STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1641

State of Minnesota,
Respondent,

vs.

Jeffrey Lee Manypenny,
Appellant.

Filed August 20, 2012
Affirmed
Worke, Judge

Becker County District Court
File No. 03-CR-11-277

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

Michael D. Fritz, Becker County Attorney, Gretchen D. Thilmony, Assistant County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Cleary, Judge.

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

WORKE, Judge

Appellant challenges his domestic-assault and fifth-degree-assault convictions, arguing that: (1) the district court committed reversible error by allowing the prosecutor

to exercise a peremptory strike to remove a Native American juror in the venire; (2) the prosecutor committed misconduct by introducing undisclosed relationship evidence; (3) the district court committed reversible error by admitting the victim's out-of-court statement; (4) the district court abused its discretion by ruling that appellant could be impeached with a prior conviction; and (5) the cumulative effect of the trial errors deprived him of a fair trial. We affirm.

D E C I S I O N

Batson challenge

Appellant Jeffrey Lee Manypenny challenges his domestic-assault and fifth-degree-assault convictions stemming from an assault against his girlfriend, J.K., in January 2011. Appellant first argues that the district court clearly erred when it denied his *Batson* challenge to the state's peremptory strike of a Native American juror, contending that the state impermissibly excluded the juror based on his race.

The Equal Protection Clause of the United States Constitution prohibits a prosecutor from exercising a peremptory challenge to exclude a prospective juror based solely on race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). Courts apply a three-part test to determine whether a prosecutor's peremptory challenge was based on the prospective juror's race. *State v. Pendleton*, 725 N.W.2d 717, 723 (Minn. 2007); *see also* Minn. R. Crim. P. 26.02, subd. 7(3) (describing the three-step process). First, the opponent of the peremptory challenge must establish a prima facie case that it was based on the prospective juror's race. *Pendleton*, 725 N.W.2d at 723. Second, the prosecutor must present a race-neutral explanation for the challenge. *Id.* at

723-24. Third, the district court must determine whether the opponent proved that the racial discrimination was purposeful. *Id.* at 724. "The defendant ultimately carries the burden of persuasion to demonstrate the existence of purposeful discrimination; this burden never shifts from the opponent of the strike." *State v. Martin*, 773 N.W.2d 89, 101 (Minn. 2009). This court "give[s] great deference to the district court's ruling" on a *Batson* challenge "and will not reverse unless [the decision] was clearly erroneous." *Id.*

"[A] prima facie case is established by showing (1) that a member of a racial minority has been peremptorily excluded *and* (2) that circumstances of the case raise an inference that the exclusion was based on race." *State v. Reiners*, 664 N.W.2d 826, 831 (Minn. 2003) (quotation omitted). Here, appellant's counsel challenged the prosecutor's peremptory strike of a prospective juror, who identified himself as Native American. Appellant's counsel did not demonstrate "that circumstances of the case raise an inference that the exclusion was based on race." *See id.* (quotation omitted). But the prosecutor waived any objection to appellant's failure to establish a prima facie case because she proceeded to provide a race-neutral reason for the strike. *See Angus v. State*, 695 N.W.2d 109, 115 (Minn. 2005) ("[I]f a party proceeds past the first step by offering a race-neutral reason without questioning the objecting party's prima facie showing, the outcome of step one is moot.").

Next, the prosecutor must give a race-neutral explanation for the strike. *See Reiners*, 664 N.W.2d at 832. The prosecutor's explanation "need not be persuasive or even plausible." *Martin*, 773 N.W.2d at 101. The explanation given will be "deemed

race neutral" unless there is "discriminatory intent [] inherent in the explanation." *Id.* (quotations omitted).

Here, the prosecutor stated:

> [T]he basis for my p[er]emptory challenge is I have information [that he] was convicted of domestic assault in 1996. He did not share that information with the [c]ourt when asked if they had been convicted of anything other than a minor traffic offense. He made no comment on that. He hesitated drastically how he felt about his contact with law enforcement . . . . He was very equivocal, and the basis for the p[er]emptory is definitely not having anything to do with race. As noted, we have a number of [N]ative [A]merican jurors on the panel.

