STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1772

State of Minnesota,
Respondent,

vs.

Joseph Edward Skiba,
Appellant.

Filed August 1, 2011
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-10-29210

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

Susan L. Segal, Minneapolis City Attorney, Zenaida Chico, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

William Ward, Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

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

PETERSON, Judge

In this appeal from convictions of fifth-degree assault and disorderly conduct, appellant argues that (1) the evidence was insufficient to support the convictions because

the victim was not credible, (2) the district court prejudicially erred in its decision to receive and answer a question by the jury without appellant and his counsel being present, (3) the court erred in allowing the state to impeach appellant with prior convictions, and (4) the court erred in its decision relating to untimely discovery. We affirm.

FACTS

Appellant Joseph E. Skiba got involved in an argument between the victim and her roommate. Appellant came into the kitchen in the victim's apartment, where the argument was occurring, and started yelling at the victim. Appellant grabbed the victim's left arm and pushed her up against a wall and held his chest against the victim to prevent her from escaping. The victim repeatedly asked appellant to let her go. Appellant did not release the victim, but the victim was able to get away. When the victim escaped, she grabbed a knife from the kitchen and told appellant, "Please get back before I have to hurt you." Appellant backed off, and the victim went into another room and called 911. Appellant also called 911, claiming that the victim had pulled a knife on him and threatened to kill him.

Minneapolis Police Officers Carlos Escobar and Philip Alejandrino responded to the 911 calls. Escobar described the victim as appearing "kind of shaken, scared" and appellant as loud, argumentative, and apparently drunk. The roommate was uncooperative with the officers and said that she had been sleeping and did not know what had happened. At the victim's request, the officers told appellant to leave. Appellant left for awhile but returned while the officers were still there. Alejandrino

described the victim as "obviously very scared when she saw [appellant] approaching again." Appellant was arrested and charged with fifth-degree assault. A disorderly-conduct charge was added later.

The case was tried to a jury. The district court ruled that appellant could be impeached with prior convictions for felony theft and gross-misdemeanor forgery if he testified. Appellant did not testify.

A recording of the victim's 911 call was admitted into evidence at trial.[1] During the call, the victim stated that the roommate and appellant had been "beating me up and I have bruises on my arms to prove it." The victim stated that appellant and the roommate had been fighting earlier in the day and that

> just now I told [appellant], get up off me and I pushed him away from me and he came at me again and I grabbed a knife but I didn't stab or cut nobody, I put the knife back and so I'm calling the police, this can't keep going on, I can't hardly breathe in my house.
> . . . .
> I put my knife back in the kitchen, I didn't grab anybody or nothing, I just wanted him to move up off of me because he kept pushing me against the wall.
> . . . .
> . . . And that I didn't cut nobody. I used it for protection to tell him to get away from me. . . .
> . . . .
> . . . He's standing in the middle of the street saying b. . . ch, you're going to jail, I told you we're going to get your house.
> . . .
> . . . .

[1] A transcript of the recording was prepared as a convenience to the court reporter, but it was not admitted into evidence.

> They're drinking. Every night they drink at this time of the night until about 1:00 or 2:00 in the morning and then they go to sleep. . . .
> . . . .
> . . . I told [appellant], I said, you know, I'm coming to get (inaudible) out of my kitchen drawer because (inaudible) toilet paper and then he runs up on me and tries to push me up against the wall and I grab my kitchen knife and said get back, get off of me.

The victim testified that she suffers from post-traumatic stress disorder (PTSD) as a result of being sexually assaulted and that she suffers from severe anxiety attacks, which can be triggered by flashbacks of the sexual assault or seeing a "man dominating a woman verbally or physically." The victim takes medications to control the PTSD and anxiety attacks and had taken her medications the day appellant assaulted her. The victim testified that she has memory problems but always remembers traumatic events and, therefore, remembers being assaulted by appellant even though she did not recall what had happened earlier that day. The victim testified that she never gets combative, confrontational, or argumentative.

The jury found appellant guilty as charged, and the district court sentenced him on the assault offense. This appeal followed.

