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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1688**

State of Minnesota,
Respondent,

vs.

Brent Paul Selge,
Appellant.

**Filed September 4, 2012
Affirmed
Chutich, Judge**

Dakota County District Court
File No. 19HA-CR-10-2271

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

James C. Backstrom, Dakota County Attorney, Heather D. Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Stauber, Presiding Judge; Chutich, Judge; and Collins,
Judge.*

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

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant, Brent Paul Selge, appeals his convictions of first- and third-degree assault and a pattern of harassing conduct. He contends that the district court erred by allowing the prosecutor to present expert testimony on battered-woman syndrome; allowing the prosecutor to impeach his trial testimony with his prior terroristic threats conviction; and failing to give the jury a limiting instruction. Because the district court properly admitted the expert testimony and evidence of Selge's prior conviction, and Selge was not prejudiced by the lack of a limiting instruction, we affirm.

FACTS

The relevant facts underlying Selge's convictions are as follows. On July 5, 2010, police responded to a call from the caretaker of an apartment complex in Apple Valley after the caretaker saw a trail of blood in a common hallway. The officers found A.S. naked and unconscious at the top of a stairwell in the common area. A.S.'s husband, Selge, also naked, was standing over her. The police officers observed a clump of hair on the stairwell and followed a trail of blood from the stairwell, through the common area, to A.S.'s private garage.

The officers restrained Selge and questioned him about what had occurred. He told the officers that he and A.S. had been drinking and that A.S. had taken prescription medication. Selge claimed that A.S. passed out in the garage, and then he moved her from the garage, up several flights of stairs, to the landing outside of her apartment.

Emergency personnel transported A.S. to the Hennepin County Medical Center where she was treated for low blood pressure, craniofacial trauma, and a subarachnoid hemorrhage—bleeding on the brain. A.S. was diagnosed with a traumatic brain injury and continues to suffer the deleterious effects of that injury.

At Selge's trial, A.S. testified that she and Selge were separated on July 5 and that when Selge came to her apartment on that day, she told him that their marriage was over. A.S. testified that the last thing she remembered was Selge putting her in a headlock and punching her repeatedly in the ribs.

A.S. further testified that Selge assaulted her twice before the July 5 incident. On May 31, 2010, Selge forcibly pulled A.S. out of the passenger side window of his car, injuring her ribs and the right side of her body. On June 6, 2010, Selge again used force and prevented A.S. from leaving her apartment for more than 12 hours. Based on these prior assaults, the district court ordered Selge not to have any contact with A.S. During her testimony, A.S. admitted that she is an alcoholic, that she had been drinking large quantities of alcohol in the days preceding the July 5 attack, and that at the time of the assault she was drunk.

Selge testified in his own defense and admitted that he assaulted A.S. on May 31 and June 6, but denied assaulting A.S. on July 5. He claimed instead that he and A.S. had spent that day together drinking at her apartment. At some point, A.S. called a cab so she and Selge could go to his parents' house. As they were walking from A.S.'s apartment down the stairs to the garage where the cab would pick them up, Selge testified that A.S. blacked out and fell down the steps. After she fell down, Selge observed "a little bit of

blood coming out of her nose,” and propped her up against a wall in the garage. Selge claimed that A.S. then attempted to stand up on her own, but she tripped and hit her head on the concrete. He said that he dragged A.S. up the stairs to the landing outside her apartment where she remained until the police officers arrived.

At trial, Dr. Susan Roe, a forensic pathologist, testified for the state. She testified that A.S.’s head laceration and bruises were inconsistent with the multiple falls that Selge claimed occurred. Dr. Roe further found petechial hemorrhages on A.S.’s face, which indicated asphyxia. The state also called psychologist Denise Wilder, an expert on battered-woman syndrome, who testified about the general characteristics of a battered woman.

The jury found Selge guilty of first-degree assault, third-degree assault, and a pattern of harassing conduct. He was sentenced to 180 months in prison, and this appeal followed.

D E C I S I O N

I. Expert Testimony

“The admission of expert testimony is within the broad discretion accorded a [district] court, and rulings regarding materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence may be reversed only if the [district] court clearly abused its discretion.” *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (citation and quotation omitted). When challenging evidentiary rulings, “the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

In criminal cases, courts must proceed “with great caution” when admitting expert testimony because “[a]n expert with special knowledge has the potential to influence a jury unduly.” *State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997). Before admitting expert testimony, a court must determine (1) “whether such testimony is relevant, *see* Minn. R. Evid. 404(a), 608(a)”; (2) “whether it is helpful to the trier of fact, *see* Minn. R. Evid. 702”; and (3) “whether its prejudicial effect substantially outweighs its probative value, *see* Minn. R. Evid. 403.” *Id.* at 193.

