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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0831**

State of Minnesota,
Respondent,

vs.

Xavier Marshawn Foster,
Appellant.

**Filed June 26, 2023
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-20-10948

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Smith, Tracy M., Judge; and Hooten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this appeal from final judgments of conviction for four counts of unlawful possession of a firearm or ammunition, appellant Xavier Marshawn Foster argues that he is entitled to a new trial because the district court abused its discretion by refusing to allow him to impeach a prosecution witness with prior convictions. In the alternative, Foster argues that the district court erred by imposing sentences for both possession of a firearm and possession of ammunition because the offenses occurred as part of a single behavioral incident. In an uncounseled supplemental brief, Foster also argues for a new trial based on ineffective assistance of counsel. We affirm.

FACTS

On May 3, 2020, police officers arrived at an apartment building in response to a 911 call reporting that a man had fired a gun. Officers spoke to T.H.—a resident of the apartment building—who identified Foster as the person who shot the gun. Foster also lived in the building.

Officers located Foster and took him into custody. Officers also obtained a search warrant and searched Foster's apartment. They found a 9mm Luger bullet in a bowl in the kitchen table and a box of 9mm Luger ammunition in a drawer under the oven. An officer also found a 9mm Luger cartridge casing outside of the apartment building. No gun was recovered.

Respondent State of Minnesota charged Foster with four counts of being a prohibited person in possession of a firearm or ammunition pursuant to Minnesota Statutes

section 624.713, subdivision 1(2) (2018). A jury trial was held from February 23 to March 2, 2022. At the trial, Foster stipulated that he was ineligible to possess a firearm and ammunition on the date in question. The state presented testimony from T.H. and D.M.—another eyewitness—that, during a dispute between them and Foster outside the apartment building, Foster went inside the building, returned outside with a gun, and fired it into the air.

The jury found Foster guilty of all counts. The district court convicted Foster of all four counts and sentenced Foster to concurrent 60-month prison terms on two of the counts.

Foster appeals.

DECISION

Foster argues that that the district court (1) abused its discretion by refusing to allow him to impeach T.H., who testified for the state, with two prior convictions and (2) erred by imposing multiple sentences because the offenses arose out of the same behavioral incident. In an uncounseled supplemental brief, Foster also contends that he was denied effective assistance of counsel.¹ We address each argument in turn.

I. The district court did not abuse its discretion by refusing to allow Foster to impeach T.H. with prior convictions.

Foster argues that the district court abused its discretion by precluding the defense from impeaching T.H. with two prior convictions involving false statements.

¹ Foster also asserts in his supplemental brief that the district court abused its discretion by preventing him from impeaching T.H. with prior convictions. Because that argument is the same as the first issue in the principal brief, we address the arguments together.

Under Minnesota Rule of Evidence 609, prior convictions may be admitted to impeach the credibility of a witness if (1) the crime was punishable as a felony and the district court determines that the probative value of admitting the evidence outweighs its prejudicial effect or (2) the crime involved dishonesty or a false statement, regardless of punishment. Minn. R. Evid. 609(a). Convictions that are stale, though, are generally inadmissible but may be admitted if the district court “determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” Minn. R. Evid. 609(b). A conviction is stale under the rule “if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.” *Id.* Appellate courts will not reverse a district court’s ruling under rule 609 absent a clear abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Foster moved to impeach T.H. with a September 25, 2009 misdemeanor conviction for falsely reporting a crime and an April 4, 2011 gross-misdemeanor conviction for aiding and abetting insurance fraud. The district court denied the motion. It concluded that, because both convictions took place more than ten years before T.H.’s testimony on February 24, 2022, both convictions were stale. It further decided not to apply the exception for admission of stale convictions because no unusual need existed to warrant their admission. Foster argues that both determinations constituted an abuse of discretion.

