

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2263**

State of Minnesota,
Respondent,

vs.

Richard Leslie Larsen,
Appellant.

**Filed October 28, 2013
Affirmed
Chutich, Judge**

Cass County District Court
File No. 11-CR-11-951

Lori Swanson, Attorney General, Matthew G. Frank, Assistant Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Christopher J. Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

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

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant Richard Larsen challenges his convictions of three counts of second-degree criminal sexual conduct, contending that the district court (1) erred by precluding

him from admitting evidence of his good character, (2) abused its discretion by ruling that his 2006 second-degree-assault conviction could be used by the state to impeach him if he testified, and (3) erred by not issuing a cautionary instruction to the jury immediately following the prior-conviction evidence. Because Larsen did not obtain a final ruling from the district court on whether he could admit evidence of his good character, the district court properly admitted evidence of Larsen's prior conviction, and the lack of a cautionary instruction following the impeachment testimony did not affect Larsen's substantial rights, we affirm.

FACTS

In December 2010, appellant Richard Larsen began sexually abusing A.J., who was eleven-years old. Larsen lived with A.J.'s mother, and the abuse occurred when A.J.'s mother was away from the home. A.J. frequently woke up at night with Larsen on top of her with his hands on her breasts and genitals, both over and under her clothes. Larsen also put his mouth on A.J.'s breasts. A.J. tried to escape from Larsen, but she was unable to move with his body weight on top of her. Once while A.J. was watching television, Larsen asked A.J. to lie in bed with him, and he "groped" her.

As the abuse worsened, Larsen lay on top of A.J. and moved his lower body up and down over A.J.'s genitals while A.J. was wearing underwear. One time, Larsen was not wearing underwear and he pushed A.J.'s underwear aside to try to put his penis into her vagina. Larsen was unable to penetrate A.J. because her body was too small. The sexual abuse ended in April 2011, when A.J.'s mother asked Larsen to move out of the house for unrelated reasons.

The sexual abuse was discovered after A.J. wrote a note to a friend at school about it. A.J.'s friend urged her to tell the social worker at school about the sexual abuse, but A.J. was too scared to tell anyone in an authority position because she feared people would think she was lying. A.J. told another friend about the abuse, and the second friend also encouraged A.J. to tell a teacher. A.J. eventually told the social worker at school about the abuse she suffered, and the school called the police and notified her mother.

During the ensuing investigation, A.J. was examined at a hospital and interviewed by the police. A.J. told the police that Larsen touched her chest and genitals approximately twenty times between December 2010 and April 2011. A.J. was soon after examined in a CornerHouse-style¹ forensic interview at the Family Advocacy Center in Bemidji. A.J. again said Larsen touched her over and under her clothes on the chest and genital area. She also said he licked a spot on her chest and lay on top of her. She stated that this abuse occurred between Thanksgiving and Easter.

Cass County ultimately charged Larsen with one count of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct. Before trial, the state moved to prohibit Larsen from calling character witnesses who would testify to irrelevant or collateral issues. The district court did not make a final ruling on the motion and requested an offer of proof from the defense. The defense never submitted an offer of proof to the district court.

¹ A CornerHouse-style interview is a protocol for questioning young children and involves, among other things, the use of open-ended questions and anatomically correct dolls.

A jury trial took place over three days in August 2012. A.J. testified about the abuse she suffered, and one of A.J.'s friends testified that A.J. told her about Larsen sexually abusing her. The district court admitted into evidence the note that A.J. wrote to her friend at school. A.J.'s brother testified that he once saw Larsen tickling A.J. under the blankets and that it made him uncomfortable because Larsen was tickling A.J. lower than her belly. He explained that when A.J. told him that Larsen was just tickling her, he could tell by her face that it was not true.

In addition, witnesses testified about the investigation that took place after A.J. reported the abuse. Two police officers, a nurse from the Cass Lake Indian Health Service, and a forensic interviewer from the Family Advocacy Center of Northern Minnesota testified that A.J. told them how Larsen touched her chest and genitals. A recording of A.J.'s CornerHouse-style interview at the Family Advocacy Center was received into evidence and played for the jury.