A. Relevance

Expert testimony on battered-woman syndrome is relevant “if it is introduced after the victim’s credibility has been attacked by the defense.” *Id.* at 197. This court has also held that such testimony may be relevant whenever the victim’s credibility is “at issue,” even when it has not been directly attacked by the defense. *State v. Vance*, 685 N.W.2d 713, 719 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

Here, A.S.’s credibility was at issue because she gave conflicting statements about her injuries after the May 31 and June 6 assaults. At trial, A.S. testified that she initially told police officers that she injured herself in a jet-skiing accident before eventually telling officers that Selge assaulted her. A.S. further testified that she again changed her statement and told a defense investigator that she lied to the police when she said that Selge attacked her. She reasserted that Selge would never hurt her. A.S. also admitted that she is an alcoholic and could not remember everything that happened on July 5 because she was drunk at the time of the assault.

A.S.'s credibility was also at issue because of her actions. She continued to spend time with Selge despite two previous assaults and a court order prohibiting contact between her and Selge. At trial, A.S. testified that after the previous assaults, she spoke with her husband, spent several days with him at the hotel where he worked, and allowed him into her garage on July 5. A.S. further testified that she felt bad for him being in trouble and that she "didn't want any of this to ever happen." Given this record, the expert testimony was relevant to address A.S.'s credibility.

B. Helpfulness

Expert testimony on battered-woman syndrome must also be helpful to the jury. *Grecinger*, 569 N.W.2d at 193; Minn. R. Evid. 702. "The basic consideration in admitting expert testimony under Rule 702 is the helpfulness test—that is, whether the testimony will assist the jury in resolving factual questions presented." *Grecinger*, 569 N.W.2d at 195. Expert testimony on battered-woman syndrome may help the jury understand inconsistent statements, counterintuitive behavior, delay in reporting a crime, and reasonableness of fear. *Id.* at 195, 197; *State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1989).

The district court specifically found that the expert testimony was particularly helpful for the charge of a pattern of harassing conduct because "[a]n integral part of that [charge] is her remaining or returning to that situation, remaining or returning to an abusive relationship." The harassing conduct charge required proof that A.S. felt terrorized or feared bodily harm as a result of Selge's acts. Minn. Stat. § 609.749, subd. 5(a) (2010). A.S. testified that she felt badly that Selge was in trouble and that she tried

to reconcile with him after the May 31 and June 6 assaults. The testimony on battered-woman syndrome helped to explain that A.S. may have felt terrorized or feared bodily harm despite her attempts to reconcile with Selge. *See Henum*, 441 N.W.2d at 798 (finding that testimony on battered-woman syndrome would “show the reasonableness of the defendant’s fear that she was in imminent peril of death or serious bodily injury”). Thus, the expert testimony was helpful to the jury’s understanding of A.S.’s counterintuitive behavior.

C. Unfair Prejudice

Given the potential for unfair prejudice, “the expert may not suggest that the complainant was battered, was truthful, or fit the battered woman syndrome. Likewise, the expert may not express an opinion as to whether the defendant was in fact a batterer.” *Grecinger*, 569 N.W.2d at 197. Here, the district court properly limited the scope of Wilder’s testimony and did not allow Wilder to testify that Selge was a batterer or that A.S. was a battered woman. Wilder testified briefly about the general symptoms of battered-woman syndrome, thereby limiting the potential for unfair prejudice.

In sum, because the expert testimony was relevant, helpful, and properly limited, the district court properly exercised its discretion in admitting the testimony.

II. Prior Conviction

The second issue Selge raises is whether the district court erred in allowing the state to admit evidence of his prior conviction of terroristic threats to impeach him. “A district court’s ruling on the admissibility of prior convictions for impeachment of a

defendant is reviewed under a clear abuse of discretion standard.” *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006).

Evidence of a defendant's prior conviction for a felony crime may be admitted for impeachment purposes if the district court concludes that the probative value of the impeachment evidence outweighs its prejudicial effect. *See* Minn. R. Evid. 609(a). In determining whether the probative value of the impeachment evidence outweighs its prejudicial effect, courts 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. Jones, 271 N.W.2d 534, 538 (Minn. 1978). The district court should “demonstrate on the record that it has considered and weighed the *Jones* factors.”

