STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2296

State of Minnesota,
Respondent,

vs.

James Al Burr,
Appellant.

Filed December 16, 2013
Affirmed in part, reversed in part, and remanded
Minge, Judge[*]

St. Louis County District Court
File No. 69DU-CR-12-1566

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

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

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Smith, Judge; and Minge, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

MINGE, Judge

Appellant challenges his conviction of and sentencing for felony domestic assault and felony domestic assault by strangulation, arguing that the district court erred: (1) by ruling that the state could impeach him with five prior convictions, (2) by incorrectly calculating his criminal-history score, and (3) by sentencing him to separate concurrent sentences for felony domestic assault and felony domestic assault by strangulation because they arose from the same behavioral incident. Appellant also argues pro se that the state's witnesses were not credible or competent to testify and that the state was required to disclose the victim's medical records. We affirm in part, reverse in part, and remand.

FACTS

In the evening of May 10, 2012, appellant, James Burr, and his girlfriend, B.K.G., were drinking with their friend, B.D.P. at B.D.P.'s apartment. Appellant started calling B.K.G. a "white trick," and accused her of sleeping with other men. B.D.P. called the police because appellant was "acting out of line." When officers arrived at B.D.P.'s apartment, they took appellant to detox for the night.

Appellant was released from detox on May 11, 2012, at approximately 6:00 a.m. He returned to B.D.P.'s apartment and started acting aggressively. He again called B.K.G. a "white trick," and accused her of sleeping with other men. His behavior escalated and he became more violent. Appellant began throwing objects around the

apartment; he broke dishes, a small folding table, and damaged B.D.P.'s couch. B.D.P. called 911 and explained that appellant was at his apartment, that he was not welcome, and that he was destroying property.

Appellant then began physically attacking B.K.G. During the attack, he pulled her hair, slapped her, choked her, and threatened to kill her. As a result of the choking, B.K.G. lost consciousness. B.D.P. called 911 back to report that appellant was choking B.K.G.

Appellant stopped strangling B.K.G. when police arrived at the apartment. Officers observed several of B.K.G.'s long blond hairs in appellant's hand. Based on that morning's conduct, the state charged appellant with felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2012), felony domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2012), and terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2012).

Appellant represented himself at trial. He exercised his right not to testify. The jury found appellant guilty of felony domestic assault and felony domestic assault by strangulation. It acquitted him of the terroristic threats charge. The district court sentenced him to 33 months in prison for each assault offense, to be served concurrently.

D E C I S I O N

I.

The first issue is whether the district court abused its discretion by ruling that the state could impeach him with five prior convictions, four of which came from a single

case. After a hearing, the district court ruled that if appellant chose to testify, the existence of five felony convictions in his record would be admissible for impeachment purposes. The court limited evidence of the convictions to disclosure of their existence, holding that the underlying charges and the details of the offenses would not be admitted.

A district court's ruling on the admissibility of prior convictions for impeachment of a defendant is reviewed under a clear abuse of discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Evidence that a witness has been convicted of a felony is admissible for impeachment if the court "determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a)(1). In making this determination, the court considers the following 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 defendant's testimony, and (5) the centrality of the credibility issue.

State v. Swanson, 707 N.W.2d 645, 654 (Minn. 2006) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). The district court "should demonstrate on the record that it has considered and weighed the *Jones* factors." *Id.* at 655.

In this case, the district court weighed and considered the *Jones* factors on the record. Appellant asserts that the district court abused its discretion by failing to conduct a separate *Jones* analysis for each conviction. The Minnesota Supreme Court has

allowed the district court to apply the *Jones* factors to several prior convictions in one analysis. *See State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (applying the *Jones* factors to five prior convictions in one analysis); *Swanson*, 707 N.W.2d at 655 (same).

A. The *Jones* Factors.

1. Impeachment value.

Appellant claims that the district court did not truly assess the probative value of any of his prior convictions because it merely noted that they have impeachment value by allowing the jury to see the whole person. "[A] prior conviction can have impeachment value by helping the jury see the 'whole person' of the defendant and better evaluate his or her truthfulness." *Swanson*, 707 N.W.2d at 655 (citing *State v. Gassler*, 505 N.W.2d 62, 66-67 (Minn. 1993)). "[I]t 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." *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011).

The district court considered the impeachment factor and stated on the record that appellant's prior convictions have impeachment value because they "would allow the jury to see the whole person of the Defendant, should he choose to testify, and . . . may be used for the limited purpose of judging credibility." All of appellant's prior convictions have impeachment value because they show appellant's general lack of respect for the law and enable the jury to see the "whole person." *See Hill*, 801 N.W.2d at 652; *Swanson*, 707 N.W.2d at 655.

