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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-488**

State of Minnesota,
Respondent,

vs.

Syed Ben Al-Amin,
Appellant.

**Filed February 21, 2012
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-CR-10-33847

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Wright, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his conviction of first-degree aggravated robbery, arguing that the district court abused its discretion by admitting prejudicial hearsay and allowing

respondent to impeach him with prior felony convictions if he chose to testify. In a supplemental pro se brief, appellant argues that his trial counsel was ineffective and had a conflict of interest, and that police officers engaged in witness tampering. We affirm.

FACTS

On July 22, 2010, at approximately 9:45 a.m., as J.S. sat on her front porch in north Minneapolis, she noticed two African-American males walking across the street. One wore a red shirt and one wore a dark shirt. J.S. saw the males approach a Caucasian male, who was talking on his cell phone, and “pound[] him with their fists.” J.S. called 911. The victim, P.S., also called 911.

Two responding police officers found P.S. at a nearby convenience store. He had a large cut on his mouth and was bleeding. He told the officers that his assailants stole his cell phone and wallet, and he described his assailants as two black males, one larger than the other, and one wearing a red shirt and the other wearing dark clothing.

An ambulance transported P.S. to a hospital. Meanwhile, police dispatch informed the responding police officers that, at a gas station about a mile from the location of the incident, individuals were attempting to use stolen credit cards to purchase gasoline. When the responding officers arrived at the gas station, other officers had already detained the occupants of a tan Saturn parked at a gas pump. The responding officers observed a wallet and cell phone on the passenger seat, which belonged to P.S. Three of the car’s occupants were identified as appellant Syed Ben Al-Amin, Angelo Parker, and Natalie Achtzener, the driver. Al-Amin wore a dark shirt, Parker wore a red shirt, and the knuckles on one of Al-Amin’s hands were bleeding.

Officers brought P.S. to the gas station to conduct a show-up identification of Al-Amin, Parker, and a third male wearing a white shirt. During the show-up, P.S. identified Parker as one of his assailants and stated that Al-Amin was possibly the other assailant, based on his size and dark clothing. P.S. said that the third male did not seem to be the other assailant. A couple of hours after the incident, J.S. identified Parker as one of the men involved in the assault and stated that Al-Amin was “probably” the other man involved.

Respondent State of Minnesota charged Al-Amin with first-degree aggravated robbery. Based on a plea agreement, Achtzener testified at Al-Amin’s trial. Before agreeing to testify, Achtzener received three telephone calls from someone claiming to be Al-Amin’s grandmother. The caller told Achtzener to change her story, not to say anything, and that Al-Amin told her to call Achtzener.

Al-Amin challenges two of the district court’s pretrial rulings. First, over Al-Amin’s objection, the court ruled that the state could question Achtzener about the phone calls she received from the caller. The court reasoned that the caller’s statements to Achtzener were not offered for their truth; they were offered as evidence of conveyance of threats to a witness. Second, the court ruled that if Al-Amin testified, the state could impeach him with his two prior convictions, a 2005 aggravated-robbery conviction and a 2008 domestic-assault-strangulation conviction. Al-Amin did not testify at trial.

The state’s witnesses included J.S.; P.S.; four police officers and one sergeant, who responded to the dispatch; and Achtzener. Achtzener testified about events that occurred immediately before and after the robbery. On the morning of the robbery,

Achtzener, Al-Amin, Parker, and another woman left Parker's house in Achtzener's tan Saturn. Al-Amin wore a black tee shirt and sat in the front passenger seat, and Parker wore a red tee shirt and sat in the back seat with the other woman. When they saw P.S., Al-Amin and Parker said, "I bet he's rich." After this comment, Achtzener drove no more than a mile, and Al-Amin told her to pull over. Al-Amin and Parker said they would be right back, left the car, and walked down the street. Achtzener did not see where they went. When Al-Amin and Parker returned a few minutes later, they were running and got into the car and said, "Go, go, go!" Achtzener noticed that Al-Amin had credit cards and a cell phone. She said that she panicked, drove off, and Al-Amin directed her to a gas station. They did not stay at the first gas station but went to a second, where police apprehended them.

A jury found Al-Amin guilty of first-degree aggravated robbery, and the district court sentenced him to a presumptive guidelines sentence of 75 months' imprisonment. This appeal follows.