A. The district court did not abuse its discretion by determining that both of T.H.’s convictions were stale.

Foster argues that the district court abused its discretion by determining that both of T.H.’s convictions were more than ten years old and thus presumptively inadmissible under rule 609(b). He contends that the district court erred by measuring the ten-year period with an endpoint of the date of T.H.’s testimony (February 24, 2022) rather than the date of Foster’s offense (May 3, 2020). If the endpoint were the date of Foster’s offense, T.H.’s 2011 conviction for aiding and abetting insurance fraud would not have been stale and would have been admissible under rule 609(a)(2).

Caselaw identifies two endpoints for measuring the ten-year time period under rule 609(b)—one for defendants when they testify as witnesses and one for nondefendant witnesses. In *Ihnot*, the supreme court held that the date of the defendant’s charged offense is the appropriate endpoint to determine whether a prior conviction is stale. 575 N.W.2d at 585. In *State v. Munger*, this court declined to extend the rule in *Ihnot* to nondefendant witnesses; instead, we held that the date of the nondefendant witness’s testimony or of the trial is the appropriate endpoint. 597 N.W.2d 570, 572 (Minn. App. 1999), *rev. denied* (Minn. Aug. 25, 1999). Foster argues that *Munger* is inconsistent with *Ihnot* and that we should overrule *Munger* and apply the rule from *Ihnot* to a nondefendant witness. We reject the argument.

First, *Munger* is a precedential opinion and we are bound by our precedential opinions. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *rev. denied* (Minn.

Sept. 21, 2010) (explaining that this court is bound by the precedent established in the supreme court's opinions and its own precedential opinions).

Second, we have no reason to overrule our decision in *Munger*. See *State ex rel. Pollard v. Roy*, 878 N.W.2d 341, 348 (Minn. App. 2016), *rev. denied* (Minn. Dec. 27, 2016) (stating that we may “overrule our own precedent if provided with a compelling reason to do so”). Contrary to Foster’s argument, *Munger* is not inconsistent with *Ihnot*. In *Ihnot*, the supreme court explained that, “if prior convictions lose their probative value for impeachment purposes because of ten years of ‘good behavior,’ that is the period [the court] should measure—the period of unquestioned good behavior.” 575 N.W.2d at 585. The supreme court concluded that a defendant’s period of unquestioned good behavior ends on the date of the defendant’s alleged offense. *Id.* In *Munger*, we discussed *Ihnot*’s reasoning and observed that a nondefendant witness’s period of unquestioned good behavior has no connection to the defendant’s conduct. *Munger*, 597 N.W.2d at 572-73. We therefore concluded that the endpoint of the ten-year period for a nondefendant witness should not be the date of the defendant’s alleged offense but rather should be the date of the nondefendant witness’s testimony or of the trial. *Id.*

Moreover, Foster’s asserted fairness reason for overruling *Munger* is unpersuasive. He contends that *Munger* creates an asymmetrical rule that works to the government’s advantage and the defendant’s disadvantage because it allows the government to impeach a testifying defendant with older crimes than those permitted to be used by the defense to impeach the state’s witnesses. But it is the status of the witness—as either the defendant or not the defendant—that dictates which endpoint applies, not the identity of the party calling

the witness. The rule in *Munger* applies to all nondefendant witnesses, whether they are testifying for the prosecution or the defense.²

Foster has not provided a “compelling reason” to overrule our precedent, and the district court properly concluded that both convictions were stale and presumptively inadmissible.

B. The district court did not abuse its discretion by excluding the stale convictions.

In the alternative, Foster argues that the district court abused its discretion by not applying the exception to the ten-year time limit to allow him to impeach T.H. with the stale convictions.

