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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-1357**

State of Minnesota,
Respondent,

vs.

Lance Javon Lenoir,
Appellant.

**Filed May 31, 2011**
**Affirmed**
**Schellhas, Judge**

Benton County District Court
File No. 05-CR-09-1296

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

Robert Raupp, Benton County Attorney, Karl L. Schmidt, Assistant County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

**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 aggravated first-degree witness tampering and first-degree witness tampering, arguing that the district court abused its discretion by

refusing to appoint him a different public defender and by ruling that the state could impeach him with his prior convictions. We affirm.

## FACTS

Respondent State of Minnesota charged appellant Lance Lenoir by amended complaint with aggravated first-degree witness tampering in violation of Minn. Stat. § 609.498, subd. 1b(a)(6) (2008), second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2008), and first-degree witness tampering in violation of Minn. Stat. § 609.498, subd. 1(f) (2008).

According to the amended complaint, the state alleged that on June 8, 2009, after St. Cloud police officers arrested Lenoir's friend or relative on June 7 or 8, Lenoir approached C.S. on a St. Cloud street, pointed a handgun at him, and suggested that if he found out that C.S. was responsible for the arrest, he would kill him.

The district court granted Lenoir's application for a public defender. From July 1, 2009, until the trial in April 2010, Lenoir repeatedly requested that the court appoint him a different public defender, complaining that his public defender did not put forth effort to help him, did not contact potential witnesses, did not prepare a defense, lacked interest in his case, waived his speedy-trial right without his permission, and smiled and smirked at him. Lenoir also stated that he wanted to talk with the prosecutor himself.

The district court told Lenoir that "we have three part-time public defenders that work in this county, and we don't have the option of letting you pick and choose who you want to work with. You get a public defender assigned to you. It's your job to figure out how to work with them." When Lenoir protested, the district court stated, "You don't get

to choose another [public defender]. . . . You take the public defender we appointed for you and work with him. That's your job. Your other choice is to represent yourself." Over the months preceding trial, the district court repeated this explanation to Lenoir several times in words or substance.

On August 19, 2009, after the public defender had advised the district court by letter that Lenoir waived his speedy-trial right, Lenoir disputed the waiver and again expressed dissatisfaction with his legal representation. The public defender informed the district court that every time he talked with Lenoir, Lenoir became agitated, swore at him, and refused to talk to him. The public defender asked the court to remove him from the case. When Lenoir insisted that he could not work with the public defender, even after the court cautioned him that he could not "get another public defender . . . [b]ecause the rules are that we only appoint one public defender," the court removed the public defender from the case.

On August 26, the district court revisited Lenoir's pro se status, discussing the trial proceedings with him and the advantages of legal representation. Lenoir wanted the court to appoint a different public defender to represent him and refused to waive his right to counsel. After attempting to explain to Lenoir the charges against him, the proceedings, and the advantages of representation, the court expressed concern about Lenoir's mental competency to represent himself and ordered him to undergo a rule 20.01 competency evaluation.

On January 27, 2010, after Lenoir was deemed competent to proceed, he reapplied for a public defender, and the district court appointed his former public defender to

represent him. Lenoir again objected, and the public defender again asked to be removed from the case because Lenoir refused to work with him, had filed professional-responsibility complaints against him, and repeatedly impugned his integrity on the record. The district court cautioned Lenoir that it was not going to appoint a different public defender. Lenoir refused to answer the court's repeated questions about whether he would work with the public defender, insisting that it was the public defender's decision to make, and again refused to waive his right to counsel.

After Lenoir left the courtroom, the district court discussed the possibility of the public defender serving as standby counsel. The district court also stated that it did not want to appoint a different attorney to represent Lenoir, noting, "it is pretty clear . . . that [he does not] get to choose who [his] attorney is, unless he could demonstrate . . . that you weren't professionally representing him; and I am not getting any examples . . . that lead me to believe that."

