STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1867

State of Minnesota,
Respondent,

vs.

Kenneth Atkinson, Jr.,
Appellant.

Filed December 8, 2009
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-07-012670

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Connolly, 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 convictions of first-degree criminal sexual conduct, appellant argues that (1) the evidence was insufficient to establish penetration, (2) the district court abused its discretion by admitting evidence of appellant's terroristic-threats conviction, and (3) he was deprived of a fair trial because jurors saw him wearing a jail identification bracelet in the courtroom and a deputy stood near appellant while he was testifying. We affirm.

FACTS

S.T. and W.T. are sisters whose parents separated in 2003. The girls' mother maintained primary physical custody, but the girls spent about equal time with their father. After the separation, the girls' mother began dating appellant Kenneth Atkinson, Jr., and sometime later, the two began living together with S.T. and W.T. When their mother was working and appellant was not, appellant was alone with and in charge of S.T. and W.T.

While at her paternal grandmother's home in December 2006, S.T. began crying and complaining of pain in her vaginal area.[1] The grandmother offered to put medicine on the irritated area, which she noted was swollen and had red marks. S.T. told her it was not a rash but that "the black guy, what he did, it hurt," explaining that the "black guy" was appellant, the man the girls' "mother brought them along to live with." S.T.

[1] The paternal grandmother testified in Hmong through an interpreter; she testified that the girls spoke in Hmong when they disclosed the information about appellant to her.

explained to her grandmother that appellant "put his penis on her groin area, and to the stomach," but answered "no" when asked if he had put his penis "in her body." Upon hearing S.T.'s story, W.T. began crying and disclosed that appellant had also done this to her. The girls both indicated that appellant had placed his penis near their mouths. The girls' uncle's girlfriend was also present, and after speaking with W.T., she decided to take the girls to the hospital.

At the hospital, S.T. and W.T. met with Dr. Linda Thompson, a pediatrician who specializes in child-abuse issues. Thompson performed anal-genital examinations on S.T. and W.T. During the examination, S.T. told Thompson that "black guy, Ken, touched my pussy and my butt." W.T. told Thompson that appellant "hurt my pussy, and there was blood on it." Neither examination revealed physical signs of injury.

Appellant was charged with two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2006) (sexual penetration with another when complainant is under 13 years of age and actor is more than 36 months older than complainant); and two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2006) (sexual penetration with another when actor has significant relationship to complainant and complainant was under 16 years of age at time of penetration). The charges were tried to a jury.

At the time of trial, S. T. was six years old, and W.T. was eight years old. When asked at trial what had happened to her, S.T. testified as follows:

> PROSECUTOR: Now, did anyone ever touch you in your pussy, you that you didn't want them to touch you? . . .
> WITNESS: No.

. . . .
PROSECUTOR: And why did it hurt, [S.T.]? Did somebody touch you there?
WITNESS: Yes.

As direct examination continued, S.T. stated:

PROSECUTOR: What did he do with his private part?
WITNESS: Put it in my pussy.
. . . .
PROSECUTOR: Where else did he put it?
WITNESS: Butt.
PROSECUTOR: In your butt?
WITNESS: Yes.
. . . .
PROSECUTOR: Did he put it anywhere else other than your pussy and your butt?
WITNESS: Mouth.
PROSECUTOR: In your mouth?
WITNESS: Yes.

S.T. answered "yes" when asked whether appellant did this "a lot of times."

During direct examination, W.T. testified that appellant had "stuck his private part into [her] private part" and into her mouth. She stated that this happened a lot of times. W.T. also stated that appellant threatened to hit her with a wooden spoon if she told anyone.

Appellant testified at trial and denied ever having inappropriately touched S.T. or W.T. For impeachment purposes, the state requested leave to introduce evidence of appellant's felony weapons and terroristic-threats convictions. The district court ruled that it would be unduly prejudicial for the state to introduce evidence of both convictions, but allowed the state to introduce evidence of the terroristic-threats conviction.

The jury found appellant guilty as charged, and the district court imposed two consecutive 144-month sentences. This appeal followed.

D E C I S I O N

I.

Appellant argues that the evidence of penetration is insufficient to support his convictions. Appellant contends that the victims' testimony was inconsistent and uncorroborated. 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 "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *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. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A person is guilty of first-degree criminal sexual conduct if the person "engages in sexual penetration with another person" and "the complainant is under 13 years of age and the actor is more than 36 months older than the complainant," or "the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration." Minn. Stat. 609.342 subd. 1(a), (g) (2006).

