

A05-0213

A05-213

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

DONTRELL DYNA FLOWERS,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Did the trial court err in refusing to suppress a gun found during a protective weapons search?

Apposite Authority

State v. Waddell, 655 N.W.2d 803 (Minn. 2003).

- II. Did the trial court abuse its discretion in refusing to declare a mistrial after an inadvertent blurring of inadmissible testimony?

Apposite Authority

State v. Cox, 322 N.W.2d 555 (Minn. 1982).

- III. Did the trial court abuse its discretion in permitting Appellant to be impeached with a prior conviction?

Apposite Authority

State v. Ihnot, 575 N.W.2d 581, 584 (Minn. 1998).

- IV. Did the trial court abuse its discretion in answering the jury's question?

Apposite Authority

State v. Murphy, 380 N.W.2d 766 (Minn. 1986).

STATEMENT OF FACTS

Appellant was convicted of being a prohibited person in possession of a firearm after a gun was found in the displaced driver's side door panel of his vehicle.

On June 12, 2004, near midnight, Appellant was driving his car in the area of 43rd Street and Pleasant Avenue in Minneapolis. Officers Reynolds and Hoff were patrolling in a squad car and saw that Appellant's car had no rear-license light as required by law. T. 9¹. As the officers turned on their red lights and bright stop lights to stop him, Appellant turned into an alley. T. 9. Appellant drove slowly down the alley. T. 10. Officer Hoff testified that "[p]ractically the entire time he was driving through the alley, he was making frantic movements." T. 45. The officers saw Appellant lunge toward the passenger side. T. 11; 45. Officer Reynolds saw Appellant making motions down to his left by the driver's door. T. 12. Officer Hoff said that Appellant was "manipulating the driver's door" and that "it appeared like he was trying to take it apart, trying to put it together, pulling it apart or something." T. 45. Appellant "almost hit a couple of items" as he went down the alley.

Officer Hoff, a 13-year-veteran of the police department testified that Appellant's actions made him nervous. T. 46. He testified that based upon his

¹ "T" refers to the trial transcript. The trial was held on September 13-16, 2004, before the Honorable Marilyn Justman Kaman, Judge of Hennepin County District Court.

experience, “when somebody is acting like that, displaying that type of behavior, they are either reaching for a gun or hiding a gun or contraband, but the first thing I’m thinking about is a gun.” T. 46.

The officers used the horn and then the siren to try to get Appellant to stop, but Appellant did not pull over until he drove out of the alley. T. 13; 43. Appellant was ordered out of the car and then put into a squad. Because Appellant was trying to hide something, the officers called a K-9 unit to go over the car first. T. 47. The K-9 did not alert so Officer Hoff approached the vehicle. The driver’s door was still open and Officer Hoff noticed that a “panel on the driver’s door, the lower left part opposite the hinges, was loose.” T. 47. Based upon Officer Hoff’s training and experience, people will hide contraband in many places within a car including door panels. T. 48. Officer Hoff moved the loose part of the door panel, where Appellant had been reaching, and saw the butt of a gun. T. 48. The gun was a loaded semi-automatic 9 millimeter pistol.

At the Rasmussen hearing, Appellant moved to suppress the gun claiming that the stop and search were illegal. The trial court denied Appellant’s motion. As to the stop, the trial court found, “...[T]he police had reasonable suspicion to stop the defendant as he was committing the equipment violation.” T. 80. As to the search of the car for the gun, the trial court found:

When the officer attempted to pull the defendant here over, he began, in the words of Officer Hoff—actually, both officers saw frantic movements, practically the entire time that the defendant was driving up the alley.

The defendant was almost all the way over into the right front passenger seat.

The officers look, could not see the defendant. The defendant was trying to manipulate the driver's door, quote, in the words of Officer Hoff, "which personally makes me nervous. It makes me think of a gun." And he feared for officer safety.

Stating from the state's memorandum, given the totality of the circumstances where it was past 11:00 p.m. in a high crime area, defendant was making suspicious movements, was not complying with attempts to pull him over, Officers Hoff and Reynolds were reasonable in fearing for their safety. Therefore, it was reasonable, under the Terry standard, to conduct a weapons search to insure officers' safety.