Appellant also argues that by admitting four prior convictions arising from the same 2009 case, the district court exaggerated his criminality and untrustworthiness. Although four of the prior convictions arose from the same prosecution, they were not part of the same behavioral incident. Because the 2007 and 2009 convictions all illustrate appellant's general lack of respect for the law, this factor weighs in favor of admission.

2. Date of the conviction.

Appellant concedes that this factor favors admission. Convictions occurring within ten years of trial are presumptively not stale. *Gassler*, 505 N.W.2d at 67. The district court noted that "the convictions fall within the time frame permitted, the ten-year time limit . . . ." Because appellant's prior convictions are from 2007 and 2009, this factor weighs in favor of admission.

3. Similarity of the past crimes with the charged crime.

Appellant's prior convictions are similar to the charged crimes. The greater the similarity of the alleged offense to the prior conviction, the more likely it is that the conviction is more prejudicial than probative. *Jones*, 271 N.W.2d at 538. The district court may allow a party to impeach a witness with an unspecified felony conviction if it finds that the prejudicial effect of disclosing the nature of a felony conviction outweighs its probative value. *Hill*, 801 N.W.2d at 652.

In the current case, appellant was charged with felony domestic assault, felony domestic assault by strangulation, and terroristic threats. The state sought to impeach appellant with a 2007 conviction for fifth-degree assault and 2009 convictions for fifth-

degree assault, false imprisonment, domestic assault, and terroristic threats. The district court acknowledged the risk of prejudice due to the similarity of the convictions. As previously stated, the district court in this case limited the disclosure of the prior convictions as "unspecified felony convictions." This factor weighs in favor of admission because omitting any details regarding the prior convictions reduced the risk of undue prejudice. *See Hill*, 801 N.W.2d at 652-53.

4. Importance of appellant's credibility and testimony.

Appellant concedes that his credibility and testimony were important. "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. The district court determined that appellant's testimony would be important if he chose to testify, and that credibility would be at issue. This factor weighs in favor of admission.

Because there is a reasonable basis for determining that all of the *Jones* factors weigh in favor of admission, we conclude the district court did not abuse its discretion under Minn. R. Evid. 609(a)(1) in deciding that the probative value of the prior convictions outweighed the prejudicial effect of admitting this evidence.

II.

The second issue is whether this case should be remanded for resentencing because appellant's criminal history was erroneously calculated to include four felony points from a 2009 prosecution in which he was convicted of four offenses but only sentenced for two. "The basic rule for computing the number of prior felony points in the criminal history is that the offender is assigned a particular weight for every felony

conviction for which a felony sentence was stayed or imposed before the current sentencing." Minn. Sent. Guidelines cmt. 2.B.101 (2012).

The state agrees that appellant's 2009 convictions were improperly treated as four convictions in calculating his criminal-history score. The record indicates that in 2009 the district court did not pronounce a sentence for the domestic assault or terroristic threats convictions. Because the calculation of appellant's criminal history was erroneous, we remand to the district court for resentencing based on a criminal-history score of five.

III.

The third issue is whether the district court erroneously sentenced appellant on both the felony domestic assault and felony domestic assault by strangulation offenses because both offenses arose from the same behavioral incident. The district court sentenced appellant to 33 months in prison for felony domestic assault and 33 months in prison for felony domestic assault by strangulation to be served concurrently. Appellant did not object to the imposition of both sentences and raises the issue for the first time on appeal. "A defendant does not waive relief from multiple sentences . . . arising from the same behavioral incident by failing to raise the issues at the time of sentencing." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992).

"[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2012). If a defendant commits multiple offenses against the same victim during

a single behavioral incident, the defendant may be sentenced for only one of those offenses. *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012). This rule even applies to concurrent sentences. *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

The purpose of this section is to protect a defendant convicted of multiple offenses against unfair exaggeration of the criminality of his conduct. *State v. Mullen*, 577 N.W.2d 505, 511 (Minn. 1998). The district court's determination of whether multiple offenses are part of a single behavioral incident is a fact question that we review for clear error. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). The district court's decision to impose multiple sentences is reviewed for an abuse of discretion. *Id.*

"[T]o determine whether two intentional crimes are part of a single behavioral incident, we consider factors of time and place . . . [and w]hether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted).

The parties agree that the two offenses occurred at the same time and place. The offenses occurred on May 11, 2012, from approximately 6:00 a.m. until sometime shortly after 7:00 a.m. at B.D.P.'s apartment. Therefore, the issue becomes whether the offenses share a criminal objective. *Id.* "The state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident." *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000) (citation omitted).

