STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1922

State of Minnesota,
Respondent,

vs.

Robert Kerrell Levell Dawson,
Appellant.

Filed September 30, 2019
Affirmed
Kalitowski, Judge[*]

Stearns County District Court
File No. 73-CR-17-11151

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

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and Kalitowski, 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

KALITOWSKI, Judge

In this direct appeal from his convictions of firearm possession, burglary, and attempted first-degree murder, appellant Robert Kerrell Levell Dawson argues that (1) the district court erred in admitting evidence concerning an altercation between appellant and relatives of the shooting victim that occurred earlier on the day of the shooting; (2) the district court abused its discretion by permitting the state to impeach appellant with evidence of prior convictions; (3) his jury-trial waiver was invalid; and (4) the district court erred by sentencing appellant for both burglary and attempted first-degree felony murder. Appellant also raises an ineffective-assistance-of-counsel claim in his pro se brief. We affirm.

FACTS

Appellant was charged with six offenses in connection with the shooting of S.C. on the evening of November 25, 2017. Investigators located appellant in Chicago and extradited him to Minnesota to face charges. Appellant waived his right to a jury trial. At the bench trial, S.C. testified that he was sitting in the bedroom of his apartment when someone entered without knocking. S.C. heard the person say something to the effect of "you all go to the back and I'm gonna go in here." S.C. recognized the voice as that of appellant, whom S.C. knew as "Boo Man" and the boyfriend of S.C.'s niece, T.M. S.C. testified that appellant came into his bedroom, they looked each other in the face, and appellant shot S.C. one time. S.C. dove through his bedroom window onto the fire escape and ran down the stairs. He called 911 and did not see appellant again.

At trial, the district court heard testimony from V.C., L.G., and M.G. concerning an incident that occurred hours before the shooting. V.C. is S.C.'s brother. L.G. is S.C.'s brother-in-law (and T.M.'s step-father). M.G. is S.C.'s niece (and L.G.'s daughter). The three of them went to appellant's mother's house to pick up T.M. When they arrived, appellant was outside the house with T.M. arguing about a phone. M.G. testified that when they arrived at A.D.'s she saw appellant pushing T.M. and when she told T.M. to get in L.G.'s car, appellant said "she's not going nowhere." M.G. further testified that T.M. was ultimately picked up by someone else and that T.M. broke appellant's phone in the street as she left. Appellant then got into the car where L.G. was sitting and told L.G. that he needed to buy appellant a new phone. L.G. said he did not have anything to do with appellant and does not get into T.M.'s business. L.G. recalled appellant saying something about T.M. "messing with [appellant's] family." M.G. was certain that appellant told L.G. that "since [T.M.] f---ked up my family I'm going to f--k up hers." When L.G. and appellant got out of the car, appellant punched L.G. in the face, dropping L.G. to the ground. Officer Baumann testified that he viewed a Snapchat video of appellant showing his knuckles and referencing "blood from [T.M.'s] daddy." The video was made at around 4:00 p.m. on the day of the shooting.

The district court found appellant guilty of all counts and sentenced appellant to concurrent executed terms of 60 months for the felon-in-possession-of-a-firearm conviction, 108 months for the first-degree-burglary conviction, and 240 months for the attempted-first-degree-felony-murder conviction.

D E C I S I O N

I.

Prior to trial, and over appellant's objection, the district court granted the state's motion to admit evidence concerning the altercation that occurred with S.C.'s family members several hours before S.C. was shot. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant has the burden on appeal to establish "that the [district] court abused its discretion and that appellant was thereby prejudiced." *Id.*

Generally, "evidence showing that the accused has committed another crime unrelated to the crime for which he or she is on trial is inadmissible because it is not competent to prove one crime by proving another." *State v. Nunn*, 561 N.W.2d 902, 908 (Minn. 1997). Evidence of prior bad acts is inadmissible except where the evidence fits within a specific exception, such as immediate-episode evidence, which is a narrow exception to the general character-evidence rule. *State v. Riddley*, 776 N.W.2d 419, 424-25 (Minn. 2009). The general rule against admitting other-crime evidence does not preclude the state from proving all relevant facts and circumstances which tend to establish any of the elements of the offense for which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant also committed other crimes. *State v. Wofford*, 114 N.W.2d 267, 271 (Minn. 1962). In order for evidence to be properly admissible as immediate-episode evidence, the supreme court has "emphasize[d] the need for a close causal and temporal connection between the prior bad act and the

charged crime." *Riddley*, 776 N.W.2d at 426 (citing *State v. Fardan*, 773 N.W.2d 303, 306 (Minn. 2009)).