T. 80-81.

In motions before trial, the court ordered that the prosecutor instruct the witnesses not to mention the fact that the gun was stolen. T. 112. The prosecutor complied with this order. T. 210. Nevertheless, Officer Reynolds mentioned the fact that the gun was stolen during his testimony. T. 153. The trial court denied the defense motion for a mistrial after taking into account "less drastic alternatives to mistrial" and "the defendant's interest in having the trial concluded in a single proceeding." T. 215. The trial court found that the mention was inadvertent and was likely related to the fact that the officer had been on duty all night before trial. T. 216. The trial court did give a remedial instruction to the jury. T. 217.

Appellant chose not to testify. T. 217-18. Appellant claimed that the reason he was not testifying was because the trial court had decided to permit the state to impeach him with a prior felony conviction. T. 218-19. Before trial, the defense

sought to prevent the state from impeaching Appellant with his prior conviction for aiding and abetting second degree unintentional murder from October 6, 1997. T. 83. The state opposed the motion and the parties spent significant time arguing the Jones factors for the admissibility of the prior conviction. T. 90-99. The trial court took the matter under advisement over night and ultimately ruled that “the Court is going to permit the impeachment by the prior conviction if the defendant decides to take the stand.” T. 111. The trial court did not make detailed findings regarding the Jones factors.

In its final instructions to the jury, the trial court instructed the jury on actual possession and constructive possession:

A person possesses a pistol or a firearm if it is on his or her person. A person also possesses a pistol or a firearm if it was in a place under his or her exclusive control to which other people did not normally have access or if the person knowingly exercised dominion and control over it.

T. 266. During deliberations, there was a jury question regarding possession. The jury asked the following question:

(See “Certain Persons Not To Possess Firearms”) states the defendant must knowingly possess the firearm or knowingly exercise control over it. However, the definition of possession does not appear to require knowledge of the firearm if it was in a place under his exclusive control. Is knowledge required for the defendant to be guilty?

T. 273. The trial court discussed the question with counsel. The defense wanted to simply instruct the jury that “knowledge is required for possession.” T. 274.

The trial court answered the question as follows:

Knowledge is required for possession. Knowledge may be inferred if the firearm was in a place under his exclusive control to which other people did not normally have access.

T. 277.

The Court of Appeals affirmed Appellant’s conviction. This Court granted Appellant’s petition for review.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS A GUN FOUND IN A PROTECTIVE WEAPONS SEARCH.

A. Standard of review.

When reviewing pretrial orders on motions to suppress evidence, an appellate court may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing – or not suppressing – the evidence. State v. Harris, 590 N.W.2d 90, 98 (Minn. 1999) (citation omitted). On issues involving the legality of a limited investigatory stop, an appellate court reviews the district court’s determination of reasonable suspicion de novo and its findings of fact for “clear error.” State v. Britton, 604 N.W.2d 84, 87 (Minn. 2000).

B. The stop was valid because it was based on a traffic violation.

An investigative stop is valid if there are particularized and objective facts for suspecting the person stopped of criminal activity. State v. Wiegand, 645 N.W.2d 125, 135 (Minn. 2002) (citation omitted). The investigative stop needs to be temporary and cannot last longer than is necessary to achieve the purpose of the stop. Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325 (1983). The scope of the stop also needs to be strictly tied to and justified by the circumstances that permitted the initiation of the investigation. Wiegand, 645 N.W.2d at 135. When an officer witnesses a traffic violation, however insignificant, an objective basis for stopping the vehicle ordinarily exists, State v. George, 557 N.W.2d 575,

578 (Minn. 1997), but law enforcement may only expand the scope of the stop to investigate other suspected illegal activity when there exists reasonable, articulable suspicion. Wiegand, 645 N.W.2d at 135.

As the trial court found, the failure to have an operating light for the rear license plate was a traffic violation that provided an objective basis for stopping Appellant's vehicle. T. 80.

C. Appellant's furtive movements justified the protective search of the vehicle.

Appellant's primary argument is that the resulting search of the car, based upon his furtive movements, was insufficient to expand the scope of the stop to include a protective weapons search. Police officers may conduct a limited protective weapons search of a lawfully stopped person if they have reasonable suspicion to believe the person may be armed and dangerous. State v. Varnado, 582 N.W.2d 886, 889 (Minn. 1998) (*citing* Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968)); State v. Gilchrist, 299 N.W.2d 913 (Minn. 1980) (objective basis for protective search came from police bulleting that suspect may be armed and dangerous). The same authority extends to a protective search of an automobile for weapons. State v. Waddell, 655 N.W.2d 803, 810 (Minn. 2003). In Waddell, this Court applied Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983), holding that [a] protective search of the passenger compartment of the vehicle, limited to those areas in which a weapon may be placed or hidden, is permissible if the officer possesses a reasonable belief, based on specific and

articulable facts, that the suspect is dangerous and may gain immediate control of a weapon. Id.

