

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1497**

State of Minnesota,
Respondent,

vs.

Stephan Laron Westlund,
Appellant.

**Filed August 20, 2012
Affirmed
Hudson, Judge**

Ramsey County District Court
File No. 62-CR-09-18082

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Ted Sampsell-Jones, Special Assistant Public Defender, Eliot Wyse, Certified Student
Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges his conviction of aiding and abetting first-degree aggravated
robbery, arguing that the district court abused its discretion by ruling that evidence of

appellant's prior felony domestic-assault conviction was admissible as impeachment evidence and by sentencing appellant to the upper end of the presumptive sentence range. Because we conclude that the district court's *Jones*-factors analysis supports admission of the prior conviction, and the district court did not abuse its discretion by imposing a guidelines sentence, we affirm.

FACTS

A jury found appellant Stephan Laron Westlund guilty of two counts of aiding and abetting first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2008), as a result of appellant's participation in a robbery that occurred in December 2009. The robbery occurred when three men, wearing makeshift masks, exited a dark-colored SUV and approached a car containing a driver and a passenger, which was parked outside a St. Paul residence. One of the men approached the passenger side of the car, carrying a gun. The second man, who also had a gun, approached the driver's side and hit the driver repeatedly in the face with the gun. The third man moved around in various locations. The men committing the robbery took two cell phones and a laptop from the car's occupants. They then ran off and drove away in the SUV.

Both the driver and the passenger identified appellant as the person who hit the driver with the gun. The passenger testified that he reached over and started honking the horn to get attention, and appellant grabbed his hand, but he then grabbed appellant's sleeve to pull him in. The driver testified that as appellant was hitting him with the gun, and the passenger was pulling on appellant, the bandana covering appellant's face slipped off. The driver also testified that appellant wore a distinctive patterned sweatshirt.

Within a short time, police were able to track the passenger's cell phone to an apartment building, where they found a maroon SUV, which felt warm as though it had recently been driven. With permission, they searched an apartment in the building and recovered the passenger's cell phone, the laptop, and a BB gun that was a replica of a large-caliber revolver. Appellant and two other men, E.B. and L.B., were present in the apartment. When appellant was taken into custody, he was wearing a patterned sweatshirt with bloodstains on the sleeves; a DNA sample from one of the stains matched the driver's DNA.

E.B., who pleaded guilty to charges arising from the robbery, testified for the prosecution that appellant was present in the SUV but did not participate in the robbery. E.B. testified that it was another man, P.C., who approached the driver's side of the car during the robbery; that appellant "kind of just hopped into the vehicle after everything was already done with"; and that appellant must have come from a nearby house. He testified that appellant told him he had hit somebody, but he thought appellant was "just lying to just try to sound cool." P.C. testified for the prosecution that he knew the other men, but he was not involved in the robbery and was spending time that week with his family, who were visiting from California.

The driver testified that he did not remember telling an investigating officer that he closed his eyes when he was being hit, but he testified at trial that his eyes had not been closed. Another investigating officer testified that the passenger stated that when he had a gun pointed at his face, he turned away because he did not want to be staring down the barrel of a gun. The driver testified that he had never seen P.C. before the trial.

Over defense objection, the state sought to impeach appellant with evidence of his 2010 conviction for felony domestic assault. The district court stated:

I have given this quite a bit of consideration and done quite a bit of thinking and research about it. And the Jones factors, of course, are the impeachment value of the prior conviction, date of the conviction and the [d]efendant's subsequent history, similarity of the prior conviction to the current charges, the importance of the [d]efendant's testimony, and the centrality of the credibility issue.

I think the impeachment value goes to the whole person and the ability of the jury to see the whole person. And I am going to allow the felony conviction to be used for impeachment purposes based on my assessment that it is important for the jury to see the whole person. This is part of that.