"Sexual penetration" includes "any intrusion however slight into the genital or anal openings." Minn. Stat. § 609.341, subd. 12(2) (2006).

At trial, S.T. and W.T. specifically described appellant's actions. W.T. testified that appellant's private part had gone "into" her private part, and S.T. testified that appellant put his private part in her "pussy" and in her "butt." Also, both girls were crying when they first told their grandmother what had happened to them. *See State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984) (stating that "significant corroborating evidence" of a sexual assault may include "testimony by others as to the victim's emotional condition at the time she complained").

The absence of physical evidence of penetration does not require reversal. The doctor who examined S.T. and W.T. testified that less than five percent of children who complain of sexual assault, including penetration, have any physical signs of abuse in their examination. And the inconsistencies in the victims' testimony are not sufficient to overcome this court's deference to the jury's role of weighing the evidence and assessing credibility. *See State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998) (stating that jury is in best position to weigh evidence). There are several explanations for S.T.'s and W.T.'s inconsistent testimony, as well as any delay in reporting their experiences. According to W.T., the children were under threat of physical violence if they told anyone what had happened to them. Also, the girls speak both Hmong and English, and they told their story to different people in different languages. Finally, the girls' examining doctor explained that there are special difficulties when children report traumatic experiences: "[C]hildren have difficulty reporting things that have happened to them in a consistent

way; it's just part of being a child that sometimes they remember something, and sometimes they remember other things. And specifically children who have been traumatized may have difficulty telling the story again."

When we view the evidence in a light most favorable to the verdict, as we must, it is sufficient to prove penetration beyond a reasonable doubt.

II.

The prosecutor sought to impeach appellant with evidence of his two felony convictions, one for a weapons offense and the other for a terroristic-threats offense. The district court ruled that allowing evidence of both convictions would be unfairly prejudicial but allowed the evidence of the terroristic-threats conviction. The facts underlying the conviction were not referred to at trial. Appellant argues that the district court abused its discretion by admitting evidence of his prior conviction.

A felony conviction may be admitted for impeachment purposes provided that less than ten years have elapsed since the conviction and the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). Whether the probative value of a prior conviction outweighs its prejudicial effect is a matter within the district court's discretion. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985). 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).

The factors that the district court must consider when determining whether probative value outweighs prejudicial effect 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."

Id. at 586 (quoting *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978)).

The district court made findings regarding each of these factors. *See State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006) ("[T]he trial judge should make explicit findings on the record as to the factors considered and the reasons for admitting or excluding the evidence." (quotation omitted)). Appellant concedes that the second, third, and fifth factors weigh in favor of admission and that the district court correctly evaluated those factors. But appellant argues that the district court abused its discretion when it determined that the first and fourth factors did not make evidence of the conviction more prejudicial than probative.

Regarding the first factor, the impeachment value of the prior crime, the district court found "that the existence of the felony is relevant for the jury to be able to assess the individual, and to make assessments about the credibility, and that is a proper factor for the jury to have before it." Appellant argues that his prior conviction does not involve dishonesty, and, therefore, its impeachment value was minimal, at best. But in *State v. Brouillette*, 286 N.W.2d 702, 708 (Minn. 1979), the supreme court concluded that Minn. R. Evid. 609 "clearly sanctions the use of felonies which are 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." The supreme court stated, "Just because a crime is not directly related to truth or falsity does not mean that evidence of the conviction has no impeachment value." *Brouillette*, 286 N.W.2d at 707. The court then explained "that impeachment by prior crime aids the jury by allowing it 'to see "the whole person" and thus to judge better the truth of his testimony.'" *Id*. (quoting *St. Paul v. DiBucci*, 304 Minn. 97, 100, 229 N.W.2d 507, 508 (1975)). The court explained further:

> "The object of a trial is not solely to surround an accused with legal safeguards but also to discover the truth. What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know. . . . Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey . . . though the violations are not concerned solely with crimes involving 'dishonesty and false statement.'"

Id. (omissions in original) (quoting *State v. Duke*, 123 A.2d 745, 746 (N.H. 1956)).

Appellant argues that this "whole person" rationale has been criticized and that overly permissive use of prior convictions for impeachment may lead to erroneous convictions. But knowledge that a jury may improperly use evidence of a prior conviction does not permit us to disregard supreme court precedent. Under *Brouillette*, appellant's prior conviction is probative of credibility.