On February 3, the district court summarized the procedural history of Lenoir's case, and the public defender detailed the history of his relationship with Lenoir. The district court repeatedly asked Lenoir whether he was willing to work with the public defender, and Lenoir repeatedly responded that because the public defender had asked to be removed, the decision was his to make. Lenoir also repeatedly stated that if the public defender would "do what I need him to do for me," he would work with him. The district court gave Lenoir one day to decide whether to work with the public defender or represent himself. Lenoir agreed to work with the public defender.

Prior to trial, the district court ruled that the state could impeach Lenoir with his prior convictions of possession of a firearm by an ineligible person, intentionally discharging a firearm under circumstances that endanger the safety of another, first-degree criminal damage to property, and misdemeanor false name to police. The district court stated, "Well, in weighing the [*Jones*] factors . . . it's important that the jury be able to have a picture of the entire person that they're having to make a judgment with regard to credibility. This is a case about credibility . . . ." Lenoir did not testify at trial.

The jury found Lenoir guilty of aggravated first-degree witness tampering and first-degree witness tampering. The district court sentenced Lenoir to the presumptive sentence of 122 months' imprisonment for aggravated first-degree witness tampering and did not impose sentence for first-degree witness-tampering.

This appeal follows.

## D E C I S I O N

### *Appointment of Counsel*

Lenoir argues that the district court's refusal to appoint him a different public defender was *per se* reversible error because an impermissible conflict existed between his public defender and him. Alternatively, Lenoir argues that this court should remand his case to the district court for further inquiry into the conflict between his public defender and him and how it affected his public defender's representation.

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6; *Gideon v. Wainwright*, 372 U.S. 335, 343–45, 83 S. Ct. 792, 976–97 (1963). A criminal defendant

has the right to select counsel of his or her choosing. *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). But "the right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his own choosing. The court is obligated to furnish an indigent with a capable attorney, but he must accept the court's appointee." *State v. Fagerstrom*, 286 Minn. 295, 299, 176 N.W.2d 261, 264 (1970). Although an indigent defendant "may request a substitution of counsel, his request will be granted only if exceptional circumstances exist and the demand is timely and reasonably made." *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). "[E]xceptional circumstances are those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001).[1] "The decision to appoint a substitute attorney is within the discretion of the district court." *Id.*

Although an indigent defendant's disagreements with a court-appointed attorney could potentially affect the attorney's ability or competence, *Gillam*, 629 N.W.2d at 450, general dissatisfaction or disagreement with appointed counsel's assessment of the case does not constitute exceptional circumstances warranting substitute counsel, *Worthy*, 583 N.W.2d at 279. And "personal tension" during trial preparation does not constitute an exceptional circumstance entitling a defendant to substitute counsel. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *see also Gillam*, 629 N.W.2d at 449–50 (holding that defendant's disagreement with appointed counsel about trial strategy and general

[1] The supreme court specifically declined to adopt the principle that an exceptional circumstance includes "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Gillam*, 629 N.W.2d at 449 (rejecting the standard of *United States v. Webster*, 84 F.3d 1056, 1062 (8th Cir. 1996)).

dissatisfaction with counsel's representation did not constitute exceptional circumstances).

The district court heard Lenoir's complaints about his public defender and his reasons for seeking substitute counsel and denied his request. The record indicates that Lenoir was generally dissatisfied with the public defender's representation, disagreed with his trial strategy, and did not get along with him. The district court told Lenoir multiple times that the public defender was an experienced and competent attorney, indicating that the court was satisfied that the public defender was able to represent him.[2] The public defender advised the court that he had reviewed the complaint with Lenoir; he visited the crime scene; he had an investigator look into some specific defense issues at Lenoir's request; he told Lenoir that he thought no affirmative defenses were available; he tried to talk with Lenoir about the trial process; he waived Lenoir's speedy-trial right upon Lenoir's specific request; he reasserted Lenoir's speedy-trial right when Lenoir accused him of waiving the right without permission; he had many conversations with Lenoir as he prepared for trial; he talked with Lenoir about possible sentences; he advised Lenoir to accept the state's offer of 33 months and then later 29 months; and, after the court discharged him and then reappointed him, he again attempted to discuss the case with Lenoir.

