STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1601

State of Minnesota,
Respondent,

vs.

Marcell Demar Blackwell,
Appellant.

Filed June 13, 2011
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19HA-CR-10-259

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

James C. Backstrom, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Klaphake, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant argues that the district court abused its discretion by admitting his prior felony convictions for impeachment purposes, by denying his motion for a mistrial after a

witness referred to his prior incarceration, and by sentencing him at the top end of the presumptive-sentence range under the sentencing guidelines. Appellant also claims that he received ineffective assistance of counsel. Because we conclude that the district court's evidentiary, procedural, and sentencing decisions were not an abuse of discretion and that appellant's ineffective-assistance-of-counsel claim does not support reversal, we affirm.

FACTS

Around 5:00 p.m. on January 19, 2010, P.B. went to the Burnsville Mall. As P.B. was heading towards the mall entrance, a man and woman walked towards her. The man and woman approached P.B. and immediately began pulling on her purse. P.B. struggled to hold onto her purse while the man and woman hit P.B.'s head and arm. The man and woman took P.B.'s purse and jumped into a green van parked nearby. P.B. described the woman as a "larger female" and could only describe the man as taller than she was because the incident "happened so fast" and she "did not have the opportunity to look at [the man's face]." She also gave a description of the van and its license plate number.

Prior to the assault, another man was waiting for a ride just inside the mall entrance. This eyewitness recalled the man and woman walking past him while leaving the mall and described the man as "over six feet, probably like six two or so" and "[r]oughly . . . between . . . [230] to [250] pounds" and the woman as approximately six feet tall and "a bigger lady." After the man and woman left the mall, the eyewitness observed them scuffling with P.B. P.B. was thrown to the ground and the man and

woman jumped into a van. The eyewitness gave descriptions of the man, woman, and van to the police.

A Burnsville police officer arrived at the scene and spoke with P.B., who was "very upset," "crying and holding her head and her arms, [and] very distraught." The officer obtained the van's license plate number from P.B. and descriptions of the man and woman from the eyewitness and radioed this information to other officers. After hearing the dispatch, an officer stopped the van at a nearby gas station. The officer ordered the van's occupants to stay in the vehicle, but the front passenger jumped out and fled on foot alongside a grocery store. The officer arrested the remaining occupants: the driver, M.J., a male weighing approximately 170 pounds, and B.B., a female weighing approximately 250 pounds. Officers brought P.B. to the gas station where she identified B.B. as the female assailant, but she was unable to identify M.J. as the male assailant.

Officers located the front passenger hiding behind a dumpster in the back of the grocery store parking lot and identified him as appellant Marcell Demar Blackwell, B.B.'s son. Appellant's state identification card described him as six feet tall and weighing 200 pounds. Officers found P.B.'s credit, bank, and airline-membership cards along with her driver's license pushed underneath the snow on top of the dumpster. P.B. was unable to identify appellant as the male assailant, but gave the officers the number to the cell phone that had been in her purse. One officer called the number while another checked to see if one of the two phones that had been removed from appellant's person was ringing. The officer showed the ringing phone to the officer who placed the call, who confirmed that the incoming number was his own. Officers arrested appellant.

The state charged appellant with aiding and abetting first-degree aggravated robbery in violation of Minn. Stat § 609.245 (2008); aiding and abetting simple robbery in violation of Minn. Stat. § 609.24 (2008); two counts of aiding and abetting fifth-degree assault in violation of Minn. Stat. § 609.224, subd. 1(1), (2) (2008); and fleeing a peace officer in violation of Minn. Stat. § 609.487, subd. 6 (2008). Appellant proceeded to a jury trial.

M.J. was the third witness to testify for the state, following P.B. and the eyewitness. The prosecutor asked M.J. when he met appellant. M.J. responded, "Well, when I went to go pick him up and—because, like I said, he was incarcerated before. So I just started knowing him about, you know—." Defense counsel immediately moved for a mistrial. The district court denied the motion. The prosecutor stated that M.J. had been specifically instructed not to talk about appellant's prior incarceration.

