STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1801

State of Minnesota,
Respondent,

vs.

Seth Mars Reimer,
Appellant.

Filed November 30, 2020
Affirmed
Schellhas, Judge[*]

St. Louis County District Court
File No. 69HI-CR-18-622

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Schellhas, 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

SCHELLHAS, Judge

Appellant challenges his convictions of first-degree criminal sexual conduct and second-degree criminal sexual conduct, arguing that the district court erred by allowing the state to impeach appellant with his prior convictions, by allowing the prosecutor to ask appellant "were they lying" questions on cross-examination, and by committing a reversible *Blakely* violation in sentencing him. We affirm.

FACTS

In 2006, appellant Seth Mars Reimer began a ten-year relationship with L.M., who had three minor daughters, M.M., E.R., and D.R. About a year after the start of their relationship, Reimer moved into L.M.'s residence with her daughters on Second Avenue West in Hibbing. Reimer, L.M., and L.M.'s three daughters moved a number of times in Hibbing. From the Second Avenue West residence, they moved to a new residence (Graysherwood). In 2009, or possibly later, they moved to a different residence (Brooklyn) for four to five years. They then moved to a different residence (Belmont) for a few months. In 2015, they moved to a residence on Second Avenue East. During the ten years of Reimer and L.M.'s relationship, L.M. struggled with chemical dependency and Reimer became a father figure to her daughters. In 2016, Reimer and L.M.'s relationship ended and Reimer moved out of the Second Avenue East residence.

In 2018, social-service authorities removed L.M.'s daughters from her care due to L.M.'s drug abuse and child neglect. The children were placed in foster care with L.M.'s sister, S.R. Once in S.R.'s care, M.M., E.R., and D.R. told S.R. that Reimer had sexually

abused them. S.R. reported the abuse to St. Louis County Public Health and Human Services. In 2018, respondent State of Minnesota charged Reimer with three counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2006). Before trial, the state amended its complaint twice to reflect a total of five counts of first-degree criminal sexual conduct.

At trial, M.M., who was then 16 years old, testified that Reimer began sexually abusing her when she was in fourth or fifth grade at the Brooklyn residence. M.M. also testified that Reimer stuck his fingers "in her butt" at the Second Avenue East residence when she was 14 years old. E.R. was 14 at the time of trial and testified that Reimer touched himself while she was sitting on his lap at the Brooklyn residence. She also testified that, on a separate occasion when she was six years old, Reimer put his penis in her hand at the Brooklyn residence. E.R. testified that, on a separate occasion, Reimer placed his penis on her side. She further testified that Reimer did the same thing at the Belmont residence and also grabbed her hand and rubbed it down his penis. D.R. was 12 years old at the time of trial. D.R. testified that Reimer placed her hand on his penis while they were lying down in the Second Avenue East residence. D.R. also testified that Reimer stuck his finger "in her butt" when she was nine or ten at the Second Avenue East residence.

M.M, E.R., and D.R. confided in each other about the abuse, disclosed it to two friends, and eventually told L.M. about the sexual abuse. L.M. testified that she feared "losing her daughters" if she reported the abuse, and that her chemical dependency contributed to that fear.

At the end of the state's case in chief, the state again amended its complaint, charging Reimer with first-degree criminal sexual conduct as to M.M. (count one), second-degree criminal sexual conduct as to E.R (count two), and first-degree criminal sexual conduct as to D.R. (count three). The state dismissed counts four and five. Reimer testified on his own behalf.

Without making findings about the dates of Reimer's acts of sexual abuse, the jury found Reimer guilty of counts one and two and not guilty of count three. Based on the sentencing guidelines in effect after August 1, 2006, the district court imposed a 360-month sentence on count one, and a concurrent 140-month sentence on count two.