In Gilchrist, this Court upheld a search that uncovered weapons beneath the front seat of the vehicle. State v. Gilchrist, 299 N.W.2d at 915. The police had reasonable suspicion to stop the defendant and a reasonable basis to conduct a protective sweep for weapons based upon the officers' knowledge that the suspect was known to carry firearms and was connected to a homicide. Id. The court concluded that the officers were justified in searching under the seat because it was within the "suspect's immediate reach" if he reentered the car, even though the defendant was not in the car at the time of the search. Id.

Furtive gestures during a stop, particularly ones that happen after the police have initiated the stop, can give rise to a reasonable belief that the suspect is armed and dangerous. The United States Supreme Court, in upholding the protective weapons sweep of a car, has recognized that "roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding the suspect. Michigan v. Long, 463 U.S. at 1049, 103 S.Ct. at 3481. In United States v. Evans, 994 F.2d 317, 319 (7th Cir. 1993), the defendant was stopped for a traffic violation. As he was being stopped, the defendant leaned forward with his hands out of view as if he was placing something under the seat. Id. The Court held that "the defendant's furtive gesture caused the officers to transfer the general danger of the encounter into a specific fear that the defendant was armed." Id. at 321. Similarly, in United States

v. Nash, 876 F.2d 1359, 1361 (7th Cir.1989), cert. denied 493 U.S. 1084, 110 S.Ct. 1145 (1990), a defendant's gestures of raising himself from the car seat and reaching for the floor were reasonably interpreted as the hiding of a gun and thus supported a protective search. Likewise, in United States v. Colin, 928 F.2d 676, 678 (5th Cir. 1991), the defendant's actions in stooping down and moving from side to side in his seat formed a basis for believing that the suspect may be armed.

Minnesota courts have likewise held that furtive gestures can form the basis of a reasonable suspicion. In State v. Dickerson, 481 N.W.2d 840, 843 (Minn. 1992), this Court reaffirmed that evasive conduct can give rise to a reasonable suspicion (*citing* State v. Johnson, 444 N.W.2d 824, 827 (Minn. 1989)). In Johnson, the Court held that "if the driver's conduct is such that the officer reasonably infers that the driver is deliberately trying to evade the officer and if, as a result, a reasonable police officer would suspect the driver of criminal activity, then the officer may stop the driver." State v. Johnson, 444 N.W.2d at 827. By contrast, in State v. Varnado, 582 N.W.2d at 890, the Minnesota Supreme Court invalidated a protective weapons search because the defendant "did not make any furtive or evasive movements."

Here, the trial court carefully considered the totality of the circumstances in finding that there was an objective basis to support the protective weapons search. See Appelgate v. Comm'r of Pub. Safety, 402 N.W.2d 106, 108 (Minn. 1987) (The court considers the totality of the circumstances to determine whether a protective weapons search is reasonable). First, Appellant did not stop immediately. T. 80.

The officers testified that Appellant did not stop immediately when the police activated their red lights and spot lights. T. 9. Instead, Appellant drove through an alley at about three miles per hour. T. 9, 42. Appellant did not stop when the officers later activated the air horn and then the siren. T. 42-43.

Second, Appellant made furtive movements the entire time he was driving slowly through the alley. Officer Hoff testified that “[p]ractically the entire time he was driving through the alley, he was making frantic movements. T. 45. The officers saw Appellant lunge toward the passenger side. T. 11; 45. Officer Reynolds saw Appellant making motions down to his left by the driver’s door. T. 12. Officer Hoff said that Appellant was “manipulating the driver’s door” and that “it appeared like he was trying to take it apart, trying to put it together, pulling it apart or something.” T. 45. The trial court credited that testimony in finding “both officers saw frantic movements, practically the entire time that the defendant was driving up the alley” and that defendant “was almost all the way over into the right front passenger seat” then “defendant was trying to manipulate the driver’s door.” T. 80-81.