The prosecutor gave two reasons for her peremptory strike: (1) failure to disclose a prior conviction of domestic assault; and (2) perceived bias against law enforcement. "Prior convictions and prior arrests are valid reasons for exercising peremptory challenges." *State v. James*, 638 N.W.2d 205, 210 (Minn. App. 2002), *review denied* (Minn. Mar. 27, 2002). And "negative feelings toward government and law enforcement in particular" is a sufficient race-neutral reason for a peremptory strike. *State v. DeVerney*, 592 N.W.2d 837, 843 (Minn. 1999). Thus, the prosecutor's race-neutral reasons for her peremptory strike were sufficient.

Appellant argues that the district court failed to address the third prong of the analysis. The third step of the *Batson* analysis requires the district court to determine whether the defendant met his burden of demonstrating that the strike was based on racial discrimination. *State v. Taylor*, 650 N.W.2d 190, 202 (Minn. 2002). This court "give[s] considerable deference to the district court's finding on the issue of the prosecutor's

intent because the court's finding typically turns largely on credibility." *Id.* The district court should "announce on the record its analysis of each of the three steps of the *Batson* analysis and," particularly for step three, it should "state fully its factual findings, including any credibility determinations." *Reiners*, 664 N.W.2d at 832. However, this court will not reverse a district court's *Batson* decision solely because it failed to specifically rule on each step of the analysis. *Pendleton*, 725 N.W.2d at 726.

Here, the district court stated:

> If there is no other reason, . . . I would be comfortable with taking the position it was [a] race issue, and if he has prior convictions . . . . I heard the same answer [the prosecutor] heard, and [appellant's counsel] heard as well, he was reluctant to respond, and when he talked about [a previous police encounter], the impression I got was that he wasn't happy with the way he was treated initially by [the officer] when he was stopped but now time has passed and so maybe not. . . . I think that those are bases to exercise a p[er]emptory challenge[.]

The district court did not specifically discuss its analysis of step three on the record, and appellant contends that the district court failed to give him an opportunity to establish purposeful discrimination. But the district court essentially made a credibility determination when it stated that it agreed with the prosecutor's assessment that the prospective juror was not happy about the manner in which he had been treated by a police officer. In addition, by denying appellant's *Batson* challenge, the district court implicitly found that appellant did not demonstrate purposeful discrimination. *See State v. Rivers*, 787 N.W.2d 206, 211-12 (Minn. App. 2010) (stating that although the district court did not specifically address step three, it "found that a number of race-neutral

reasons supported the strike and, by denying the challenge, implicitly found that [the defendant] did not prove purposeful discrimination"), *review denied* (Minn. Oct. 19, 2010). The district court adequately addressed the third step of the *Batson* analysis; therefore, the district court's denial of appellant's *Batson* challenge to the prosecutor's peremptory strike was not clearly erroneous.

Prosecutorial misconduct

Appellant next argues that the prosecutor committed misconduct when she introduced undisclosed relationship evidence. In general, "[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). But "[e]vidence of similar conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury." Minn. Stat. § 634.20 (2010). "Similar conduct" includes evidence of domestic abuse. *Id.* Evidence of domestic abuse is treated differently than other prior-bad-act evidence because it "is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Thus, "the stringent procedural requirements of rule 404(b) do not apply to section 634.20 evidence," and the state is not required to give notice of its intent to offer relationship evidence. *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008).

Here, shortly after the complaint was filed, the state gave written notice of its intent to offer evidence of three prior incidents. The notice provided that in August 2009,

J.K. reported to police that appellant punched her in the head, broke her phone, grabbed her around the neck with both of his hands, and threw her against the wall. J.K. further reported that appellant picked her up, threw her again, threatened to kill her, and showed her an 11-inch-long knife. J.K. went to the hospital to have her arm examined because it was bruised and swollen and she was concerned that it was broken. Before trial, appellant moved to suppress evidence of this incident. The district court denied the motion, stating: "I think under the statute it is admissible, that the relationship statute provides for just a situation like this. . . . I wouldn't disagree it is prejudicial. The issue is whether the probative value outweighs the prejudicial impact, and I believe it does."