D E C I S I O N

I.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court

must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Accordingly, we will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

In challenging the sufficiency of the evidence, appellant argues that the wandering nature of the victim's trial testimony and inconsistencies in her testimony demonstrate that her testimony is simply not credible. Assessing the credibility of witnesses and weighing their testimony are within the exclusive province of the fact-finder. *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998). Minor inconsistencies in testimony and conflicts in evidence do not require reversal but rather are factors for the jury to consider when making credibility determinations. *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

Appellant cites Alejandrino's testimony that the victim

> was very paranoid, holding a lot of anxiety. She was really worked up. She would stutter, because she would try to talk so fast. She had stated that she had anxiety issues, and she suffered from PTSD, and that really heightened her anxiety.

The victim admitted that, when the officers arrived, she "was having real bad anxiety" and could hardly breathe. Appellant also argues that inconsistencies between the victim's 911 call and her trial testimony, including her inability to recall at trial what had

happened earlier during the day the assault occurred and discrepancies as to when she went to the domestic-abuse office, undercut her credibility.

Appellant relies on *State v. Lehikoinen*, in which this court held that the evidence was insufficient to support an assault conviction. 463 N.W.2d 770, 772 (Minn. App. 1990). In *Lehikoinen*, the charges arose out of police reports stating that the defendant hit the victim with a bottle. *Id.* at 770. But the only evidence presented at trial was the victim's testimony, and she denied that the defendant hit her. *Id.* at 771. Here, in contrast to *Lehikoinen*, the victim testified at trial about how appellant assaulted her, and the state also presented other evidence to prove the elements of the charged offenses, including the testimony of both responding officers, a photograph showing the bruise on the victim's left arm, and a recording of the victim's 911 call. *See* Minn. Stat. § 609.224, subd. 1(2) (2008) (fifth-degree assault); Minneapolis, Minn., Code of Ordinances § 385.90 (2008) (disorderly conduct).

The jury heard the officers' and the victim's testimony about her demeanor at the time of the assault and the victim's testimony about her PTSD and how it affects her memory. The jury also had the opportunity to evaluate the victim's demeanor by listening to the recording of the 911 call. The victim's statements during the 911 call and her trial testimony were consistent as to appellant pinning her against the wall and the victim grabbing a knife so she could escape. The victim consistently testified that appellant caused a bruise on her left arm, the arm that he grabbed, and the victim's testimony was corroborated by a photograph showing the bruise. The victim's demeanor

and the evidence about how PTSD affects her memory were factors for the jury to consider in assessing credibility and do not require reversal.

Viewing the evidence in the light most favorable to the conviction, the evidence was sufficient to support the jury's verdict.

II.

> Through the Confrontation Clause, the Sixth Amendment to the United States Constitution grants a defendant the right to be present at all stages of trial. Responding to a deliberating jury's question is a stage of trial. Thus, the general rule is that a trial court judge should have no communication with the jury after deliberations begin unless that communication is in open court and in the defendant's presence.

State v. Sessions, 621 N.W.2d 751, 755-56 (Minn. 2001) (citations omitted); *see also* Minn. R. Crim. P. 26.03, subd. 20(2)-(3) (accord).

> Even if a defendant is wrongfully denied the right to be present at every stage of trial, a new trial is warranted only if the error was not harmless. If the verdict was surely unattributable to the error, the error is harmless beyond a reasonable doubt. When considering whether the erroneous exclusion of a defendant from judge-jury communications constitutes harmless error, we consider the strength of the evidence, and substance of the judge's response.

Sessions, 621 N.W.2d at 756 (citations omitted).

The jury asked, "Can we ask if Exhibit 2 shows a forearm, or an upper arm?" Without notifying the parties, the district court responded with a note stating, "You're to use your own recollection of the testimony as to what Exhibit 2 depicts."

