STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0476

State of Minnesota,
Respondent,

vs.

Cheri Facchin,
Appellant.

Filed June 3, 2008
Affirmed
Peterson, Judge

Ramsey County District Court
File No. KX-05-3247

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Gurdip Singh Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Stoneburner, Judge.

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

PETERSON, Judge

In this appeal from a conviction of offering a forged check, appellant argues that (1) the district court erred in admitting for impeachment purposes evidence of prior convictions for controlled-substance offenses and receiving stolen property; (2) the prosecutor committed misconduct by shifting the burden of proof, disparaging appellant's defense, giving a personal opinion of appellant's guilt, and attacking appellant's character; and (3) the evidence was insufficient to prove the element of intent to defraud. We affirm.

FACTS

On July 12 and 13, 2005, appellant Cheri Facchin presented at a credit union where she had an account three checks drawn on the account of H.I. The first check was made payable to cash in the amount of $275. Appellant went inside the credit union and cashed the check with a teller at about 3:15 p.m. on July 12. One hour and 25 minutes later, appellant cashed the second check, payable to cash in the amount of $650, with a teller at a drive-through window. At 5:34 p.m. on July 13, using a drive-through window, appellant deposited the third check, payable to appellant in the amount of $320, into her account. Immediately after depositing the third check, appellant went inside the credit union and withdrew the $320 from her account. All three checks were endorsed by appellant. H.I. testified that she did not write or sign any of the checks.

Appellant testified: She worked for M.S., who is a good friend and is in the business of selling items bought at auction. On July 7, 2005, she received a call from a

woman who was interested in a go-cart that M.S. had for sale. The woman did not have enough cash to pay for the go-cart, so she gave appellant a check to hold it for a few days. Appellant instructed the woman to make the check out to "cash" because M.S. did not have a bank account and appellant would be cashing the check for him. Five days later, after the woman had talked to M.S. and M.S. had verified that the account on which the check was drawn had sufficient funds, M.S. and appellant, with the woman following them, drove to the credit union and cashed the check. M.S. then returned to his house and met with the woman there. The woman noticed some pond equipment that appellant had stored in M.S.'s garage and expressed an interest in buying it. Appellant agreed to sell the pond equipment for $650, and the woman wrote a check for that amount. The woman also bought a set of tires from M.S. for $320. The woman could not fit all of the pond equipment into her car. When she returned the next day to pick up the rest of the equipment, she wrote a check for $320 for the tires. Appellant had the woman write the check to appellant because appellant had already given M.S. the money for the tires out of the $650 check.

A jury found appellant guilty of offering a forged check in violation of Minn. Stat. § 609.631, subds. 3, 4(3)(a) (2004). The district court sentenced appellant to the presumptive sentence of a stayed term of 15 months. This direct appeal challenging the conviction followed.

D E C I S I O N

I.

The district court's ruling on the impeachment of a witness by a prior conviction is reviewed under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). A felony conviction may be admitted for impeachment purposes provided that ten or fewer years have elapsed since the conviction and the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b).

The factors to consider when determining whether probative value outweighs prejudicial effect, which are known as the *Jones* factors, are

> "(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."

Ihnot, 575 N.W.2d at 586 (quoting *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978)). Whether the probative value of the prior convictions outweighs their prejudicial effect is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985).

Before trial, the state declared its intention to impeach appellant with her prior felony convictions for (1) fifth-degree possession of methamphetamine in 2002, (2) possession of a stolen motor vehicle in 2004, and (3) fifth-degree possession of a controlled substance in 2005. The district court considered the *Jones* factors and, due to

the importance of appellant's credibility, ruled that the prior convictions would be admissible for impeachment purposes.[1]

