STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1802

State of Minnesota,
Respondent,

vs.

Damion John Gullickson, Jr.,
Appellant.

Filed September 9, 2019
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Cass County District Court
File No. 11-CR-17-1730

Keith Elllison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Benjamin T. Lindstrom, Cass County Attorney, Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

SMITH, TRACY M., Judge

In this direct appeal from his final judgment of conviction and sentence for four counts of assault, appellant argues that (1) the district court abused its discretion by

permitting the state to use a prior conviction for impeachment; (2) the district court abused its discretion by failing to provide a reason for an upward durational departure in sentencing; and (3) the district court erred by entering judgments of conviction for the lesser-included assault crimes. We affirm in part, reverse in part, and remand to correct the warrant of commitment by vacating the convictions for the lesser-included assault crimes.

FACTS

On September 17, 2017, Cass County law enforcement officers responded to a 911 call reporting an assault. They found the victim, V.W., lying on the deck of the house. His nose appeared broken, and he had blood coming from his mouth, nose, face, and hands. V.W. stated that appellant, Damion John Gullickson Jr., was one of his attackers. He said that Gullickson and a juvenile female hit, kicked, and punched him and that they also hit him with a wooden chair.

Respondent State of Minnesota charged Gullickson with aiding and abetting second-degree assault with a dangerous weapon and inflicting substantial bodily harm under Minn. Stat. § 609.222, subd. 2 (2016) (count I); aiding and abetting second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2016) (count II); and aiding and abetting third-degree assault under Minn. Stat. § 609.223, subd. 1 (2016) (count III). The state later amended the complaint to add aiding and abetting first-degree assault under Minn. Stat. § 609.221, subd. 1 (2016) (count IV). The amendment occurred after law enforcement met with V.W. and learned that his injuries were so severe that he needed three plates surgically implanted above his left eye.

The district court held a jury trial in June 2018. Before trial, the state moved the district court to allow it to introduce Gullickson's previous felony conviction for second-degree manslaughter for impeachment purposes. The district court, applying the *Jones* factors,[1] ultimately decided to allow the prior conviction to be introduced as impeachment evidence if Gullickson chose to testify. The district court decided to permit the state to reference that the conviction was for second-degree manslaughter. Gullickson then chose not to testify.

The jury found Gullickson guilty of all charges. At the *Blakely* stage of the trial,[2] the jury found that an aggravating factor existed, answering "yes" to the question: "Does the defendant have a prior conviction for an offense in which the victim was injured?"

The district court held a sentencing hearing on August 9, 2018. The state asked for an aggravated sentence and the statutory maximum of 240 months' imprisonment. Defense counsel argued for a sentence at the bottom of the guidelines range, arguing that Gullickson was a 23-year-old young man who has issues with chemical dependency and wants to obtain treatment.

The district court did not follow either recommendation. Instead, the district court stated: "The presumptive duration is 84 to 117 months. The middle of the box would be 98. The Court is going to depart in an upward departure, and the Court is going to impose

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[1] *See State v. Jones*, 271 N.W.2d 534, 537 538 (Minn. 1978) (identifying factors to consider in determining admissibility of prior convictions for impeachment purposes).

[2] *See Blakely v. Washington*, 542 U.S. 296, 301,124 S. Ct. 2531, 2536 (2004) (holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (quotation omitted)).

140 months of prison." The district court sentenced Gullickson to 140 months' imprisonment on count IV, first-degree assault. The state agreed that the proper procedure would be to "let the verdicts stand and only enter the conviction and sentence on the first-degree assault" because the other charges were "lesser includeds or involved the same behavioral incident." However, the warrant of commitment reflects that convictions were entered on all counts.

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion when it ruled that Gullickson's prior conviction was admissible as impeachment evidence.

Gullickson argues that the district court abused its discretion by ruling that his prior conviction was admissible as impeachment evidence and by ruling that the state did not need to "sanitize" the conviction but could identify it as a conviction for second-degree manslaughter.

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 five 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 (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.

Jones, 271 N.W.2d at 538. We review a district court's admission of a defendant's prior convictions for an abuse of discretion. *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006). If the district court abused its discretion, we will reverse only if the error substantially influenced the jury's verdict. *State v. Carridine*, 812 N.W.2d 130, 141 (Minn. 2012).