Swanson, 707 N.W.2d at 655

Selge is correct that the district court did not analyze all of the *Jones* factors on the record. When the state moved to allow testimony regarding Selge’s prior conviction, the district court stated:

I believe that all the Jones factors are met. The defense was given notice of the intent a long time ago, of the intent to introduce this. It is dissimilar enough in circumstances that it is appropriate and the danger of the jury finding similarity in context is pretty minimal. So I think that it’s appropriate to allow the testimony. If the defendant testifies, it’s appropriate to allow him to be cross-examined regarding that—or impeached regarding that conviction in 2004.

When the district court fails to make a complete record of its analysis, as it did here, we independently review the *Jones* factors under a harmless-error analysis. *See id.*

Selge was convicted in 2004 for making a terroristic threat. *See* Minn. Stat. § 609.713, subd. 1 (2004) (“Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.”). Selge concedes that three of the *Jones* factors—the date of the terroristic-threat conviction, his testimony, and his credibility—all weigh in favor of admission. He argues instead that the conviction had no impeachment value because it “did not reflect on [his] truthfulness.” But evidence of prior felony convictions, including convictions of crimes that do not involve dishonesty, has impeachment value because “it allows the jury to see the whole person and thus to judge better the truth of [the witness’s] testimony.” *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007) (alteration in original) (quotation omitted).

Selge also contends that his terroristic-threat conviction was so similar to the charged offenses that it suggested that he had a history of violent behavior. The more similar the alleged offense and the crime underlying a past conviction, the more likely it is that the conviction is more prejudicial than probative. *See Jones*, 271 N.W.2d at 538.

Applying this principle here, we conclude that the terroristic-threats conviction is not sufficiently similar to the charges of assault and harassing conduct to prevent admission. While some similarity exists between the current charges and the prior

conviction,¹ the potential for prejudice is diminished when, as here, the facts underlying the previous conviction are completely different from the facts underlying the charged offenses. *See State v. Ihnot*, 575 N.W.2d 581, 586–87 (Minn. 1998) (concluding that two crimes of criminal sexual conduct were not sufficiently similar because the facts underlying each charge were “sufficiently different”). Because the *Jones* factors weigh in favor of admitting evidence of Selge’s prior terroristic-threat conviction, the district court’s failure to conduct a *Jones* analysis on the record was harmless error.

III. Jury Instructions

Finally, Selge contends that the district court erred by not giving the jury a cautionary instruction limiting the use of his prior conviction. We review the district court’s failure to issue a cautionary instruction using the plain-error standard because Selge did not request, or object to the lack of, such an instruction. *State v. Word*, 755 N.W.2d 776, 785 (Minn. App. 2008). “Under plain error analysis, we must determine whether there was error, that was plain, and that affected the defendant’s substantial rights.” *State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011). “An error affects substantial rights if the error was prejudicial and affected the outcome of the case.” *Id.* at 853. “If all three elements are met, we will only reverse if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Word*, 755 N.W.2d at 782.

¹ *See* Minn. Stat. § 609.749, subd. 5(b)(3) (2010) (stating that a terroristic threat can form part of the basis for a pattern of harassing conduct charge).

When a prior conviction is admitted for impeachment purposes, the district court should give the jury a limiting instruction once when the evidence is offered, and then again in its final instructions to the jury. *See State v. Bissell*, 368 N.W.2d 281, 283 (Minn. 1985) (stating that the district court should give a limiting instruction to a jury whether or not one is requested). The complete absence of a cautionary instruction is plain error. *See State v. Barnslater*, 786 N.W.2d 646, 654 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010).

Although the district court erred by failing to give a cautionary instruction to the jury, the error did not affect Selge's substantial rights. The evidence of Selge's prior conviction consisted of two brief questions by the prosecutor on cross-examination; the conviction was not mentioned again during questioning or closing arguments. By comparison, the jury heard detailed testimony about the two assaults that Selge committed against A.S. shortly before the July offense. Additionally, Dr. Roe testified convincingly that A.S.'s injuries from the July 5 assault were not consistent with Selge's version of the events, thereby undermining his theory of the case. Thus, given the strong evidence of Selge's guilt, the district court's failure to instruct the jury on the proper use of his prior conviction did not affect the jury's verdict.

Affirmed.