The state relies on *State v. Eaton* to support its claim that the domestic assault and the domestic assault by strangulation were separate offenses. 292 N.W.2d 260 (Minn. 1980). In *Eaton*, the defendant committed thefts of two different checks three days apart. *Id.* at 267. Although the defendant in that case tried to argue that his actions constituted one criminal objective, the court pointed out that changing circumstances of the criminal conduct over the three-day period precluded consolidating the offending conduct and ruled that his large plan to swindle money was too broad to be considered a single behavioral incident. *Id.* The current case is very different from *Eaton*; the offenses in this case occurred at the same time and place and were continuing, even if escalating, behavior.

The state focuses on the fact that there were two 911 calls to show that the strangulation offense was more serious than the domestic assault, thereby indicating different criminal objectives. When B.D.P. first called the police, he reported that appellant was destroying his property and acting out of control. Law enforcement labeled this as a "code 2 response," meaning that the responding officer did not turn his squad lights on or rush to the scene. When B.D.P. called 911 the second time, he reported that appellant was now strangling B.K.G. Although officers treated the initial 911 call as reporting the destruction of property and accorded it a lower urgency than the subsequent 911 strangulation call, the distinction does not establish that here the domestic assault and domestic assault by strangulation were different behavioral incidents.

The state also relies on *State v. Bookwalter* to argue that the offenses have different criminal objectives because they have different intents. 541 N.W.2d 290 (Minn. 1995). In *Bookwalter*, the defendant kidnapped the victim, sexually assaulted her in her own van, and then drove her to a different location where he attempted to murder her. *Id.* at 291-92. The offenses in *Bookwalter* occurred at different times and at different locations. The court held that they were not part of the same behavioral incident. *Id.* at 297. The court noted, "it is meaningful to realize that the two crimes involve separate intents, with the crime of attempted murder requiring the specific intent to kill and criminal sexual conduct in the first degree requiring the general intent to sexually penetrate the victim." *Id.* at 296.

Unlike *Bookwalter*, the offenses at issue here have the same intent to assault the victim. In this case, to prove the charges of domestic assault and domestic assault by strangulation, the state had to prove that the defendant intentionally inflicted or intended to inflict bodily harm on a family or household member. Minn. Stat. § 609.2242, subds. 1, 4 (2012); Minn. Stat. § 609.2247, subd. 2. The state argues that felony domestic assault has a different intent requirement than felony domestic assault by strangulation because in proving felony domestic assault it does not need to prove the intent to impede normal breathing as it would for the strangulation charge. Although the strangulation element is an additional element, it does not change the overarching intent to assault a household or family member. Similarly, in proving felony domestic assault by

strangulation and felony domestic assault, the state must prove the underlying assault. *Compare* 10 *Minnesota Practice*, CRIMJIG 13.49 (2012), *with* CRIMJIG 13.132.

Furthermore, the state, in its closing argument, stated that appellant should be convicted of felony domestic assault based on the fact that appellant hit B.K.G., strangled her, pulled her hair, and pulled her by the head. The fact that this statement was made to illustrate appellant's general assaultive behavior indicates that appellant had a singular criminal objective to assault B.K.G. In sum, we conclude that on this record, it is clear that both offenses arose from a single behavioral incident.[1]

Because appellant was convicted of two offenses based on a single behavioral incident, appellant may only be sentenced for only one of these offenses. Minn. Stat. § 609.035, subd. 1. "[S]ection 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). In determining which offense is the most serious, the following considerations may be used for guidance: (1) the length of the sentences actually imposed by the district court, (2) the sentencing guidelines' severity-level rankings, and (3) the maximum potential sentence of each offense. *Id.*

[1] In deciding that these offenses constitute a single course of conduct in this case, we do not decide whether these offenses always arise from a single behavioral incident. We recognize that situations may arise in which these offenses constitute two separate incidents.

Here, the length of the sentences actually imposed and the sentencing guidelines' severity-level rankings are the same for both crimes; appellant received 33-month sentences for each crime and both offenses are ranked at a severity level of four. Minn. Sent. Guidelines 5.A (2012). The maximum potential sentence for felony domestic assault is five years imprisonment or a $10,000 fine, or both. Minn. Stat. § 609.2242, subd. 4. The maximum potential sentence for domestic assault by strangulation is three years imprisonment or a $5,000 fine, or both. Minn. Stat. § 609.2247, subd. 2. Because felony domestic assault has a higher statutory maximum sentence, it is the more serious offense. Therefore, we reverse and remand to the district court to vacate appellant's sentence for domestic assault by strangulation.