A. Admissibility of prior conviction

The district court here decided that Gullickson's conviction, including the date of conviction and the fact that the conviction was for second-degree manslaughter, was admissible impeachment evidence. But the district court ruled that it would not allow in the certified copy of the conviction because it had the word "murder" on it, which the court thought could be prejudicial. In making its decision, the district court evaluated the five *Jones* factors and found that factors one, two, four, and five weighed in favor of admitting the past conviction. We examine each in turn.

1. The impeachment value of the prior conviction

The district court found that this factor weighed in favor of admission, explaining that the impeachment value lay in the "ability to better judge the truth of the testimony." Gullickson argues that his prior conviction lacked impeachment value because it was "not a crime of dishonesty." However, caselaw supports the district court's determination. The purpose of admitting past convictions to impeach is to give the jury an opportunity to judge the "whole person." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted). And the supreme court in *State v. Hill* explained that "it is the general lack of respect for the law, rather than the specific nature of the conviction, that informs the fact-

finder about a witness's credibility." 801 N.W.2d 646, 652 (Minn. 2011). Thus, even though manslaughter is not a "crime of dishonesty," conviction of that crime would still be valuable as impeachment evidence to inform the jury of Gullickson's previous contempt for the law.

2. Date of conviction and subsequent history

Gullickson's manslaughter conviction occurred in 2014. As he admits, this was recent. Therefore, as the district court found, this factor weighed in favor of admission.

3. Similarity between the prior offense and the charged offense

The state conceded, and the district court agreed, that Gullickson's prior manslaughter conviction was similar to his first-degree assault charge. This factor weighed against admission.

4. The importance of Gullickson's testimony

The only person present at the assault who testified at trial was the victim, V.W., whom the state called as a witness. In evaluating this factor, the district court noted that there were a number of other people who were present at the actual assault, but the defense did not call them. The district court thought that calling those witnesses "would have been [an] opportunity for the defense to get information from folks that were there." Instead, the defense called no witnesses. The district court therefore held that this factor weighed in favor of admission.

The fact that V.W. was the only person present at the assault who testified could render Gullickson's testimony important to give another version of events. But Gullickson made no offer of proof regarding what his testimony would be and thus gave no indication

of how his testimony would be important to the case. *See State v. Williams*, 771 N.W.2d 514, 519 (Minn. 2009) (observing, in discussing this *Jones* factor, that the appellant "made no offer of proof as to what testimony he would have added to the testimony" of another witness). Moreover, if credibility is a central issue (which, as we conclude below, it is), both the fourth and fifth factors weigh in favor of admission. *Swanson*, 707 N.W.2d at 655.

5. The centrality of credibility

The district court also found this factor weighed in favor of admission, explaining that "certainly that is always one that I think the jury should know if there are big issues in the history of the defendant." Had Gullickson testified to refute the victim's testimony, his credibility would have been central.

In sum, the district court concluded that only the third *Jones* factor—the similarity of the prior crime and the charged crime—weighed against admissibility. It further decided that the overall balance of the factors supported admissibility of the conviction for impeachment. Its decision was not an abuse of discretion. In other cases in which the prior crime is similar to the charged crime, the supreme court has affirmed the admission of the prior convictions for impeachment. *See State v. Frank*, 364 N.W.2d 398, 399 (Minn. 1985) (affirming admissibility of two prior rape convictions for impeachment in a trial for criminal sexual conduct); *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (affirming admissibility of prior aggravated rape conviction although "basically the same" as the charged offense).

B. Unsanitized conviction

Gullickson further argues that, even if it was not error to allow impeachment with the prior conviction, the district court still abused its discretion by ruling that the jury could hear the nature of the prior conviction without "sanitizing" it. Gullickson cites *State v. Hill* in support of this argument. 801 N.W.2d at 652. *Hill* stands for the proposition that unspecified felony convictions can be used to impeach a criminal defendant's testimony. *Id.* However, Gullickson's reliance on *Hill* is misguided; the supreme court in that case specifically explained:

> We do not suggest . . . that a party must always impeach a witness with an unspecified felony conviction. To the contrary, the decision about what details, if any, to disclose about the conviction at the time of impeachment is a decision that remains within the sound discretion of the district court.

