**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-2164**

State of Minnesota,
Respondent,

vs.

Lester Ray Wiley,
Appellant.

**Filed March 30, 2010**
**Affirmed**
**Lansing, Judge**

Ramsey County District Court
File No. 62-K4-08-000228

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Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

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Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

**LANSING**, Judge

In this appeal from conviction of third-degree burglary, Lester Wiley challenges the district court's rulings on the admissibility of a show-up identification and the admissibility of five previous felony convictions as impeachment. We agree that the rulings constitute error, but we conclude that a new trial is not required because, on this record, the verdict was, beyond a reasonable doubt, unattributable to the errors. We therefore affirm.

## F A C T S

A real-estate developer (RD) who was returning to his home after an evening meeting in January 2008, drove by his Arden Hills office and saw a man entering the front door. RD called 911 and parked approximately 225 feet from the entrance to watch. A minute or two later, RD saw the man leave RD's office and walk to a van, the only vehicle parked in the lot. RD told the 911 dispatcher that the man was carrying a flashlight and wearing a brown coat and that the van was white with dark stripes. When the dispatcher asked if RD could detect the race of the man leaving his office, RD said that he could not. RD did not provide any additional description of the man.

The van passed RD on its way out of the parking lot and he saw that only one person was in the van. RD followed the van, but after several blocks he lost it from view. Shortly after the police received the 911 call, an officer sighted a van that matched RD's description. The van was stuck in the snow in the driveway of a residence located one-quarter to one-half mile from the office building in the direction that RD last saw the van

travelling. The officer approached the only person that he saw in the area, a man standing next to the van. The officer confirmed that the man was Lester Wiley and that the van was registered to him. Inside the van the officer found a small flashlight.

A woman who lived next door owned the house where the van was stuck. Before the officer arrived, the woman saw the van in the driveway and watched as a man got out of the van. He told her that he was stuck in the snow and asked for a shovel. She did not see anyone else get out of the van. While the woman was getting a shovel, the police arrived.

When RD lost sight of the van, he returned to his office building where several police officers were waiting. The officers told him that a van had been found that matched the description he provided in the 911 call. The officers told RD that police had the van's driver in custody and that they intended to drive RD to the van to identify this person. When they reached the van's location, Wiley was in the back of a police car. RD asked the officers to remove Wiley from the car so he could see his coat. An officer removed Wiley from the car while another officer shined a spotlight on him. RD could see the van and Wiley's coat from where RD was sitting in the back of an adjacent police car. RD indicated to the officers that this was the person he saw leaving his office building.

A police officer drove RD back to his office where RD determined that his laptop computer was missing. The officer who dropped RD at his office returned to the driveway area where Wiley was detained. The officer observed footprints in the snow that led from the van's location in the driveway to a parked Bobcat. In the bucket of the

Bobcat, he saw a laptop computer. The footprints leading to the Bobcat showed that the sole of the footwear had a distinct circular pattern. The officer examined the bottom of Wiley's shoes and determined that the soles matched the imprint on the footsteps in the snow. RD later identified the laptop retrieved from the Bobcat as the one missing from his office.

Before trial, Wiley moved to suppress RD's show-up identification as unnecessarily suggestive and not reliable. At a hearing on the motion, RD testified that his identification was based first on the van, second on the coat, and third on Wiley's race. He testified that he was not able to see the facial features of the man leaving his office from his location about 225 feet away and did not base his identification on Wiley's face. RD explained that he had told the dispatcher that he could not identify the race of the man that he had seen because the question made him uncomfortable and he was trying to focus on how to stop the man from getting away. But he said that he had told his brother before the show-up identification that he believed the man was black. The district court ruled that the state could not introduce evidence or suggest that RD identified Wiley based on his facial features. The district court also concluded that the show-up identification was not unnecessarily suggestive and that RD's identification of circumstantial evidence indicating that Wiley was the person he saw leaving his building was reliable. The district court allowed the state to introduce evidence of RD's identification of Wiley's van, coat, and race.