IV.

In his pro se supplemental brief, appellant raises four additional issues: First he argues that B.K.G. and B.D.P. were not credible based on inconsistencies in their testimony. "As a general matter, judging the credibility of witnesses is the exclusive function of the jury." *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995). A "jury is free to accept part and reject part of a witness's testimony." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). "Inconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *Id.* Indeed such discrepancies are commonplace. Assuming that the state's witnesses' testimonies did contain inconsistencies, the jury heard this evidence and concluded that the state's

witnesses were credible. This determination was within the exclusive domain of the fact-finder. *Dale*, 535 N.W.2d at 623.

Appellant's second pro se claim is that the state's witnesses committed perjury. A person is guilty of perjury if he or she "makes a false material statement not believing it to be true" in a proceeding "in which the statement is required or authorized by law to be made under oath or affirmation." Minn. Stat. § 609.48, subd. 1(1) (2012). In cases of alleged false testimony, Minnesota appellate courts will grant a new trial if the following three-part test is satisfied: "(1) the court is reasonably well satisfied that the testimony in question was false; (2) that without the testimony the jury might have reached a different conclusion; and (3) that the petitioner was taken by surprise at trial or did not know of the falsity until after trial." *Dobbins v. State*, 788 N.W.2d 719, 733 (Minn. 2010).

Appellant alleges that B.K.G. committed perjury based on her inconsistent statements. Appellant has not offered proof as to how this testimony was false beyond speculating about inconsistencies in B.K.G.'s memory. The jury heard these inconsistencies at trial and still found appellant guilty. The district court ruled that "no one broke the law on the witness stand." Appellant does not claim that this determination was clearly erroneous. Because we are not reasonably satisfied that the testimony was false, we conclude appellant is not entitled to a new trial on this ground.

Third, appellant argues that B.K.G. and B.D.P. were not competent to testify because they were intoxicated when the offense occurred. He relies on the law applicable to witnesses who are intoxicated when they testify in court. *See* Minn. Stat. § 595.02,

subd. 1(f) (2012) ("Persons of unsound mind and persons intoxicated at the time of their production for examination are not competent witnesses if they lack capacity to remember or to relate truthfully facts respecting which they are examined."). Appellant does not claim that any witness was intoxicated at trial, and therefore this standard is not applicable.

Appellant also relies on a personal injury case, *Frank v. Stiegler*, to argue that it was error to permit the witnesses to testify because they were intoxicated when the events occurred. 250 Minn. 447, 84 N.W.2d 912 (1957). In *Frank*, a witness testified that he thought a car was traveling at 35 miles per hour at the time of the car accident, despite being intoxicated when he made this observation. *Id.* at 451-52, 84 N.W.2d at 916. The court concluded that "the witness . . . did not possess the faculties of a person of ordinary ability and intelligence nor did he under the circumstances have the means or opportunity of observation so as to make him a competent witness to testify as to the rate of speed." *Id.* at 452, 84 N.W.2d at 916. Therefore, the court concluded "it was error to permit testimony of the witness as to speed where his observation, while he was in an intoxicated condition, permitted him to have only a momentary view of the car with which he collided." *Id.* at 452, 84 N.W.2d at 917. In this case, even though the witnesses were drinking around the time of the assault, the record clearly indicates that they had ample opportunity to observe the incident.

Fourth, appellant claims that he requested B.K.G.'s medical reports from the state but did not receive them. A witness's medical records are protected by privilege. Minn.

Stat. § 595.02, subd. 1(d) (2012). However, a criminal defendant's right to prepare and present a defense is part of the constitutional right to a fair trial. *State v. Wildenberg*, 573 N.W.2d 692, 697 (Minn. 1998). If a defendant requests a witness's medical records, district courts are encouraged to review medical records *in camera* to determine whether the privilege must give way. *State v. Reese*, 692 N.W.2d 736, 742 (Minn. 2005). But a defendant requesting in camera review "must make at least some plausible showing that the information sought would be material and favorable to his defense." *State v. Burrell*, 697 N.W.2d 579, 605 (Minn. 2005) (quotation omitted).

During his sentencing hearing, appellant admitted that he failed to obtain a subpoena for the records. There is no offer of proof or other evidentiary indication that any medical records actually exist or what information they contain. Nor has appellant made a plausible showing that the information in the medical records would be material or favorable to his defense. We conclude appellant is not entitled to relief on this ground.

Affirmed in part, reversed in part, and remanded.