STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1046

State of Minnesota,
Respondent,

vs.

Marvin Allen Strong,
Appellant.

Filed June 27, 2011
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CR-06-084773

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Bjorkman, Judge.

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

HUDSON, Judge

On appeal from his conviction of second-degree criminal sexual conduct, appellant argues that (1) the district court committed plain error affecting his substantial

rights by failing to instruct the jury on the proper use of relationship evidence and (2) the court erred by allowing the state to impeach appellant with evidence of a 2007 conviction of failure to register as a sex offender. Because the district court's failure to provide a limiting instruction in the use of relationship evidence did not affect appellant's substantial rights and because the district court did not abuse its discretion by admitting evidence of appellant's 2007 conviction, we affirm.

FACTS

In 2007, the state charged appellant Marvin Allen Strong with two counts of second-degree criminal sexual conduct: one count of engaging in sexual conduct when the complainant is under age 16, the defendant has a significant relationship to the complainant, and the offense involved multiple acts committed over an extended time period, in violation of Minn. Stat. § 609.343 subd. 1(h)(iii) (2006); and one count of engaging in sexual contact with a person under age 13, when the defendant is over 36 months older than the complainant, in violation of Minn. Stat. § 609.343, subd. 1(a) (2006).

The complaint alleged that appellant engaged in sexual contact during 2006 with J.T., the minor child of S.T, with whom appellant had a romantic relationship. In addition, appellant had a previous conviction of criminal sexual conduct involving J.T. Specifically, in 2005, appellant pleaded guilty to one count of second-degree criminal sexual conduct.

A jury initially convicted appellant of both counts listed in the 2007 complaint. But this court reversed the convictions on appeal, concluding that the district court

committed plain error affecting appellant's substantial rights because it improperly admitted evidence that related to appellant's prior misconduct, which included his sexual abuse of J.T. and her sister, A.T., as well as additional evidence relating to his probation conditions and violations, warrants, and arrest. *State v. Strong*, No. A08-1528, 2009 WL 2745681 (Minn. App. Sept. 1, 2009). This court therefore ordered a new trial.

At appellant's second trial, the state sought to introduce evidence of appellant's 2005 conviction of criminal sexual conduct involving J.T. and his 2007 conviction of failing to register as a predatory offender. The district court granted the motion, but provided no reasoning for its decision on the record. The district court also permitted the introduction of relationship evidence regarding sexual contact between appellant and J.T.

At trial, J.T. testified about several incidents of abuse by appellant when she lived in a home with appellant, S.T., and A.T. Those incidents included a December 2004 incident, in which she observed appellant watching pornography, and he pulled down her pants and touched her crotch with his penis. J.T. reported that incident to school officials and was placed in foster care, but she returned home in late 2005. J.T. testified that the abuse from appellant began again, and she told A.T., who arranged for J.T. to live temporarily with a friend, but J.T. again returned home. J.T. testified that appellant engaged in separate incidents of abuse, in which appellant touched and grabbed J.T.'s chest, bottom, and crotch; entered the bathroom and stood nude when J.T. was showering; "humped" J.T. by rubbing his penis against her; and grabbed her crotch and pulled her toward him. J.T. testified that, after the last incident, she told her friend, who reported the incident to authorities. S.T. testified that when J.T. initially returned home

from foster care, appellant was again living in S.T's home, but S.T. did not notify child protection because she wanted to have her family together.

Appellant exercised his right to testify in his own defense and denied that he had abused J.T., testifying that "[i]t was the other way around," and J.T. touched him inappropriately. He testified that he had discipline problems with J.T. and A.T. Appellant testified that, although he had pleaded guilty to the 2005 offense, he did not commit that offense and pleaded guilty only because of pressure from his attorney. He further testified that, as a result of the 2005 conviction, he received probation with conditions. Appellant said he violated the condition prohibiting him from living with J.T. and S.T. because he could not reach his probation officer, he had no money, and he had nowhere else to go. He testified that the probation officer would not return his phone calls, and that, given the conditions imposed, the state should have provided him a place to stay.

On cross-examination, the prosecutor impeached appellant with the 2007 failure-to-register conviction. In response to questioning, appellant testified that he attempted to reach his probation officer, but because the probation officer did not get back to him, the probation officer did not know where he was living. The prosecutor asked appellant if he had moved in with S.T. and her daughters, whether that violated his probation, and whether there was a warrant for his arrest for violating probation. He acknowledged that his action of living with J.T. violated probation and that a warrant existed. The prosecutor then asked appellant again whether he had been accused of abusing J.T., whether he had pleaded guilty to that offense, whether he was placed on probation, and

whether he violated probation by living with J.T. He admitted the truth of these assertions. At closing argument, the prosecutor argued that appellant "moved right back in to the situation [from which] he was strictly prohibited."

The jury convicted appellant of both counts. This appeal follows.