D E C I S I O N

Impeachment by prior convictions

Before trial, the state sought the district court's permission to impeach Reimer with seven prior felony convictions should he choose to testify. Five of the convictions arose out of a 2013 burglary spree that Reimer committed in one day. Reimer argued that the cumulative effect of the burglary convictions was overly prejudicial and objected to their admission. If the court allowed their admission, Reimer asked that they be admitted only as unspecified felonies. The court ruled that the state could impeach Reimer with all five burglary convictions and denied Reimer's request that the convictions be admitted as unspecified convictions.

An appellate court does not reverse "a district court's ruling on the impeachment of a defendant with his prior conviction absent an abuse of discretion." *See State v. Zornes*, 831 N.W.2d 609, 626 (Minn. 2013) (noting that the supreme court has held that it will not

reverse a district court's ruling on the impeachment of a defendant with his prior conviction absent an abuse of discretion). Reimer argues that the district court abused its discretion and committed reversible error by permitting the state to impeach him with seven prior convictions, including all five burglary convictions, and by denying his request that the convictions be admitted as unspecified felonies. He argues that the probative value of his prior felonies was outweighed by their prejudicial effect.

Under the Minnesota Rules of Evidence, subject to restrictions not at issue in this case, a witness's prior conviction may be admitted as impeachment evidence "only if . . . the court determines that the probative value of admitting [the] evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a). Five factors (known as *Jones* factors) are "relevant to determining if a prior conviction is more probative than prejudicial." *Zornes*, 831 N.W.2d at 627 (citing *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978)). The five *Jones* factors are: "(1) the impeachment value of the prior crime; (2) the date of 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." *Id.*

Reimer argues that the cumulative effect of the five burglary convictions was more prejudicial than probative for two reasons: (1) regarding the second *Jones* factor, he had no opportunity to change his behavior during his spree of burglary crimes, and (2) allowing admission of the repetitive burglary crimes impermissibly implicated his character under Minnesota Rules Evidence 404(b). We disagree.

"Impeachment through prior convictions allows the fact-finder to make credibility determinations by seeing the whole person to judge better the truth of his testimony." *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011) (quotation omitted) (prior felony convictions allow the jury to see the "whole person"). To properly exercise its discretion in determining whether to admit a witness's prior convictions as impeachment evidence, a district court must consider whether the probative value of each prior conviction outweighs its prejudicial effect. *See* Minn. R. Evid. 609(a); *Zornes*, 831 N.W.2d at 627; *State v. Swinger*, 800 N.W.2d 833, 838 (Minn. App. 2011) (concluding that the district court improperly admitted evidence of multiple prior convictions because it did not consider the probative value of each conviction individually), *review denied* (Minn. Sept. 23, 2011). Here, the district court found that each of the seven felonies allowed the jury to see Reimer's whole person because the nature of a burglary "spree" is different from a single burglary.

Reimer cites cases under rule 404(b) for the proposition that district courts must consider the cumulative prejudicial effect of multiple convictions. *See State v. Ture,* 681 N.W.2d 9, 16 (Minn. 2004) (stating that "courts should not allow the state, when presenting *Spreigl* evidence, to present evidence that is unduly cumulative with the potential to fixate the jury on the defendant's guilt of the other crime")[1]; *see also State v. Titworth*, 255 N.W.2d 241, 246 (Minn. 1977) (affirming admission of four robberies where cumulative prejudicial effect of each incident was outweighed by probative value of evidence, namely opportunity, identity, intent, and common scheme of robberies). But these cases involved

[1] Evidence of other crimes or acts is commonly referred to as "*Spreigl* evidence" after our supreme court's decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

Spreigl evidence, not impeachment evidence under rule 609, and therefore have only limited applicability in this case. Moreover, appellate courts have affirmed the admission of multiple prior convictions for impeachment purposes without discussing rule 404(b) caselaw. *See State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006) (affirming admission of five prior felony convictions for impeachment purposes); *State v. Mitchell*, 687 N.W.2d 393, 398 (Minn. App. 2004) (affirming admission of three burglary convictions for impeachment purposes), *review denied* (Minn. Dec. 13, 2005).