The district court erred by answering the question without notifying the parties. But, as we have already discussed, the evidence was sufficient to support the jury's

verdict. The victim's testimony about the assault was consistent with her statements during the 911 call and was corroborated by her demeanor and appellant's demeanor following the assault and the photograph showing the bruise on her left arm. *See State v. Mosby*, 450 N.W.2d 629, 635 (Minn. App. 1990) (finding consistency of sexual assault victim's "testimony and prior statements as to all significant details to be strongly corroborative" and noting that victim's "upset, emotional state after the assault provides further corroboration"), *review denied* (Minn. Mar. 16, 1990).

In *Sessions*, in evaluating whether the district court's response to a jury question was prejudicial, the supreme court stated:

> The court did not issue any new instructions in its responses, and the instruction repeated did not favor the prosecution or defense. In response to the jury's question regarding the date of the check to the water company, the court appropriately advised jurors that they were to decide the case based upon their own collective recollection of the evidence. As such, the court's communications with the jury were not prejudicial to the rights of the appellant.

621 N.W.2d at 756-57.

Here, as in *Sessions*, the district court instructed the jury to rely on its recollection of the evidence. Although appellant argues that the instruction was prejudicial, he does not state any objection to the instruction, other than that he and his counsel were not present when the court gave the instruction, or suggest any alternative response. We, therefore, conclude that the error was harmless beyond a reasonable doubt.

III.

The district court ruled that if appellant testified, the state could impeach him with evidence of a 2005 felony theft conviction and a 2002 gross-misdemeanor forgery conviction. Defense counsel acknowledged that the forgery conviction was admissible for impeachment purposes.

When ten or fewer years have elapsed since a felony conviction, evidence of the conviction may be admitted for impeachment purposes provided that the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). In determining whether the probative value of the evidence outweighs its prejudicial effect, a district court must consider:

> "(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. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). The district court's ruling on the impeachment of a witness by prior conviction is reviewed under a clear-abuse-of-discretion standard. *Id.* at 584.

Appellant argues that the district court erred by failing to address the *Jones* factors on the record. A district court errs when it fails to demonstrate on the record that it has considered and weighed the *Jones* factors. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). But an appellate court may conduct its own review of the *Jones* factors in determining whether this type of error is harmless. *Id.* at 655-56 (conducting review of

Jones factors in absence of district court analysis and concluding that the district court did not abuse its discretion under Minn. R. Evid. 609(a)(1)).

Felony Theft Conviction-Impeachment Value

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." *Brouillette*, 286 N.W.2d at 707 (quotation omitted). "Lack of trustworthiness may be evinced by [an] abiding and repeated contempt for laws [that one] is legally and morally bound to obey . . . ." *Id.* Although the district court did not address all of the *Jones* factors on the record, it did find that the theft conviction had impeachment value under the whole-person rationale.

Timeliness

Evidence of a prior conviction is admissible if the offense for which the defendant is on trial occurred within ten years of the conviction or the witness's release from confinement imposed for that conviction. Minn. R. Evid. 609(b); *Ihnot*, 575 N.W.2d at 585. The theft conviction occurred within ten years of the current offense.

Similarity of Crimes

"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). "[T]he greater the similarity, the greater the reason for not permitting use of the prior crime to impeach." *Jones*, 271 N.W.2d at 538. The theft conviction and the current offense were not similar, so this factor weighs in favor of admission. *See State v. Skinner*, 450 N.W.2d 648, 653 (Minn. App. 1990) (stating that prior conviction for grand theft auto not similar to criminal sexual conduct offense), *review denied* (Minn. Feb. 28, 1990).

Importance of Appellant's Testimony and Centrality of Appellant's Credibility

If the admission of prior convictions prevents a jury from hearing a defendant's version of events, the fourth *Jones* factor weighs against admission. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Because appellant did not make an offer of proof as to what his testimony would have been, it is not known what, if anything, his testimony would have added to the evidence presented at trial. Alejandrino testified that appellant had called 911 claiming that the victim had pulled a knife on him and threatened to kill him. Alejandrino also testified that appellant said he had gone outside because he had had an altercation with the victim and did not want to further escalate the situation.

