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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1744**

State of Minnesota,
Respondent,

vs.

David Scott Steele,
Appellant.

**Filed September 17, 2012
Affirmed
Halbrooks, Judge**

Pine County District Court
File No. 58-CR-10-291

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

John K. Carlson, Pine County Attorney, John Bowen, Assistant County Attorney, Pine City, Minnesota (for respondent)

Brent S. Schafer, Schafer Law Firm, P.A., Lilydale, Minnesota (for appellant)

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his conviction of first-degree test refusal, arguing that the district court erred by permitting the state to introduce evidence of his prior felony

driving-while-impaired (DWI) conviction for the purpose of impeachment under Minn. R. Evid. 609. Specifically, appellant argues that the district court erred in applying the five-factor test of *State v. Jones*, 271 N.W.2d 534 (Minn. 1978), and by determining that the impeachment value of the prior felony DWI conviction would outweigh its prejudicial effect. We affirm.

FACTS

Pine County Sheriff's Deputy Daniel Kunz was on routine patrol during the evening of May 9, 2010, when he noticed a pick-up truck without a working rear license-plate light. Deputy Kunz stopped the vehicle and observed that its driver, appellant David Scott Steele, appeared to be intoxicated. Deputy Kunz administered four field sobriety tests, including a preliminary breath test, which registered an alcohol concentration of .138. Deputy Kunz then arrested appellant for suspicion of DWI.

Deputy Kunz reviewed appellant's driving record and learned that appellant had been convicted of previous DWI offenses, the latest of which was a September 17, 2003 conviction for first-degree DWI. Deputy Kunz also learned that appellant's driver's license had a restriction that prohibited any use of alcohol or drugs. Deputy Kunz ordered that appellant's truck be towed, and while conducting an inventory search he found a shotgun in the truck's cab.

Deputy Kunz brought appellant to the Pine County jail and read him the Minnesota implied-consent advisory. Appellant refused to submit to a blood or urine test. Appellant explained that he was refusing because he believed that the stop was illegal.

The state charged appellant with four offenses: first-degree test refusal in violation of Minn. Stat. §§ 169A.20, subd. 2, .24, subd. 1(2) (2008); first-degree DWI in violation of Minn. Stat. §§ 169A.20, subd. 1(1) (Supp. 2009), .24, subd. 1(2) (2008); violation of a restricted driver's license in violation of Minn. Stat. § 171.09, subd. 1(d)(1) (2008); and ineligible person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(10)(i) (Supp. 2009). The state dismissed the firearm charge, and appellant agreed to stipulate to facts that permitted a finding of guilt for the restricted-driver's-license charge.

The state moved in limine to prohibit appellant from asserting an affirmative defense of reasonable refusal based on his belief that Deputy Kunz was harassing or stalking him. This affirmative defense was based on the fact that Deputy Kunz had previously dated appellant's girlfriend, B.L. Appellant moved in limine on several issues. The motion pertinent to this appeal was appellant's motion to allow him to stipulate to his multiple prior DWI convictions and thereby preclude the state from introducing evidence or eliciting testimony regarding those convictions.

Following a hearing on the motions, the district court denied the state's motion, ruling that appellant was not precluded from raising an affirmative defense of reasonable refusal, but the district court reserved a final determination on the affirmative defense until it heard appellant's offer of proof or testimony. The district court also ruled that the state could introduce appellant's prior felony DWI conviction to impeach appellant under Minn. R. Evid. 609, if appellant testified at trial. In reaching that decision, the district court applied the five-factor test from *Jones*, 271 N.W.2d at 538. The district court determined that two factors favored admitting the evidence for impeachment, two factors

avored excluding it, and one factor was neutral. But the district court concluded that “looking at the totality of the case . . . it is appropriate that the evidence of the prior conviction be admitted.”

The case proceeded to a jury trial. Deputy Kunz testified for the state and was cross-examined by appellant. Appellant called no witnesses and chose not to testify on his own behalf. But outside the presence of the jury, appellant made a proffer of his intended testimony. In his proffer, appellant answered “Yes” to six leading questions asked by his attorney. The questions concerned: (1) where appellant was traveling from on the night of the arrest; (2) how appellant felt regarding the alcohol he consumed; (3) appellant’s performance on the field sobriety tests; (4) appellant’s observations of Deputy Kunz’s use of the preliminary breath-testing device; (5) the relationship between appellant, Deputy Kunz, and B.L.; and (6) what was going through appellant’s mind about what Deputy Kunz was doing in the case as appellant sat in the police station. The proffer contained no specific information regarding those topics. The district court ruled that although the state was prohibited from introducing evidence in its case in chief that appellant had a prior felony conviction, the state could use the conviction to impeach appellant if he testified. The district court explained its reasoning:

[I]n going through the *Jones* factors, I did see this really coming down to a credibility issue. And I did put some thought into and deliberated regarding the testimony of Mr. Steele and the impact of the—of the impeachment of him by the prior felony conviction. And I really thought that the jury would be denied the opportunity to see the entire situation here if the—if the State was prevented from cross-examining Mr.—Mr. Steele with the—with the prior. It wasn’t a decision that I made lightly. I understood when we

heard that we may only have three witnesses to testify that—that the decision would impact Mr. Steele in his decision whether to testify or not. I recognize that. But I do think that in going through all of the five factors the key was one of credibility and I just didn't think it was fundamentally fair. The State was prohibited from introducing the evidence in its case in chief. But to deny the State the opportunity to cross-examine on that issue I didn't think it was fundamentally fair so that's why I made the decision I did.

The district court instructed the jury: “The defendant is not guilty of refusal to submit to testing if the Defendant’s refusal was reasonable. . . . The defendant has the burden of proving this defense by the preponderance of the evidence.” The jury found appellant guilty of first-degree test refusal, and the district court found appellant guilty of violating his driver’s-license restrictions. The district court dismissed the additional two counts based on the state’s recommendation.

The district court sentenced appellant to 42 months’ imprisonment for the test-refusal conviction and a concurrent sentence of 365 days for the driver’s-license-violation conviction, but stayed the sentence pending appeal. This appeal follows.

D E C I S I O N

A. Application of the *Jones* Factors

Appellant argues that the district court erred by permitting the state to introduce evidence of his prior felony DWI conviction for the purpose of impeachment under Minn. R. Evid. 609. Specifically, appellant argues that the district court erred in applying the five *Jones* factors and determining that the impeachment value of the prior felony DWI conviction outweighed its prejudicial effect. “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 of 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. Minn. R. Evid. 609(a). In determining whether the probative value of the impeachment evidence outweighs its prejudicial effect, a district court considers:

- (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. Davis, 735 N.W.2d 674, 680 (Minn. 2007) (quoting *Jones*, 271 N.W.2d at 538).

The district court in this case expressly addressed each of the *Jones* factors in its pretrial order.

1. Impeachment value

The supreme court has held that evidence of prior felony convictions, including convictions of crimes that do not involve dishonesty, generally has impeachment value because “it allows the jury to see the whole person and thus to judge better the truth of [the] testimony.” *Davis*, 735 N.W.2d at 680 (quotation omitted). The district court reasoned that the impeachment value of appellant’s prior felony DWI conviction supported allowing the conviction to come into evidence. Appellant concedes that the first *Jones* factor weighs in favor of admissibility.

2. Dates of prior conviction

The district court ruled that appellant's 2003 conviction for first-degree DWI "favors neither party" because it was "fairly remote" from the May 9, 2010 incident and the district court had "limited knowledge of [appellant's] lifestyle since his 2003 felony driving while impaired conviction." Appellant argues that the DWI conviction should have been excluded because the conviction "occurred a long time ago and appellant has not been convicted of a crime since."

Minn. R. Evid. 609(b) permits evidence of a conviction for purposes of impeachment if the conviction occurred within the past ten years. "Convictions that have occurred within the ten-year period are presumptively not stale." *State v. Williams*, 757 N.W.2d 504, 509 (Minn. App. 2008), *aff'd*, 771 N.W.2d 514 (Minn. 2009). This factor favors admitting the prior felony DWI conviction to impeach appellant.

3. Similarity of crimes

The district court determined that "[t]he 2003 conviction and the instant offenses concern crimes of the same nature" and that evidence of the prior conviction would therefore "be greatly prejudicial to [appellant]." "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 close similarity between appellant's 2003 felony DWI conviction and the current felony DWI charges suggests that the district court properly determined that this factor weighed against admissibility.

4. Importance of appellant's testimony

The district court determined that appellant could only introduce his affirmative defense of reasonable refusal through his personal testimony. The district court therefore determined that the fourth *Jones* factor weighed against admissibility.

To analyze the importance of appellant's testimony, "it is necessary to ascertain what appellant's testimony would have been had he testified." *State v. Hochstein*, 623 N.W.2d 617, 624 (Minn. App. 2001). "If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Swanson*, 707 N.W.2d at 655. "[I]f the issue for the jury narrows to a choice between defendant's credibility and that of one other person then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater." *State v. Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998) (quoting *Bettin*, 295 N.W.2d at 546).