Appellant argues that the prosecutor committed misconduct when she introduced the August 2009 incident because the specific acts of holding J.K. around the neck against the wall, threatening to kill her, and hurting her arm are the type of bad acts that require notice. However, the prosecutor provided detailed, written notice of this incident, even though she was not required to under Minn. Stat. § 634.20. This relationship evidence was admissible unless its probative value was substantially outweighed by the danger of unfair prejudice. "Evidence satisfies the unfair-prejudice test when it persuades by illegitimate means and gives one party an unfair advantage." *Id.* The 2009 incident was between the same parties and involved similar conduct, including allegations that appellant put his hands around J.K.'s neck and choked her. The evidence was not unfairly prejudicial. We conclude that the prosecutor did not commit misconduct by introducing relationship evidence.

Victim's prior statement

Appellant argues that the district court erred when it permitted testimony about J.K.'s prior statement. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Here, the prosecutor solicited testimony from a police officer about the statement J.K. made to him on the night of the January 2011 assault. Appellant's counsel objected to the testimony as hearsay, and the prosecutor stated, "Prior inconsistent statement, Your Honor." The district court overruled the objection and the officer testified about J.K.'s statement.

Out-of-court statements that are offered for the truth of the matter asserted are generally inadmissible. Minn. R. Evid. 801(c), 802. But a witness's prior statement is not hearsay if the witness testifies and is subject to cross-examination, the prior statement is inconsistent with the witness's testimony, and it "was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Minn. R. Evid. 801(d)(1)(A). Because J.K.'s prior statement was given to a police officer shortly after the alleged incident and not under oath at a prior proceeding, the district court erred by allowing the statement to be admitted as a prior inconsistent statement.

The state now concedes that J.K.'s prior statement was not admissible as a prior inconsistent statement, but contends that it was independently admissible as substantive

evidence under a different evidentiary rule. A district court's admission of evidence on an erroneous basis is harmless if the evidence was also admissible on a different basis. *See State v. Copeland*, 656 N.W.2d 599, 602 (Minn. App. 2003) (concluding that the district court's admission of strained-relationship evidence was harmless because the evidence was also admissible under an alternative basis), *review denied* (Minn. Apr. 29, 2003).

The state asserts that J.K.'s prior statement was admissible under Minn. R. Evid. 801(d)(1)(D), which provides that a witness's prior statement is admissible if the witness testifies at trial, is subject to cross-examination, and the statement is one "describing or explaining an event or condition made while the [witness] was perceiving the event or condition or immediately thereafter." S*ee State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (holding that statements made to police officers who responded immediately to the accident scene were admissible under rule 801(d)(1)(D) because they were "probably made within a few minutes of the accident" and before the witnesses "had an opportunity to discuss the events").

It is not clear how much time elapsed between when J.K. called 911 to report that appellant had just punched her and when the police officer arrived at J.K.'s home. The officer testified that he went to J.K.'s home after he received a call from dispatch and when he arrived, J.K. "was upset" and "looked like she just went through a frantic struggle." J.K.'s emotional state when the officer arrived at her home suggests that he arrived shortly after the assault occurred. We conclude that J.K.'s statement to the police

officer was admissible under rule 801(d)(1)(D) because it was made immediately after appellant assaulted her.

Accordingly, although the district court erroneously admitted J.K.'s statements under the prior-inconsistent-statement hearsay exception, the district court's error was harmless because the statements were also admissible under a different evidentiary rule.