DECISION

Admission of Testimony about the Phone Calls

Al-Amin challenges the district court's admission of Achtzener's testimony about phone calls she received from a caller who claimed to be Al-Amin's grandmother. The district court's evidentiary rulings rest within its sound discretion and "will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). To successfully challenge a district court's evidentiary ruling, an appellant must

establish both that the district court abused its discretion and that he was thereby prejudiced. *Id.*

Achtzener testified that she received three phone calls from a caller who identified herself as Al-Amin's grandmother. The caller told Achtzener that "[Al-Amin] is looking at a lot of time," "you don't have to tell them about anything," and "[d]on't say anything, don't say anything!," and the caller instructed Achtzener "to change what [she] was saying." The caller also told Achtzener that Al-Amin told her to make the calls.¹

"Evidence of threats to witnesses may be relevant in showing consciousness of guilt." *Holt v. State*, 772 N.W.2d 470, 481 (Minn. 2009) (quotation omitted). But "this inference is inappropriate when the threats cannot be traced directly to the defendant." *State v. McArthur*, 730 N.W.2d 44, 52 (Minn. 2007). Evidence of threats to witnesses "is not admissible if it is characterized as tending to show defendant's propensity or disposition to commit the crime charged." *Holt*, 772 N.W.2d at 481 (quotation omitted).²

Al-Amin argues that all of Achtzener's testimony about what the caller said during the phone calls was inadmissible hearsay. Hearsay is an out-of-court statement offered for "the truth of the matter asserted." Minn. R. Evid. 801(a), (c). Hearsay evidence is inadmissible unless an exception applies. Minn. R. Evid. 802. First, we address Achtzener's statements about what the caller told her concerning the time Al-Amin faced,

¹ The record is unclear whether the caller told Achtzener during all three calls that Al-Amin told her to call Achtzener.

² Although not argued as error by appellant, when considering whether to admit threat evidence, a district court must also consider whether the evidence's "probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403; *e.g.*, *State v. Harris*, 521 N.W.2d 348, 351–52 (Minn. 1994) (stating that rule 403 is applicable to admission of threat evidence).

not having to say anything, not saying anything, and changing her story. These statements are not hearsay because they were not “offered in evidence to prove the truth of the matter asserted,” Minn. R. Evid. 801(c), but, rather, were evidence of threats offered to show Al-Amin’s consciousness of guilt. Because these statements were offered as threat evidence to show Al-Amin’s consciousness of guilt, they were not inadmissible on the ground that they were hearsay. But the statements were inadmissible on other grounds.

The only evidence linking the caller’s threats to Al-Amin was Achtzener’s testimony that the caller told Achtzener that Al-Amin told her to make the calls. This statement was offered for its truth—that Al-Amin orchestrated the telephone calls. Because this statement relayed an earlier conversation that the caller allegedly had with Al-Amin, it included hearsay within hearsay. Hearsay within hearsay must be excluded unless “each part of the combined statement conforms with an exception to the hearsay rule[s]”. Minn. R. Evid. 805. Because no exception applies, the statement that Al-Amin told the caller to make the phone calls to Achtzener is inadmissible. And because the caller’s reference to Al-Amin’s instruction to make the call is the only evidence that traces the threatening calls to Al-Amin, none of the statements was admissible to show Al-Amin’s consciousness of guilt. *See Harris*, 521 N.W.2d at 351–53, 55 (reversing and remanding for a new trial because the district court erred by allowing the inference that the defendant made threats to witnesses in the absence of any evidence linking the defendant to the threats to support the inference); *see also Holt*, 772 N.W.2d at 482

(noting that the proffered threat evidence established a direct link between the defendant and the threats to witnesses).

We conclude that the district court abused its discretion by admitting Achtzener's testimony about the three phone calls, but Al-Amin has not shown that he was prejudiced. *See State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004) (stating that prejudice requires that "the error substantially influenced the jury's decision") (quotation omitted)). The challenged testimony covered only 3 pages of Achtzener's testimony, which consisted of 19 pages of transcript in a 238-page trial transcript. The record reveals that the state did not focus its case on the phone calls, and it did not mention the phone calls during its closing argument. Rather, the state based its case on the ample circumstantial and physical evidence. *See State v. Vance*, 714 N.W.2d 428, 442 (Minn. 2006) (holding that defendant was not prejudiced by admission of evidence of threats against witnesses because the threats were not the focus of the state's examination of the witnesses, they were isolated, they were offered in response to credibility attacks, and they were mentioned briefly in closing). Consequently, Al-Amin has not shown that the admission of Achtzener's testimony about the phone calls influenced the outcome of the trial.

Al-Amin alternatively argues that if the phone-call evidence was admissible, the district court erred by not sua sponte providing the jury with a cautionary instruction concerning the testimony. Because we have concluded that the testimony was inadmissible, we do not address this argument.