[2] The public defender's request to be dismissed from the case does not show incompetence or an inability to represent Lenoir. The public defender's request was based on Lenoir's uncooperativeness and desire for a different attorney. And once Lenoir agreed to work with the public defender, the public defender was in fact able to competently represent Lenoir at trial.

Lenoir argues that "the district court erred by not adequately inquiring into Lenoir's dissatisfaction with [the public defender]." In *State v. Clark*, the defendant argued to the supreme court that "he raised substantial complaints about the effectiveness of the representation provided by appointed counsel, amounting to exceptional circumstances such that the trial court should have conducted a more searching inquiry before ruling on the request." 722 N.W.2d 460, 464 (Minn. 2006) (quotation marks omitted). The court stated, "That may be so, particularly when a defendant voices serious allegations of inadequate representation before trial has commenced. But here it is evident . . . that the trial court was satisfied that appointed counsel had conducted a proper investigation, was thoroughly prepared for trial, and . . . maintained contact with [the defendant]." *Id.* The court noted that caselaw suggests that a record should be made when defense counsel and a defendant disagree on significant matters of tactics or strategy. *Id.* n.2 (citing *State v. Eling*, 355 N.W.2d 286, 294–95 (Minn. 1984)).

Here, when Lenoir voiced general concerns about the public defender's representation on two occasions in July 2009, the district court assured him that the public defender was an experienced, competent lawyer. In August, the district court asked Lenoir if he had discussed possible defenses with the public defender, and Lenoir informed the court that they discussed defenses and that the public defender's assessment was that Lenoir had no defense. On January 27, 2010, the district court asked Lenoir for examples of the public defender's inadequate representation, and Lenoir offered examples. Additionally, the public defender explained that Lenoir "cuss[ed him] out over the phone, called him a "redneck," instructed him to tell the court that he had "fired him

again," and called him a "clown." On February 3, when Lenoir stated that he had a reason for requesting another public defender, the court inquired about the reason and asked the public defender to discuss his working relationship with Lenoir. Lenoir even acknowledges in his brief that "the court spent a considerable amount of time discussing . . . his dissatisfaction with [the public defender]."

We conclude that the district court made a "searching inquiry" into Lenoir's dissatisfaction with the public defender and into whether an impermissible conflict existed.

Lenoir also argues that the district court's belief that it was prohibited from appointing Lenoir a different public defender was incorrect and therefore the court erred by not appointing him a different public defender. But Lenoir mischaracterizes the record. The record indicates that the district court understood that it could appoint Lenoir a different public defender if his public defender was not "professionally representing him." The record also indicates that the court was satisfied that Lenoir's appointed counsel was adequately representing him. The court properly exercised its discretion by denying Lenoir's request for a different public defender.

We agree with Lenoir that the district court's repeated statements to him that the rules did not allow a substitution of counsel, suggesting that he could not have a different public defender under any circumstances, were inaccurate. But any claimed error is harmless absent a showing of incompetent representation or good cause for a new attorney. *See State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991) (holding, in case involving a defendant's hypothetical request for substitute counsel in the event conflict

arose, that absent improper representation on part of defendant's attorney and absent showing of good cause to have a new attorney, district court's inaccurate statement to defendant that he could not have a different public defender under any circumstances was harmless error), *review denied* (Minn. Sept. 13, 1991). Lenoir fails to make such a showing.

On this record, we conclude that the district court did not abuse its discretion by denying Lenoir's request for a different public defender.

***Admissibility of Evidence of Prior Convictions for Impeachment Purposes***

Lenoir concedes that the district court correctly ruled that, if he testified, the state could impeach him with evidence of his prior conviction for giving false information to a police officer. Lenoir argues that the district court erred by ruling that the state could impeach him with his prior felony convictions for possession of a firearm by an ineligible person, intentionally discharging a firearm under circumstances that endanger the safety of another, and criminal damage to property. "We review a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion." *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009).

The credibility of a witness may be attacked by evidence that the witness has been convicted of a crime. Minn. R. Evid. 609(a). Evidence of prior convictions for impeachment purposes is admissible if the crime "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." *Id.* (a)(1). "Evidence of a conviction under this rule is

not admissible if . . . more than ten years has elapsed since the date of the conviction . . . unless the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." *Id.* (b).