Reimer also argues that the district court clearly abused its discretion by denying his request that his convictions be admitted only as unspecified felony convictions without introduction of evidence about the nature of the offenses. In *Hill*, the supreme court said:

> [W]e adopt the majority rule that Rule 609(a) permits a party to impeach a witness with unspecified felony convictions. We do not suggest, however, 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. To exercise that discretion properly, a district court must weigh the probative value of admitting the evidence against its prejudicial effect.

801 N.W.2d at 652 (emphasis added) (citation omitted). We reject Reimer's argument. The record reflects that the district court properly exercised its discretion in deciding what details about Reimer's prior convictions could be admitted by weighing the probative value of admitting the evidence against its prejudicial effect.

Allowance of "were they lying" questions

On direct examination, Reimer denied that he committed any of the acts alleged by M.M., E.R., and D.R. Defense counsel asked Reimer about "the [allegation] regarding [M.M.] when she was 14, that she said she was on the bottom bunk and you had stuck your finger in her butt. Do you understand that? You heard it, right?" After Reimer responded affirmatively, defense counsel asked, "[D]id you ever do that to her," and Reimer replied, "No, absolutely not." To defense counsel's additional question about whether Reimer went into M.M.'s room when he visited, Reimer responded, "No, absolutely not. I would not go into that room." When asked if he penetrated D.R., Reimer said "No." When asked if he recalled "playing with himself or something like that" when D.R. was present, Reimer said, "No. That never happened." When asked whether any of "the rest of the allegations" that were "sort of spread out over times and places" were "true," Reimer said, "No, none of them are true."

During cross-examination, the prosecutor asked Reimer, "You would have to speculate to understand why . . . [M.M. and D.R.] would make up these allegations to you because you don't understand why they would, is that correct?" And the prosecutor asked, "Because as far as you know, they loved you? They didn't have any reason to . . . make up these allegations?" Although Reimer did not object to the prosecutor's questions, he argues on appeal that the questions constituted prejudicial prosecutorial misconduct because they constituted "were they lying" questions.

An appellate court reviews a claim of unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The

defendant bears the burden of establishing error that is plain, but upon doing so, the burden shifts to the state to prove that no reasonable likelihood exists that the absence of the misconduct would have had a significant effect on the jury's verdict. *Id*. If the state fails to meet its burden, an appellate court assesses whether it should address the error in fairness and for the integrity of the judicial proceedings. *Id*.

The Minnesota Supreme Court has stated that "[a]s a general rule, 'were they lying' questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). But "an exception exists when a criminal defendant makes the issue of witness credibility a central focus of his case." *State v. Jones*, 755 N.W.2d 341, 353 (Minn. App. 2008), *aff'd*, 772 N.W.2d 496 (Minn. 2009); *see also State v. Morton*, 701 N.W.2d 225, 233-34 (Minn. 2005) (stating that in some cases, the state may question a witness about whether evidence is wrong); *State v. Leutschaft*, 759 N.W.2d 414, 423 (Minn. App. 2009) (stating that district courts "should allow 'were they lying' questions only when the defense expressly or by unmistakable insinuation accuses a witness of a falsehood"), *review denied* (Minn. Mar. 17, 2009). In *Morton*, the supreme court clarified that simply asking a witness if the information is "wrong" does not comment on whether the source of information "*intended* to perpetuate a falsehood." 701 N.W.2d at 234. In *Leutschaft*, the prosecutor expressly asked, "Or was she lying about that?" 759 N.W.2d at 420.

Here, the prosecutor expressly asked Reimer if the victims would have a motive to lie, asking him to speculate about the motive. The prosecutor did not limit his line of

questioning to whether the evidence was wrong. We agree that the prosecutor's questions constituted "were they lying" questions. The issue that we must address is whether the questions were permissible or impermissible.