Ruling Concerning Impeachment Evidence

Al-Amin argues that the district court erred by allowing the state to impeach him with two prior felony convictions—aggravated robbery and domestic assault by strangulation—if he chose to testify. We review a district court’s ruling on the impeachment of a witness by a prior conviction for a clear abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). A felony conviction may be admissible for purposes of impeachment if no more than ten years have passed since the date of the conviction and the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a), (b).

In considering whether probative value outweighs prejudicial effect, a district court considers the five *Jones* factors: “(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; (4) the importance of defendant’s testimony; and (5) the centrality of the credibility issue.” *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

1. Impeachment Value of Prior Conviction

The district court concluded that both convictions have some impeachment value. Al-Amin asserts that this factor does not favor admission of the prior convictions because neither of his prior convictions involved a crime of dishonesty. But Minnesota caselaw does not require that a prior conviction involve truth or falsity to have impeachment value. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). This factor weighs in favor of the admission of both convictions.

2. *Date of Prior Conviction and Al-Amin's Subsequent History*

Al-Amin does not challenge the district court's conclusion that his prior convictions are not too distant in time to be admissible. Because both convictions occurred within the past ten years, this factor weighs in favor of admissibility. *See id.* (stating that a prior conviction that occurred within ten years is not stale).

3. *Similarity of Prior Conviction to Charged Crime*

The district court reasoned that Al-Amin's aggravated-robbery conviction is too similar to the charged offense and this factor weighs against admission, but that his domestic-assault-strangulation conviction is not too similar. Al-Amin does not challenge this conclusion on appeal. This factor weighs against admitting the aggravated-robbery conviction but in favor of admitting the domestic-assault-strangulation conviction.

4. *Importance of Al-Amin's Testimony*

The district court concluded that the importance of Al-Amin's testimony is a "neutral" factor, not weighing for or against admissibility. Al-Amin asserts that this factor weighs against admissibility because only through his testimony could he have shown that he did not participate in the robbery.

If the admission of prior convictions prevents a jury from hearing a defendant's version of events, this weighs against admission of the prior convictions. *Id.* But here, the record shows that Al-Amin did not make clear to the court whether a ruling allowing impeachment by his prior convictions would prevent his testimony. And Al-Amin made no offer of proof concerning what he intended to testify to, which supports the admission of the evidence for purposes of impeachment. *See State v. Lloyd*, 345 N.W.2d 240, 246

(Minn. 1984) (stating that defendant's failure to make offer of proof on his testimony supported court's ruling to admit prior conviction for impeachment purposes).

Based on this record, we conclude that the district court was within its discretion in deciding that this factor favored neither admission nor exclusion of Al-Amin's prior convictions.

5. Centrality of Credibility Issue

Had Al-Amin chosen to testify, his credibility would have been a central issue, making this factor one favoring admissibility. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (stating that "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"). Here, Al-Amin likely would have testified that he was not part of the robbery, which would have forced the jury to consider his credibility over J.P.'s and P.S.'s. This factor favors admissibility.

We conclude that, under the *Jones* factors, the district court did not abuse its discretion by allowing the state to impeach Al-Amin with his prior convictions if he chose to testify.

Appellant's Pro Se Arguments

Al-Amin argues that his trial counsel was ineffective because counsel did not request a cautionary instruction concerning Achtzener's testimony about the phone calls and did not subpoena a codefendant witness. Both of these decisions relate to counsel's trial strategy and "lie within the proper discretion of the trial counsel." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (stating that deciding which witnesses to call at trial is a

matter of trial strategy); *see Vance*, 714 N.W.2d at 443 (stating that “a defendant may choose not to request an instruction for strategic reasons”). “Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight.” *Jones*, 392 N.W.2d at 236. We therefore decline to review these decisions by Al-Amin’s counsel.

Al-Amin also claims that his trial counsel had a conflict of interest, but Al-Amin fails to point to any evidence in the record demonstrating that trial counsel actively represented conflicting interests, and accordingly, he has not established the factual predicate for his claim. *See Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006) (stating that “until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim” (quotation omitted)).

Al-Amin also asserts that police officers tampered with P.S., but Al-Amin does not identify any specific conduct by police officers that constitutes wrongdoing. Al-Amin seems to be challenging the pretrial ruling in which the district court rejected his argument that police officers committed misconduct during the show-up. No evidence in the record supports a conclusion that this ruling was an abuse of discretion. To the extent that we understand Al-Amin’s pro se arguments, they are unpersuasive.

Affirmed.