D E C I S I O N

This court reviews for an abuse of discretion the district court's decision to admit evidence of similar conduct by a defendant against an alleged victim of domestic abuse under Minn. Stat. § 634.20. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). The district court may admit such relationship evidence, which is evidence offered to illuminate the relationship between an accused and an alleged victim, unless the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice" to the defendant. Minn. Stat. § 634.20 (2006); *see also State v. Bell*, 719 N.W.2d 635, 638–39 n.4 (Minn. 2006) (defining relationship evidence).

Appellant argues that the district court abused its discretion by admitting relationship evidence of the 2004 incident, in which he also engaged in sexual conduct with J.T., without giving cautionary instructions to the jury about the proper use of that evidence. Because appellant did not request a limiting instruction or object to the final jury instructions, we review this alleged error under a plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). This standard requires that appellant must demonstrate an error that is plain and that affects his substantial rights. *Id*. An error affects a defendant's substantial rights if there is a reasonable likelihood that it significantly affected the jury's verdict. *State v. Barnslater*, 786 N.W.2d 646, 653 (Minn.

App. 2010), *review denied* (Minn. Oct. 27, 2010). If these requirements are met, this court will correct the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

The district court has the responsibility to instruct the jury regarding the proper use of relationship evidence presented under section 634.20 when the evidence is received and in the final jury instructions. *See State v. Meldrum*, 724 N.W.2d 15, 21–22 (Minn. App. 2006) (stating that "[t]he danger" of using evidence to convict a defendant based on prior bad acts "is so significant that . . . a limiting instruction . . . should be applied to relationship evidence"), *review denied* (Minn. Jan. 24, 2007). Here, the district court did not provide limiting instructions, which contravened case law and potentially affected appellant's substantial rights and the fairness of the proceedings; therefore, the district court committed plain error by failing to do so. *See Barnslater*, 786 N.W.2d at 654 (concluding that absence of cautionary instructions amounted to plain error). But even if the admission of relationship evidence without a limiting instruction constitutes plain error, it does not compel reversal if the probative value of the relationship evidence outweighs the potential for unfair prejudice resulting from the error. *See id*. at 653–54 (concluding that plain error did not affect defendant's substantial rights when testimony on relationship evidence was limited, court instructed jury not to convict defendant of crime of which he was not charged, and evidence of defendant's guilt was strong).

Based on our review of the record, we conclude that the probative value of the evidence outweighed any unfair prejudice arising from the omission of cautionary

instructions. Appellant countered the relationship evidence by testifying that he did not abuse J.T. in 2004 and pleaded guilty to that offense only because his attorney advised him to do so. The district court instructed the jury that the state had the burden to prove each element of the offenses beyond a reasonable doubt, that they should consider the evidence relating to each offense separately, and that a finding of guilt as to one offense should not control the jury's verdict as to the other offense. This instruction focused the jury's attention specifically on the charged offenses. Finally, the evidence of appellant's abuse of J.T. in 2006—primarily J.T.'s testimony—was very strong. Under these circumstances, the district court's failure to issue a limiting instruction on the proper use of relationship evidence did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings, and reversal on this basis is not warranted.

II

Without comment or analysis, the district court ruled that appellant could be impeached with his 2007 failure-to-register conviction. Appellant argues that this ruling constitutes reversible error. This court reviews the admissibility of prior convictions for impeachment purposes for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998); *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). A district court may admit evidence of a defendant's prior felony convictions on a determination that the crime either (1) was punishable by imprisonment of over one year and "the probative value of admitting this evidence outweighs its prejudicial effect" or (2) involves dishonesty or false statement. Minn. R. Evid. 609(a). In determining whether the

probative value of the conviction outweighs its prejudicial effect, the district court considers

> (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 of the issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978).

"[A] district court should demonstrate on the record that it has considered and weighed the *Jones* factors." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). But if a district court fails to conduct an analysis of the *Jones* factors, an appellate court may review the factors to determine whether the error was harmless. *Id.* "[T]he error is harmless if the conviction could have been admitted after a proper application of the *Jones*-factor analysis." *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

The state first argues that the district court properly admitted the failure-to-register conviction because it amounted to a crime of dishonesty. Although such a crime may often relate to dishonesty, it need not always do so. Therefore, by itself, the state's characterization of the conviction does not support the use of the conviction to impeach appellant. Accordingly, we examine the application of the *Jones* factors to consider whether the probative value of the evidence outweighs its prejudicial effect.

Impeachment value of prior crime

Appellant argues that his failure-to-register conviction had minimal impeachment value. But Minnesota courts have concluded that evidence of prior crimes bears on credibility because it "aids the jury by allowing it to see the whole person and thus to judge better the truth of [a defendant's] testimony." *Gassler*, 505 N.W.2d at 67 (quotation omitted). Because the failure-to-register conviction contributes to the jury's ability to judge appellant as a whole person, this factor weighs in favor of admitting the evidence.

Date of conviction and defendant's subsequent history

Because the 2007 conviction was very recent, that factor supports admitting the evidence. *Cf.* Minn. R. Evid. 609(b) (stating that convictions more than ten years old are generally inadmissible).

