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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0351**

State of Minnesota,
Respondent,

vs.

Saul Lopez,
Appellant.

**Filed December 11, 2017
Affirmed
Reyes, Judge**

McLeod County District Court
File No. 43-CR-16-694

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

Michael K. Junge, McLeod County Attorney, Zachary Lyngaas, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellant challenges his conviction of one count of storing methamphetamine paraphernalia in the presence of a child, arguing that (1) the district court committed plain

error in allowing the admission of evidence of his use and possession of marijuana; (2) the district court abused its discretion in admitting a prior conviction as impeachment evidence; and (3) prosecutorial misconduct deprived him of a fair trial. We affirm.

FACTS

On July 30, 2015, the chief of the Winsted Police Department went to appellant Saul Lopez's residence to address a complaint. A young child answered the door, and the chief noticed the odor of marijuana emanating from the residence. When appellant came to the door to discuss the complaint, the chief told appellant that he smelled marijuana. Appellant replied, "Oh no." The chief froze the scene in order to obtain a search warrant for the residence based on the odor of marijuana. Assisting officers arrived and executed the search warrant. The officers discovered a pipe believed to be methamphetamine paraphernalia alongside marijuana and marijuana paraphernalia in the master bedroom. White residue found inside the pipe field-tested positive for methamphetamine. The pipe was sent to the Minnesota Bureau of Criminal Apprehension (BCA) for further testing, along with DNA samples from appellant and his wife. A BCA scientist performed DNA testing on the glass pipe. The scientist identified one major DNA profile on the pipe, compared it to the DNA samples from appellant and his wife, and found that it matched the sample given by appellant but not the sample provided by his wife.

On May 11, 2016, respondent State of Minnesota charged appellant with one count of storing methamphetamine paraphernalia in the presence of a child in violation of Minn. Stat. § 152.137, subd. 2(a)(4) (2016). A jury trial was held on October 12 and 13, 2016. At the trial, the jury heard testimony from multiple law-enforcement officers, the scientist,

and appellant. The officers testified that the pipe could only be used for the purpose of smoking methamphetamine and described that process in detail. The officers testified on both direct- and cross-examination, without objection, about the presence and seizure of marijuana in the residence. The jury did not receive any instruction as to how the marijuana evidence related to the charged crime.

Appellant testified on his own behalf at trial. Prior to his testimony, the district court heard arguments regarding the admission of evidence of appellant's 2010 third-degree felony-assault conviction for impeachment purposes. The district court acknowledged that, while it was a "close call," the prior conviction was "probative on the issue of credibility and the entire character of the defendant." The district court stated that it would issue a curative instruction to make sure the jury understood what the conviction was for or interject as necessary.

Appellant testified that the pipe found in his bedroom was an incense burner and described the process of burning incense with the pipe. At the end of the direct examination, defense counsel asked about appellant's prior felony assault conviction and established that it was from 2010. There were no questions on cross-examination about the prior felony conviction. Prior to submitting the case to the jury, the district court instructed the jury that the evidence of the prior conviction could be considered only as it may affect appellant's credibility and was not to be considered as substantive evidence.

The jury found appellant guilty. The district court sentenced him to 45 days in jail, stayed the imposition of the sentence, and placed him on supervised release for a period of four years. This appeal follows.

DECISION

I. The admission of marijuana evidence did not affect appellant's substantial rights.

Appellant asserts that the unobjected-to testimony about the presence of marijuana at his residence was irrelevant and prejudicial and, by allowing it to be elicited, the district court committed plain error affecting his substantial rights. We disagree.

When a party fails to object to the admission of evidence, we review an assertion of error under the plain-error standard. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002); Minn. R. Crim. P. 31.02. The plain-error standard requires that the defendant show (1) error, (2) that was plain, and (3) that affected substantial rights. *Strommen*, 648 N.W.2d at 686. If the defendant cannot satisfy any one of the three prongs, the other prongs need not be addressed. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011).

Even if the admission of the marijuana evidence was error that was plain, appellant has not shown that it affected his substantial rights. An error affects substantial rights if the error is prejudicial, meaning “there is a reasonable likelihood that the error substantially affected the verdict.” *Strommen*, 648 N.W.2d at 688. Appellant bears a “heavy burden” of proving prejudice. *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015). In determining whether an error is prejudicial under the plain-error test, we consider the other evidence presented, whether the jury received a limiting instruction on the challenged evidence, whether the state emphasized the evidence in closing argument, whether the defendant had an opportunity to rebut the evidence, and whether the other evidence of guilt was

overwhelming. See *State v. Prtine*, 784 N.W.2d 303, 315 (Minn. 2010); *State v. Riddley*, 776 N.W.2d 419, 428 (Minn. 2009); *State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005).