At trial, RD testified that he identified the man arrested near the van as the same man he saw leave his office. A police officer testified that the person RD identified and

that the officer arrested was Wiley. The officer also made an in-court identification of Wiley. RD explained that his identification was based on the van, the coat the man was wearing, and the man's race, not facial features. RD also testified that when the 911 dispatcher asked if he could detect the man's race, he said that he could not.

The state moved to admit five previous burglary convictions to impeach Wiley if he chose to testify. Wiley argued that because the five convictions were the same as the charge for which he was being tried and because his testimony was important, the convictions were more prejudicial than probative. The district court agreed that admitting evidence of the five prior burglaries was problematic because the prior convictions involved the same type of charge for which RD was on trial. He ruled, instead, that Wiley could be impeached with five unspecified felony convictions. Wiley chose not to testify.

The jury found Wiley guilty of third-degree burglary. Wiley appeals his conviction, arguing that RD's show-up identification should have been suppressed and that the district court erred in ruling that his five prior convictions would be admissible for impeachment purposes. He argues that these errors require that we reverse his conviction and remand for a new trial.

## D E C I S I O N

### I

The Due Process Clause requires that identification evidence must be excluded if the procedure used was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377,

384, 88 S. Ct. 967, 971 (1968). Minnesota courts analyze this standard using a two-part test. The first part asks whether the procedure was unnecessarily suggestive. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). If so, we determine whether the identification was nevertheless reliable considering the totality of the circumstances. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995).

Police told RD that they had taken into custody the driver of the van that RD described and that they were taking RD to identify him. Wiley was in a police car near the distinctively striped van when RD arrived. He was removed from the car by one officer while another officer shined a light on him, and he was then placed back in the police car. The state recognizes that this one-person show-up was unnecessarily suggestive. We agree. *See State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (finding identification procedure unnecessarily suggestive when police singled out suspect based on eyewitness's description, brought suspect back to area in squad car, presented suspect flanked by uniformed police officer, told witness that they thought they had person in custody who matched description, and then asked eyewitness for identification); *Taylor*, 594 N.W.2d at 162 (stating that one-person show-ups become unnecessarily suggestive when "police single [the suspect] out from the general population based on a [witness's] description . . . and then . . . present him to the [witness], in handcuffs, for identification in a one-person show-up").

None of the officers who participated in the show-up asked RD for a description of the man before they took RD to identify him. RD, who had watched the man in the parking lot from a distance of about 225 feet, had only been able to describe the color of

the man's coat to the 911 dispatcher. These facts provide little basis for understanding why the police would use the inherently suggestive show-up identification procedure.

The state argues that the identification was reliable because it had an independent origin. To assess whether an identification was reliable under the totality of the circumstances we consider: the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness; and the time between the crime and the confrontation. *Ostrem*, 535 N.W.2d at 921.

RD parked his car to observe the man entering and leaving his office. He testified that he was not able to see the man's facial features but that he was in a good position to watch what was happening. RD testified that he was "keyed-up" but focused on what he was seeing, and he identified Wiley within an hour of the crime. These facts weigh in favor of reliability.

But the arresting officer testified that RD was not one-hundred-percent certain in his identification and was equivocal on whether Wiley was the person he had seen in the office parking lot. Significantly, RD provided the 911 dispatcher with only a minimal description. He said that the man was wearing a brown coat and carrying a flashlight. He could not describe the man's race and did not describe any other physical characteristic or other item of clothing. At the suppression hearing, RD testified that he believed the man was wearing jeans and had a jacket with a hood, which corresponded to other clothing Wiley was wearing at the time of the show-up. But RD provided the fuller description of the clothing only after he identified RD at the show-up identification. In

addition, RD's description of the coat varied between the 911 call and the suppression hearing. He told the 911 dispatcher it was brown but described it at the suppression hearing as a yellow-gold ski parka. The coat was introduced into evidence and described by the arresting officer as a tan, Carhartt jacket. RD's only pre-identification description was of a man in a brown coat. And at the identification, he was not certain Wiley was the person he saw in the office parking lot. Based on these facts, we conclude that the show-up identification did not have an independently reliable basis sufficient to overcome the unnecessarily suggestive procedure. Thus, we conclude that the district court erred in admitting testimony identifying Wiley as the man RD saw leaving his office.

