbids an individual convicted of a crime of violence to possess a firearm. *See* Minn. Stat. § 624.713, subd. 1(2). Because the offenses require proof of different elements, we conclude that the district court did not abuse its discretion by finding that the crimes are not similar. Moreover, the district court negated the risk that the jury would use the conviction substantively by permitting the state to impeach Brown by reference to an unspecified felony conviction.

Brown argues that the district court erred because the prior conviction involved the use of a firearm, thereby making the convictions too similar and, thus, too prejudicial. But normally “the prosecutor may not elicit evidence concerning the facts underlying previous convictions used to impeach defendant’s credibility.” *State v. Bolte*, 530 N.W.2d 191, 198 n.4 (Minn. 1995) (quotation omitted). And the district court noted its concern that the prior conviction was for criminal sexual conduct, thereby allowing only impeachment by an unspecified felony. The district court did not abuse its discretion by determining that this factor favors admission.

4. Importance of defendant’s testimony and centrality of the credibility issue

This court may consider the fourth and fifth *Jones* factors together. *See Swanson*, 707 N.W.2d at 655 (grouping the fourth and fifth factors together). “If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.” *Id.* If the defendant’s version of the facts would not be heard by the jury, then these factors would support exclusion. *Gassler*, 505 N.W.2d at 67. “[I]f the defendant’s credibility is the central issue in the case . . . then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is

greater.” *Bettin*, 295 N.W.2d at 546. Credibility is central to the case “if the issue for the jury narrows to a choice between defendant’s credibility and that of one other person.” *Id.*

Brown’s credibility was a central issue in the case. But the district court noted that it expected Angie to testify as a defense witness at trial and that she would advance Brown’s theory that he did not possess the firearm. Thus, even if Brown did not testify, his defense would still be communicated to the jury. The district court did not abuse its discretion by determining that this factor favors admission.

In sum, the district court considered each of the *Jones* factors on the record and concluded that each favors admission of Brown’s prior conviction as impeachment evidence. The district court also concluded that reference to the prior conviction as an unspecified felony removes any unfair prejudice from the admission of the evidence. In ruling that the evidence was admissible, the district court did not abuse its discretion.

II.

We apply an abuse-of-discretion standard when reviewing a district court’s charge to a jury to continue deliberating after the jury has indicated it is deadlocked. *State v. Cox*, 820 N.W.2d 540, 550 (Minn. 2012). The district court may require the jury to continue deliberating and may give or repeat an instruction if it believes that the jury has been unable to agree. *State v. Kelley*, 517 N.W.2d 905, 909 (Minn. App. 1994). “As long as the district court does not coerce a verdict, the court may require the jury to continue deliberating.” *Cox*, 820 N.W.2d at 550. A district court can neither inform that the case must be decided nor allow the jury to believe that a deadlock is not an option.

State v. Jones, 556 N.W.2d 903, 912 (Minn. 1996). We review the district court's instructions as a whole to determine whether they contained material misstatements of the law or coerced the jury toward a unanimous verdict. *Id.*

Before the jury began deliberations, the district court read to the jury 10 *Minnesota Practice*, CRIMJIG 3.04 (2006), the standard jury charge regarding unanimous verdicts in criminal cases.¹ The district court's later instruction to continue deliberating is not coercive, does not require that the case be decided, and does not indicate that being deadlocked is not an option. Considering that instruction together with the original jury instructions, the district court did not abuse its discretion by requiring the jury to continue deliberating. *See Cox*, 820 N.W.2d at 551–52 (concluding that the district court did not coerce the jury to reach a verdict in part because the district court instructed the jury on CRIMJIG 3.04 before deliberations and did not communicate to the jury that a verdict needed to be reached in response to a question from the jury).

¹ CRIMJIG 3.04 states, in relevant part:

In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.

You should discuss the case with one another, and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to reexamine your views and change your opinion if you become convinced they are erroneous, but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

Brown contends that “the jury deliberated for a relatively lengthy period considering the lack of complexity of the charges and the evidence.” The length of time a jury may be kept deliberating is generally within the district court’s discretion. *Kelley*, 517 N.W.2d at 909. But the district “court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.” *Id.* The reasonableness of the deliberation period depends on the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors’ statements concerning the probability of agreement. *Id.*

Brown is correct in that the issues were not necessarily complex—there were only two charges brought against him (a single defendant), and the jury gave no indication about the probability of agreement. But the trial lasted over two days, consisted of competing theories on the possession-of-a-firearm charge, and included testimony from nine witnesses and the presentation of DNA and fingerprint evidence. Moreover, the jury had deliberated only approximately five hours when it submitted its question and deliberated less than 20 minutes more after receiving the district court’s instruction to continue deliberating. Under these circumstances, the district court did not abuse its discretion by requiring the jury to continue deliberating. *See Cox*, 820 N.W.2d at 552 (noting that jury was not required to deliberate for an unreasonable length of time when it returned its verdict less than 30 minutes after receiving an instruction from the district court).

Affirmed.