Appellant argues that the district court abused its discretion because evidence of the earlier assaults was not sufficiently related to the shooting, not relevant or material to the current allegation, and any probative value was far outweighed by the prejudice. Appellant also maintains that the earlier assaults occurred hours before the shooting, and admitting evidence of T.M. breaking appellant's phone would have been sufficient to support the state's theory. But the state's theory was not that appellant was simply upset about a phone—its theory was that appellant had threatened to go through T.M.'s family to get back at her.

Immediate-episode evidence "is admissible where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae." *Riddley*, 776 N.W.2d at 425 (quotation omitted). The two events bore such a connection here. As found at trial, appellant went into S.C.'s apartment, was inside for only ten seconds, shot S.C. at point-blank range, and ran out. Given S.C.'s limited familiarity with appellant, and no evidence of any contention between the two or other motivation, the shooting does not make sense without having an understanding of the incident occurring earlier in the day. And the district court's determination to admit evidence concerning the earlier assault and threats is consistent with authority addressing this issue. In *Nunn*, 561 N.W.2d at 908, the supreme court explained that the district court properly admitted evidence of threats that occurred several months prior to the alleged crime as immediate-

episode evidence because the evidence supported the prosecution's case on motive, which in turn went to the issues of intent and premeditation, which are elements of attempted first-degree murder. It also explained that the earlier threats and "kidnapping" were relevant "to show the lengths to which Nunn was willing to go to retrieve his money and marijuana and to punish the individuals he believed to be responsible for their disappearance." *Id.*; *State v. Leecy*, 294 N.W.2d 280, 282 (Minn. 1980) (concluding that the district court properly admitted testimony concerning a threat defendant made earlier in the evening in question).

Appellant asserts that even if the evidence of the earlier events was immediate-episode evidence, its probative value was outweighed by the highly prejudicial nature of the evidence. Appellant's argument, properly understood, is that the evidence is highly prejudicial because it is highly probative. But the standard under Minn. R. Evid. 404(b) is only concerned with *unfair* prejudice. *See State v. Schulz*, 691 N.W.2d 474, 478 ("Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage."). The overarching concern regarding evidence of prior bad acts is its potential use for an improper purpose, such as suggesting that the defendant has the propensity to commit a crime. *See State v. Washington*, 693 N.W.2d 195, 200-01 (Minn. 2005). Here, we see no reasonable likelihood that the fact-finder would be inclined to unfairly conclude that, based upon the earlier immediate-episode evidence, appellant had a propensity to commit the shooting. More logically, the fact-finder was going to either

accept or reject the state's theory that there was an earlier incident involving an assault and threats, culminating with appellant shooting S.C.

II.

Prior to trial, the state filed its notice of intent, pursuant to Minn. R. Evid. 609, to introduce seven prior felony convictions and three false-information-to-police-officer convictions to impeach appellant. The prior felony convictions included three predatory-offender registration violations, two domestic-abuse-no-contact order (DANCO) violations, and two aggravated-robbery convictions. Appellant objected, arguing that admitting ten convictions for impeachment purposes was excessive and overly prejudicial. The district court ruled that the state could introduce all of the convictions except for one DANCO violation because it arose from the same case as the other DANCO violation.

Appellate courts 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). As discussed, appellant has the burden on appeal to establish that the district court abused its discretion and that appellant was thereby prejudiced. *Amos*, 658 N.W.2d at 203.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime "(1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect; or (2) involved dishonesty or false statement, regardless of the punishment." Minn. R. Evid. 609(a). When applying Minn. R. Evid. 609, the district

court considers: (1) the impeachment value of the prior crime; (2) the dates of conviction and the defendant's subsequent history; (3) the similarity of the past crime with the crime charged; (4) the importance of the defendant's testimony; and (5) the centrality of credibility. *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). We address these factors in turn.