Most importantly, these were objective facts that led these officers to reasonably fear for their safety. Officer Hoff testified that, based upon his training and experience, the first thing he thought of was a “gun.” Based upon his experience, when somebody is acting like Appellant, they are hiding a gun or contraband and the first thing he was thinking was a gun. T. 46. The trial court credited this testimony as well. T. 81; See Matter of the Welfare of G.M., 560

N.W.2d 687, 691 (Minn. 1997) (citation omitted)(the officer assesses the need for a stop “on the basis of ‘all of the circumstances’” and “‘draws inferences and makes deductions *** that might well elude an untrained person.’”). The officers had a reasonable basis to conduct the weapons search and the trial court did not err in refusing to suppress the gun.

Appellant claims that he was cooperative, based upon the officers’ testimony about how he behaved when the car was finally stopped. By then, however, Appellant had already finished manipulating the driver’s door to hide the gun - there was no longer any reason for him to be uncooperative. Yet at the critical time, when the police were trying to stop the vehicle, Appellant did not cooperate but was manipulating the door panel trying to hide the gun. Here, Appellant points to the fact that he was a model detainee after his vehicle was stopped. However, he asks this Court to ignore his lunge toward the passenger side and dismantling of the driver’s door that occurred *after* the police turned on the red lights and spot lights. Under the totality of the circumstances, there was a sufficient basis for the officers to conduct a search for the gun.

D. Appellant’s furtive movements provided probable cause to search.

Appellant’s furtive gestures also provided probable cause to search the vehicle. A warrantless search of an automobile may be conducted when the police have probable cause. Chambers v. Maroney, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, (1970) (applying automobile exception to closed compartment under the dashboard). “Probable cause exists where, in the totality of the circumstances, the

officer: conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested.” State v. Lohnes, 344 N.W.2d 605, 612 (Minn. 1984). An officer may search a vehicle without a warrant under the automobile exception if there is probable cause to believe the search will result in the discovery of contraband or will produce evidence of a crime. Maryland v. Dyson, 527 U.S. 465, 467, 119 S.Ct. 2013, 2014 (1999) (probable cause alone satisfies the automobile exception to the Fourth Amendment warrant requirement); State v. Search, 472 N.W.2d 850, 852 (Minn. 1991).

Here, Appellant’s furtive gestures and his failure to stop provided probable cause that Appellant was committing a crime. Furtive gestures can be used to support a finding of probable cause to search a vehicle. See State v. Gallagher, 275 N.W.2d 803 (Minn. 1979) (automobile passenger attempted to shield brown paper bag containing contraband from police officer’s view. The Court of Appeals held

[P]robable cause is substantiated both by appellant’s furtive movements following the officers’ indication that he stop and his failure to stop until he had driven suspiciously for an entire block. Coupled with the officers’ claim that they were patrolling a high-crime area and appellant’s movements were consistent, in their experience, with someone trying to reach for or hide a weapon or contraband, there appears to be an independent basis for the stop.

State v. Flowers, 2006 WL 1228997 (Minn. Ct. App. May 9, 2006)(unpublished)
(reproduced in Respondent's Appendix at 1) review granted (Minn. Jul. 19, 2006).

The Court of Appeals did not err in upholding the protective search of the car.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED UPON INADVERTENT BLURTING OF INADMISSIBLE EVIDENCE.

A. Standard of review.

An appellate court reviews a trial court's denial of a motion for a mistrial for abuse of discretion. State v. Spann, 574 N.W.2d 47, 52 (Minn. 1998). “The trial judge is in the best position to determine whether an outburst creates sufficient prejudice to deny the defendant a fair trial such that a mistrial should be granted.” State v. Manthey, 711 N.W.2d 498, 506 (Minn. 2006). “[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different” if the event that prompted the motion had not occurred. Spann, 574 N.W.2d at 53(citation omitted).

B. The inadvertent blurt.

In motions before trial, the defense sought to exclude any testimony that the gun that was recovered was stolen. T. 84. The State did not oppose the motion. T. 87. The court ordered that the prosecutor instruct the witnesses not to mention the fact that the gun was stolen. T. 112. Nevertheless, Officer Reynolds mentioned this fact in his testimony.

Q: Was anything found inside of the vehicle that would consist of either a weapon or illegal contraband?

A: There was a stolen gun found in the vehicle.

