STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1619

State of Minnesota,
Respondent,

vs.

Antonio NMN Thelen,
Appellant.

Filed November 10, 2009
Affirmed
Klaphake, Judge

Ramsey County District Court
File No. 62-K6-07-003055

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

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

Marie L. Wolf, Interim Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Minge, Judge.

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

KLAPHAKE, Judge

In this direct appeal from his conviction of second-degree murder, Minn. Stat. § 609.19, subd. 1(1) (2006), appellant Antonio Thelen claims that the district court abused its discretion by (1) admitting evidence that a key witness had been threatened by a third party who acted on appellant's behalf, (2) excluding expert testimony on eyewitness identification, and (3) admitting evidence of appellant's prior firearms conviction for impeachment purposes. Appellant also claims that he received ineffective assistance of counsel. We affirm because we conclude that the district court did not abuse its discretion by admitting evidence of threats made to a witness or by excluding expert witness testimony on eyewitness identification; that while the district court may have abused its discretion by admitting evidence of appellant's prior weapons conviction, such error was harmless in light of other strong evidence of appellant's guilt; and that appellant has not met his burden to establish a claim of ineffective assistance of counsel.

D E C I S I O N

Evidentiary Issues

An appellate court "will uphold a district court's decision to admit evidence provided that the court did not abuse its discretion." *State v. Pendleton*, 759 N.W.2d 900, 908 (Minn. 2009); *see State v. Stone*, 767 N.W.2d 735, 739 (Minn. App. 2009) ("Evidentiary rulings are generally left to the district court's sound discretion and will not be disturbed on appeal absent a clear abuse of that discretion"). "Failure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that basis."

State v. Tscheu, 758 N.W.2d 849, 863 (Minn. 2008). A reviewing court may consider the admission of non-objected-to evidence under the plain error rule if "there was (1) error, (2) the error was plain, and (3) the error affected the defendant's substantial rights," and the appellate court determines that it should consider the issue "to ensure fairness and the integrity of the judicial proceedings." *Id.* (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

This case involves a 2006 late-night shooting at the intersection of Kellogg Boulevard and Smith Street in St. Paul, in which appellant was the driver of a vehicle that intercepted another vehicle driven by the victim, S.G. A jury found appellant guilty for shooting S.G. after engaging in an altercation with him. Witnesses to the crime included a passenger from each vehicle and a police officer who was nearby investigating a reported theft. During a police interview, J.H., the passenger in appellant's vehicle, suggested that appellant's "people" were threatening him in order to coerce him to admit culpability for S.G.'s murder. Although appellant did not object to admission of this evidence at trial, he now argues that it was plain error for the district court to do so.

Appellant's argument fails for several reasons. First, J.H.'s statements were admissible to explain discrepancies between his first two statements to police, in which he either denied being present at the murder scene or admitted that he was present in appellant's car but claimed to be asleep at the time of the murder, and the third statement, in which he identified appellant as the person who shot S.G. *See State v. Clifton*, 701 N.W.2d 793, 797 (Minn. 2005) ("Threat evidence can be relevant to explain a witness' inconsistent statements"). Second, because appellant did not object to admission of the

evidence at trial, in order to satisfy the plain error test, the evidence must have undermined the integrity of appellant's trial. *See Tscheu*, 758 N.W.2d at 863 (indicating that the effect of the error must have been to deprive the defendant of a fair trial). The evidence does not undermine the integrity of appellant's trial because the evidence was not emphasized at trial, and in addition to J.H.'s testimony, there was other strong evidence of appellant's guilt, including testimony from a police officer who was an eyewitness to the murder. Under these circumstances, any error in the admission of the evidence of threats to J.H. does not require reversal of appellant's conviction.

Appellant's next claimed evidentiary error is that the district court abused its discretion by refusing to allow him to call Dr. Otto Maclin to testify as an expert on memory recall. After defense counsel disclosed the proposed content of Dr. Maclin's testimony, the district court granted respondent's motion to exclude the evidence, concluding that the evidence "covers the common factors" that are required in jury instructions. The court also ruled that expert testimony on false memory was unnecessary because it was either a matter of common knowledge or because certain aspects of the proffered evidence, such as evidence related to false memory, were not at issue in appellant's trial and were therefore not relevant.