When a defendant's credibility is central, the fifth *Jones* factor weighs in favor of admission. *Swanson*, 707 N.W.2d at 655-56; *see also Bettin*, 295 N.W.2d at 546 (stating that if defendant's credibility is the central issue in the case, a greater case can be made for admitting impeachment evidence because the need for the evidence is greater). Appellant does not dispute that his credibility was central.

Because Alejandrino's testimony addressed appellant's version of events and appellant made no offer of proof as to any additional testimony he would have added and

because appellant's credibility was central, the fourth and fifth *Jones* factors weigh in favor of admission. *See Gassler*, 505 N.W.2d at 67 (finding that fourth and fifth *Jones* factors weighed in favor of admission when appellant's version of events was presented to jury by testimony of other witnesses, appellant made no offer of proof as to any additional testimony he would have added, and appellant's credibility was central).

Although the district court erred by failing to address all of the *Jones* factors, based on our analysis of those factors, we conclude that the district court did not abuse its discretion in admitting evidence of the theft conviction.

Forgery Conviction

On appeal, appellant also argues that the 2002 gross-misdemeanor forgery conviction was inadmissible. Minn. R. Evid. 609(a)(2) permits impeachment with any conviction involving "dishonesty or false statement." When a defendant fails to object to the admission of evidence, this court reviews under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If those three prongs are met, this court will correct the error only if it seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Appellant argues that "the record here is not clear enough to affirm the [district] court's decision to admit the gross-misdemeanor forgery conviction for impeachment" because "the record does not state for what kind of acts [appellant] was convicted." But the supreme court has stated that a forgery conviction is automatically admissible under

Minn. R. Evid. 609 because forgery is an offense directly involving dishonesty or false statement. *State v. Kruse*, 302 N.W.2d 29, 31 (Minn. 1981). And because appellant acknowledged at trial that the forgery conviction was admissible, appellant must show plain error to obtain a reversal. Because the record does not include the facts underlying the forgery offense, appellant has failed in his burden to show plain error.

IV.

On the day of trial, the victim told the prosecutor that photographs of her bruises had been taken at the Domestic Abuse Service Center (DASC),[2] and the prosecutor promptly disclosed the photographs to appellant. Appellant does not contend that the rules governing discovery in misdemeanor cases were violated, but he argues that the district court should have excluded the photographs as a discovery sanction because broader discovery than that required by the rules is routinely conducted in misdemeanor cases. Absent any rule violation, there is no basis for this court to conclude that the district court erred by declining to impose a discovery sanction.

"Rulings on the admissibility of photographs as evidence are in the broad discretion of the district court and will not be reversed on appeal absent a showing of a clear abuse of discretion." *State v. Dame*, 670 N.W.2d 261, 264 (Minn. 2003). When the erroneous admission of evidence does not implicate a constitutional right, "a new trial is

[2] The record does not support appellant's assertion that the DASC is part of the city attorney's office. In his reply brief, appellant requests that respondent's statement that the DASC is not part of the city attorney's office be stricken. Because the record does not contain evidence showing what entity the DASC is part of, we strike the references in both parties' briefs.

required only when the error substantially influenced the jury's verdict." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009).

The photographs, which were exhibits one and two, showed bruises on the victim's arm. Exhibit two, which showed the bruise caused by appellant, was relevant because it corroborated the victim's testimony about the assault. The district court, therefore, did not abuse its discretion by admitting exhibit two. Even if exhibit one was not relevant, it was not prejudicial because the victim testified that only the bruise on her left arm was caused by appellant and that the other bruises were caused by the roommate.

The other two items of evidence to which appellant objects were not admitted, so the issue is moot on appeal.

In two footnotes and the conclusion section of his brief, appellant claims that the district court erred in instructing the jury that there was no reference to a butcher knife in any of the testimony, there was only a reference to a knife. Because Alejandrino testified that he was aware that appellant had stated to a 911 operator that the victim had pulled a butcher knife on appellant, the instruction was erroneous. But because appellant makes only three brief references to the error with no argument or citation to authority, we decline to address the issue. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (deeming assignment of error unsupported by argument or authority waived).

Affirmed.