Similarity of past crime to crime charged

The use of prior convictions that are similar to the charged offenses poses a risk that "the jury will use the convictions as substantive evidence, in addition to impeachment evidence." *State v. Pendleton*, 725 N.W.2d 717, 728–29 (Minn. 2007). Appellant's failure-to-register conviction requires proof of different elements from those required to prove the current criminal-sexual conduct offenses. Informing the jury that appellant had been convicted of failing to inform authorities of his residence would not pose a risk that the jury would convict appellant of criminal sexual conduct based on that prior conviction. There may have been some relationship in that the jury could have

believed that appellant failed to register in order to be free to commit a new sex offense. But overall, this factor weighs in favor of admission.

Importance of defendant's testimony and centrality of credibility

The fourth and fifth factors weigh in favor of admission if the defendant's credibility is central to the case. *Swanson*, 707 N.W.2d at 655–56. Here, appellant testified on his own behalf and denied that he committed the offenses. The jury was required to weigh his credibility against that of J.T. and the other state's witnesses. Therefore, his credibility was central to the case, and these factors support admitting the testimony. *See Pendleton*, 725 N.W.2d at 729 (concluding that defendant's credibility was critical when his theory of defense contradicted consistent testimony of state's witnesses). Here, all of the *Jones* factors weigh in favor of admitting evidence of the 2007 failure-to-register conviction. Accordingly, the district court's failure to conduct an analysis of the *Jones* factors was harmless error. *Swanson*, 707 N.W.2d at 655.

Appellant also argues that, even if evidence of the 2007 conviction was properly admitted, the district court abused its discretion by allowing the state to impeach appellant with additional, unfairly prejudicial evidence relating to that conviction. Generally, when a defendant testifies in his own defense, "cross-examination as to the witness's prior convictions may ordinarily extend only to the fact of conviction, the nature of the offense, and the identity of the defendant." *State v. Griese*, 565 N.W.2d 419, 426 (Minn. 1997). This limitation recognizes the possibility that "broad inquiry into the facts underlying a prior conviction might confuse the issues before the jury or have a chilling effect on the accused's right to testify in his own defense." *Id.* "But the

underlying-facts exclusion is not an iron-clad rule," and the district court generally has discretion to determine the scope of cross-examination regarding prior convictions, "depending upon the circumstances." *State v. Valtierra*, 718 N.W.2d 425, 436 (quotations omitted). One circumstance in which the district court may permit testimony on underlying-facts evidence occurs if a defendant "opens the door" by introducing certain evidence that creates a right to respond with otherwise inadmissible material. *Id*.

In passing, the state suggests that when appellant testified that he violated his probation conditions by returning to S.T.'s home, he "opened the door" to the state's elicitation of additional evidence relating to the underlying facts of the 2007 conviction. *See, e.g., State v. Gardner*, 328 N.W.2d 159, 161 (Minn. 1983) (concluding that by asking question relating to witness's attack of the defendant, defense counsel "opened the door" for state to elicit underlying facts of prior conviction that helped explain circumstances of attack). Here, appellant testified on direct examination that he had conditions of probation, which included that he could not live with S.T. and her family; that he could not afford to stay at a hotel and could not reach his probation officer; and that he then returned to S.T.'s home. On cross-examination, the prosecutor impeached appellant with the 2007 failure-to-register conviction, eliciting appellant's testimony that he did not notify his probation officer that he was living in S.T.'s home, that his continuing to live with S.T. and J.T. violated the conditions of his probation, and that the violation resulted in the issuance of an arrest warrant.

We do not need to resolve this issue if the admission of the evidence was harmless error. *See Valtierra*, 718 N.W.2d at 438 (stating that "improperly admitted underlying-

facts evidence will not require reversal unless the error substantially influences the jury's decision" (quotation omitted)). Appellant argues that the challenged evidence was highly prejudicial and, indeed, is similar to the evidence that supported reversal of appellant's first conviction in this case. Appellant also alleges that appellant was prejudiced because, at closing argument, the prosecutor improperly referred to appellant's admission that he violated probation by moving back in with S.T. But the currently challenged evidence lacks the specificity of that determined to be prejudicial in the first appeal; that evidence included testimony from appellant's probation officer, appellant's written probation agreement, his predatory-offender registration packet, and detailed circumstances relating to his arrest. *See Strong*, 2009 WL 2745681, at *6. Here, the more general underlying-facts evidence carries less potential for unfair prejudice. And the district court properly instructed the jury that the arguments of the attorneys were not evidence, thus minimizing the opportunity for prejudice resulting from the prosecutor's closing remark. *See State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010) (concluding that argument based on facts not in evidence did not prejudice defendant, noting that jury was instructed that attorneys' arguments were not evidence).

In addition, the evidence strongly supports appellant's guilt. J.T. testified credibly relating to specific instances in which appellant engaged in inappropriate sexual contact with her. Appellant's defense—that J.T., not appellant, initiated the sexual contact—was unpersuasive. Under these circumstances, we conclude that any error in admitting additional evidence relating to appellant's 2007 conviction was harmless because it did not substantially affect the jury's decision to convict.

Appellant has also asserted additional arguments in a pro se supplemental brief. We have carefully considered these arguments and determine that they lack merit.

Affirmed.