Here, the state presented strong evidence. The pipe found in the master bedroom field-tested positive for methamphetamine. Law-enforcement officers identified the pipe as a methamphetamine pipe, based on their years of training and experience. Only appellant's DNA matched the major DNA profile found on the pipe. Appellant's testimony that the item was an incense burner rather than a methamphetamine pipe was the only evidence presented in his favor. The state only mentioned the marijuana evidence in rebuttal and characterized it as supporting proof for the charge. And although the jury was not given a limiting instruction, defense counsel had the opportunity to rebut the evidence in his closing argument, reminding the jury that the marijuana found in the home was unrelated to the charge at issue. On this record, appellant has failed to show that there was a reasonable likelihood that the marijuana evidence substantially affected the verdict.

II. The district court did not abuse its discretion by allowing appellant's prior felony conviction to be admitted as impeachment evidence.

Appellant argues the district court abused its discretion in ruling that evidence of his 2010 third-degree felony assault conviction could be admitted as impeachment evidence. We are not persuaded.

The state may impeach a defendant with evidence of a prior felony conviction if no more than ten years has passed since the date of conviction or his release from confinement and if the district court determines that the probative value of admitting the evidence

outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). Five factors guide the district court's discretion in determining whether the balancing test is met:

(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 the defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). We review a district court's ruling on prior convictions for a clear abuse of discretion. *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011).

Regarding the first factor, appellant argues that convictions that do not involve dishonesty lack impeachment value. The district court stated that the impeachment value of appellant's prior conviction was not overwhelming and observed that crimes of dishonesty carry "a lot more probative value" than other crimes. However, the district court concluded that "the jury is entitled to know about the whole person, and the whole person includes prior felony convictions." Any felony conviction is probative of a person's credibility. *Id.* at 652. Furthermore, the purpose of admitting prior convictions is to permit the jury to see "the whole person of the defendant and better evaluate his or her truthfulness." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (quotation omitted).

On the second factor, the district court noted the date of the conviction was within the ten-year period. Convictions occurring within ten years of trial are presumptively not stale. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Accordingly, this factor favors admission.

Regarding the third factor, the district court concluded that the prior conviction had “nothing to do with drugs.” “The more similar the alleged offense and the crime underlying the past conviction, the more likely it is that the conviction is more prejudicial than probative.” *Swanson*, 707 N.W.2d at 655. Because the prior conviction bears no similarity to the crime charged, this factor weighs in favor of admission.

Regarding the fourth and fifth factors, appellant argues that the importance of his testimony weighed against admissibility. The district court determined that appellant’s testimony was important to the case as it was the only evidence presented in his favor and that his credibility as a witness was “the heart of the whole case.” If credibility is a central issue, as it is here, the fourth and fifth *Jones* factors weigh in favor of admission of prior convictions. *Id.*

In sum, all five *Jones* factors weigh in favor of admission. Therefore, the district court did not abuse its discretion in ruling that appellant’s prior conviction was admissible for impeachment purposes.

III. The state did not commit prosecutorial misconduct during its closing argument.

Appellant argues that the state committed prosecutorial misconduct in two instances in its closing argument by misrepresenting the DNA evidence. We disagree.

The challenged statements took place during the state’s rebuttal:

STATE: Defense counsel had mentioned that, ‘Well, if you live in a residence, you’d expect everyone’s DNA to be on the mouthpiece.’ Well, his wife’s wasn’t; that was excluded by the BCA from being that major DNA profile. She lives in the residence. It was his DNA that was found on the mouthpiece around the area that the methamphetamine would be ingested.

And ask yourselves: on an incense burner, do you put your mouth around a mouthpiece and inhale the incense?

Because appellant did not object to these statements at trial, we address the issue under a modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). Under this standard, appellant must establish that the misconduct constitutes error that was plain. *Id.* If established, the burden shifts to the state to demonstrate that the error did not affect appellant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

"It is unprofessional conduct for the prosecutor to intentionally misstate the evidence or mislead the jury as to the inferences it may draw." *State v. Bobo*, 770 N.W.2d 129, 143 (Minn. 2009) (quotation omitted). Rather, the state's closing arguments must be "based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). When assessing alleged prosecutorial misconduct during a closing argument, this court looks to "the closing argument as a whole, rather than selected phrases and remarks." *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004).

The state did not misstate the evidence or mislead the jury. In context, the state made reasonable inferences from the evidence presented at trial. The state presented evidence that appellant's DNA was a match for the only major identified profile found on the mouthpiece of the pipe and that his wife's DNA did not match the major profile. Based on this record, the state's arguments do not constitute misconduct or error and appellant is not entitled to relief.

Affirmed.