1. Impeachment value of prior convictions

Appellant argues that this factor weighs in his favor, but acknowledges precedent to the contrary. In *Hill*, the supreme court 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 at 652. *Any* felony conviction is probative of a witness's credibility and holds impeachment value. *Id.* Appellant disputes this interpretation. But the cases he relies on do not support his argument and were decided before *Hill*. Appellant's felony convictions hold significant impeachment value because they allow the fact-finder to make credibility determinations by seeing "the whole person to judge better the truth of his testimony." *Hill*, 801 N.W.2d at 651 (quotation omitted). This factor favors admissibility.

2. Dates of conviction and subsequent history

Minn. R. Evid. 609(b) provides that prior felony convictions more than ten years old are inadmissible for impeachment purposes. All of appellant's convictions were within ten years of the offense date. The oldest conviction was from 2009, or approximately eight years prior to the date of the charged offense. While eight years is close to the 10-year-limit, appellant's subsequent history supports admission. In *State v. Ihnot*, the supreme

court explained that while the prior conviction was fairly old (also eight years), Ihnot's subsequent convictions show "a pattern of lawlessness that indicates that the prior offense had not lost any relevance by the passage of time." 575 N.W.2d 581, 586 (Minn. 1998) (quotation omitted). This factor favors admission.

3. Similarity between the prior offense and the charged offense

The supreme court has recognized that the greater the similarity between the prior conviction and charged offense, the greater the reason for not permitting use of the prior conviction to impeach. *Jones*, 271 N.W.2d at 538. Here, the two aggravated-robbery convictions bear some similarity to the charged offense. But the district court explained that it would not consider the types of offenses in any way to determine whether appellant was guilty of the charged offense. *Hill* explained that if a district court finds that the prejudicial effect of disclosing the nature of a felony conviction outweighs its probative value, it may still allow a party to impeach a witness with an unspecified felony conviction if the use of the unspecified conviction satisfies the balancing test. 801 N.W.2d at 652-53. This factor also favors admission.

4. The importance of defendant's testimony

The district court explained that the importance of appellant's testimony obviously weighs against admission, but posited that it would be easier for the court to separate out the fact that appellant has prior convictions than it might be for a jury. Appellant argues that his testimony was critical because, without it, the defense version of events was never presented to the court. He argues that he could have explained why he went to Chicago, which the court found suggestive of guilt. But appellant made no offer of proof. If the

defendant does not make any offer of proof as to any additional testimony the defendant would have added if he had taken the stand, that is a factor that favors admissibility of prior-conviction-impeachment evidence. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993); *State v. Lloyd*, 345 N.W.2d 240, 246 (Minn. 1984). Where the defendant makes no offer of proof, the district court "is left to assume that the thrust of his testimony would have been to deny the allegations." *Ihnot*, 575 N.W.2d at 587. Therefore, even if the district court correctly weighed this factor in favor of appellant, it favors appellant only slightly.

5. The centrality of credibility

Without providing argument, appellant states that this factor might weigh in favor of admissibility. The district court found that this factor weighs in favor of admissibility and caselaw supports that determination. Where credibility would have been a main issue in the case had the defendant testified, there would have been a significant need for the admission of impeachment evidence. *Gassler*, 505 N.W.2d at 67; *see, e.g., State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (explaining that if credibility is a central issue, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions). This factor weights in favor of admission because appellant's credibility would have been a central issue had he testified.

Contrary to appellant's assertion, the fact that the district court allowed six felonies to be admitted was not excessive. *Cf. Hill*, 801 N.W.2d at 651 (noting that lack of trustworthiness may be evinced by the defendant's repeated contempt for laws). The district court did not clearly abuse its discretion by admitting the prior-conviction evidence.

See Lloyd, 345 N.W.2d at 246 ("We must uphold the [district] court's ruling unless a clear abuse of discretion is shown." (quotation omitted)); *see also Gassler*, 505 N.W.2d at 67 ("The [district] court is vested with great discretion in this area.").

III.