Q: Regarding – where was the gun found?

A: In the driver's door panel.

T. 153. No objection was made at the time of the testimony. However, defense counsel later moved for a mistrial. The prosecutor made it clear that the witnesses had been instructed not to mention the fact that the gun was stolen. T. 210. The trial court denied the mistrial motion after taking into account “less drastic alternatives to mistrial” and “the defendant’s interest in having the trial concluded in a single proceeding.” T. 215. The trial court found that the mention was inadvertent.

I am not going to grant the motion for a mistrial. While this was the subject of a motion in limine and the Court clearly instructed the state to speak to its witnesses, the Court, nevertheless, believes and finds that the mention was inadvertent, in passing, it was not repeated, not returned to by the prosecutor during the subsequent questioning and is not a central issue of the case.

One thing the record does not reflect is that both yesterday and today, at the Rasmussen hearing, the officer in question was almost falling asleep on the witness stand, probably having done dog watch last night again. So I fully—the Court fully believes that the mention of the stolen nature of the weapon was not intentional, designed to prejudice the jury in any fashion.

T. 216. The trial court also gave a remedial instruction to the jury as follows:

*** During the testimony of one of the officers today, there was testimony that the weapon recovered by the police was stolen. That is not a fact that has any bearing on the issue in this case. The sole issue for your consideration is that of possession. And whether

or not this gun was stolen is to be disregarded by you and shall have no place in you discussions.

T. 217.

C. There was no abuse of discretion in denying the mistrial motion.

When analyzing whether potentially prejudicial but inadvertent testimony has deprived a defendant of the right to an impartial jury, this Court considers the following factors: “the nature and source of the prejudicial matter, the number of jurors exposed to the influence, the weight of evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice.” State v. Cox, 322 N.W.2d 555, 559 (Minn. 1982).

In this case, there is no dispute that Officer Reynolds should not have testified that the gun recovered was stolen. However, the mistake was inadvertent. The prosecutor had instructed the witnesses not to mention that the gun was stolen. T. 210. See State v. Underwood, 281 N.W.2d 337, 342 (Minn. 1979) (state has a duty to properly prepare its witnesses prior to trial to avoid the problem of witnesses blurting out inadmissible or prejudicial testimony). Nevertheless, the witness mentioned it. However, the trial court found that the “mention was inadvertent, in passing, it was not repeated, not returned to by the prosecutor during the subsequent questioning and is not a central issue of the case.” T. 216. Moreover, the trial court noted that the witness was fatigued and found that the testimony was “not intentional” or “designed to prejudice the jury in any fashion.”

T. 216. Thus, there is no showing that Appellant was denied a fair trial by the admission of this evidence.

In addition, the trial court properly gave a curative instruction. T. 223. See State v. Barnes, 713 N.W.2d 325, 337 (Minn. 2006) (improper testimony of officer about defendant's past drug use harmless where "disclosure appears to have been inadvertent and the district court immediately gave the jury a curative instruction."). This Court presumes that the jury followed the district court's instructions. State v. Miller, 573 N.W.2d 661, 675 (Minn. 1998).

Accordingly, Appellant has failed to demonstrate that the trial court abused its discretion in denying his motion for a mistrial.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING APPELLANT TO BE IMPEACHED WITH HIS PRIOR FELONY CONVICTION.

A. Standard of review.

A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear abuse of discretion standard. State v. Ihnot, 575 N.W.2d 581, 584 (Minn. 1998). Evidence of a witness's prior convictions is admissible for impeachment if the crime is a felony and the district court determines that the probative value of admitting this evidence outweighs its prejudicial effect. Minn. R. Evid. 609 (a)(1). In making this determination, the court weighs five factors:

- (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 the defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978).

A district court should demonstrate on the record that it has considered and weighed the Jones factors." State v. Swanson, 707 N.W.2d 645, 655 (Minn. 2006). However, where the trial court fails to properly analyze the Jones factors on the record, an appellate court may conduct a "review of those factors" to determine if the error was harmless. Id.

B. There was no error in permitting Appellant to be impeached with his prior conviction.

In 1997, Appellant was convicted of aiding and abetting second degree murder. T. 90. The defense made a motion to prevent the State from using Appellant's prior felony conviction to impeach him if he testified. T. 83. The parties argued extensively about the Jones factors. T. 90-99. However, when the trial court ruled that the prior conviction was admissible for impeachment, the trial court did not make its own findings regarding the Jones factors. A review of the record demonstrates that the error was harmless and the conviction was properly ruled admissible.