At the close of the state's case, defense counsel asked the district court to rule on the state's motion to admit appellant's prior convictions for impeachment purposes, so that appellant could decide whether he would testify. The state sought to introduce five convictions: a simple robbery from 2002, three aggravated robberies from 2002, and a second-degree assault from 2004. The district court ruled that the three aggravated-robbery convictions were admissible for impeachment purposes, concluding that the convictions had "considerable impeachment value" because, although it had been "eight years since the convictions[,] . . . [appellant] had just gotten out of prison months before this offense was allegedly committed." The district court acknowledged that the offenses were "similar" to the current charges, "basically purse snatching," and that it was

important for appellant to testify because there was "somebody else to point the finger at" and appellant's "credibility is central to the case."

Following the ruling, defense counsel made a record of appellant's decision not to testify, for reasons including the admissibility of appellant's prior convictions and the state's likely inquiry into the convictions if appellant testified. The defense rested without presenting any witnesses. The jury convicted appellant on all counts and the district court sentenced him to 129 months in prison on the aggravated-robbery charge. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by ruling that appellant's three prior felony convictions for aggravated robbery were admissible for impeachment purposes.

A defendant's prior convictions may be admitted for purposes of impeachment if the crime is punishable by more than one year of imprisonment and "the district court determines that the probative value of admitting this evidence outweighs the prejudicial effect." Minn. R. Evid. 609(a)(1). 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). Appellant argues that the district court abused its discretion when it ruled that the probative value of appellant's three prior convictions for aggravated robbery outweighed their prejudicial effect.

In weighing the probative value of prior-conviction impeachment evidence against its prejudicial effect, courts consider five factors: "[A] the impeachment value of the prior crime; [B] the date of the conviction and the defendant's subsequent history; [C] the

similarity of the past crime with the charged crime; [D] the importance of defendant's testimony; and [E] the centrality of the credibility issue." *Id.* (citing *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978)).

A. Impeachment Value

Appellant contends that "[a] conviction for aggravated robbery is not relevant to a defendant's credibility in any meaningful way" and that "[t]he only thing the jury would do with this information in this case is find that appellant acted in conformity with his prior convictions . . . ." But in *State v. Brouillette*, the Minnesota Supreme Court held that "[j]ust because a crime is not directly related to truth or falsity does not mean that evidence of the conviction has no impeachment value." 286 N.W.2d 702, 707 (Minn. 1979). The court observed that "impeachment by prior conviction aids the jury by allowing it to see 'the whole person' and thus to judge better the truth of his testimony." *Id.* (quotation omitted). The court also stated that Rule 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." *Id.* at 708.

Appellant asks us to "reexamine the 'whole person' rationale" and formulate a rule in which "certain crimes would bear on credibility, but other crimes would not." The Minnesota Supreme Court, however, recently reaffirmed the value of the whole-person test, stating that "it allows the jury to see the 'whole person' of the testifying witness to better evaluate the truth or falsity of the testimony" and that "the rationale for the test expressed in *Brouillette* is sound." *Williams*, 771 N.W.2d at 519. "[T]his court is bound

to follow supreme court precedent." *State v. Allinder*, 746 N.W.2d 923, 925 (Minn. App. 2008). The first factor, therefore, weighs in favor of admitting appellant's prior convictions to provide the jury with a more complete basis on which to evaluate appellant's testimony.

B. Timing of the convictions

Appellant does not dispute that this factor weighs in favor of admissibility. And, although eight years had passed since appellant's convictions, he "had just gotten out of prison months before this offense was allegedly committed." *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (concluding that prior conviction did not lose relevancy due to passage of time when defendant was in prison between prior and current offenses).

C. Similarity of the prior offenses

"[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). Here, the three aggravated-robbery convictions were the same offense as one of the charges against appellant and involved the same general circumstances (purse snatching). Appellant, therefore, correctly asserts that this factor weighs against admissibility. *See Bettin*, 295 N.W.2d at 546 (fact that "prior crime was basically the same crime with which defendant was charged" weighs against admission).