The district court should consider five factors in determining the admissibility of prior convictions. *State v. Jones*, 271 N.W.2d 534, 537–38 (Minn. 1978). These factors are as follows:

> (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.

*Id.* at 538.

In making its ruling, the district court stated, "Well, in weighing the [*Jones*] factors . . . it's important that the jury be able to have a picture of the entire person that they're having to make a judgment with regard to credibility. This is a case about credibility . . . ." Despite the district court's statement that it was weighing the *Jones* factors, the district court did not explicitly address all of the *Jones* factors, and therefore erred. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (stating that a district court errs if it fails to demonstrate on the record that it weighed the *Jones* factors). But this court may conduct its own review of the *Jones* factors to determine whether the district court's error was harmless. *Id.* at 655–56 (reviewing *Jones* factors in absence of district court analysis and concluding that the district court did not abuse its discretion under rule 609).

*Impeachment Value*

Lenoir argues that his prior felony convictions do not involve dishonesty and therefore have little impeachment value. But "the fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value." *Williams*, 771 N.W.2d at 518 (quotation omitted). In *State v. Brouillette*, the supreme court concluded that Minn. R. Evid. 609 "clearly sanctions the use of felonies which are not directly related to truth or falsity for purposes of impeachment, and thus necessarily recognizes that a prior conviction, though not specifically involving veracity, is nevertheless probative of credibility." 286 N.W.2d 702, 708 (Minn. 1979). "[I]mpeachment by prior crime aids the jury by permitting it to see the 'whole person' of the testifying witness and therefore to better judge the truth of his testimony." *Williams*, 771 N.W.2d at 518 (quoting *Brouillette*, 286 N.W.2d at 707). This factor weighs in favor of admissibility because Lenoir's prior convictions aid the jury in determining credibility by permitting it to see the "whole person."

*Date of the Convictions and Defendant's Subsequent History*

Lenoir was convicted of his three prior felonies on August 3, 2007. Lenoir committed the current offense on June 8, 2009, which is less than two years after the date of his prior convictions. Between August 2007 and June 2009, Lenoir was also convicted of gross misdemeanor theft from a person, misdemeanor giving false information to a police officer, and gross misdemeanor third-degree damage to property. This factor weighs in favor of admissibility because the convictions are within two years of the current offense and Lenoir's subsequent history indicates that the convictions remain

relevant. *See Swanson*, 707 N.W.2d at 655 (noting that an "older conviction" occurring within ten years of the charged crime "can remain probative if later convictions demonstrate a history of lawlessness" (quotation omitted)); *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998) (concluding that the second *Jones* factor favored admissibility of a fairly old conviction because subsequent convictions showed a pattern of lawlessness indicating that the older offense had not lost any relevance through the passage of time).

*Similarity of the Past Crime with the Charged Crime*

"[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). The conviction for criminal damage to property is not similar to witness tampering. This factor therefore weighs in favor of admissibility with respect to that conviction.

The two prior firearm-related convictions, though not identical to the current offense, are similar enough that a jury might use the evidence substantively because an issue in the current case was whether Lenoir threatened a witness with a firearm and the prior convictions show that Lenoir has a history of possessing and using firearms in a criminal manner. This factor therefore weighs against admissibility with respect to the two firearm-related convictions.

*Importance of Defendant's Testimony/Centrality of the Credibility Issue*

When credibility is a central issue in a case, the fourth and fifth *Jones* factors weigh in favor of admitting a prior conviction. *E.g.*, *Swanson*, 707 N.W.2d at 655–56.

The parties agree that credibility was a central issue in the case. The fourth and fifth factors therefore weigh in favor of admissibility.

Because all five *Jones* factors weigh in favor of admissibility for the damage-to-property conviction and four of the five *Jones* factors weigh in favor of admissibility for the two firearm-related convictions, the district court did not abuse its discretion by ruling that the state could impeach Lenoir with evidence of his three prior felony convictions and its error in not explicitly addressing all of the *Jones* factors on the record is harmless. We affirm.

**Affirmed.**