STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2302

State of Minnesota,
Respondent,

vs.

Daniel Jordan Thurstin,
Appellant.

Filed November 5, 2012
Affirmed
Kirk, Judge

St. Louis County District Court
File No. 69HI-CR-11-358

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

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

KIRK, Judge

On appeal from his convictions of aiding and abetting attempted first-degree aggravated robbery and fifth-degree assault, appellant argues that the district court abused

its discretion by (1) denying his motion for a change of venue, and (2) allowing the state to impeach him with evidence of his prior convictions. In a pro se supplemental brief, appellant challenges the credibility of several witnesses and contends that his trial counsel was ineffective. We affirm.

FACTS

On May 10, 2011, the state charged appellant Daniel Jordan Thurstin with two counts of first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2010), two counts of attempted simple robbery in violation of Minn. Stat. § 609.24 (2010), one count of making terroristic threats in violation of Minn. Stat. § 609.713 (2010), and one count of fifth-degree assault in violation of Minn. Stat. § 609.224, subd. 2(b) (2010).

The complaint alleged that on May 6, R.C. was walking home from a bar with his wife, J.C., and their friends, R.J. and his wife T.J., when they observed a man cross the street and come toward them. The man asked the two couples if they had any money. R.J. told him that they did not have any money and would not give him any if they did. At that point, two more men came from behind the trees across the street and approached the two couples. One man, who was later identified as appellant, approached R.J. After an exchange of words, appellant punched R.J. with both fists, causing injury to both sides of R.J.'s face, and then fled the scene. Police arrested appellant at his house later that night.

Appellant moved for a change of venue before trial, arguing that he could not receive a fair and impartial trial in St. Louis County due to the media coverage the case had received and because one of the victims was a public figure. He attached several news articles to the motion. The district court denied the motion, but stated that appellant could "renew the motion if the jury selection proves to be extraordinarily difficult."

At a pretrial hearing, appellant asked the district court, "After jury selection, I still have that option of requesting a change of venue, correct?" In response, the court stated, "Your attorney can ask for a change of venue at any time. I denied the request and I don't suspect that is going to be an issue." The district court explained that the jury would be instructed to decide the case based only on the evidence presented in court.

During voir dire, the district court removed several prospective jurors from the jury panel for cause because they had some connection to the victims. While several prospective jurors acknowledged that they had seen news coverage of the incident, none could recall specific details and they did not espouse any biased attitudes linked with the news coverage. Appellant did not renew his request for a change of venue.

The jury found appellant guilty of two counts of aiding and abetting attempted first-degree aggravated robbery and fifth-degree assault and not guilty of the remaining charges. The district court sentenced appellant to 44 months for one count of aiding and abetting attempted first-degree aggravated robbery and 24 months for the second count, to be served consecutively. This appeal follows.

D E C I S I O N

I. Appellant waived any right to a change of venue when he failed to renew his motion.

If the district court is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending, the court may transfer the case to another county. Minn. R. Crim. P. 24.03, subd. 1. "The decision to grant or deny a motion for a change of venue is within the wide discretion of the [district] court." *State v. Chambers*, 589 N.W.2d 466, 473 (Minn. 1999). This court will not reverse the district court's decision absent an abuse of discretion and a showing of prejudice to the appellant. *Id.* "Where a defendant is granted leave to renew his motion for change of venue immediately before trial, but declines to do so, he waives any right he may have had to a change of venue." *Id.* at 474 (quotations omitted).

Appellant concedes that he never renewed his motion for a change of venue but contends that, under the circumstances of this case, his failure to renew his motion was not a waiver. He argues that it was fruitless to renew his motion because the district court's response to his question about whether he could renew his motion made it clear that the court would likely deny the motion. But the district court never told appellant that it would deny a renewed motion for change of venue. Instead, the court informed appellant that his counsel could renew the motion at any time and explained that the jury would be instructed to reach a verdict based only on the evidence presented in court. Thus, appellant waived any right to a change of venue by failing to renew his motion.

II. The district court did not abuse its discretion by allowing the state to impeach appellant with evidence of his prior convictions.

Appellant argues that the district court abused its discretion by allowing the state to impeach him with evidence of his three prior felony convictions. Evidence of a defendant's 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). To determine whether the probative value of prior-conviction evidence outweighs its prejudicial effect, courts consider 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). This court will not reverse a district court's ruling on the impeachment of a witness by a prior conviction absent a clear abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Here, the state moved to admit appellant's three prior felony convictions for impeachment purposes. Over appellant's objection, the district court granted the state's motion, noting that the case "comes down to credibility." The district court did not specifically discuss each *Jones* factor on the record. Appellant testified at trial and during his testimony he acknowledged that he has felony convictions for attempted third-degree burglary, fleeing a police officer, and domestic assault.

A. *Jones* factors.

Appellant contends that the district court abused its discretion by failing to consider each *Jones* factor. It is error for the district court to fail to consider and weigh these factors on the record. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). But an appellate court may review the *Jones* factors to determine whether the error was harmless because the conviction was admissible. *Id.* What follows is our analysis of each *Jones* factor.

1. Impeachment value.

Appellant argues that his past convictions had limited impeachment value because none of them reflected on his truthfulness. The Minnesota Supreme Court has held a witness may be impeached by his prior crimes, even those that do not involve dishonesty or false statement, because "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 other words, *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). Appellant's three prior felony convictions have probative value under the whole-person rationale. This factor weighs in favor of admissibility.