D. Importance of defendant's testimony

When the defendant's version of the facts is "centrally important to the result reached by the jury," the admission of impeachment evidence is disfavored "if by

admitting it, [the defendant's] account of events would not be heard by the jury." *Gassler*, 505 N.W.2d at 67. The district court observed that appellant's testimony was important because there was "somebody else to point the finger at," referring to M.J., who was also charged with the robbery of P.B. Because P.B. was unable to identify the man who participated in the robbery and M.J. had an incentive to minimize any role he might have played because of his own pending criminal charges, appellant's "testimony would have been crucial to undercut [M.J.'s] claim that [M.J.] was wholly innocent of the offense." And, one of the reasons appellant decided not to testify was because of the admission of his prior convictions. Thus, this factor weighs against admission of the prior convictions because their admission discouraged appellant from providing important testimony.

E. Centrality of the credibility issue

Generally, "if the issue for the jury narrows to a choice between [the] defendant's credibility and that of one other person—then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater." *Bettin*, 295 N.W.2d at 546. Appellant's credibility was critical in this case because the identity of the man who participated in the robbery of P.B. was a central issue at trial and both appellant and M.J. were charged in connection with the robbery. *See Williams*, 771 N.W.2d at 520 (when identity of perpetrator was a central issue at trial in which defendant's testimony would have contradicted other witnesses, credibility factor favored admissibility). Because appellant's credibility was a central issue in assisting the jury in determining the

identity of the male perpetrator, this factor weighs in favor of admitting the impeachment evidence.

Because three of the five factors establish that the probative value of appellant's prior aggravated-robbery convictions outweighed their prejudicial effect, the district court did not abuse its discretion in admitting the convictions for impeachment purposes.

Finally, appellant contends that he "was presented with the Hobson's choice of not presenting his version of what happened or presenting his version and having his character attacked by prior convictions for the same type of offense he was charged with committing here." In *Gassler*, the supreme court explained that

> defendants often make decisions not to testify based on the potential damage that prior convictions could inflict on their credibility. The mere fact that a [district] court would allow impeachment evidence if a defendant chooses to testify does not necessarily implicate his constitutional right to testify in his own defense. At a minimum, in order to prevail on this argument, appellant would have to show that the trial court abused its discretion in ruling that the probative value of the impeachment evidence outweighed its prejudicial effect; it is only when a trial court has abused its discretion under Rule 609(a)(2) that a defendant's right to testify may be infringed by the threat of impeachment evidence.

505 N.W.2d at 68. Because the district court did not abuse its discretion in ruling that the probative value of appellant's prior convictions outweighed their prejudicial effect, appellant was not presented with a "Hobson's" choice.

II. The district court did not abuse its discretion by denying appellant's motion for a mistrial when the state's witness referred to appellant's prior incarceration.

References to a defendant's prior incarceration can be unfairly prejudicial and "the state has an obligation to caution its witnesses against making" such statements during their testimony. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). Appellant moved for a mistrial after M.J. testified that appellant "was incarcerated before." Appellant challenges the denial of his mistrial motion.

Appellate courts review the denial of a motion for a mistrial for an abuse of discretion. *Id.* Unless there is a reasonable possibility that, absent the objectionable conduct, the outcome of the trial would have been different, a mistrial motion should not be granted. *Id.* (quotation omitted). Where "a reference to a defendant's prior record is of a 'passing nature,' or the evidence of guilt is 'overwhelming,' a new trial is not warranted because it is extremely unlikely 'that the evidence in question played a significant role in persuading the jury to convict.'" *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quoting *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978)).

The record reflects that M.J.'s reference to appellant's prior incarceration was a passing remark. The prosecutor did not intentionally elicit the information and, outside the presence of the jury, stated that M.J. was specifically instructed not to talk about appellant's prior incarceration. M.J. did not reveal any information as to the reason for or length of appellant's incarceration. Additionally, the evidence of appellant's guilt was overwhelming. Appellant fits both P.B.'s and the eyewitness's physical description of the male perpetrator; officers found P.B.'s identification, credit, and bank cards buried in

the snow on top of the dumpster that appellant was hiding behind; and officers removed P.B.'s cell phone from appellant's person when he was arrested. Because the evidence of appellant's guilt was overwhelming, M.J.'s passing remark concerning appellant's prior incarceration was extremely unlikely to have persuaded the jury to convict. We conclude that the district court did not abuse its discretion in denying appellant's motion for a mistrial.