The prior conviction and subsequent history. The unfortunate part, of course, is that this did happen after the charged offense

It also cuts both ways. And the fact that it did happen afterwards is of concern and, I think, makes it more likely for it to come in. It is not similar to the charged crime. I believe that there is also the—the credibility issue here I don't think is central in this assessment.

So for all those reasons I am granting the State's request to have the prior—the conviction to be used for impeachment.

Appellant testified on his own behalf that he was present in the SUV, but that the other men planned and carried out the robbery. He testified that, as the men were all waiting in the SUV to purchase marijuana, L.B. and P.C. suddenly pulled out weapons and masks and ran over to the car. Appellant acknowledged that the driver's blood was

on his sweatshirt but testified that after P.C. hit the driver, he intervened to help the driver.

The jury found appellant guilty of both counts. At sentencing, the state requested 69 months, the high end of the presumptive guidelines sentence. The defense requested 58 months, the middle of the guidelines-sentence range. The state argued that appellant failed to take responsibility for his actions and made up a story to place blame on P.C. and change the facts to his benefit. The defense argued that appellant should not be punished for choosing to go to trial. The district court, without additional comment, sentenced appellant to 69 months, the top of the presumptive sentence for his offense. This appeal follows.

D E C I S I O N

I

Appellant challenges the district court's admission of his 2010 domestic-assault conviction 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). "We review a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion." *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009). 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)).

Impeachment value of prior conviction

Appellant argues that the domestic-assault conviction had minimal impeachment value because it did not involve dishonesty. But a prior crime need not directly involve truth or falsity to have impeachment value. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). The Minnesota Supreme Court has concluded that “impeachment by prior crime aids the jury by allowing it to see ‘the whole person’” and better judge credibility because “abiding and repeated contempt for laws [that one] is legally and morally bound to obey” demonstrates a lack of trustworthiness. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotations omitted). Appellant also challenges the application of this rule on policy grounds. But the supreme court has recently affirmed that “any felony conviction is probative of a witness’s credibility.” *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). It is not this court’s role to review supreme court decisions. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998); see *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that “[t]he function of the court of appeals is limited to identifying errors and then correcting them”). We conclude that the district court properly determined that the impeachment value of the crime favored its admission.

Date of conviction and subsequent history

A prior conviction is admissible if the offense for which the defendant is on trial occurred within ten years after the prior conviction. Minn. R. Evid. 609(b). The supreme court has stated that “recent convictions [are considered] to have more probative value than older ones.” *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). The same principles regarding admissibility apply to convictions occurring before the charged offense and those occurring after the charged offense. *Cf. State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998) (concluding that evidence of subsequent crimes may be admitted as *Spreigl* evidence for proper purpose). Because the domestic-assault conviction occurred in 2010, we agree with the district court that this factor favors admissibility.

Similarity of crime to charged offense

“[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively.” *Gassler*, 505 N.W.2d at 67. Appellant challenges the district court’s determination on this *Jones* factor, arguing that the domestic-assault conviction and the current aggravated-robbery offense were similar because they were both crimes of violence. The mere fact that both crimes were violent is insufficient to demonstrate their similarity for the purpose of a *Jones*-factor analysis. But we nonetheless conclude that the crimes were similar because they both require the commission of an assault. *See* Minn. Stat. § 609.24 (Minn. 2008) (noting element of robbery that a person “uses or threatens the imminent use of force against any person to overcome the person’s resistance or powers of resistance”); *State v. Swanson*, 707 N.W.2d 645, 655 (Minn.

2006) (concluding that factor of similarity of crimes weighed against admissibility because past assault convictions were similar to charged offense of murder). Therefore, this factor weighs against admissibility.