Id. And Gullickson cites no other caselaw that supports his argument that failing to sanitize a prior conviction for impeachment is an abuse of discretion. Here, the district court weighed the probative value versus prejudicial effect of Gullickson's prior manslaughter conviction and decided to permit the general information, but not the certified copy, because it had the word "murder" on it, which the district court decided would be prejudicial. The district court did not abuse its discretion by not sanitizing the prior conviction.

C. Absence of prejudice

Finally, even if Gullickson were able to demonstrate an abuse of discretion by the district court in this evidentiary ruling, he would still need to show that it significantly affected the verdict. *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006). It is unlikely

that Gullickson would be able to meet this burden. V.W. described in his testimony how Gullickson punched him in his face and chest and that Gullickson "hit [him] hard enough where [V.W.] kind of fell to [his] knees, and then that's where [Gullickson] presumed to kick [him]." V.W. also testified that Gullickson was the person who hit him with the chair, stating, "I was kind of like in a crawling position, and he hit me over the back with it." The record also includes physical evidence of V.W.'s blood on Gullickson's shorts and scratches on Gullickson's hands, which would have been very impactful on the jury.

Furthermore, because Gullickson does not explain what he planned to testify to or how his testimony would have been important, it is difficult to say that the district court's ruling made a difference to the jury's verdict. There is no reason to believe from this record that the district court's ruling on the prior conviction significantly affected the verdict.

II. The district court did not abuse its discretion when it imposed an upward durational departure.

The Minnesota Sentencing Guidelines prescribe a range of sentences, and the sentencing court "must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted); *see* Minn. Sent. Guidelines 2.D.1 (2016). "Substantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). The district court has broad discretion to

depart, and we review its decision for an abuse of discretion. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

The guidelines provide a nonexclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines 2.D.3.b (2016). Before imposing an upward departure, the district court "must submit to a jury the question of whether the State has proven beyond a reasonable doubt the existence of additional facts . . . which support reasons for departure." *State v. Rourke*, 773 N.W.2d 913, 921 (Minn. 2009). Then, based on the factual determinations made by the jury, the district court must "explain why the circumstances or additional facts found by the jurors in a *Blakely* trial provide the district court a substantial and compelling reason to impose a sentence outside the range on the grid." *Id.* at 920.

Here, the district court chose to depart durationally, imposing a 140-month prison term when the presumptive duration was 84 to 117 months.

Gullickson does not assert that the aggravating factor found by the jury—a prior conviction for an offense in which the victim was injured—is not a substantial and compelling basis for departure. Rather, he argues that the district court erred by failing to identify the departure ground on the record. Gullickson contends that his sentence must, therefore, be vacated and the case remanded for the district court to impose a guidelines sentence.

It is true that a departure ground must be stated on the record by the district court at the time of sentencing. *See State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003) (holding that, "absent a statement of the reasons for the sentencing departure placed on the record

at the time of sentencing, no departure will be allowed"); *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985) ("If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed."). Gullickson argues that the district court did not identify the reason for departure when, after hearing arguments from counsel, the district court said:

> Mr. Gullickson, you're going to get out at some point, and the Court wishes you the best when you do, but the jury spoke, and it didn't take them long to figure out what they wanted to speak for as an answer, and they were convinced that this was a bad deal, and as such I'm going to sentence you.
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> . . . .
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> Like I said, you're going to get out, and I hope that you don't come right back in like what has happened this time. That's one of the more concerning facts for me, too, is the short window of time between being off of one case and right back in on another.
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> . . . .
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> The presumptive duration is 84 to 117 months. . . . The Court is going to depart in an upward departure, and the Court is going to impose 140 months of prison time . . . .

A review of the sentencing transcript as a whole demonstrates that the district court identified the aggravating factor on the record. Before the court pronounced sentence, the parties and the district court discussed the single aggravating factor at issue. The district court stated, "And with respect to the aggravating factor, the question that was given to the jury was, 'Does the defendant have a prior conviction for an offense in which the victim was injured,' and the jury answered 'Yes,' . . . . So we have that aggravating factor." The district court then referred to this jury determination when it explained at sentencing,

"[T]he jury spoke, and it didn't take them long to figure out what they wanted to speak for as an answer, and they were convinced that this was a bad deal." The district court also referenced the aggravating factor when it stated, "I hope that you don't come right back in like what has happened this time. That's one of the more concerning facts for me, too, is the short window of time between being off of one case and right back in on another." The district court explicitly stated that it was choosing to impose an upward departure. Taking the district court's comments together in the context of the sentencing hearing as a whole, we conclude that the district court stated its reason for departure on the record at the time of sentencing.

