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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-414**

State of Minnesota,
Respondent,

vs.

Pierre Diante Gardner,
Appellant.

**Filed April 9, 2012
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CR-10-32027

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard A. Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from convictions of second- and third-degree assault, appellant argues that (1) the district court erred when it allowed the state, in this self-defense case,

to impeach appellant with two prior assault convictions without applying the *Jones* factors; and (2) the district court violated appellant's right to comment on the evidence and present a defense when it limited the scope of appellant's closing argument by sustaining objections to appellant's argument that the jury should not give any weight to appellant's prior assault convictions when assessing appellant's credibility. We affirm.

FACTS

Appellant Pierre Diante Gardner was visiting the victim, who was a friend, at the victim's apartment. Appellant went outside, and, as he came back in, the victim started to turn around to make sure that the person entering was appellant. Appellant picked up an unopened liquor bottle from a table and hit the victim in the head with it, causing the victim to fall to the floor. Appellant continued hitting the victim in the head with the bottle, began choking him, and threatened to kill him. The victim got away from appellant and ran to the front door.

Before the victim could get the door unlocked, appellant tackled him. Appellant had a sharp object in his hand that he used to try to cut the victim's neck. The victim grabbed the object from appellant's hand and threw it. As the victim struggled against appellant, the victim fell onto a coffee table, breaking it. Appellant grabbed one of the table legs and hit the victim in the head with it between five and ten times. The victim again got away from appellant and ran to the back door. Appellant followed the victim to the back door, hit him with the table leg again, and pushed him into the bathroom. The victim pushed his way out of the bathroom and went to the back door again.

A tenant across the hall heard the scuffle and someone calling for help and called the landlord, who called 911. Minneapolis police officers responded to the 911 call. When appellant heard the police arrive, he let go of the victim, who went to the front door and fell out of it as he opened it. The victim was bleeding profusely from multiple lacerations on his head and face, and, to the officers, his injuries appeared severe and possibly life-threatening. When the victim arrived at the hospital, his condition was unstable, and his vital signs were abnormal.

Appellant, who was found hiding in a bedroom closet, had a jagged cut or tear on his upper right arm that was not bleeding much. Minneapolis Police Officer Steven Lecy saw no other injuries on appellant. Appellant claimed that he had been defending himself against a sexual advance by the victim.

The officer who examined the crime scene saw large pools of blood on the floor and blood stains on the floor, walls, and furniture. There were shards of glass and broken furniture on the floor.

Appellant was charged with one count of second-degree assault in violation of Minn. Stat. § 609.222, subd. 2 (2010) (assault with a dangerous weapon and infliction of substantial bodily harm), and one count of third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2010) (infliction of substantial bodily harm). The case was tried to a jury.

Appellant testified in his own defense at trial. Appellant claimed that the altercation began when the victim made a sexual advance. According to appellant, when he pushed the victim away, the victim cut appellant on the arm with a small bladed

instrument, and the two of them struggled over the blade. Appellant testified that, during the struggle, the two of them fell on the coffee table, breaking it, and, in an effort to escape from the victim, who was lying on top of him, appellant hit the victim on the head with a table leg. According to appellant, the victim eventually stopped attacking him and went into the bathroom to clean up.

The district court allowed the state to impeach appellant with a 2008 conviction for felony domestic assault by strangulation and a 2008 conviction for felony fifth-degree assault.

The jury found appellant guilty as charged. The district court sentenced appellant on the second-degree assault conviction to an executed term of 39 months in prison. This appeal followed.

D E C I S I O N

I.

Evidence of a felony conviction may be admitted for impeachment purposes provided that ten or fewer years have elapsed since the conviction and its probative value outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b); *see also State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998) (listing factors to consider when determining whether probative value outweighs prejudicial effect) (quoting *State v. Jones*, 271 N.W.2d 534, 537-38 (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. *Ihnot*, 575 N.W.2d at 584; *see also State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985) (stating

that determination whether probative value of prior convictions outweighs prejudicial effect is committed to district court's discretion).

Appellant argues that the district court erred in admitting the two prior assault convictions without making findings on the *Jones* factors. 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 to determine whether the error was harmless. *Id.* at 655-56.

Impeachment Value

The supreme court has stated 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); *see also State v. Head*, 561 N.W.2d 182, 186 (Minn. App. 1997), *review denied* (Minn. May 28, 1997) (explaining that under rule 609(a), a crime involving dishonesty or false statement is automatically admissible and admission of other crimes is discretionary with district court). “[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 708 (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.*

Appellant argues that the whole-person rationale has been criticized and that jurors tend to misuse prior convictions as propensity evidence. Nevertheless, admission of prior convictions for impeachment purposes under the whole-person rationale remains within the district court's discretion. *See Swanson*, 707 N.W.2d at 655 (assigning impeachment value to prior convictions under whole-person rationale). 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) ("The function of the court of appeals is limited to identifying errors and then correcting them."). Under the whole-person rationale, appellant's prior assault convictions have impeachment value.

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. Minn. R. Evid. 609(b). Appellant's prior convictions occurred in 2008. Appellant does not dispute that this factor favors admissibility.

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.

Because both of the prior convictions and the current offense are assaults, this factor weighs against admissibility. But although this factor weighs against admission, it

does not preclude admission. *See State v. Hochstein*, 623 N.W.2d 617, 624-25 (Minn. App. 2001) (stating that this factor weighed against admission when prior methamphetamine-possession crime was nearly identical to charged crime but affirming admission based on other factors).

Importance of Appellant's Testimony and Centrality of Credibility

If a defendant's version of the relevant events is important to the jury's verdict, the importance of the defendant's testimony weighs in favor of excluding the impeachment evidence if, "by admitting it, appellant's account of events would not be heard by the jury." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). If, however, the defendant's credibility would have been the main issue for the jury to consider, this would weigh in favor of admitting the impeachment evidence. *Id.*; *see also State v. Pendleton*, 725 N.W.2d 717, 729 (Minn. 2007) ("If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions" (quoting *Swanson*, 707 N.W.2d at 655)); *Ihnot*, 575 N.W.2d at 587 ("if 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" (quotation omitted)).

Because appellant testified at trial and because his credibility was central, these factors weigh in favor of admission.

Because four of the five *Jones* factors weigh in favor of admission, the district court did not clearly abuse its discretion in admitting appellant's prior convictions, and the error in failing to consider the *Jones* factors was harmless.

II.

Under our system of jurisprudence, every criminal defendant has the right to be afforded a meaningful opportunity to present a complete defense. But that right is not absolute. Counsel have the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom. We review a district court's rulings regarding the scope of arguments for abuse of discretion.

State v. Romine, 757 N.W.2d 884, 892 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009) (quotation omitted).

Appellant challenges the district court's ruling sustaining the state's objections to defense counsel's statements during closing argument that appellant's prior convictions were not relevant to appellant's credibility. Appellant relies on *Crane v. Kentucky*, in which the Supreme Court held that, because the voluntariness of a confession is separate from its truthfulness, the district court erred in excluding evidence surrounding the circumstances of the confession. 476 U.S. 683, 687-91, 106 S. Ct. 2142, 2145-47 (1986). Unlike *Crane*, defense counsel's argument that appellant's prior convictions were not relevant to credibility was contrary to the district court's ruling that the convictions were admissible for impeachment purposes. Because the convictions were admissible for impeachment purposes, the district court properly sustained the objections to defense counsel's argument.

Affirmed.