Having determined that the district court erred in admitting the identification, we must assess whether the error was harmless beyond a reasonable doubt or requires a new trial. *State v. Jones*, 556 N.W.2d 903, 913 (Minn. 1996). "[T]he constitutional harmless error analysis is not a matter of analyzing whether a jury would have convicted the defendant without the error, but rather . . . whether the error reasonably could have impacted upon the jury's decision." *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) (quotation omitted). That the evidence was sufficient, or even overwhelming, does not mean that the error was necessarily harmless. *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997). If the jury's verdict was surely unattributable to the error, then the error is harmless beyond a reasonable doubt. *Id.* at 292. When making this assessment, we consider the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, whether it was effectively countered

by the defendant, and the strength of the other evidence. *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

RD was the state's first witness and provided the most extensive testimony. His testimony was focused on his observations of the person that he saw leaving his office and walking in the parking lot. RD testified about his show-up identification of Wiley but also emphasized that it was based primarily on identifying the van and the coat, not Wiley's person. He stated repeatedly that he was not able to see the man's facial features and that he could not identify Wiley based on his facial features. The jury also heard a recording of the 911 call and the description Wiley gave to the dispatcher. The manner of presentation therefore favors harmlessness, because the identification rested on other indicia, and less on the inadmissible statements that pointed to Wiley as the man in the parking lot.

For similar reasons we do not think the identification testimony carried its usual persuasive force. The police-officer's in-court identification of Wiley was based on RD's statements at the show-up. But the in-court identification of Wiley added very little to the other evidence identifying him as the man in the parking lot. The state introduced RD's description to the 911 dispatcher; photographs of the van matching the description; evidence that the van was found near the office in the same direction RD last saw the van travelling; testimony that Wiley was found next to the van and that the van was registered to Wiley; evidence that the van and Wiley were observed shortly after the crime took place; testimony that RD and another witness saw only one man in the van; RD's identification of the coat worn by the man arrested as the same coat he saw on the man

leaving his office; the flashlight found in the van; and evidence of footprints matching Wiley's shoes leading to RD's laptop. In light of this highly persuasive admissible evidence, RD's equivocal identification was highly unlikely to affect the jury's determination.

In closing argument, the state relied on RD's show-up identification. But the defense countered this argument by pointing out that despite RD's detailed testimony he couldn't identify the man's race and was inconsistent in describing the coat. Defense counsel also questioned RD extensively on the limited basis of his identification.

Finally, the other evidence was very strong. Very little time had elapsed between the burglary and the police discovery of Wiley and his van. And, the circumstantial evidence tying him to the crime through his van, coat, and footprints was substantial. Because four of the five factors indicate the error was harmless, we conclude that the admission of RD's identification does not require reversal.

**II**

The state sought to impeach Wiley with five prior burglary convictions that occurred between 1999 and 2005. Prior convictions for crimes that do not involve dishonesty or a false statement may be admitted to impeach a defendant's testimony when the convictions are less than ten years old and are punishable by imprisonment in excess of one year, if the probative value of admitting this evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1)-(b). To determine whether the probative value of a prior conviction outweighs its prejudicial effect the district court must consider:

> (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 *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). We review a district court's ruling on the use of a defendant's prior conviction for impeachment purposes under an abuse-of-discretion standard. *Ihnot*, 575 N.W.2d at 584.

