**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-474**

State of Minnesota,
Respondent,

vs.

Cecil Gary Wayman,
Appellant.

**Filed January 25, 2011**
**Affirmed**
**Worke, Judge**

Hennepin County District Court
File No. 27-CR-08-52923

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Mark D. Nyvold, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

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

**WORKE**, Judge

Appellant challenges his burglary conviction, arguing that the district court abused its discretion by allowing the state to impeach appellant with a prior conviction. In a pro

se supplemental brief, appellant argues that he received ineffective assistance of counsel and that his constitutional rights were violated by serialized prosecution. We affirm.

## FACTS

Appellant Cecil Gary Wayman was charged with kidnapping, first-degree burglary, and theft of a motor vehicle following an October 15, 2008 incident. At his first appearance, appellant's attorney noted that appellant was arrested in New Mexico after the incident and was charged with receiving a stolen motor vehicle, which was the vehicle referenced in the Minnesota complaint. Following a plea in New Mexico, appellant served his sentence before extradition to Minnesota. Appellant's attorney argued that appellant was subjected to serialized prosecution because he already served a sentence for the theft charge. The state did not pursue the theft charge, but the district court determined that appellant's argument failed as to the other two charges.

L.W. testified at appellant's jury trial that she and appellant dated and lived together at her mother's home. Appellant moved out when the couple broke up shortly before the incident. Around 10:00 a.m. on October 15, L.W. was awakened by a loud noise and appellant jumping on her. L.W. saw that appellant gained access through a window. Appellant told L.W. that he was going to kill her, pulled her hair, punched her, threw her onto the floor, kicked her, and dragged her out of the house.

Appellant forced L.W. into her car with him, and he drove away. Appellant drove to a gas station, and L.W. yelled that she needed to use the restroom. Appellant gave in when L.W.'s yelling drew attention. L.W. locked herself in the restroom. When appellant's efforts to get L.W. out of the restroom failed, he left and she called 911.

Officers photographed L.W.'s injuries, including a rug burn on her knee and marks on her head, eye, and rib cage. Officers photographed hair on the floor of L.W.'s bedroom, a broken window, and dirt and grass on a window ledge. Attempts were made to collect fingerprint evidence, but prints lifted were not identifiable.

Prior to appellant testifying, the state sought to admit prior-conviction evidence to impeach appellant. The district court allowed the evidence, and appellant testified that he has a third-degree-assault conviction from 2003 and a conviction for giving false information to police. Appellant then testified that he moved out of L.W.'s mother's home, but that he and L.W. did not break up. Appellant testified that on October 14, he and L.W. went to a party. When appellant realized that L.W. left him at the party, he spent the night at a motel. The next morning, his sister drove him to L.W.'s mother's home. He knocked on the door and L.W. answered the door. L.W. gave him her car keys and he drove to a gas station where he left L.W. because she failed to come out of the restroom. A couple of days later, appellant left on a road trip with friends, during which he talked to L.W. and she asked him to pick her up, but he did not want to turn around.

Appellant's sister testified that on October 14, appellant and L.W. stopped at her home before going to a party. The next morning, she drove appellant to L.W.'s mother's home. Appellant knocked on the door and L.W. willingly left with appellant. One of appellant's friends testified that he and appellant planned a road trip to Las Vegas in L.W.'s vehicle. He stated that during the trip, he heard appellant talking to L.W. The jury found appellant guilty of first-degree burglary and fifth-degree assault, and this appeal follows.

## D E C I S I O N

***Prior-Conviction Impeachment Evidence***

Appellant argues that the district court abused its discretion by allowing the state to impeach him with a third-degree-assault conviction. *See State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (stating that an appellate court reviews a district court's decision to admit prior-conviction evidence for an abuse of discretion).

The admissibility of prior convictions is partly governed by Minn. R. Evid. 609(a):

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

The district court should consider five factors in determining the admissibility of prior convictions. *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978). These 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.

*Id.* at 538.

The district court did not address the *Jones* factors, and erred in failing to do so. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (stating that a district court errs if it fails to demonstrate on the record that it weighed the *Jones* factors). But we may

conduct our own review of the *Jones* factors to determine whether the district court's error was harmless. *Id.* at 655-56 (reviewing *Jones* factors in absence of district court analysis and concluding that the district court did not abuse its discretion under rule 609).

*Impeachment value of the prior crime*

Appellant argues that the impeachment value of the third-degree-assault conviction was less valuable because it was not a crime of dishonesty. But a prior crime need not relate directly to truth or falsity to have impeachment value. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979). Rather, Minnesota adheres to the "whole person" doctrine, which recognizes that a crime does not need to involve dishonesty to have impeachment value. *See, e.g.*, *State v. Pendleton*, 725 N.W.2d 717, 728 (Minn. 2007) (permitting impeachment with prior terroristic-threats and fleeing-a-peace-officer convictions). Thus, evidence of appellant's prior third-degree-assault conviction had impeachment value because it helped the jury see the "whole person." *See Swanson*, 707 N.W.2d at 655 ("[A] prior conviction can have impeachment value by helping the jury see the 'whole person' of the defendant and better evaluate his . . . truthfulness."). As such, this factor weighs in favor of admission.