1. Impeachment Value

Appellant argues that the controlled-substance convictions do not involve dishonesty, and, therefore, lacked impeachment value. But the supreme court has concluded that Minn. R. Evid. 609 "clearly sanctions the use of felonies . . . not directly related to truth or falsity for purposes of impeachment, and thus necessarily recognizes that a prior conviction, though not specifically involving veracity, is nevertheless probative of credibility." *State v. Brouillette*, 286 N.W.2d 702, 708 (Minn. 1979) (footnote omitted); *see also State v. Head*, 561 N.W.2d 182, 186 (Minn. App. 1997) (explaining that under rule 609(a), a crime involving dishonesty or false statement is automatically admissible and admission of other crimes is discretionary with district court). "[I]mpeachment by prior crime aids the jury by allowing it 'to see "the whole person" and thus to judge better the truth of his testimony.'" *Brouillette*, 286 N.W.2d at 707 (quoting *City of St. Paul v. DiBucci*, 304 Minn. 97, 100, 229 N.W.2d 507, 508 (1975)). "Lack of trustworthiness may be evinced by [an] abiding and repeated contempt for laws [that one] is legally and morally bound to obey . . ." *Id.* (quotation omitted).

Although admitting evidence of convictions of controlled-substance offenses under the whole-person rationale has been criticized, it remains within the district court's

[1] Appellant does not challenge the sufficiency of the district court's findings on the *Jones* factors. But even if the findings were insufficient, "the error is harmless if the conviction could have been admitted after a proper application of the *Jones*-factor analysis." *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

discretion. *See State v. Flemino*, 721 N.W.2d 326, 328-29 (Minn. App. 2006) (in upholding admission of controlled-substance offense for impeachment, court noted that, despite widespread criticism of "whole person" rationale, rule 609 reflects a broader credibility concept and court of appeals lacks authority to alter rule adopted by supreme court); *State v. Norregaard*, 380 N.W.2d 549, 554 (Minn. App. 1986) (noting that use of prior drug conviction to impeach is disfavored but nonetheless affirming admission of that conviction), *aff'd as modified*, 384 N.W.2d 449 (Minn. 1986). Appellant's three prior convictions during a period of less than three years show a repeated contempt for the law and support admission under the whole-person rationale.

Appellant does not dispute the impeachment value of the stolen-property conviction.

2. Date of Conviction and Subsequent History

Under this factor, the court evaluates the date of a conviction and appellant's subsequent history to determine whether the conviction has lost its relevance over time. *Vanhouse*, 634 N.W.2d at 719 (citing *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980)). Appellant's relatively recent pattern of criminal activity, beginning with the 2002 offense, weighs in favor of admission.

3. Similarity of Crimes

"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." *Bettin*, 295 N.W.2d at 546. The greater the similarity, the

greater the reason for not permitting use of the prior crime to impeach. *Jones*, 271 N.W.2d at 538.

Appellant does not claim that the controlled-substance offenses were similar to the current offense.

Appellant argues that the stolen-property offense was similar to the current offense because both involved knowing possession of stolen property. *See* Minn. Stat. §§ 609.53, subd. 1 (receipt of stolen property), .631, subd. 3 (2004) (offering a forged check). The only fact that the jury was told about the stolen-property offense was that appellant pleaded guilty to possessing a stolen vehicle. In trying appellant for the current offense, the focus was not on her possession of stolen checks but on her offering the checks, specifically, her efforts to make the checks appear to be payments for business transactions and her efforts to avoid detection.

4. Importance of Appellant's Testimony

Because appellant testified and her version of the facts was central to the jury's determination of guilt, this factor weighs in favor of admission. *See State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (stating that if the admission of prior convictions prevents a jury from hearing a defendant's version of events, this weighs against admission of the prior convictions).

5. Centrality of Appellant's Credibility

Because appellant's testimony, if credible, provided an explanation why she legitimately possessed the checks that she cashed at her credit union, this factor also weighs in favor of admission. *See Bettin*, 295 N.W.2d at 546 (stating that if defendant's

credibility is the central issue in the case, a greater case can be made for admitting impeachment evidence because the need for the evidence is greater).

The district court did not clearly abuse its discretion when it admitted evidence of appellant's prior convictions for impeachment purposes.