Stale convictions may be admitted to impeach a witness’s testimony if the district court determines, “in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” Minn. R. Evid. 609(b). Though the parties do not entirely agree on how to apply this rule to the convictions in this case, both agree that the exception for stale convictions

² Foster also asserts that *Munger* unconstitutionally prevented him from presenting a complete defense because the admissibility of T.H.’s prior conviction depended on which party offered the evidence. As Foster acknowledges, he did not assert a constitutional argument in the district court, and this court generally does not entertain new arguments on appeal. *See Steward v. State*, 950 N.W.2d 750, 756 (Minn. 2020). In any event, the argument lacks merit. As discussed above, it was the status of the testifying witness as a defendant or nondefendant that determined the end point of the ten-year period, not which party offered the evidence. And, contrary to Foster’s assertion, it is not arbitrary to measure the period of good behavior differently for defendants and nondefendants.

demands a showing of “unusual need.”³ *See Jones*, 271 N.W.2d at 537 (explaining that admitting stale convictions under rule 609(b) demands a “specific showing of unusual need”).

The district court determined that an unusual need for the prior convictions did not exist. It stated that there was nothing in the case suggesting the passage of time had not diminished the impeachment value of T.H.’s convictions. It also stated that T.H. had “no pattern of lawlessness” and that the impeachment evidence was not especially necessary to judge witness credibility because T.H. was not the sole eyewitness to testify about Foster’s firearm possession. The district court therefore refused to admit the stale convictions.

Foster argues that the district court abused its discretion because T.H.’s credibility was a central issue in the case and because impeachment of T.H. would also have undermined the credibility of D.M.—the other eyewitness to Foster shooting the gun—because T.H. and D.M. were close friends. We are not persuaded. The district court

³ Foster uses a two-step approach in analyzing the issue: first, he applies the five factors commonly called the *Jones* factors that are used for evaluating the admissibility of felony convictions under rule 609(a)(1), *see State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006) (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)), and then he evaluates “unusual need” under rule 609(b). The state suggests that it is not necessary to apply the *Jones* factors when the convictions are stale and that the analysis is limited to whether unusual need is shown under rule 609(b). We note that, even if T.H.’s convictions were not stale, application of the *Jones* factors would be misplaced since the convictions were nonfelony convictions involving dishonesty or false statement, *see* Minn. R. Evid. 609(a)(2), and they were offered to impeach a prosecution witness, not a testifying defendant, *see State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995) (evaluating the admissibility of prior felony convictions to impeach a prosecution witness by considering concerns such as protecting witnesses from harassment, not confusing the jury, and not unreasonably prolonging trials). Because Foster and the state agree that he must establish unusual need to admit a stale conviction here, and we agree with the district court that Foster failed to establish unusual need, we do not reach the parties’ dispute about *Jones*.

reasonably concluded that T.H.'s credibility was not especially important. D.M. testified that Foster fired a gun, and the ammunition found in Foster's apartment matched the casing found outside. Furthermore, no witnesses contradicted T.H.'s story and thus the jury was not required to determine whether to believe T.H. or another witness. In addition, the assertion that an unusual need existed because T.H.'s stale convictions would also undermine T.H.'s friend's credibility is unconvincing.

Foster also argues that the probative value of T.H.'s stale convictions substantially outweighs their prejudicial effect because he had no option to "blunt the impact of [T.H.'s] testimony." But Foster had the opportunity to blunt the impact of T.H.'s testimony by testifying himself, and he chose not to do so. Even if Foster did not testify because he feared the impact of the possible admission of his own prior convictions under rule 609, it does not mean that he lacked the opportunity to testify. *See State v. Gassler*, 505 N.W.2d 62, 67-68 (Minn. 1993). In addition, Foster had the opportunity to cross-examine each witness.

In sum, we discern no abuse of discretion in the district court's determination that there was no specific showing of unusual need justifying admission of T.H.'s stale convictions under rule 609(b).

