STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1587

State of Minnesota,
Respondent,

vs.

Adam Gregory Behl,
Appellant.

Filed September 24, 2018
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CR-16-22892

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Kirk, Judge; and Smith, John, 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

KIRK, Judge

Appellant challenges his conviction of first-degree burglary, arguing that the district court erred by allowing the state to impeach him with evidence of three prior convictions, failing to provide a limiting instruction, and failing to name any independent crime, or its elements, in the court's jury instructions for burglary. Appellant also filed a pro se brief raising similar arguments. We affirm.

FACTS

On August 13, 2016, at roughly 2:30 a.m., appellant Adam Gregory Behl entered the home of E.L., the mother of three of his children, by climbing through a kitchen window. E.L. testified that although she allowed him to stay at the house on rare occasions, he did not have permission to be there that night and did not have a key to the house. Appellant testified that he would regularly visit the house to see his children, spent the night there several times a week, and on August 12 had made plans to come for dinner and stay the night. Appellant testified that although he did not come for dinner, instead going out to a bar, he believed that he still had permission to enter the residence that night.

Both appellant and E.L. testified that: E.L. came down to the kitchen that night because appellant made a lot of noise while climbing through the window; appellant was intoxicated; E.L. asked appellant to leave when her children came down to the kitchen; E.L. went upstairs and locked herself in her bedroom; upon finding the bedroom locked, appellant used force to open the locked door, damaging it; and after appellant entered the locked bedroom, E.L. called the police and appellant left.

Following the incident, the state charged appellant with first-degree burglary, and a jury found him guilty of the charge. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by allowing the state to impeach appellant with evidence of three prior felony convictions.

The district court allowed the state to impeach appellant with evidence of three prior felony convictions: a 2006 conviction for a third-degree controlled-substance crime, a 2009 conviction for driving while intoxicated (DWI), and a 2016 conviction for fourth-degree criminal sexual conduct. Appellant argues the district court erred in allowing the impeachment evidence and allowing the state to name two of the felonies.

An appellate court "will not reverse a district court's ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion." *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011) (quotation omitted). Prior-conviction evidence is admissible under Minn. R. Evid. 609(a)(1) if the crime is a felony "and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." In conducting this balancing test, the district court considers five factors:

> (1) the impeachment value of the prior crime, (2) the date of conviction and defendant's subsequent history, (3) the similarity of past crime and 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, 537-38 n.1 (Minn. 1978). Because the district court is in "a unique position" to assess and weigh the *Jones* factors, "it must be accorded broad discretion." *State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001). "[*A*]*ny* felony

conviction is probative of a witness's credibility, and the mere fact that a witness is a convicted felon holds impeachment value." *Hill*, 801 N.W.2d at 652. "If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006).

Here, the district court considered each of the five *Jones* factors and concluded that each of the factors weighed in favor of admitting evidence of the prior convictions, finding that each of the crimes had impeachment value; the dates of the offenses demonstrated continuing criminal action, increasing the impeachment value; the crimes were not similar to the charged crime; and appellant's testimony and credibility would be a central issue. To avoid unfair prejudice to appellant, the district court directed the state to mention the criminal-sexual conduct conviction only as a generic felony.

Appellant concedes that his previous convictions were within ten years and that his testimony and credibility were central issues, but argues that the impeachment value of the prior crimes was low and that the DWI conviction and drug-sale conviction were both similar to the charged burglary offense because he was intoxicated during the commission of the charged offense. We disagree. Neither a DWI nor a controlled-substance crime are similar to first-degree burglary simply because appellant was intoxicated while committing the burglary. On this record, the district court did not abuse its discretion in weighing the *Jones* factors, finding that the probative value of the crimes outweighed the prejudicial effect, and allowing the state to introduce evidence that appellant had been convicted of three prior felonies, including a DWI and a controlled-substance crime.

II. The district court erred by refusing to issue limiting instructions for the use of impeachment evidence, but its error was harmless.

Appellant argues that the district court erred by not reading a cautionary instruction when the prosecutor introduced appellant's prior convictions as impeachment evidence. Under Minn. R. Evid. 105, "When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." A district court errs in refusing to give a limiting instruction about the use of a defendant's prior convictions. *State v. Bissell*, 368 N.W.2d 281, 283 (Minn. 1985); *cf. State v. Taylor*, 869 N.W.2d 1, 18 (Minn. 2015) (explaining preference that district courts give limiting instructions sua sponte, but it is not plain error to fail to do so). The Minnesota jury instruction guide provides a model limiting instruction for the receipt of evidence of prior convictions. 10 *Minnesota Practice*, CRIMJIG 2.02 (2017).

In this case, defense counsel requested a limiting instruction, following the district court's ruling allowing impeachment evidence. The district court declined the request for a limiting instruction, without giving a clear explanation of its reasoning.[1] Under Minn. R. Evid. 105, the district court was required to provide a limiting instruction, and erred in refusing to so.