Appellant argues that, although the district court gave a limiting instruction in its final instructions, it erred by not also giving a limiting instruction when the prior convictions were admitted into evidence. In *State v. Bissell*, 368 N.W.2d 281, 283 (Minn. 1985), the supreme court stated that, when a prior conviction is admitted for impeachment, the district court should on its own give a limiting instruction both when the evidence is admitted and in its final instructions. But even though the defendant requested the instruction when the evidence was admitted, the supreme court also stated that the refusal to give the instruction when the evidence was admitted "clearly was not prejudicial since the court did give such an instruction as part of its final instructions to the jury and since no one suggested that the evidence should be used for any purpose other than determining defendant's credibility as a witness." *Id.* Under *Bissell*, because appellant did not request a limiting instruction when the prior convictions were admitted, the district court gave a limiting instruction in its final instructions, and no one suggested that the evidence should be used for any purpose other than determining appellant's credibility, any error in failing to give the instruction when the convictions were admitted was not prejudicial.

II.

The plain-error doctrine applies when examining unobjected-to prosecutorial misconduct. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under that doctrine, "there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn.1998). Although the *Ramey* court applied the plain-error doctrine to unobjected-to prosecutorial misconduct, it modified the *Griller* formulation, which places the burden of proof of all elements on the defendant, and held that "when prosecutorial misconduct reaches the level of plain or obvious error – conduct the prosecutor should know is improper – the prosecution should bear the burden of demonstrating that its misconduct did not prejudice the defendant's substantial rights." *Ramey*, 721 N.W.2d at 299-300.

Without objecting, appellant noted that the cross-examination of appellant "came dangerously close" to addressing her right to remain silent. But appellant did not object at trial and does not argue on appeal that the cross-examination was misconduct.

Appellant argues that the prosecutor improperly shifted the burden of proof to appellant. Of the three transcript pages cited by appellant to support her argument, only one contains argument by the prosecutor. The prosecutor stated:

> [W]hen I asked her . . . about . . . whether she had contacted her bank of over twenty-five years about the three forged checks, she replied that she may have but that she couldn't remember. Then she went on to say that she thought she might have written a letter to someone in the collections department at the bank about that, but she couldn't recall for sure. But one thing she did remember was that she didn't have a copy of that letter, in fact, she didn't have any

> documentation whatsoever about any efforts that she might have made to try to make things right with her bank.

The argument, read in context, goes to the credibility of appellant's claim that she was the victim of a forgery. The argument was not misconduct. *See Gassler*, 505 N.W.2d at 69 (stating that a prosecutor may not comment on a defendant's failure to present evidence or call a witness but that it is not misconduct to attack the merit of a particular defense theory or argument).

Appellant argues that the following argument improperly disparaged her theory of defense:

> I would submit to you that [appellant] was desperate to try to explain away the fact that she offered three forged checks that you heard introduced as part of this trial. Those checks belonged to [H.I.], as she testified. Please remember that [appellant] is on trial for offering three forged checks, not for theft of [H.I's] checks.
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> . . . These check forgery cases often times involve checks that have been stolen from [sic] someone other than the person who ultimately ends up offering those checks. [Appellant] was so desperate in this case that she concocted an elaborate story about some mystery person who responded to a flyer, and you will see that flyer that was admitted as Exhibit 17 in this case. . . . Now, she concocted the story about this person responding to this flyer about a go-cart in order to get herself out of this offering a forged check charge.

The prosecutor then noted appellant's failure to tell anyone prior to trial that she had been a victim of forgery.

While a prosecutor commits misconduct by disparaging a defense, it is not misconduct to highlight evidence that the state believes made the defense implausible when the prosecutor focuses on evidence rather than on matters that tend to divert the

jurors' minds from the facts in evidence. *State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000). Here, the prosecutor's argument addressed evidence that the prosecutor believed made appellant's defense implausible and did not improperly disparage the defense. *Compare id.* (noting that it is misconduct to call a type of defense "soddy" or to suggest that the jurors would be "suckers" if they believed the defense); *State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002) (concluding that the prosecutor committed misconduct by disparaging the defense by referring to the defense's argument as "ridiculous" and telling the jury not to be "snowed" by the defense), *review denied* (Minn. May 14, 2002).