"The admission of an expert's opinion generally rests within the discretion of the district court." *State v. Moore*, 699 N.W.2d 733, 739 (Minn. 2005). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a qualified expert may testify. Minn. R. Evid. 702; *see State v. Lopez-Rios*, 669 N.W.2d 603, 612 (Minn. 2003) ("The primary

consideration for admission of [expert evidence] is whether the testimony will assist the jury in resolving factual questions presented"). "Expert opinion testimony is not helpful if the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience." *Moore*, 699 N.W.2d at 740 (quotation omitted).

In *State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998), the supreme court upheld a district court's exclusion of expert testimony on eyewitness identification, noting that there was nothing in the trial record in that case "to suggest that expert testimony on the accuracy of eyewitness identification in general would be particularly helpful to the jury[.]" *See also State v. Erickson*, 454 N.W.2d 624, 628 (Minn. App. 1990) (noting that expert witness testimony on identification may be excluded where it has "the potential for unduly influencing the jury's credibility assessment"), *review denied* (Minn. May 23, 1990). We conclude that the district court's ruling was not an abuse of discretion, because there is support in the record for the court's determination that the proffered evidence had minimal potential for helpfulness and some of the proffered evidence was irrelevant. *See Miles*, 585 N.W.2d at 372 (excluding eyewitness expert testimony when the jury would not be assisted by its admission); *State v. Barlow*, 541 N.W.2d 309, 313 (Minn. 1995) (excluding eyewitness expert testimony where it would be only minimally helpful to jury).[1]

[1] Citing authority from other states, appellant suggests that it is an abuse of discretion for a district court to exclude expert testimony offered on eyewitness identification,

Appellant next claims that the district court improperly admitted for impeachment purposes evidence of his 1995 conviction for dangerous discharge of a firearm. The district court also admitted appellant's 1992 conviction for providing false information to a police officer. Generally, a felony conviction is admissible for impeachment purposes if the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1). In determining admissibility, the court is guided by the five factors set forth in *State v. Jones*, 271 N.W.2d 534 (Minn. 1978), which include

> (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. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998) (quoting *Jones*, 271 N.W.2d at 538); *Stone*, 767 N.W.2d at 742. An appellate court reviews a district court's ruling allowing the impeachment of a witness by a prior conviction under the abuse of discretion standard. *Ihnot*, 575 N.W.2d at 584.

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especially when the eyewitness identification is central to the state's case. To the extent that there is a general rule on this issue, it is that appellate courts defer to a district court's exercise of discretion to exclude expert testimony on eyewitness identification, because jurors need to refer only to their own experience in evaluating the testimony of an eyewitness. *See, e.g.*, *State v. Kemp*, 507 A.2d 1387, 1389 (Conn. 1986) (noting that "[a]lmost uniformly, state and federal courts have upheld the trial court's exercise of discretion to exclude [expert] testimony [on eyewitness identification]"); *State v. Wheaton*, 729 P.2d 1183, 1188 (Kan. 1986); *Johnson v. State*, 438 So.2d 774, 777 (Fla. 1983), *cert. denied*, 465 U.S. 1051, 104 S. Ct. 1329 (1984); *State v. Hoisington*, 657 P.2d 17, 29 (Id. 1983); *Taylor v. United States*, 451 A.2d 859, 866 (D.C.1982), *cert. denied*, 461 U.S. 936, 103 S. Ct. 2105 (1983). Applying Minnesota law, we observe no abuse of discretion in the district court's ruling that the jury did not need expert assistance to evaluate the eyewitness testimony in this case.

Under current law, appellant's prior conviction had probative value, permitting the jury to consider his violations of law as evidence of the "whole person," *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (quotation omitted), and his prior conviction is within the 10-year period contemplated for admissibility under Minn. R. Evid. 609(b) (stating "evidence of a [prior] conviction is . . . not admissible if . . . more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date"). These factors support the district court's discretionary decision to admit the evidence. As to the fourth and fifth *Jones* factors, appellant and J.H. each claimed that the other shot S.G., making identification a disputed issue at trial. Appellant's credibility was essential to his defense because he was the only person to identify J.H. as the person who shot S.G. "If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). Regarding the fifth factor, "the 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." *Ihnot*, 575 N.W.2d at 587 (quotation omitted).