II. The district court did not err when sentencing Foster.

Foster also challenges his sentences, arguing that the district court erred by imposing more than one sentence for two of the counts of which he was convicted because the offenses arose out of the same behavioral incident.⁴

The district court imposed sentences for count I, unlawful possession of firearm, which was based on the gun that was discharged, and count IV, unlawful possession of ammunition, which was based on the 16 rounds of 9mm Luger ammunition found in the oven drawer of Foster's apartment.⁵

Minnesota law prohibits district courts from imposing multiple sentences for offenses committed as part of a single behavioral incident. *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020); see Minn. Stat. § 609.035, subd. 1 (2018). To determine whether the facts establish a "single behavioral incident," courts consider whether the facts show a unity in time, place, and purpose between the offenses. *Barthman*, 938 N.W.2d at 265. In evaluating a determination to impose multiple sentences, appellate courts "review the district court's finding of fact under a clearly erroneous standard, and its application of the law to those facts de novo." *Id.*

Foster asserts, with little analysis, that his possession of the gun outside his apartment and his possession of the bullets inside his apartment were part of the same

⁴ The district court entered convictions for all four counts but only sentenced on two. On appeal, Foster does not challenge the multiple convictions.

⁵ The district court did not impose a sentence for count II, unlawful possession of ammunition, based on the bullet shot from the firearm, or count III, unlawful possession of ammunition, based on the bullet found on the table in Foster's apartment.

behavioral incident. The state counters that the two offenses were part of separate behavioral incidents because (1) they occurred at different times and different places and (2) they were not motivated by a single criminal objective. We agree with the state.

First, Foster's possession of the gun and the ammunition in the oven-drawer were temporally and spatially separate. Foster possessed the gun when he fired it outside. He possessed the box of ammunition in the oven drawer when the officers located it in his apartment later that day. There is no evidence that Foster physically possessed the box of ammunition when he shot the firearm.

Second, the incidents were motivated by separate criminal purposes. Because the ammunition found in the oven drawer matched the ammunition fired from the gun, Foster presumably possessed the ammunition for use in that firearm. But such "[b]road statements of criminal purpose do not unify separate acts into a single course of conduct." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). Instead, the question is "whether all of the acts performed were necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime." *Barthman*, 938 N.W.2d at 267. Foster's possession of the ammunition inside the apartment was not necessary to Foster's acts outside. As the state points out, Foster possessed the firearm outside the building to fire it in the air and intimidate T.H. and D.M. Though the possession of the oven-drawer ammunition may have been related to a broader criminal purpose, it was not necessary to fulfill Foster's specific criminal objective outside the apartment building.

In sum, because the factors of time, place, and purpose support the district court's implicit determination that Foster's conduct constituted two separate behavioral incidents, the district court did not err by imposing two sentences. *See id.*⁶

III. Foster was not denied effective assistance of counsel.

In his supplemental brief, Foster asserts that he was denied effective assistance of counsel because his lawyer did not try to locate the 911 caller and did not object to the admission of the 911 call at trial.

Appellate courts examine an ineffective-assistance-of-counsel claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Davis*, 982 N.W.2d 716, 728 (Minn. 2022). To prevail under *Strickland*, the defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* Because a claim of ineffective assistance of counsel involves mixed questions of law and fact, appellate courts review the claim *de novo*. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

Foster's claim fails both *Strickland* prongs. As to the first prong, Foster's counsel's decisions not to locate the 911 caller and not to object to the 911 call were both matters of

⁶ In his appellate brief, Foster focuses primarily on the argument that the firearm exception to the single-behavioral-incident rule in section 609.035 does not apply in this case. The firearm exception permits a district court to impose a sentence for unlawfully possessing a firearm or ammunition even though the offense arose out of the same behavioral incident as another offense. Minn. Stat. § 609.035, subd. 3 (2018). We need not reach Foster's firearm-exception argument because, as explained above, the offenses constituted separate behavioral incidents.

trial strategy. *See id.* at 421 (concluding that counsel’s decision not to investigate alternative suspects was a matter of trial strategy); *Leake v. State*, 737 N.W.2d 531, 542 (Minn. 2007) (“Decisions about objections at trial are matters of trial strategy.”). Appellate courts generally do not review for competence the decisions of counsel that are based on trial strategy. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). And Foster offers no explanation for why the strategic decisions here were unreasonable. As to the second prong, Foster fails to identify any prejudice resulting from the failure to locate the 911 caller or from the admission of the 911 call at trial.

Affirmed.