In arguing that the state had proven each of the elements of offering a forged check, the prosecutor used the prefatory phrase "I submit to you." Appellant argues that using this phrase improperly interjected the prosecutor's personal opinion. But Minnesota courts have consistently held that using prefatory phrases such as "I submit" or "I would submit to you," when offering a proposed interpretation of the evidence to the jury does not amount to an impermissible interjection of personal opinion. *See, e.g.*, *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (concluding that prosecutor was offering interpretation of evidence rather than personal opinion as to guilt when he stated, "I submit to you [that the victim] was killed by her partner"); *State v. Anderson*, 720 N.W.2d 854, 864 (Minn. App. 2006) (concluding that "prosecutor's prefatory phrase 'I suggest' [was] equivalent to 'I submit' or 'the state submits,'" which are permissible), *aff'd*, 733 N.W.2d 128 (Minn. 2007).

Appellant argues that the following argument was an improper attack on her character, "I submit to you that by convicting [appellant] you are not doing anything to her that she hasn't already done to herself. So I ask you to find [appellant] guilty of offering a forged check." In cases holding that a prosecutor committed misconduct by attacking a defendant's character, the statements were more egregious than in this case. *See State v. Ray*, 659 N.W.2d 736, 747 (Minn. 2003) (holding that the prosecutor's attempt to supply race-based explanation for witnesses' behavior improperly invited jury to apply racial and socioeconomic considerations in determining guilt); *State v. Buggs*, 581 N.W.2d 329, 342 (Minn. 1998) (holding that the prosecutor improperly attacked the defendant's character when she referred to him as "coward" with a "twisted" thought process). An isolated comment related to a defendant's character is not necessarily misconduct. *See State v. Haynes*, 725 N.W.2d 524, 529-30 (Minn. 2007) (holding that an isolated question relating to defendant's character was not prosecutorial misconduct).

To the extent that there was misconduct, it was minor, and appellant is not entitled to reversal based on her claims of prosecutorial misconduct.

III.

Appellant argues that the evidence was insufficient to prove intent to defraud. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any contrary

evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Circumstantial evidence is entitled to as much weight as direct evidence. *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). For a defendant to be convicted based on circumstantial evidence alone, however, the circumstances proved must be "consistent with the hypothesis that the [defendant] is guilty and inconsistent with any rational hypothesis [other than] guilt." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). Even with this strict standard, the jury is in the best position to weigh the credibility of evidence and, thus, determines which witnesses to believe and how much weight to give to their testimony. *State v. Daniels*, 361 N.W.2d 819, 826-27 (Minn. 1985). "[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995).

A person is guilty of offering a forged check if the person "with intent to defraud, offers, or possesses with intent to offer, a forged check, whether or not it is accepted." Minn. Stat. § 609.631, subd. 3. Intent is an inference drawn by the jury from the totality of the circumstances, *State v. Marsyla*, 269 N.W.2d 2, 5 (Minn. 1978), and is generally proved circumstantially "by inference from words and acts of the actor both before and after the incident." *Johnson*, 616 N.W.2d at 726.

Appellant cashed the three checks at three different times in only two days. When cashing the third check, appellant acted evasively by using a drive-through window to deposit the money into her account and then immediately going inside to withdraw the money. Appellant claimed that she received the checks, which added up to a large sum of money, from a woman who initially had inquired about a go-cart advertised in a flyer. But the flyer that was admitted into evidence at trial did not advertise a go-cart, and appellant did not verify the woman's identification. Appellant claimed that the first and third checks were payments for items purchased from a business, but neither of the checks was payable to the person who operated the business. Appellant claimed that the check for $650 was a payment for pond equipment owned by appellant, but that check was made payable to cash, and another check was made payable to appellant. Considering this evidence as a whole makes the possibility that appellant acted without the intent to defraud seem unreasonable.

Affirmed.