STATE OF MINNESOTA
IN COURT OF APPEALS
A11-632

State of Minnesota,
Respondent,

vs.

Larry Joseph Thompson, Jr.,
Appellant.

Filed April 16, 2012
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-CR-10-2377

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

John J. Choi, Ramsey County Attorney, Mark Nathan Lystig, Thomas Ragatz, Assistant County Attorneys, St. Paul, Minnesota (for respondent)

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

Considered and decided by Schellhas, Presiding Judge; Bjorkman, Judge; and Randall, Judge.*

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

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

On appeal from a conviction of first-degree burglary, appellant argues that the district court erred by (1) permitting the state to impeach appellant with his felony convictions without conducting a *Jones* analysis and (2) sentencing appellant for burglary after he was sentenced for a subsequent possession-of-a-firearm-by-an-ineligible-person offense. Because the district court's failure to conduct a *Jones* analysis was harmless error and its sentencing complied with the sentencing guidelines, we affirm.

FACTS

On July 24, 2009, appellant Larry Joseph Thompson, Jr. was involved in a burglary and assault in an apartment occupied by R.F. and others. None of the occupants contacted the police. But two days later, R.F. was murdered, triggering an investigation of the prior burglary. The state charged appellant with aiding and abetting first-degree burglary for the July 24 offense. The state moved to impeach appellant's testimony with evidence of his prior convictions of second-degree assault (1999), first-degree criminal damage to property (2002), fifth-degree possession of a controlled substance (2002), and fleeing a police officer (2004). Appellant objected, but the district court ruled that the felony convictions were admissible because they were more probative than prejudicial. Appellant chose not to testify, but did not indicate on the record what his testimony would have been and whether he would have testified absent the district court's ruling. The jury found appellant guilty of first-degree burglary.

The state charged appellant for his role in R.F.'s death in a separate proceeding that was tried three weeks before the burglary charge. A jury acquitted appellant of murder but found him guilty of ineligible possession of a firearm. Two days before sentencing in the ineligible-possession case, appellant asked the district court to move up the sentencing date in this case so the burglary sentence would precede the ineligible-possession sentence. The district court declined to do so and imposed a sentence of 108 months' imprisonment for the burglary conviction.[1] This appeal follows.

D E C I S I O N

I. The district court's failure to conduct a *Jones* analysis on the record was harmless error.

A district court may admit evidence of a defendant's prior felony convictions for impeachment if "the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a)(1). In determining whether the probative value of a conviction outweighs its prejudicial effect, the 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. Jones, 271 N.W.2d 534, 538 (Minn. 1978). A district court's failure to consider and weigh these factors on the record is error. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). But an appellate court may conduct a *Jones* analysis to determine whether

[1] Had appellant been sentenced in the reverse order, the presumptive sentence would have been 88 months.

the error was harmless because the conviction was admissible. *See id.* Accordingly, we consider each of the *Jones* factors in turn.

A. Impeachment value of the prior crime

Appellant argues that this factor does not support admission because his prior convictions of fleeing a police officer, fifth-degree possession of a controlled substance, first-degree criminal damage to property, and second-degree assault are not "directly relevant to credibility." We disagree. A prior conviction may have impeachment value even if it did not directly involve dishonesty. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Prior felonies allow the jury 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). We decline to reject the whole-person approach, as appellant urges, particularly in light of the supreme court's recent affirmation that "*any* felony conviction is probative of a witness's credibility." *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). The challenged convictions demonstrate appellant's lack of concern for numerous legal and moral duties, indicating that he may have little concern for his duty to speak truthfully under oath. This factor therefore weighs heavily in favor of admission.

B. Date of the convictions and the defendant's subsequent history

Appellant contends that this factor weighs heavily against admission because one of his convictions was almost stale and the others occurred at least five years prior to trial. We are not persuaded. "[E]ven an older conviction can remain probative if later

convictions demonstrate a history of lawlessness." *Swanson*, 707 N.W.2d at 655 (quotation omitted); *see also State v. Vanhouse*, 634 N.W.2d 715, 719-20 (Minn. App. 2001) (considering convictions not eligible as impeachment evidence when addressing subsequent history), *review denied* (Minn. Dec. 11, 2011). And a defendant's imprisonment shortly before the charged offense indicates that the passage of time has not diminished the probative value of the prior offenses. *State v. Mitchell*, 687 N.W.2d 393, 398 (Minn. App. 2004) (holding that this factor weighed "heavily" in favor of admission where defendant committed prior offenses ten years before the charged offense but was released from prison only two years before the charged offense), *review denied* (Minn. Dec. 13, 2005). Because the record shows that appellant consistently engaged in misdemeanor and felony activity between 1999 and 2009 and the only gaps in his criminal history occurred while he was in prison, this factor weighs heavily in favor of admission.

C. Similarity of the past crime with the charged crime

Appellant argues that this factor weighs against admission of his second-degree-assault conviction and is neutral as to the remaining convictions. We agree. The more similar the alleged offense and the conduct underlying a past conviction, the more likely it is that the conviction is more prejudicial than probative. *Swanson*, 707 N.W.2d at 655. "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). This factor is neutral regarding appellant's convictions of fleeing a peace officer, possession of a

controlled substance, and criminal damage to property since they are unlike burglary. *See State v. Williams*, 757 N.W.2d 504, 509 (Minn. App. 2008) (stating that a controlled-substance offense was not similar to an assault offense), *aff'd*, 771 N.W.2d 514 (Minn. 2009); *State v. Clark*, 486 N.W.2d 166, 169 (Minn. App. 1992) (stating that two property crimes were not sufficiently similar for this factor to favor exclusion).