A criminal defendant has the constitutional right to a jury trial when charged with an offense punishable by incarceration. *State v. Kuhlmann*, 806 N.W.2d 844, 848 (Minn. 2011). A defendant may waive the right to a jury trial so long as the waiver is voluntary, knowing, and intelligent. *Id.* "A waiver made in compliance with [Minn. R. Crim. P.] 26.01, subdivision 1(2)(a), meets the knowing, voluntary, and intelligent requirement." *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006). With the approval of the court, a defendant may waive a jury trial on the issue of guilt provided that the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel. Minn. R. Crim. P. 26.01, subd. 1(2)(a).

Appellant argues that his jury-trial waiver was invalid. Appellant does not contest that his waiver was done personally and on the record. Nor does appellant argue that the district court failed to advise him of his right to trial by jury. Importantly, appellant does not argue that he did not have an opportunity to consult with counsel. Rather, appellant argues that the district court frustrated his jury-trial rights because the district court failed to *ask* whether he had an opportunity to consult with counsel. We reject this argument.

The record demonstrates that appellant's counsel was present at the omnibus hearing, represented appellant's interests, and appellant had an opportunity to consult with

his counsel. Defense counsel stated that "we've had several conversations with [appellant] and my last one was this morning with him, and he indicated to me that he had made a decision to waive his jury trial, and ask that his case be heard in front of you sitting alone." The district court then said that it was going to have appellant sworn in and "ask you a couple of questions to make sure that this is what you want to do, okay?" Appellant said, "Yes, ma'am" and the following colloquy occurred:

> Q. All right, and Mr. Dawson, obviously, you're familiar with the counts, the five counts [sic] that are in the complaint, correct?
> A. Yes, ma'am.
> Q. All right, you understand that you have a right to have the State prove beyond a reasonable doubt to members of a jury if you choose, to all of them, that you committed the crimes to which you are charged, you aware of that?
> A. Yes, Your Honor.
> Q. And if you did choose a jury trial it would be twelve members of the community that would be making that decision, and they would have to agree unanimously that the State had proven beyond a reasonable doubt, one, and then and up to all of those crimes, you know crime by crime, it would have to be proven beyond a reasonable doubt in order for you to be found guilty of each of those crimes, you understand that?
> A. Yes, Your Honor.
> Q. Are you wanting to give up your right to a jury and to the unanimous verdict by a jury, and instead have those cases, in each of those crimes come before me?
> A. Yes, Your Honor.

Appellant is on record waiving his right to a jury trial after being advised of that right. The fact that appellant did not expressly state on the record that he consulted with counsel does not render the waiver invalid. *See State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979) (explaining that the district court should have questioned the defendant more thoroughly to determine whether he had conferred with his attorney about the

consequences of a waiver, but the failure to do so did not require reversal). Appellant's jury-trial waiver was knowing, voluntary, and intelligent. It was therefore valid.

IV.

Appellant was charged with first-degree burglary under both subdivision 1(b) and 1(c), but convicted of first-degree burglary only under Minn. Stat. § 609.582, subd. 1(b). Appellant was also convicted of attempted first-degree felony murder under Minn. Stat. § 609.185(a)(3) (2016), an offense that occurred during the burglary. The issue is whether appellant may be separately convicted of and sentenced for first-degree burglary while possessing a dangerous weapon and attempted first-degree felony murder. Whether a sentence conforms to the requirements of a statute is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

Minnesota law generally prohibits a person from being punished twice for conduct that is part of the same behavioral incident. "Except as provided in . . . [section] 609.585 . . . if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2016). Minn. Stat. § 609.585 (2016), in turn, provides that: "Notwithstanding section 609.04, a prosecution for or conviction of the crime of burglary is not a bar to conviction of or punishment for *any other crime* committed on entering or while in the building entered." (emphasis added). The issue here then, is whether the nonburglary offense is "any other crime." *State v. Holmes*, 778 N.W.2d 336, 340 (Minn. 2010). If attempted first-degree felony murder is "any other crime," appellant may be convicted and sentenced for both first-degree burglary with a dangerous weapon and attempted first-degree felony

murder. *Id.* If attempted first-degree felony murder is not "any other crime," Minn. Stat. § 609.585 may not be used to allow multiple convictions and sentences based on the same conduct. *Id.* The Minnesota Supreme Court has explained that, in the context of section 609.585, the phrase "any other crime" means "a crime that requires proof of different statutory elements than the crime of burglary." *Id.* at 341.

