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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1381**

State of Minnesota,
Respondent,

vs.

Jerryl William Bobo,
Appellant.

**Filed July 15, 2013
Affirmed
Hudson, Judge**

Benton County District Court
File No. 05-CR-11-1652

Lori Swanson, Attorney General, Jennifer R. Coates, Assistant Attorney General, St. Paul, Minnesota; and

Karl Schmidt, Benton County Attorney, Foley, 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 Hudson, Presiding Judge; Peterson, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from his conviction of third-degree controlled-substance crime, appellant argues that the district court abused its discretion by (1) admitting identification

testimony from a drug- and gang-unit officer based upon “prior knowledge,” and (2) admitting evidence of appellant’s six prior felony convictions for impeachment purposes, should he testify. Because neither ruling constituted an abuse of discretion, we affirm.

FACTS

Appellant Jerryl William Bobo was convicted of third-degree controlled-substance crime for selling 1.2 grams of a substance containing cocaine to T.P., who was working as a confidential informant for the St. Cloud Police Department in exchange for a lesser sentence after he was arrested for selling his prescription medication. On December 7, 2010, T.P. informed the police that he had contacted G.J., a woman whom T.P. knew to be a cocaine user, and that her drug source, “Bugaloo,” had agreed to meet T.P. to sell him crack cocaine. In preparation for the controlled buy, officers from the drug and gang unit provided T.P. with \$200 cash and equipped him with a wireless audio transmission device.

Officer Aaron Dix drove T.P. to a lot adjacent to the Cash Wise parking lot, the location of the planned purchase. Officer Daniel Trautman drove a separate vehicle to the parking lot to conduct audio, visual, and photographic surveillance. Before G.J. arrived with the seller, T.P. entered the Cash Wise to use the bathroom. While T.P. was in the bathroom, a tan Toyota entered the parking lot and parked approximately 20 feet from Officer Trautman’s vehicle. G.J. exited the vehicle and entered the store to look for T.P. After a few minutes, T.P. and G.J. emerged from the store and walked toward the Toyota.

When T.P. and G.J. reached the Toyota, the driver exited the vehicle, and T.P. sat in the driver's seat while G.J. waited outside the car. T.P. testified that when he entered the vehicle, a black male seated in the front seat asked him if he was an undercover cop, which T.P. denied. The individual then instructed T.P. to place the money on the console between the two front seats. After T.P. placed the money on the console, he was handed a plastic bag containing a white substance.

Once the exchange was complete, T.P. exited the vehicle. In accordance with department procedure, no effort was made to stop the Toyota or arrest the seller immediately after the controlled buy. The Toyota exited the parking lot, and Officer Dix picked up T.P. at a nearby store and collected the drugs and audio transmitter. Lab tests revealed that the bag contained 1.2 grams of a white powder containing cocaine.

T.P. testified that he did not get a good look at the seller, having become somewhat panicked after the seller asked him if he was an undercover cop. T.P. was not immediately able to identify the seller of the drugs in a photo lineup but eventually selected a photograph of appellant, stating that he "looked familiar."

G.J. identified appellant as the person she knew as Bugaloo and stated that appellant had sold crack cocaine to T.P. inside the Toyota. But G.J. admitted that she did not know appellant's name when the transaction took place and had only met him on two prior occasions. G.J. was impeached with her history of substance abuse and prior convictions.

Neither Officer Dix nor Officer Trautman witnessed the physical exchange of drugs or money. Officer Dix was not close enough to the Toyota to positively identify

the individuals in the vehicle. Officer Trautman took 13 photographs of the alleged transaction, focusing on the vehicle itself and the individual in the front seat, though the lighting obscured the identity of the individuals in the vehicle. Officer Trautman testified that he recognized the individual in the front seat as appellant due to his prior knowledge of appellant. He also identified appellant as the individual in the photographs taken at the scene.

Several days after the controlled buy, Officer Trautman stopped appellant, who was driving the Toyota that was used in the drug transaction. During the traffic stop, Officer Trautman identified appellant by his Minnesota driver's license. Officer Trautman later testified that, during the traffic stop, he recognized appellant as having been in the front seat of the Toyota during the controlled buy.

At trial, appellant moved to exclude any police testimony identifying appellant based upon prior knowledge. The district court denied the motion, holding that the testimony was probative and necessary for the state's case. Appellant also objected to admission of six of his prior felony theft convictions.¹ The district court conducted an analysis of the *Jones* factors and determined that, because witness credibility was a central issue in the case, appellant could be impeached with the prior felony convictions if he chose to testify. Appellant did not testify.