Larsen testified in his own defense and denied ever sexually abusing A.J. He stated that he believed A.J.'s mother told her to lie about the sexual abuse so that he could not see his children. Larsen was impeached, over his objection, after the district court ruled that his 2006 conviction for second-degree assault was admissible as impeachment evidence.

Larsen called seven witnesses, including his brother, son, and goddaughter, as well as a friend, a tribal liaison, and a sexual-assault nurse examiner. Some of these witnesses testified about Larsen's positive activities with his children, and some reported that A.J.'s mother mistreated her.

The jury convicted Larsen of three counts of second-degree criminal sexual conduct and acquitted him of one count of first-degree criminal sexual conduct. This appeal followed.

D E C I S I O N

I. Character Evidence

Larsen claims that the district court abused its discretion by precluding him from calling witnesses to testify about his good character under Minnesota Rule of Evidence 404(a)(1) and that this error substantially influenced the jury's decision. After carefully examining the record, we conclude that the district court did not definitively exclude any of Larsen's proposed character evidence and, therefore, did not err.

We generally review evidentiary rulings for abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Both parties argued in their briefs that the standard of review on this issue was abuse of discretion, but when, as here, counsel fails to "seek clarification" on a "provisional" ruling, we review only for plain error. *State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008). Plain error requires that the appellant show "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

In response to the state's motion to prohibit character witnesses from testifying about irrelevant or collateral issues, the district court stated:

On the motion in limine, *I haven't made a final decision on that*, but I expect that I will grant the motion of the State with respect to character evidence. *What I would ask the defense to do is make an offer of proof so that I can further analyze that*. But it seems under the Rules of Evidence that unless it's for the, the character of the defendant is attacked, then evidence of his reputation for truthfulness or honesty could be used to rehabilitate that credibility. But generally specific acts of conduct or habit are not allowed to bolster character evidence. *But I'll look for your offer of proof*.

(emphasis added). No evidence in the record shows that the defense ever made an offer of proof or that the district court ever made a final ruling on the issue.

“[E]videntiary objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear, or when the context at trial differs materially from that at the time of the former ruling.” *Word*, 755 N.W.2d at 783. Additionally, “attorneys have an obligation to seek clarification regarding whether an in limine ruling is definitive when there is doubt on that point.” *Id.* Accordingly, Larsen should have obtained a “definitive ruling” from the district court, and if the ruling resulted in the exclusion of the positive character evidence, he should have made an offer of proof to properly preserve the issue for appeal. *See* Minn. R. Evid. 103(a)(2).

Instead of requesting the district court to make a final ruling on the issue, Larsen proceeded to call seven witnesses, including some witnesses he argues on appeal were excluded, to testify during his case-in-chief. The state did not object to their testimony

on Larsen's character. Because the district court never made a final ruling on the state's motion in limine and did not exclude character testimony from Larsen's witnesses, the district court did not err, much less plainly err.

II. Evidence of Prior Conviction

Larsen argues that the district court abused its discretion in allowing his 2006 conviction of second-degree assault to be admitted for impeachment purposes because the district court did not analyze each of the *Jones* factors on the record. After carefully considering the record, we conclude the district court properly admitted this evidence.

We review the district court's decision on impeachment of a defendant by prior convictions for an abuse of discretion. *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011). Under Minnesota Rule of Evidence 609, a prior conviction punishable by a year or more of imprisonment can be admitted into evidence for impeachment purposes if the conviction is less than ten years old and the probative value of the conviction outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). The district court is guided by the following five factors to determine whether a prior conviction has a more prejudicial effect than probative value: "(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 . . . , (4) the importance of [the] defendant's testimony, and (5) the centrality of the credibility issue." *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978).

While a district court "should demonstrate on the record that it has considered and weighed the *Jones* factors," *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006), where

it does not do so, we must analyze independently the five factors. *State v. James*, 638 N.W.2d 205, 211 (Minn. App. 2002), *review denied* (Minn. Mar. 27, 2002). Weighing these factors here, we conclude the district court properly admitted evidence of Larsen’s prior conviction.