III. Appellant's ineffective-assistance-of-counsel claim does not support reversal.

"To prevail on a claim that counsel is ineffective, [the defendant] must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). "A strong presumption exists in favor of finding that counsel's representation was reasonable, and particular deference is given to matters of trial strategy, including which witnesses to call and what information to present to the jury." *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009); *Leake*, 767 N.W.2d at 10 ("Trial counsel's performance is presumed reasonable."). If the prejudice prong of the test is dispositive, courts need not consider whether trial counsel acted reasonably. *Leake*, 767 N.W.2d at 10.

Appellant raises four specific points with regard to his ineffective-assistance-of-counsel claim. He first contends that defense counsel waived the omnibus hearing without informing him. It appears, however, that appellant did receive an omnibus hearing. The record reflects that trial counsel filed a notice of motion and motion for an

omnibus hearing, including a challenge to the sufficiency of the complaint to establish probable cause that appellant committed the charged offenses. A hearing took place on February 8, 2010. Appellant was present at this hearing and the district court concluded that probable cause existed to support the charges.

Appellant next claims that because he was not positively identified as the male perpetrator, trial counsel should have sought to have the complaint amended to add lesser-included offenses. But appellant does not show how he was prejudiced, considering that the jury had the option to convict appellant of aggravated robbery or simple robbery and convicted him of both, suggesting that appellant would still have been convicted of the greater offense even if less-severe offenses had been presented to the jury. *See State v. Harris*, 713 N.W.2d 844, 851 (Minn. 2006) (holding that defendant suffered no prejudice from denial of lesser-included-offense instruction when jury convicted defendant of greater offense despite availability of lesser offense).

Appellant's third and fourth assertions of error are matters of trial strategy that we do not review. *See Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (stating appellate courts generally do not review attacks on trial strategy). Appellant argues that mall security video would show that he did not participate in the alleged offenses and claims that trial counsel failed to obtain the video. "The extent of counsel's investigation is considered a part of trial strategy." *Id.* Notwithstanding our deference to trial counsel in matters of strategy, the record reflects that the video does not exist. Appellant was not prejudiced by trial counsel's failure to obtain a nonexistent video.

Appellant also asserts that trial counsel refused to call B.B., appellant's mother, to testify. But, the decision as to which witnesses to call is a matter of trial strategy to which we give particular deference. *See Scruggs v. State*, 484 N.W.2d 21, 26-27 (Minn. 1992) (concluding trial counsel was not ineffective in failing to call three potential defense witnesses as such decisions are within trial counsel's discretion).

IV. The district court did not abuse its discretion in sentencing appellant to 129 months in prison.

Appellant argues that his sentence was the result of an improper upward, durational departure. Sentences imposed by the district court are reviewed for abuse of discretion. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). This court will not generally review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range. *State v. Starnes*, 396 N.W.2d 676, 681 (Minn. App. 1986). Only in a "rare" case will a reviewing court reverse imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court will generally not exercise its authority to modify a sentence within the presumptive range "absent compelling circumstances." *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982).

Any sentence within the presumptive range for the convicted offense constitutes a presumptive sentence and is not a departure. Minn. Sent. Guidelines II.C & II.D (2009); *State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008) ("All three numbers in any given cell constitute an acceptable sentence . . . ."). Based on appellant's conviction for first-degree aggravated robbery, a level VIII offense, and criminal history score of seven,

his presumptive sentence range was between 92 and 129 months. Minn. Sent. Guidelines IV & V (2009). Because appellant's 129-month sentence was not beyond the maximum provided for in the presumptive range, appellant's sentence was not a departure. Appellant has not provided any compelling circumstances to support a determination that the district court abused its discretion in sentencing him at the top end of the presumptive range. We affirm the sentence imposed.

Affirmed.