The district court analyzed each factor in detail on the record. It stated, "Prior behavior resulting in a criminal conviction may provide reliable insight into a witness's everyday, that is, out-of-court life, that would otherwise be outside of the limitations of time and place that normally are imposed simply by a trial. More specifically, that behavior might directly or indirectly provide jurors with reliable insight into a witness's capacity for truthfulness." Minnesota case law recognizes that past crimes can allow the jury to assess a witness's "whole person" and to determine whether a person is more likely to lie or misrepresent facts when testifying. *State v. Williams*, 771 N.W.2d 514, 518-19 (Minn. 2009). The district court suggested that burglary is a crime involving dishonesty and that the convictions might be admissible under Minn. R. Evid. 609(a)(2). Burglary, however, is not admissible under rule 609(a)(2). *State v. Ross*, 491 N.W.2d 658, 659-60 (Minn. 1992). Although burglary does not directly involve dishonesty, it does require entering a building without consent, which indirectly suggests action contrary to what the entrant knows to be true about his rights to the building. It therefore

has a greater impeachment value than some other crimes. *See generally State v. Norregaard*, 380 N.W.2d 549, 554 (Minn. App. 1986), *aff'd as modified on other grounds*, 384 N.W.2d 449 (Minn. 1986) (stating that "using prior drug convictions and terroristic threat convictions to impeach an accused is not favored" and that "this type of conviction does not directly relate to an accused's truthfulness and honesty"). We agree that this factor weighs moderately in favor of admitting the convictions.

Two of Wiley's prior convictions occurred less than three years before the charged burglary; two occurred less than six years earlier; and the fifth occurred nine years earlier. On appeal, Wiley acknowledges that the second factor weighs in favor of admission. We agree. *See State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007) (stating that "recent convictions [] have more probative value than older ones, and recent convictions can enhance the probative value of older convictions by . . . indicating that the relevance of the older convictions has not faded with time").

The district court recognized the significant prejudicial effect that admitting Wiley's prior burglary convictions would have in this current trial for burglary. In an attempt to mitigate this effect, the district court limited the state to referring to the convictions as unspecified felony convictions. In a case that was decided after Wiley's trial, we held that it is error to allow impeachment in the form of an unspecified prior conviction because the fact finder is unable to assess the impeachment value of that conviction. *State v. Utter*, 773 N.W.2d 127, 132 (Minn. App. 2009). The state concedes that the district court erred when it admitted Wiley's convictions as unspecified felony

convictions. The district court should have admitted Wiley's prior convictions as burglary and attempted burglary convictions or not at all.

"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." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980); *see also State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984) (stating that "the key factor weighing against admission of the prior conviction was the fact that the prior crime was similar to the crime with which [] defendant was charged"). Because Wiley's prior convictions were for exactly the same crime as the charge for which he was on trial, because there were multiple convictions for burglary, and because of the substantial danger that the jury would misuse the burglary convictions as substantive evidence, this factor weighs heavily against admitting the prior convictions.

Reviewing courts have expressed particular concern when admission of impeachment evidence causes a defendant not to testify. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (stating that "appellant's version of the facts may be centrally important to the result reached by the jury," and that "if this fact would support exclusion of the impeachment evidence if by admitting it, appellant's account of events would not be heard by the jury"); *Bettin*, 295 N.W.2d at 546. This concern can be mitigated if the defendant's version of the facts is presented to the jury through other defense witnesses or a statement made to police. *Gassler*, 505 N.W.2d at 67; *Lloyd*, 345 N.W.2d at 246. Wiley called only one witness and that witness testified about fingerprints on the laptop.

Wiley's account of what happened that evening never came before the jury. This factor weighs against admission of the convictions.

If Wiley had testified, his credibility certainly would have been an important issue, but not the exclusively central issue that results when a decision narrowly focuses on the directly competing veracity of another witness. "[I]f 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 (involving third-degree criminal-sexual-conduct charge in which only complainant and defendant were witnesses to events and consent was defense). Wiley's version of the events would not have been pitted solely against another witness's. The state presented evidence that tied Wiley to the laptop, to the van that matched RD's description, and to the coat Wiley was wearing. This factor weighs only moderately in favor of admitting the prior convictions.