2. Date of conviction and subsequent history.

Appellant contends that while some impeachment evidence may have been appropriate, his burglary conviction was stale because it occurred almost ten years prior

to this matter. 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). "But even an older conviction can remain probative if later convictions demonstrate a history of lawlessness." *Swanson*, 707 N.W.2d at 655 (quotation omitted). Appellant was convicted of attempted third-degree burglary in April 2002, fleeing a police officer in November 2004, and domestic assault in January 2009. Because appellant's three convictions occurred within ten years and demonstrate that he consistently participated in felony activity during that time, this factor weighs in favor of admission.

3. Similarity of past crimes.

Appellant argues that his convictions for assault and burglary were similar to the offenses at issue in this matter. 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). While the underlying facts of appellant's prior convictions are not part of the record, the jury could reasonably infer that his conviction for domestic assault was similar to the charged offense because it included an

element of assault. *Cf. State v. Flemino*, 721 N.W.2d 326, 329 (Minn. App. 2006) (noting that the crimes were "not similar in name or fact"). However, his conviction for burglary is not similar to the charged offense. *See id.* (concluding that the defendant's prior burglary conviction was not similar to his robbery charge). This factor does not weigh in favor of admission of appellant's conviction of domestic assault.

4. Centrality of credibility.

"If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Swanson*, 707 N.W.2d at 655. Appellant concedes that credibility is a central issue in this case and that the fourth and fifth factors weigh in favor of admission.

Because four of the five *Jones* factors weigh in favor of admission, the district court did not abuse its discretion by allowing the state to impeach appellant with his three prior felony convictions. Thus, the district court's failure to consider each *Jones* factor on the record was harmless.

B. Cautionary instruction.

Appellant argues that the district court erred by failing to provide a cautionary instruction to the jury immediately following the admission of the evidence of his prior convictions. In general, a district court should give a limiting instruction at the time it admits evidence of a defendant's prior convictions for impeachment purposes as well as in its final instructions to the jury. *State v. Bissell*, 368 N.W.2d 281, 283 (Minn. 1985). But a delay in giving the instructions is generally not prejudicial. *See id.* ("Although the

trial court should have given the cautionary instruction when the evidence was admitted, the court's refusal to do so clearly was not prejudicial since the court did give such an instruction as part of its final instructions to the jury . . . ."); *State v. Craig*, 807 N.W.2d 453, 470 (Minn. App. 2011) (rejecting appellant's argument that the district court erred by failing to give a cautionary instruction when the evidence was received because "the district court did instruct the jury as to the appropriate use of prior-conviction evidence in its final instructions"), *review granted* (Minn. Feb. 14, 2012).

Here, the district court did not give a cautionary instruction at the time it admitted evidence of appellant's prior convictions for impeachment purposes. But the district court gave a limiting instruction in its final instructions to the jury:

> There was evidence concerning prior convictions of the defendant here and that is admitted only for consideration in deciding whether he is telling the truth in this case. You must not consider that conviction or those convictions as evidence of the defendant's character or conduct except as you may think it reflects on believability or credibility.

Thus, the district court's failure to give a cautionary instruction at the time it admitted the evidence was not prejudicial.

III. Appellant's pro se arguments do not have merit.

In his pro se supplemental brief, appellant challenges the credibility of several witnesses and argues that his trial counsel was ineffective.

A. Witness credibility.

Appellant first challenges the credibility of several witnesses who testified at trial, including R.J., T.J., and R.C. He contends that their testimony was not consistent with

their prior statements and that they misrepresented the level of their intoxication at the time of the incident. But "weighing the credibility of witnesses is the exclusive function of the jury." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "As the sole judge of credibility, [the jury] is free to accept part and reject part of a witness's testimony." *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). Here, the jury heard testimony from numerous witnesses and was required to weigh testimony from those witnesses and make credibility determinations. The jury's verdict indicates that it found the victims to be credible and we defer to that determination.

B. Ineffective assistance of counsel.

Appellant argues that his trial counsel was ineffective. To establish a claim of ineffective assistance of counsel, a defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Caldwell*, 803 N.W.2d 373, 386 (Minn. 2011). There is a strong presumption that counsel's performance was reasonable. *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003). An appellate court "generally will not review attacks on counsel's trial strategy." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Determining what evidence to present to the jury is a matter of trial strategy. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999).

Appellant contends that his trial counsel failed to adequately cross-examine witnesses, including R.C. and R.J. But this claim is based on his disagreement with his trial counsel's trial strategy, which we decline to review.

Appellant also contends that his trial counsel failed to communicate a plea offer to him. He cites an exchange between the prosecutor and the district court at a pretrial hearing, during which the prosecutor stated, "And also it is my understanding that the defendant has rejected the plea offer made by the state." In response, the district court stated, "I think that is pretty obvious at least at this point." There was no objection to these statements on the record by appellant or his counsel. Appellant now contends that he was unaware of the plea offer and that, when he questioned his counsel about it, his counsel told him that he did not think appellant would accept the offer. But even if appellant has demonstrated that his trial counsel failed to communicate a plea offer to him, he has not established that there was a reasonable probability that the outcome would have been different but for his counsel's error. *See State v. Powell*, 578 N.W.2d 727, 732-33 (Minn. 1998) (concluding that the appellant failed to demonstrate that he was prejudiced by his counsel's deficient representation because he was not amenable to pleading guilty and there was no evidence that he would have pleaded guilty). Appellant does not claim that he would have accepted the plea offer if it had been offered to him and there is nothing in the record to indicate he would have pleaded guilty. Thus, we conclude that appellant was not denied effective assistance of trial counsel.

Affirmed.