Appellant argues that the district court erred in deciding that the fourth factor, the importance of the defendant's testimony, weighed in favor of admission. When the jury will be faced with a credibility issue in which the defendant's testimony is in direct

conflict with another person's testimony, courts are encouraged to weigh the fourth and fifth factors together. *See Ihnot*, 575 N.W.2d at 587 ("'[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.'") (quoting *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980)). Also, the supreme court has stated, "If credibility is a central issue in the case, the fourth and fifth *Jones* factors should weigh in favor of admission of the prior convictions." *Swanson*, 707 N.W.2d at 655. The district court weighed the fourth and fifth factors together and determined that in this situation where two young girls testified about events that occurred when they were only four and six years old and appellant was the only other person allegedly present when the events occurred, witness credibility was the key issue in appellant's trial. Under these circumstances, appellant's testimony was extremely important, and the fourth factor weighed in favor of admission.

The district court did not clearly abuse its discretion by admitting evidence of appellant's terroristic-threats conviction for impeachment purposes.

III.

Appellant argues that he was deprived of his right to a fair trial because (1) before the jury was empanelled, at least one jury-panel member saw a jail identification bracelet that appellant was required to wear on his wrist; and (2) a deputy in the courtroom moved to stand next to appellant when appellant became agitated and began showing emotion and raised his hand up in the air while testifying. Appellant argues that his convictions

should be reversed because these two "security measures likely painted appellant as a dangerous person and prejudiced the jury against him."

Regarding the identification bracelet, the district court denied appellant's motion to strike the jury panel,[2] and the bracelet was moved to appellant's ankle, where it would not be seen. Appellant argues that wearing an identification bracelet is comparable to a defendant being forced to wear prison attire in the courtroom. A criminal defendant should not appear before the jury in prison clothes because it may impair the presumption of innocence guaranteed by the Due Process Clause. *Estelle v. Williams*, 425 U.S. 501, 503-04, 96 S. Ct. 1691, 1692-93 (1976). But "defendants are required to show actual prejudice in situations where "'[t]he conditions under which defendants were seen were routine security measures rather than situations of unusual restraint such as shackling of defendants during trial.'" *Payne v. Smith*, 667 F.2d 541, 544-45 (6th Cir. 1981) (alteration in original) (quoting *United States v. Diecidue*, 603 F.2d 535, 549 (5th Cir. 1979).

Appellant reported that one member of the jury panel pointed at his identification bracelet before voir dire, and the problem was remedied as soon as it was brought to the district court's attention. The district court determined that the identification bracelet was "not something that is conspicuous or noticeable" and that it was not likely that the jury panel knew what the bracelet was. Also, the record does not indicate that the jury-panel member who pointed at the bracelet became a member of the jury or that any jury

[2] Appellant contends that the district court denied his motion for a mistrial, but we have not found anything in the record that indicates that appellant moved for a mistrial.

member saw the bracelet and realized what it was. Therefore, appellant has not shown that actual prejudice resulted from his wearing the bracelet in the courtroom.

Appellant argues that the deputy standing next to appellant during his testimony is analogous to requiring a defendant to wear a restraint and both security measures were prejudicial because they gave the jury the impression that the defendant is dangerous. Quoting *State v. Lehman*, 511 N.W.2d 1, 3 (Minn. 1994), appellant contends that restraint during trial is only justified if "it is reasonably and eminently necessary and then only to the extent necessary under the circumstances." But the court in *Lehman* was addressing a situation in which the trial court ordered the defendant to wear a leg restraint during trial, which is very different from what happened during appellant's trial. While appellant was testifying, he became agitated and began showing emotion and raised his hand up in the air. This caused the deputy in the courtroom to move forward and stand near appellant. Appellant's attorney made a signal to the district court, and after the court excused the jury, the attorney objected to the deputy standing next to the bench during appellant's testimony. The district court then asked the deputy to not stand near the bench, and there was no request for further relief.

Appellant argues that when the jury saw the deputy approach appellant, the jurors likely believed that the deputy had reason to fear that appellant would lose control, which may have made the jury more likely to convict appellant. But there is nothing in the record that indicates what the jurors believed about the deputy's actions, and appellant's

speculation about what the jurors likely believed is not sufficient to show actual prejudice.

Affirmed.