[1] Defense counsel did not reference Minn. R. Evid. 105 or the model instruction provided in CRIMJIG 2.02 in his request for a limiting instruction, and the record does not disclose any evidence that defense counsel, the prosecutor, or the district court considered Minn. R. Evid. 105.

A reviewing court "evaluate[s] the erroneous omission of a [requested] jury instruction under a harmless error analysis." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). If the reviewing court finds "beyond a reasonable doubt the omission did not have a significant impact on the verdict, reversal is not warranted." *Id.* (quotation omitted).

Here, the state had a very strong case, including appellant's incriminating testimony that E.L. asked him repeatedly to leave, that she locked herself in her bedroom, and that upon finding the bedroom door locked, he "shoved it open," damaging it. Appellant's own testimony established that he remained in the building without consent and committed criminal damage to property while in the building. *See* Minn. Stat. § 609.582, subd. 1 (defining first-degree burglary in relevant part as entering or remaining in an occupied dwelling without consent and committing a crime while in the building) (2016); Minn. Stat. § 609.595 (defining criminal damage to property) (2016).

In addition to the strong evidence of appellant's guilt, his prior convictions were referenced only once at trial. During cross-examination, the state asked appellant whether he had three prior felony convictions, including a "drug sell" and a "DWI," and appellant responded that he did. The state did not suggest that the jury consider the evidence in any improper way, limiting any potential prejudice from the lack of a limiting instruction.

Although the district court erred in failing to apply Minn. R. Evid. 105, on this record, we must conclude that the error was harmless.

III. Any error in the district court's jury instructions on the elements of burglary did not affect appellant's substantial rights.

Appellant argues that the district court omitted a necessary element of first-degree burglary in its jury instruction by failing to define any crime that appellant was accused of committing while in E.L.'s home. Defense counsel did not object to the instruction.

This court reviews unobjected-to jury instructions for plain error. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). To establish plain error, appellant must show: (1) there was error; (2) that was plain; and (3) that the error affected appellant's substantial rights. *Id.* "An error affects a defendant's substantial rights if the error was prejudicial and affected the outcome of the case." *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013). In determining whether the omission of an element of a charged offense was prejudicial, a "reviewing court may consider, among other factors, whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the State submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element." *Id.* at 29.

A district court properly exercises its discretion if the jury "instructions read as a whole correctly state the law in language that can be understood by the jury." *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012). "[D]etailed definitions of the elements to the crime need not be given in the jury instructions if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *State v. Davis*, 864 N.W.2d 171, 177 (Minn. 2015) (quotation omitted). However, "[t]he court must instruct the jury on all matters of law necessary to render a verdict." Minn. R. Crim. P. 26.03, subd. 19(6).

Under Minn. Stat. § 609.582, subd. 1, anyone who "enters a building without consent and commits a crime while in the building . . . commits burglary in the first degree." The Minnesota jury instruction guide recommends naming any crime a defendant is alleged to have committed while in the building and reading the jury instructions or statutory definition for that crime. *See* 10 *Minnesota Practice*, CRIMJIG 17.02 (2017).

Here, appellant argues that a jury could not properly have found that he committed a crime while in the building without being instructed on the definition and elements of any such crime. The state counters that the district court's jury instruction was consistent with the statutory language and did not constitute plain error. But, we need not decide whether the lack of more detailed instructions was error because any such error did not affect appellant's substantial rights. Appellant did not contest whether he committed a crime while inside E.L.'s home during the trial. Appellant's testimony establishes that he committed criminal damage to property, and during closing arguments, defense counsel conceded that the jury could conclude appellant committed criminal damage to property and disorderly conduct, stating, "[W]e're not saying . . . those weren't true and weren't proven." Rather, appellant argued that he had permission to be inside the home and left once that permission was revoked. The state also submitted E.L.'s testimony that appellant broke down her door, and photographs of the damaged door frame. On this record, we conclude that any error by the district court in failing to define a crime appellant may have committed while in E.L.'s home did not affect appellant's substantial rights.

IV. Appellant's pro se arguments are without merit.

Appellant filed a pro se supplemental brief arguing that he had ineffective assistance of counsel and the district court erred in its burglary instructions.

To prevail on an ineffective-assistance-of-counsel claim, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Appellate courts "need not analyze both prongs if either one is determinative." *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014). As previously discussed, the evidence against appellant was very strong, and there is no reasonable probability that any alleged errors on the part of appellant's counsel affected the outcome of the case.

Appellant also asserts that the district court erred by failing to instruct the jury that burglary could be committed by entering a building with intent to commit a crime. Appellant argues that the statute required the jury to find that he entered E.L.'s home with intent to commit a crime. However, the statute provides that either entering with intent to commit a crime *or* entering and committing a crime constitutes burglary. Minn. Stat. § 609.582, subd. 1. A district court judge is not required to provide both burglary instructions to the jury, "particularly when one of the options (in this case the first) is inconsistent with the state's theory of the case and unsupported by the evidence." *State v.*

Johnson, 699 N.W.2d 335, 340 (Minn. App. 2005). Accordingly, the district court did not err in providing only the second instruction.

Affirmed.