*Date of conviction and subsequent history*

A felony conviction is admissible if it occurred within ten years of the current offense. Minn. R. Evid. 609(b). The prior conviction occurred in 2003; the current offense occurred in 2008. Appellant concedes that this factor favored admission.

*Similarity of the crimes*

Appellant argues that the two crimes are very similar because assault is an element of the burglary charge. The similarity of the prior crime to the current offense weighs against admission. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (stating that when the past crime is similar to the charged crime there may be an increased likelihood that the jury will use the evidence substantively rather than merely for impeachment).

The past offense was third-degree assault. One is guilty of third-degree assault when he "assaults another and inflicts substantial bodily harm." Minn. Stat. § 609.223, subd. 1 (2008). The current first-degree-burglary charge involves one entering a building without consent and with intent to commit a crime, or entering a building without consent and committing a crime while in the building. Minn. Stat. § 609.582, subd. 1 (2008). The jury found appellant guilty of fifth-degree assault, which involves an act committed with intent to cause fear in another of immediate bodily harm or death, or the intentional infliction or attempted intentional infliction of bodily harm. Minn. Stat. § 609.224, subd. 1 (2008). Fifth-degree assault requires a level of intent. *See id.* Third-degree assault does not require intent, making the crimes less similar than suggested by appellant. *See* Minn. Stat. § 609.223, subd. 1.

Appellant's argument fails because the concern underlying this *Jones* factor is less pressing when the claimed similarity exists only at an abstract and conceptual level. *See State v. Flemino*, 721 N.W.2d 326, 329 (Minn. App. 2006) (rejecting argument that prior burglary conviction was similar to robbery charge because both crimes involved entering a residence and committing a crime therein). This factor weighs in favor of admission.

*Importance of appellant's testimony and the centrality of credibility*

Appellant argues that there was sufficient evidence connecting him to the offense rendering his testimony unnecessary. Courts often combine the fourth and fifth *Jones* factors. *E.g.*, *Swanson*, 707 N.W.2d at 655. In weighing these two factors, courts should consider whether the admission of the evidence will cause the defendant not to testify. *State v. Gassler*, 505 N.W.2d 62, 66 (Minn. 1993). Generally, if the defendant's version of the facts is centrally important to the result reached by the jury, and he chose not to testify because of impeachment evidence, this factor weighs against admission. *Id*. at 67.

Appellant testified and denied the charges. Appellant claims that credibility was not a central issue, but the jury needed to determine whether to believe the complainant or appellant. *See Bettin*, 295 N.W.2d at 546 (stating that credibility is a central issue when the jury has to "narrow[] to a choice between defendant's credibility and that of one other person"). These factors weigh in favor of admission.

Our analysis of the *Jones* factors indicates that it was not error to admit evidence of appellant's prior conviction. *See State v. Hochstein*, 623 N.W.2d 617, 624-25 (Minn. App. 2001) (affirming admission of prior conviction when first *Jones* factor was neutral, second and third factors weighed against admission, and fourth and fifth factors weighed in favor of admission).

***Pro Se Arguments***

*Ineffective Assistance of Counsel*

Appellant argues that he did not receive effective assistance of counsel. While the best procedure for raising an ineffective-assistance-of-counsel claim is in a

postconviction petition, such claims may be considered on direct appeal if the record is sufficient for review. *Torres v. State*, 688 N.W.2d 569, 572, n.1 (Minn. 2004). In order to obtain a new trial based on a claim of ineffective assistance, appellant "must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable 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) (quotations omitted).

Appellant claims that his attorney failed to investigate, contact potential witnesses, and challenge evidence. But a claim of ineffective assistance cannot be based on a matter of trial strategy. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). The determination of which issues to address at trial receives a presumption of competent performance. *See Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (observing that presumption of counsel's competency receives particular deference when it relates to trial strategy). Appellant raises an issue regarding fingerprint evidence, but the evidence at trial showed that while fingerprints were lifted, they were not useful for identification purposes and there was no evidence that the fingerprints were appellant's.

Additionally, there was substantial evidence supporting the jury's verdict, including L.W.'s testimony, photographs of L.W.'s injuries, and photographs of the crime scene. Even assuming that appellant's counsel's representation fell below the reasonable professional norm because he failed to call a certain witness or challenge evidence, appellant fails to show that there is a reasonable probability that, but for any error, the jury would have had a reasonable doubt respecting guilt.

*Serialized Prosecution*

Finally, appellant argues that he was the victim of serialized prosecution. Appellant's attorney raised a similar issue during appellant's first appearance and, as a result, the state did not pursue the theft-of-a-motor-vehicle charge. But appellant seems to argue that all charges stemmed from one behavioral incident and because he pleaded in New Mexico to the motor-vehicle-theft charge, he cannot be tried in Minnesota for the kidnapping and burglary charges. This argument is without merit because appellant was charged with a crime in New Mexico—transferring a stolen vehicle into the state. New Mexico could not charge appellant with kidnapping or burglary because those acts occurred in Minnesota. Perhaps appellant thinks that he cannot receive a second sentence because he served a sentence in New Mexico, but, again, the sentence in New Mexico was for the theft charge and unrelated to the sentence imposed in Minnesota. Appellant was not charged, nor was he found guilty or sentenced for the theft in Minnesota; thus, there was no bar to prosecution in Minnesota for the burglary charge.

**Affirmed.**