Gullickson cites a recent unpublished decision of this court in which the parties agreed about the presence of aggravating factors supporting a departure in a plea agreement but, at sentencing, the district court "did not provide any departure grounds" or "state that its sentence constituted a departure." *State v. Barnard*, No. A17-0116, 2017 WL 5559905, at *1 (Minn. App. Nov. 20, 2017), *review denied* (Minn. Jan. 24, 2018). This court reversed, stating, "Although we have no doubt that permissible departure grounds exist in this case, because the district court did not provide any departure grounds on the record at the time of sentencing, caselaw compels us to remand for imposition of the presumptive sentence." *Id.* at *3.

Barnard is distinguishable from the situation here. Although the district court's findings here were not extensive, the district court stated on the record that it was departing and did so after referencing the sole aggravating factor found by the jury.

Gullickson also cites another recent decision, *State v. Ivy*, in which we remanded for resentencing. 902 N.W.2d 652, 658 (Minn. App. 2017), *review denied* (Minn. Dec. 19, 2017). But, *Ivy*, too, is distinguishable. In *Ivy*, we concluded that "neither the sentencing transcript nor the warrant of commitment" reflected any sentencing departure and, "because the district court did not depart, it did not articulate reasons to support a departure." *Id.* at 667. *Ivy* does not compel the conclusion that the district court here failed to articulate its basis for departure.

Because the district court sufficiently stated its reason for departure on the record at sentencing, the district court did not abuse its discretion by imposing an upward durational departure.

III. The district court erred when it entered convictions on all four counts.

Gullickson finally argues that the district court erred by entering convictions on the second- and third-degree assault offenses because the offenses are lesser-included offenses of the first-degree assault, arising from the same act against the same victim. The state agrees and recommends that the case be remanded for the district court to vacate the convictions for counts I through III, leaving in place the guilty verdicts on those offenses.

A defendant may be convicted of either a crime charged, or an included offense, but not both. Minn. Stat. § 609.04 (2016). "If the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an 'included offense' under section 609.04." *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995) (quotations and citations omitted). Here, Gullickson was found guilty of first-, second- (two counts), and third-degree assault based on his assault of V.W. The

district court sentenced only on the first-degree count but entered convictions on all four. Because the second- and third-degree-assault crimes are lesser degrees of the same crime, conviction on those crimes is precluded by section 609.04. *See id.* (holding that second-degree assault is an included offense of first-degree assault). We remand with instructions to vacate the convictions on counts I, II, and III, while leaving intact the jury verdicts of guilt on those crimes. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (holding that "the proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time.").

In his pro se brief, Gullickson argues that the district court improperly entered multiple convictions for the same offense, which is true. But, citing Minn. Stat. § 611.02 (2016) (stating that when "there exists a reasonable doubt as to which of two or more degrees the defendant is guilty, the defendant shall be convicted only of the lowest"), he argues that he should have been convicted of the third-degree assault, not the first-degree assault, because the jury "must have had doubt" about which count he was guilty of.

The same argument was rejected by the supreme court in *Morrow v. State*, 886 N.W.2d 204 (Minn. 2016). In that case, the supreme court held that section 609.04 did not require the district court to convict the appellant of the lowest-degree offense charge; instead, the district court was only prevented from entering convictions on *both* first and second-degree murder. *Morrow*, 886 N.W.2d at 207-08. Moreover, the supreme court rejected the argument that section 611.02 changes the analysis, reasoning that the jury's

verdicts of guilty on both offenses "demonstrate beyond reasonable doubt that [the appellant] was guilty of both charges." *Id.* at 208 n.3. Likewise, here, there is nothing to suggest that there is reasonable doubt about which count the jury thought Gullickson guilty of, since the jury found him guilty of all four. Thus, under section 609.04 and consistent with section 611.02, the appropriate conviction in this case is for first-degree assault.

Affirmed in part, reversed in part, and remanded.