¹ At the time of trial, appellant had fifteen prior felony convictions, with the earliest dating back to 1989. The state sought to admit six of these convictions—five for theft and one for attempted theft, for offenses taking place between 2003 and 2008.

The jury found appellant guilty of third-degree controlled-substance crime in violation of Minn. Stat. § 152.023, subd. 1(1) (2010), and the district court imposed an executed sentence of 57 months. This appeal follows.

DECISION

I

Appellant argues that the district court committed prejudicial error by admitting an officer's testimony identifying appellant as the seller based upon the officer's "prior knowledge" of appellant from his work in the "gang and drug unit." The testimony was highly prejudicial and of no probative value, appellant argues, because there was ample evidence of appellant's identity.

Reviewing courts generally give deference to the evidentiary rulings of the district court and will not overturn such rulings absent a clear abuse of discretion. *State v. Dobbins*, 725 N.W.2d 492, 505 (Minn. 2006). When the error was objected to, as here, we apply harmless-error analysis to determine if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). "[I]f there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *Id.*

The Minnesota Rules of Evidence provide that evidence is admissible when it is relevant, and its probative value is not substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 401, 403. Testimony from a police officer suggesting that he knows the defendant from prior contacts or incidents may be prejudicial because it

identifies the defendant as a “person of bad character,” and it may motivate the jury to punish the defendant based upon his character. *State v. Strommen*, 648 N.W.2d 681, 687–88 (Minn. 2002). Eliciting such testimony is error if the defendant’s identity is not at issue in the case. *Id.* at 688. However, admission of such evidence is not necessarily error where the purpose of the testimony is to establish identity. *See id.*; *State v. Valentine*, 787 N.W.2d 630, 641 (Minn. App. 2010) (holding that “[e]liciting an officer’s testimony that he knows the defendant from prior contacts is error if the defendant’s identity is not an issue in the case”), *review denied* (Minn. Nov. 16, 2010).

Appellant argues that admission of Officer Trautman’s testimony was improper because appellant’s identity had been amply established by other evidence. But this does not render the testimony irrelevant because the central issue in the case was whether appellant was the person in the front seat of the Toyota during the controlled buy. And despite what appellant now claims was overwhelming evidence, appellant’s counsel argued in his opening statement that T.P.’s drug purchase “did not involve Mr. Bobo and that he was in no way involved in that transaction.” Given the state’s burden of proof and the centrality of appellant’s identity to the state’s case, Officer Trautman’s testimony was probative, even if other evidence of appellant’s identity had been offered.

Furthermore, appellant’s argument ignores the questionable reliability of the other evidence establishing appellant’s identity. T.P. could not make a firm identification of appellant as the seller. G.J.’s credibility was repeatedly called into question, and her memory of the event was spotty. The photographs were not conclusive due to the poor lighting. Because of the questionable reliability of the other evidence of appellant’s

identity and the importance of establishing appellant's identity to the state's case, Officer Trautman's testimony was highly probative. And any prejudicial effect of Officer Trautman's testimony was limited—Officer Trautman provided no details regarding the source of his prior knowledge. We conclude that the district court did not abuse its discretion by admitting Officer Trautman's testimony that he was able to identify appellant because of his prior knowledge.

II

Appellant argues that the district court deprived him of his constitutional right to testify by permitting the state to impeach him with evidence of his six prior felony-theft convictions if he chose to testify. Before trial, appellant moved to prohibit the state from impeaching him with evidence of his prior convictions, and he renewed his motion after the state rested its case-in-chief. The district court ruled that, if appellant testified, the state could impeach him with seven prior convictions: one misdemeanor conviction for giving a false name to police, and six felony convictions for theft and attempted theft. Appellant claimed that because of the ruling, he would not testify. While appellant concedes that his conviction for giving a false name to police was admissible as a crime of dishonesty under Minn. R. Evid. 609(a)(2), he argues that the district court abused its discretion by admitting the other six convictions for impeachment purposes.

“We will not reverse a district court's ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion.” *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011) (quotation omitted). To prevail on a claim that the district court's decision to admit evidence of prior convictions for impeachment purposes chilled his right to

testify, appellant must show that the district court abused its discretion in admitting the evidence. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Under Minn. R. Evid. 609(a)(1), evidence of a previous conviction is admissible if the crime was a felony punishable by “imprisonment in excess of one year” and it is determined “that the probative value of admitting this evidence outweighs its prejudicial effect.” Minn. R. Evid. 609(a)(1). In exercising discretion under rule 609(a), courts consider five factors, known as the *Jones* 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).