Appellant explained in his pretrial argument that he planned to argue that Deputy Kunz was stalking him on May 9, 2010, and that the traffic stop was pretextual. But appellant's proffer was so vague that it is impossible to predict what he would have said if he had testified. Much of his proffer was irrelevant to both the elements of the crime and to his affirmative defense. It is difficult to see the relevancy of where appellant was coming from on the night of the arrest, how appellant felt regarding the alcohol that he drank, or appellant's thoughts in the jail regarding Deputy Kunz. *See* Minn. R. Evid. 401 (defining "relevant evidence"). Although appellant's testimony on these matters would likely be the only means for the information to come into evidence, the testimony would have been legally meaningful.

5. Centrality of credibility

The district court determined that the *Jones* factor regarding the centrality of credibility favored admitting the prior conviction for impeachment purposes. After hearing appellant's proffer, the district court ruled that, of the five *Jones* factors, "the key was one of credibility." Appellant argues that "[c]redibility was not an issue in [his] case."

The proffer's elements concerning the field sobriety test and the relationship between appellant, Deputy Kunz, and B.L. concerned the credibility of Deputy Kunz. Presumably, appellant would have attempted to show that Deputy Kunz made the traffic stop because of appellant's relationship with B.L., and appellant would have also testified that Deputy Kunz misstated the results of the field sobriety tests. Appellant conducted an extensive cross-examination of Deputy Kunz that included questions about his past relationship with B.L. The jury also viewed the videotape of the field sobriety testing and the implied-consent advisory. Because credibility was a central issue in the state's case-in-chief and in appellant's affirmative defense, the prior felony DWI conviction was admissible. *See Swanson*, 707 N.W.2d at 655; *Ihnot*, 575 N.W.2d at 587.

We therefore conclude that the district court did not abuse its discretion when it carefully weighed the *Jones* factors and concluded that appellant could be impeached with his prior felony DWI conviction if he chose to testify.

B. Effect of District Court's Decision to Accept Appellant's Stipulation

Appellant argues that by accepting his stipulation to the prior felony DWI conviction, the district court erred by then permitting the state to use the same prior

conviction to impeach him. The crimes of first-degree DWI and first-degree test refusal both require the state to prove that a defendant was previously convicted of a felony-level DWI offense. Minn. Stat. § 169A.24, subd. 1(2). Because appellant stipulated to his prior felony DWI conviction, the state did not need to prove that element. But appellant's stipulation did not necessarily bar his prior felony DWI conviction from being admitted for a different purpose, i.e., impeachment if appellant testified. A prior conviction may still be used under Minn. R. Evid. 609 to impeach a defendant even if the defendant removes the issue from the fact-finder. *State v. Davidson*, 351 N.W.2d. 8, 11 (Minn. 1984).

Appellant's reliance upon *State v. Berkelman* is misplaced. 355 N.W.2d 394 (Minn. 1984). In *Berkelman*, the supreme court held that the district court erred by refusing to accept a defendant's stipulation to his prior DWI conviction. *Id.* at 397. *Berkelman* does not discuss impeachment under Minn. R. Evid. 609. And *Berkelman* actually undermines appellant's argument, because although the supreme court ruled that the district court erred, "the error was not so prejudicial as to require a new trial." *Id.*

C. Appellant's Prejudice in Choosing not to Testify

Appellant contends that he was prejudiced by the district court's decision to allow use of his prior felony DWI conviction for impeachment. Appellant argues that the district court's decision "effectively prohibited" him from testifying. Appellant raises this argument as a separate issue on appeal. But prejudice is already addressed by the *Jones* five-factor analysis. 271 N.W.2d at 538. The very purpose of the *Jones* analysis is to provide a framework for weighing the probative value of impeachment evidence

against the possible prejudicial impact of a defendant's decision not to testify. *Id.* at 537-38; *see also* Minn. R. Evid. 609(a)(1). Accordingly, the issue of prejudice has been addressed in the *Jones* analysis.

D. Appellant's Alternative Request for a New Trial and Impeachment through a Non-Specified Felony

At oral argument, appellant requested that we reverse his conviction and remand for a new trial with an instruction that the district court not allow appellant's impeachment with the prior felony DWI conviction. In the alternative, appellant requested that we remand for a new trial with the instruction that appellant could be impeached with reference only to an unspecified prior felony conviction.

Appellant did not make the alternative argument in his original brief to this court. Ordinarily, issues that are not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). But more importantly, appellant did not ask the district court for an order limiting impeachment to an unspecified felony conviction. This court generally does not consider matters that a party did not raise to the district court, *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996), and we decline to do so in this case.

Affirmed.