While some of the *Jones* factors favored admission of the prior conviction, in our view, the key factor at issue here is the third *Jones* factor, the similarity of the prior conviction to the present offense. The district court ruled that this factor favored admission; we disagree. As the identity of the person who shot S.G. was the essential

issue for the jury to decide and the evidence at trial limited the choice of the shooter to either appellant or J.H., any evidence suggesting that appellant owned a gun or had a propensity to shoot a gun was highly prejudicial. *See State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (stating that similarity of prior conviction to charged crime increases danger for jury to use evidence substantively). Thus, even though appellant's prior conviction was somewhat dissimilar to the current offense because it did not involve shooting a person, the prior conviction could have suggested or indicated that appellant had a familiarity with weapons and that he might have been in possession of a weapon or have a propensity to shoot a weapon. Under the circumstances presented here, the third *Jones* factor was determinative. *See State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001) (noting that district court can assign greater weight to certain factors than to others and may not simply "add up the factors and arrive at a mathematical result").

However, while the district court may have abused its discretion by ruling the prior weapons conviction admissible for impeachment purposes, we conclude that any error in this evidentiary ruling was harmless because the verdict reached in this case was "surely unattributable to the error." *State v. Hall*, 764 N.W.2d 837, 842 (Minn. 2009) (quotations omitted). At trial, the evidence establishes that either appellant or J.H. shot the victim. A police officer eyewitness testified that the driver of appellant's vehicle shot S.G. and then got into the driver's seat and drove away from the murder scene. When appellant testified, he admitted that he drove the vehicle when leaving the murder scene. In light of this evidence of appellant's guilt, any error in the admission of the prior conviction was harmless.

Ineffective Assistance of Counsel Claim

Appellant next claims that his trial counsel provided ineffective assistance of counsel by failing to ask for exclusion of portions of J.H.'s third police statement that included his allegation of threats. In a pro se brief, appellant also claims that his counsel failed to pursue J.H.'s purported confession to his girlfriend while she was in jail and failed to properly address the issue of whether two jurors were sleeping during trial. To establish a claim of ineffective assistance of counsel, appellant must "affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a strong probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). An insufficient showing on either *Strickland* prong defeats a claim of ineffective assistance of counsel. *Gates*, 398 N.W.2d at 562 n.1 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

Appellant has failed to show that counsel's errors would have had a reasonable probability of changing the outcome in his case: an eyewitness police officer identified the driver of the vehicle as the person who shot S.G.; appellant admitted that he was the driver of the vehicle; and J.H. testified that appellant, not he, shot S.G. An attorney's decision on whether to call a witness is a matter of trial strategy that does not constitute ineffective assistance of counsel. *See Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007) (stating that "which witnesses to call at trial and what information to present to the jury are questions of trial strategy that lie with the discretion of trial counsel"); *State v. Miller*,

666 N.W.2d 703, 716-17 (Minn. 2003) (trial strategy includes decisions about what evidence to present to a jury). Many of the witnesses in this case had well-established criminal records, including, apparently, J.H.'s girlfriend, and defense counsel may have considered credibility in determining whether to call her as a witness. Further, as to defense counsel's failure to move to redact the threat evidence contained in J.H.'s third police statement, the district court had a proper basis to deny such a motion because the threat evidence explained discrepancies in J.H.'s testimony. *See Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004) ("A claim of ineffective assistance of counsel may not rest on the failure of an attorney to make a motion that would have been denied if it had been made"). Finally, appellant offers no evidence to support his claim that jurors were sleeping during trial. *See McKenzie v. State*, 754 N.W.2d 366, 370 (Minn. 2008) (stating that ineffective assistance of counsel claim fails when defendant fails to offer facts to support claim). For these reasons, appellant has not met his burden to establish a claim of ineffective assistance of counsel.

Affirmed. [2]

[2] As a separate issue, appellant claims pro se that the prosecutor threatened a potential witness, "Bobby Florez." As appellant offers no factual or legal support for this claim, this court declines to address it. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (declining to consider portions of pro se brief that included only argument and were unsupported in the trial record); *State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002) (stating that pro se defendant's assertions are waived without support by argument or legal authority).