Impeachment

Appellant argues that the district court abused its discretion by allowing the state to impeach him with a prior burglary conviction. Evidence of a prior conviction is admissible for purposes of impeachment if the crime is punishable by more than one year in prison and the probative value outweighs the prejudicial effect. Minn. R. Evid. 609(a)(1). To determine whether the probative value of prior-conviction evidence outweighs its prejudicial effect, the district court considers the following factors:

> (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 [the] defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). It is error for the district court to fail to consider and weigh the *Jones* factors on the record. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). This court will not reverse a district court's ruling on the impeachment of a witness by a prior conviction absent an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Here, the district court considered whether the state could impeach appellant with a prior felony burglary conviction and determined that:

> As far as the burglary is concerned, I think that it falls squarely within the rules that allow for impeachment. [*Jones*] factors, if applied, the only one that really might be an issue is whether . . . the prejudicial value would exceed the probative value[;] I think the other factors are met in terms of time [and] type of crime.
>
> As far as centrality of the credibility issue, the reason that prior convictions in felony cases have been allowed for as long as I have been in this business is a credibility issue. Clearly that is the situation in this case. I am comfortable that the probative value does outweigh the prejudicial value, so the burglary conviction can be used for purposes of impeachment.

During appellant's testimony at trial, the prosecutor asked, "You are on probation for committing the offense of first degree burglary involving assault; is that correct?" Appellant answered, "Yes." We follow with a review of the *Jones* factors applied in this matter.

Impeachment value

Appellant argues that the district court erred by assuming that his burglary conviction had probative value and that, rather, his conviction was not relevant to truthfulness because it did not involve dishonesty or a false statement. The Minnesota Supreme Court has held "that impeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotations omitted). In addition, "[l]ack of trustworthiness may be evinced by [a defendant's] abiding and repeated contempt for laws which he is legally and morally bound to obey . . . though the violations are not

concerned solely with crimes involving dishonesty and false statement." *Id.* (quotations omitted). The supreme court recently reaffirmed that "*any* felony conviction is probative of a witness's credibility, and the mere fact that a witness is a convicted felon holds impeachment value." *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). While appellant's prior felony burglary conviction does not involve dishonesty, it has probative value regarding his credibility under the whole-person rationale. This factor weighs in favor of admission.

Date of conviction and subsequent history

A defendant's prior conviction is not admissible if more than ten years have passed since the date of the defendant's conviction or release from confinement imposed for the conviction. Minn. R. Evid. 609(b). "[R]ecent convictions [] have more probative value than older ones." *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). Appellant was convicted of first-degree burglary in April 2010 and the complaint in this matter was filed less than a year later. This factor weighs in favor of admission.

Similarity of past crimes

The more similarity there is between the alleged offense and the defendant's past conviction, "the more likely it is that the conviction is more prejudicial than probative." *Swanson*, 707 N.W.2d at 655. "The danger when the past crime is similar to the charged crime is that the likelihood is increased that the jury will use the evidence substantively rather than merely for impeachment purposes." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). Here, while the underlying facts of each incident are different, both

appellant's prior burglary conviction and the alleged offense involved assault. This factor does not weigh in favor of admission.

Importance of defendant's testimony

Appellant argues that his testimony was very important to his defense because only he and J.K. were present during the alleged incident. If a defendant's version of facts is "centrally important" to the jury's determination, the admission of the impeachment evidence is disfavored if it would discourage the defendant from testifying and thereby prevent the jury from hearing the defendant's version of the incident. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Appellant chose to testify despite knowing that his prior conviction could be used to impeach him. This factor weighs in favor of admission.

Centrality of the credibility issue

If the central issue for the jury is a choice between the defendant's credibility and the credibility of another witness, "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 a central issue because appellant and J.K. were the only people present when the alleged incident occurred. This factor weighs in favor of admission.

Because four out of the five *Jones* factors weigh in favor of admission, we conclude that the district court did not abuse its discretion when it permitted the state to impeach appellant with his prior burglary conviction.

Fair trial

Finally, appellant argues that he was deprived of his right to a fair trial because of the cumulative effect of the prosecutor's misconduct and the evidentiary errors. "An appellant is entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009) (quotation omitted).

The district court did not commit clear error when it denied appellant's *Batson* challenge or abuse its discretion when it allowed appellant to be impeached with his prior conviction. The prosecutor did not commit misconduct when she referred to relationship evidence. In addition, while the district court erroneously admitted the victim's prior statement as a prior inconsistent statement, the error was harmless because the statement was admissible under a different rule of evidence. Thus, appellant was not deprived of a fair trial.

Affirmed.