Whether the district court abused its discretion by admitting the prior convictions is complicated by the fact that the district court tried to mitigate their prejudicial effect by labeling them felony convictions. The district court might not have allowed the convictions to be admitted as burglary convictions rather than unspecified felonies. Although three of the five factors favor admission, the similarity and number of the past convictions is particularly problematic. *See State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001) (stating that "the trial court is not simply to add up the factors and arrive at a mathematical result" and that "depending on the particular facts of the case,

the [district] court may assign different weights to different factors"). We conclude the five prior burglary convictions are more prejudicial than probative and were not admissible.

Wiley argues that because his constitutional right to testify was affected, the error must be harmless beyond a reasonable doubt to avoid reversal and a new trial. *See Ihnot*, 575 N.W.2d at 584 (quoting *Gassler*, 505 N.W.2d at 67-68, which recognized defendant's right to testify may be chilled by erroneous ruling on impeachment evidence). If the jury's verdict was surely unattributable to the error, the error is harmless beyond a reasonable doubt. *Juarez*, 572 N.W.2d at 292. Under this standard, we must first assess the impact of the district court's ruling on Wiley's decision to testify. Although the court in *Gassler* recognized that a defendant's right to testify may be infringed by an improper ruling on impeachment evidence, it also stated that a court's impeachment ruling does not prevent a defendant from testifying; the defendant must make a decision about testifying that takes into account the ruling and other circumstances of the case. *Gassler*, 505 N.W.2d at 67-68.

Based on the record, we do not know why Wiley chose not to testify. Wiley's attorney confirmed on the record that he understood that the state would be able to refer to five felony convictions in front of the jury if he chose to testify. She then asked, "Keeping that in mind . . . as well as the other information that we've discussed throughout your case and throughout the trial, have you made a decision on whether or not you want to testify?" Wiley responded that he had decided not to testify. It is not clear that Wiley would have testified without the district court's ruling. Therefore, it is

not clear that the district court's erroneous impeachment ruling infringed on Wiley's right to testify.

Analyzing whether Wiley was prejudiced by the ruling requires us to compare his proposed testimony with the state's evidence to assess whether he would have countered the state's proof and did not do so because of the threat of impeachment. Wiley's version of the facts was not presented to the jury, but the record provides no basis to determine that what he would have presented to the jury would have been sufficient to refute or explain the state's evidence. Wiley offered only a vague description of his testimony. Wiley's attorney stated that "[h]is testimony would instruct the jury on his events from that night, explain to the jury where he was, why he was in the area, and how he came to be in the area." It is possible to think of testimony that might tend to exonerate Wiley, but we would simply be speculating. A defendant's offer of proof can be general, but this statement is so general that it provides no substance on which to assess prejudice.

Without being able to determine whether Wiley chose not to testify because of the district court's ruling or whether his testimony would have countered the state's evidence, we are left to examine the strength of the evidence against Wiley. The strength of the other evidence is not the overriding factor for consideration in determining whether an error was harmless beyond a reasonable doubt. *Caulfield*, 722 N.W.2d at 316-17. But it is the only factor we are able to assess in this case. Again, the circumstantial evidence tying Wiley to the crime was substantial and persuasive. Very little time elapsed between when the burglary occurred and when Wiley was observed standing next to the van. The state presented extensive evidence indicating that Wiley was the driver of the van; that no

one else had been in the van; that Wiley hid the laptop; and that he was wearing the same coat as the person RD saw leaving his building. In light of this evidence and the difficulty in assessing why Wiley did not testify and how he would have countered the state's evidence, we conclude that the district court's error by allowing the state to impeach Wiley with five felony convictions was harmless beyond a reasonable doubt.

**Affirmed.**