The second-degree-assault conviction is a different matter. Second-degree assault is similar to the charged offense, which includes an element of assault. Citing *State v. Ihnot*, 575 N.W.2d 581, 587-88 (Minn. 1998), the state argues that the potential prejudice to appellant is mitigated because the state agreed not to present the facts underlying the assault conviction to the jury. We disagree. In *Ihnot*, the prejudice related to the prior conviction was lessened because the facts underlying it were *different* from the facts underlying the charged offense, allowing the defendant to distinguish the prior and charged offenses in his testimony to the jury. 575 N.W.2d at 586-87. Here, the record does not show whether appellant could have distinguished the two offenses had he testified. But the jury would have heard that appellant was convicted of something called assault, which is an element of the charged offense. *See State v. Flemino*, 721 N.W.2d 326, 329 (Minn. App. 2006) (addressing similarities "in name or fact"). Because the jury could reasonably infer that the prior assault conviction was based on behavior similar to the charged offense, this factor favors exclusion of the second-degree-assault conviction.

D. Importance of defendant's testimony

Appellant maintains that this factor weighs against admission of the prior convictions because the district court's ruling discouraged him from testifying and he was

the only person who could tell his side of the story. This argument is unavailing. If the admission of prior convictions prevents a jury from hearing a defendant's version of events, the fourth *Jones* factor generally weighs against admission. *Gassler*, 505 N.W.2d at 67. But it may weigh in favor of admission if the defendant fails to make an offer of proof as to what his testimony would add to the evidence before the jury. *See State v. Lloyd*, 345 N.W.2d 240, 246 (Minn. 1984) (noting the significance of defendant's failure to show what his testimony might have been). Appellant made no record as to why he chose not to testify or what his testimony would have been. Moreover, defense counsel communicated his theory of the case—that the eyewitnesses failed to report any crime to the police because, in truth, appellant committed no crime—through his opening statement, cross-examination of the state's witnesses, and closing arguments. On this record, this factor weighs in favor of admission.

E. The centrality of credibility

Appellant asserts that this factor is neutral because the state could have impeached appellant through other means than his prior felony convictions. We are not persuaded. Admission of prior convictions is favored when credibility is a central issue. *E.g.*, *Swanson*, 707 N.W.2d at 655. Credibility was key here because there was no physical evidence that appellant committed burglary, and appellant's theory of the case was that the state's eyewitnesses had concocted the entire story. As a result, it was particularly important that the jury have all the relevant information to evaluate appellant's testimony if he chose to testify. This factor therefore weighs in favor of admission.

Because four of the five *Jones* factors weigh in favor of admission, we conclude that the prior convictions were admissible, and the district court's failure to conduct a *Jones* analysis on the record was harmless error.

II. The district court did not err by denying appellant's motion to sentence him for burglary before he was sentenced for ineligible possession of a firearm.

Appellant argues that the district court violated the Minnesota Sentencing Guidelines by denying his motion to sentence him for burglary before he was sentenced in the other case for ineligible possession of a firearm—an offense he committed two days after he committed burglary. The order of sentencing increased the presumptive sentence for the burglary conviction from 88 months to 108 months. We review a district court's interpretation of the sentencing guidelines de novo. *State v. Myers*, 627 N.W.2d 58, 62 (Minn. 2001).

The sentencing guidelines set the following method for calculating an offender's criminal-history score:

> [T]he offender is assigned a particular weight for every extended jurisdiction juvenile conviction and for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing. Multiple offenses are sentenced in the order in which they occurred.

Minn. Sent. Guidelines II.B.1 (2008). The commentary explains that "[w]hen multiple current offenses are sentenced *on the same day before the same judge*, sentencing shall occur in the order in which the offenses occurred." Minn. Sent. Guidelines cmt. II.B.105 (2008) (emphasis added). Appellant relies on section II.B.1, but ignores this

commentary, to support his claim that he should have been sentenced in the order of his offenses.

This court rejected a similar argument in *State v. Mondry*, 682 N.W.2d 183, 184 (Minn. App. 2004), when the appellant challenged the district court's inclusion of two criminal-history points that appellant received for a subsequent offense. In interpreting the sentencing guidelines, we concluded that "an offender's conviction of an offense committed subsequent to the current offense, but sentenced prior to the current sentencing, is properly included in the defendant's criminal-history score." *Id.*[2]; *accord State v. Best*, 370 N.W.2d 691, 696 (Minn. App. 1985). Here, appellant was sentenced for the ineligible-possession-of-a-firearm conviction by a different judge one month before his burglary sentencing. Accordingly, we conclude that the district court did not err in connection with the burglary sentence.

Affirmed.

[2] Appellant makes much of the fact that in *Mondry*, the defendant had been sentenced in a different jurisdiction (North Dakota) for his subsequent offenses. But the court's analysis in *Mondry* made no mention of this fact, instead basing its entire analysis on the plain language of the sentencing guidelines and the accompanying commentary.