Importance of defendant's testimony and centrality of credibility

The fourth and fifth *Jones* factors are often considered together. *Swanson*, 707 N.W.2d at 655. “If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.” *State v. Pendleton*, 725 N.W.2d 717, 729 (Minn. 2007) (quotation omitted). Appellant and E.B. denied appellant’s participation in the robbery, which contradicted the driver’s and passenger’s version of events. As to the fourth *Jones* factor, appellant argues that admission of his prior conviction could have led to his failure to testify, preventing the jury from hearing his version of events. *See Gassler*, 505 N.W.2d at 67 (stating that if the admission of a prior conviction would prevent a jury from hearing a defendant’s version of events, and that testimony is important to the jury’s determination, this factor weighs against admission). But even had appellant chosen not to testify, the jury in fact heard his theory of the defense—that P.C., not appellant, was involved in the robbery—through E.B.’s testimony.

Appellant also argues that the district court misapplied the fifth *Jones* factor because it ruled the prior conviction admissible, despite the district court’s statement that “the credibility issue here I don’t think is central in this assessment.” We agree that this statement is confusing. But because it was important for the jury to evaluate appellant’s credibility as weighed against the credibility of other witnesses, the need for evidence of

appellant's prior conviction was great. *See e.g., Pendleton*, 725 N.W.2d at 729 (stating that “[c]redibility was critical” when defendant’s defense contradicted consistent story of state’s witnesses, evidence of DNA found on shirt near crime, and additional inculpatory evidence). We conclude that, to the extent that the district court may have misstated its analysis on this factor, such a misstatement did not affect the district court’s overall determination of admissibility. *See State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001) (stating that in *Jones*-factor analysis, the “[district] court is not simply to add up the factors and arrive at a mathematical result” and that “[d]epending on the particular facts of the case, the [district] court may assign different weights to different factors”).

We conclude that, because four of the *Jones* factors favor admitting evidence of the conviction and only one factor weighs against admissibility, the district court did not abuse its discretion by concluding that appellant’s prior domestic-assault conviction was admissible for impeachment purposes.

II

Appellant argues that the district court abused its discretion by sentencing him to the high end of the presumptive guidelines sentence range. This court reviews a district court’s sentencing decision for an abuse of discretion. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). A reviewing court rarely reverses the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The district court sentenced appellant to a 69-month executed sentence, the top of the guidelines range for his offense and criminal-history score. Any sentence within the presumptive guidelines range does not amount to a departure and is generally not subject

to appellate review. *State v. Delk*, 781 N.W.2d 426, 428–29 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). And a district court need not provide reasons to support the imposition of a presumptive sentence. Minn. Sent. Guidelines II.C, D (2009); *see State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984) (concluding that district court must consider mitigating factors if they exist, but is not required to depart downward even if mitigating factors are shown).

Appellant argues that the district court erred because it impermissibly imposed a lengthy sentence based on appellant’s exercise of his constitutional right to testify, relying on *United States v. Dunnigan*, 507 U.S. 87, 96–97, 113 S. Ct. 1111, 1117–18 (1993). In *Dunnigan*, the United States Supreme Court articulated a “concern that courts will enhance sentences as a matter of course whenever the accused takes the stand and is found guilty” and concluded that if a court imposes an increased sentence based on perjured testimony, the court must make findings that support all of the elements of a perjury violation. *Id.* at 96–97, 113 S. Ct. at 1118.

But *Dunnigan* is inapposite because the record does not show that the district court imposed a greater sentence based on appellant’s testimony. At sentencing, the state sought a sentence at the high end of the guidelines range, maintaining that appellant failed to take responsibility for his actions; made up a story to place the blame on P.C., an innocent party; and attempted to change the facts to benefit his position. The defense argued in response that appellant should not be punished for exercising his right to testify. But the district court did not refer to either of these arguments when sentencing appellant. Appellant’s sentence was within the presumptive guidelines range, and the

district court was not required to furnish its reasons for imposing a guidelines sentence. *Delk*, 781 N.W.2d at 428–29. We also note that the record contains the driver’s testimony that appellant hit him in the face six or seven times with a gun, which amply supports the district court’s decision to impose a sentence at the top of the presumptive-guidelines range.

Affirmed.