First-degree burglary with a dangerous weapon prohibits a person from (1) entering a building without consent and with the intent to commit a crime, or entering a building without consent and committing a crime while in the building; and (2) possessing when entering, or at any time while in the building, a dangerous weapon, any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or an explosive. Minn. Stat. § 609.582, subd. 1(b).

A defendant is guilty of first-degree felony murder if the defendant:

> causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit burglary, aggravated robbery, kidnapping, arson in the first or second degree, a drive-by shooting, tampering with a witness in the first degree, escape from custody, or any felony violation of chapter 152 involving the unlawful sale of a controlled substance.

Minn. Stat. § 609.185, subd. (a)(3). "Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime . . . ." Minn. Stat. § 609.17, subd. 1 (2016). Therefore, a defendant is guilty of attempted first-degree felony murder if the defendant attempts to effect the death of a human being, provided that the attempt is done while committing, or attempting to commit, one of the enumerated crimes.

Attempted first-degree felony murder requires that the defendant attempt to cause the death of another person. First-degree burglary does not. Because attempted first-degree felony murder requires proof of different statutory elements than first-degree burglary with a dangerous weapon, it falls within the meaning of "any other crime" under Minn. Stat. § 609.585. *Cf. Holmes*, 778 N.W.2d at 341. Accordingly, a conviction and sentence for first-degree burglary with a dangerous weapon is not a bar to a conviction and sentence for attempted first-degree felony murder committed during the course of the burglary.

V.

Appellant also filed a pro se supplemental brief in which he claims that his trial counsel was ineffective. "To prevail on an ineffective-assistance-of-counsel claim, [appellant] must prove that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's errors, the outcome would have been different." *Staunton v. State*, 784 N.W.2d 289, 300 (Minn. 2010); *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Because both prongs of the *Strickland* test are required, we need not analyze both prongs if one is determinative. *Staunton*, 784 N.W.2d at 300. "When a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal or it is *Knaffla*-barred." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). But when the claim requires examination of evidence outside of the trial record or additional fact-finding, the claim is better brought in a postconviction proceeding and is not *Knaffla* barred. *Id.*

Appellant argues that his trial counsel's representation was ineffective because counsel failed to interview witnesses and to visit the crime scene. Appellate courts generally do not review attacks on counsel's trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Decisions regarding what witnesses to call and what information to present to the jury are generally questions that lie within the discretion of trial counsel. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). But the supreme court has considered whether trial counsel's lack of investigation, including failure to thoroughly investigate the crime scene and review photographic and video evidence of the crime scene taken by police, affected the outcome of the case. *Staunton*, 784 N.W.2d at 300 n.9 (observing that trial counsel's lack of investigation was "disturbing," but declining to address deficiency prong in light of absence of prejudice). On this record we cannot ascertain whether appellant has demonstrated that trial counsel's purported failure to investigate fell below an objective standard of reasonableness, or that the lack of investigation affected the outcome of the case. Because the record is insufficient, we decline to consider this issue. *See State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (preserving appellant's right to pursue ineffective-assistance-of-counsel claim in postconviction proceedings where record was insufficient).

Appellant also raises an ineffective-assistance-of-appellate counsel claim premised on his appellate counsel's refusal to stay the appeal to pursue postconviction relief on his ineffective-assistance-of-trial-counsel claim. *See* Minn. R. Crim. P. 28.02, subd. 4(4) (providing that defendant may file motion to stay appeal for postconviction proceedings). Appellate counsel does not have an obligation to raise all possible claims on direct appeal,

and is "permitted to argue only the most meritorious claims." *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007). Claims that appellate counsel was ineffective may be raised in postconviction proceedings because defects in appellate counsel's representation are not known at the time of the direct appeal. *Id.* at 521. Moreover, an ineffective-assistance-of-appellate-counsel claim premised on counsel's failure to raise a claim that trial was counsel was ineffective requires appellant to establish that his trial counsel's representation was ineffective. *Id*. Because appellant's ineffective-assistance-of-appellate-counsel claim depends on the determination that his trial counsel was ineffective, we decline to consider the ineffective-assistance-of-appellate-counsel claim.

Affirmed.