Reimer argues that he did not make the victim's credibility a central focus of his case, either expressly or by insinuation, and that as a result the questions were impermissible as an exception to the general prohibition against "were they lying" questions. The central-focus-on-credibility exception applies when the defense expressly or by implication accuses the other witness of falsehoods or fabrications. *Leutschaft*, 759 N.W.2d at 422-23. In *Pilot*, the supreme court concluded that the defendant's theory was that the state's witnesses were lying, thereby placing the truthfulness of their testimonies in central focus. 595 N.W.2d at 518. Similarly, here, Reimer's defense rested solely on the untruthfulness of the victims—the only other witnesses to the events in question. We conclude that the credibility of M.M., E.R., and D.R. was the central focus of Reimer's defense. The prosecutor's "were they lying" questions therefore were permissible. Because the questions were permissible, the district court did not commit error by allowing them. Because Reimer has not shown error, we need not address the remaining prongs of the plain-error analysis. *See Pilot*, 595 N.W.2d at 518 (stating that failure to meet first prong obviates need to address other factors).

Sentencing

The presentence investigation report (PSI) recommended 161 months on count one, and 57 months on count two, based on the Sentencing Guidelines effective before August 1, 2006. The state objected to the PSI recommendation—the state's Sentencing

Memorandum requested the district court impose the presumptive sentences of 360 months on count one, and 140 months on count two because the first acts occurred after August 1, 2006.

The district court sentenced Reimer after finding that Reimer committed the offenses after August 1, 2006. The court therefore applied the Minnesota Sentencing Guidelines in effect after August 1, 2006, which resulted in increased presumptive sentences for each of the counts of which the jury found Reimer guilty. Reimer argues that the court committed reversible error under *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004), by engaging in impermissible fact-finding that increased his sentences.

Whether a defendant's sentence was based on facts not found by the jury is a question of law that an appellate court reviews de novo. *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006). If the sentence was based on impermissible fact-finding, an appellate court reviews the violation under a harmless-error standard. *Id*. at 904. An error is not harmless if any reasonable doubt exists about whether the result would have been different had the error not occurred. *Id*.

Under the Sixth Amendment, a defendant is entitled to a sentence that is based solely on jury findings, without any additional findings. *Blakely*, 542 U.S. at 303-04, 124 S. Ct. at 2537. In *DeRosier*, the supreme court concluded that a jury must make relevant factual findings about offense dates, if the dates can increase the maximum sentence. 719 N.W.2d at 903.

Reimer argues, and respondent concedes, that the district court's finding that the offenses occurred after August 1, 2006 ran afoul of *Blakely* and *DeRosier*. We agree. *DeRosier* controls because the factual finding that the offenses occurred after August 1, 2006, increased Reimer's presumptive and maximum sentences. 719 N.W.2d at 903. Reimer was entitled to be sentenced based on the jury's factual findings of the offense dates without any additional findings by the district court. We therefore must decide whether the court's error was harmless or whether it requires reversal.

Reimer argues that the district court's error was not harmless because his presumptive sentence would have been 199 months shorter for count one and 83 months shorter for count two, based on the sentencing guidelines in effect prior to August 1, 2006. He relies on *DeRosier* to support his request for reversal of his sentences, but the facts in this case differ markedly from those in *DeRosier*. In that case, the alleged criminal-sexual-conduct offenses occurred from June to August 2000, and the sentencing guidelines changed in August 2000. 719 N.W.2d at 901. In this case, M.M.'s testimony reflects that the oldest offense occurred at the Brooklyn residence, and the evidence is undisputed that Reimer, L.M., and L.M.'s children did not move into the Brooklyn residence until after 2006. The record simply contains no evidence to support a jury finding that any of the offenses occurred before August 1, 2006, and Reimer makes no claim to the contrary. Under the unique circumstances in this case, we conclude that the district court's error in not asking the jury to make findings about the offense dates was harmless. *See State v. Essex*, 838 N.W.2d 805, 813 (Minn. App. 2013) (concluding that a *Blakely* violation was harmless when the trial testimony, including the defendant's testimony, left no room for

the jury to find otherwise), *review denied* (Minn. Jan. 21, 2014). We nevertheless emphasize that, absent unique facts like those in this case, district courts must require juries to make all factual findings that may increase a defendant's presumptive or maximum sentence.

Affirmed.