A. Impeachment Value of the Prior Crime

Larsen argues that his prior conviction had low impeachment value because he was not convicted of a crime of dishonesty. But a prior conviction that does not directly involve truth or falsity still has impeachment value. *See State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). “[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.” *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (quoting *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979)). Because Larsen’s prior assault conviction assisted the jury in determining his credibility as a witness, this factor weighs in favor of admission.

B. Date of the Conviction and Defendant’s Subsequent History

Larsen concedes that his 2006 conviction is “well within the 10 year requirement” of Minnesota Rule of Evidence 609(b) and that this factor “weighs in favor of admission.”

C. Similarity of the Past Crime With the Charged Crime

Larsen asserts that his prior conviction was too similar to the charged crime to be admitted because both crimes involved an assault. We recognize that these crimes are both crimes against a person, but they differ in notable ways. For example, Larsen’s

prior conviction was not for a sexual assault, and it did not involve a child victim. Given these distinguishing characteristics, this factor weighs in favor of admitting Larsen's prior conviction for impeachment purposes. *See, e.g., State v. Ihnot*, 575 N.W.2d 581, 583, 587 (Minn. 1998) (upholding the admission of a conviction for third-degree criminal sexual conduct in a trial for first-degree criminal sexual conduct).

D. Importance of the Defendant's Testimony

This factor favors exclusion of a prior conviction if the defendant's testimony is the only evidence available for the defendant to present a defense and the admission of the prior conviction would also persuade the defendant not to testify. *See Gassler*, 505 N.W.2d at 67; *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). When a defendant elects to testify at trial despite the possibility of being impeached by a prior conviction, this factor weighs in favor of upholding the admissibility of the prior conviction. *State v. Craig*, 807 N.W.2d 453, 470 (Minn. App. 2011), *aff'd on other grounds*, 826 N.W.2d 789 (Minn. 2013). Because Larsen voluntarily chose to testify in his defense, this factor also weighs in favor of the prior conviction's admission.

E. Centrality of the Credibility Issue

Larsen concedes that the fifth factor likely favors admission. “[T]he general view is that if the defendant's credibility is the central issue in the case—that is, if the issue for the jury narrows to a choice between 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. Because no other witnesses saw the behavior at issue, the jury had to weigh the credibility of Larsen's

testimony against the credibility of A.J.'s. This factor favors admission of Larsen's prior conviction.

In sum, after analyzing all five *Jones* factors and finding that they weigh in favor of admission, we conclude that the district court properly exercised its discretion in allowing the state to impeach Larsen with evidence of his prior conviction.

III. Cautionary Instruction

Finally, Larsen argues that the district court erred by failing to give the jury a cautionary instruction when his prior conviction was admitted. Larsen did not object to the failure to give the instruction at trial, so we apply plain-error review. *State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011). "Under plain error analysis, we must determine whether there was error, that was plain, and that affected the defendant's substantial rights." *Id.*

We have recently held that it is error for a district court to wait until the end of the trial to give a cautionary instruction to the jury on evidence of a defendant's prior conviction, but that this error "does not prejudice a defendant's substantial rights if the district court provides a limiting instruction . . . to the jury at the end of the trial and the state makes little use of the evidence." *State v. Irby*, 820 N.W.2d 30, 38 (Minn. App. 2012) (quotation omitted), *review granted on other grounds* (Minn. Nov. 20, 2012). Thus, the district court erred by not giving the instruction sua sponte when Larsen testified about his prior conviction. This error did not, however, prejudice Larsen because the district court gave a limiting instruction at the end of trial. In addition, Larsen was able to explain on direct examination his version of the events that resulted in

his conviction of second-degree assault. Further, the record reflects that the state did not reference Larsen's prior conviction in its closing argument. The district court's error in omitting a cautionary instruction during trial did not affect Larsen's substantial rights.

Affirmed.