In reaching its decision, the district court properly weighed these factors on the record, concluding that the first three factors favored admission, the fourth was neutral, and the fifth factor also favored admission. *See State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006) (“[A] district court should demonstrate on the record that it has considered and weighed the *Jones* factors.”). The district court concluded that, given the centrality of appellant’s credibility to the outcome of the case, the convictions were admissible for impeachment purposes. We analyze each factor in turn to determine if the district court abused its discretion.

Impeachment value

Appellant argues that the convictions had no probative value because they do not demonstrate a propensity for untruthfulness, reasoning that if every crime has inherent impeachment value, the *Jones* framework functions as a “rubber stamp for admissibility.” But the Minnesota Supreme Court has rejected this argument, concluding that “it is the general lack of respect for the law, rather than the specific nature of the conviction, that informs the fact-finder about a witness’s credibility.” *Hill*, 801 N.W.2d at 652. “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.” *Id.*

Appellant argues that admission of the misdemeanor conviction for giving a false name to police was sufficient to demonstrate appellant’s lack of credibility. But the purpose in admitting evidence of prior convictions for impeachment purposes is to allow the fact-finder to see “the whole person” in order to “judge better the truth of his testimony.” *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted). A defendant’s lack of trustworthiness may be demonstrated by “abiding and repeated contempt for laws which he is legally and morally bound to obey.” *Id.* (quotation omitted). Admitting evidence of appellant’s six felony-theft convictions, in addition to evidence of his conviction for giving a false name to police, better informed the jury of appellant as a whole person because it demonstrated the severity of his prior conduct and his consistent and repeated disregard for the laws of society. The first factor therefore weighs in favor of admission.

Date of conviction and prior history

The six felony-theft convictions occurred between 2003 and 2008, with three of the convictions occurring in 2008, less than three years before the date of the alleged offense. Having occurred within ten years of trial, the convictions are presumptively not stale. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). This factor weighs in favor of admission. *See State v. Williams*, 757 N.W.2d 504, 509 (Minn. App. 2008) (stating that because the convictions occurred within the past ten years, the second *Jones* factor “weigh[ed] in favor of admission”), *aff’d*, 771 N.W.2d 514 (Minn. 2009).

Similarity of the past offenses to the charged offense

Appellant was charged with third-degree controlled-substance crime, but his six prior felony convictions were all theft-related. The dissimilarity of the prior offenses from the charged offense minimized the potential prejudicial effect of admitting the prior convictions. *See Ihnot*, 575 N.W.2d at 586–87. The third factor favored admission. *See State v. Williams*, 771 N.W.2d 514, 519 (Minn. 2009).

Importance and credibility of defendant’s testimony

Courts often consider the fourth and fifth factors together. *See, e.g., Gassler*, 505 N.W.2d at 67. “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 argues on appeal that he would have testified that he had a different purpose for being in the Toyota other than to sell crack cocaine to T.P. and that his testimony was the only way for him to raise this defense. However, to the extent that

appellant's testimony was critical to his defense, his credibility would have likewise become a central issue, because the jury would have been asked to determine whether appellant's account was more credible than those given by G.J. and T.P.

Furthermore, had appellant testified, the jury would not have been able to accurately assess the credibility of each witness absent admission of evidence of appellant's prior offenses. The credibility of both T.P. and G.J. was impeached with evidence of their prior offenses and history of drug use; providing a balanced and complete picture of the credibility of each witness to the jury would have required impeaching appellant with evidence of his past offenses. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (permitting the state to impeach defendant with past convictions because it was necessary to give the jury a balanced account after defendant's extensive attacks on complainant's credibility).

The district court's conclusion that a combination of the fourth and fifth *Jones* factors favored admission is supported by appellant's failure to articulate the importance of his testimony on the record. It is "the responsibility of the defendant to make an offer of proof as to what would have been the substance of the testimony, had it been provided." *Ihnot*, 575 N.W.2d at 587 n.3. Appellant was given an opportunity to make a record of what the substance of his testimony would have been, but made no such offer of proof. Given the critical importance of appellant's credibility and appellant's failure to demonstrate the importance of his testimony, the district court did not abuse its discretion by determining that the fourth and fifth *Jones* factors, on balance, favored admission of appellant's prior convictions.

Because at least four of the five *Jones* factors favored admission of appellant's six prior felony-theft convictions, the district court did not abuse its discretion by admitting evidence of those convictions for impeachment purposes under Minn. R. Evid. 609(a)(1).

Affirmed.