1. *Impeachment Value of Prior Crime.*

Appellant argues that his prior conviction for aiding and abetting second degree murder lacked impeachment value. However, although prior violent crimes may lack impeachment value regarding truth or falsity, trial courts have broad discretion in admitting them to impeach a witness because "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." State v. Gassler, 505 N.W.2d 62, 66-67 (Minn. 1993). Even though a prior crime does not involve dishonesty, it is still probative of credibility and truthfulness. State v. Brouillette, 286 N.W.2d 702, 708 (Minn. 1979). This prior conviction would have helped the jury to see Appellant as a whole person and this factor weighed in favor of its admission.

2. *Date of Conviction and Subsequent History.*

There is no dispute that the conviction was not stale. The conviction occurred in 1997. However, Appellant was not released from prison on that offense until May of 2003. The presentence investigation in this case indicates that Appellant was “released from the correctional facility on 5/5/03.” Felony Presentence Investigation dated 10/18/2004. Minn. R. Evid. 609 (b) calculates the time limit for impeachment by prior convictions as ten years “since the date of conviction or of the release of the witness from confinement, whichever is the later date...”. Thus, for impeachment purposes, the 1997 conviction was merely a year and a half old at the time of his current trial.

3. *Similarity of Past and Charged Crimes.*

Contrary to Appellant’s assertion, there is little similarity between aiding and abetting murder and possession of a pistol. The prior offense involved aiding a murder. The current offense involved possessing a gun. There is nothing about the prior conviction itself that indicates that a gun was involved or that Appellant possessed a gun during the prior offense.

Even if the offenses were deemed similar, it would not bar admission. If the prior conviction is similar to the charged offense, “there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively.” Gassler, 505 N.W.2d at 67. The similarity of a prior offense to the charged crime weighs against, but does not preclude, its admission. State v. Bias, 419 N.W.2d 480, 487 (Minn. 1988). Minnesota courts have upheld the admission

of much more similar crimes for impeachment purposes. For example, in State v. Dye, 371 N.W.2d 47, 51 (Minn. Ct. App. 1985), the Minnesota Court of Appeals upheld the admission of a prior simple robbery conviction to impeach a defendant who was charged with first degree burglary. Thus, this factor appears to weigh neither strongly for nor strongly against admission.

4. *Importance of Appellant's Testimony/Centrality of Credibility..*

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 at 655(citations omitted). Appellant did not make an offer of proof as to what his testimony would have been, so this Court is left to assume that he would have denied the allegations and thereby made credibility a key issue in the case.

Defense counsel was coy on this issue. He said, "But Mr. Flowers is the only person that can tell this jury his side of the story; what was going on, what he was aware of, what his mindset was, what he was doing and whether he knowingly possessed this gun." T. 96. Yet he never indicated what crucial testimony Appellant intended to offer. Even as Appellant was waiving his right to testify, he did not indicate what that testimony would have been. T. 217-19. As the Minnesota Supreme Court stated in State v. Ihnot, 575 N.W.2d at 587:

Because Ihnot did not make an offer of proof as to what his testimony would have been had he testified, this court is left to assume that the thrust of his testimony would have been to deny the allegations of criminal sexual conduct. That being the case, the fourth and fifth *Jones* factors are also satisfied, in that, had Ihnot chosen to testify, credibility would have

been the central issue in this case. On this point, we have said previously: "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." State v. Bettin, 295 N.W.2d 542, 546 (Minn. 1981).

Id. As in Ihnot, the fourth and fifth Jones factors are satisfied in that had Appellant chosen to testify, credibility would have been the central issue in the case. Accordingly, a greater case could be made for admitting the impeachment evidence because the need would have been greater.

After analyzing the five Jones factors, it is clear that the trial court was within its discretion to allow Appellant to be impeached with his prior convictions. The trial court's failure to include the analysis of these five factors on the record was harmless error.

IV. THE TRIAL COURT DID NOT DENY APPELLANT A FAIR TRIAL IN ANSWERING THE JURY QUESTION.

A. Standard of review.

An appellate court analyzes jury instructions "with the understanding that trial courts possess significant discretion in the selection of instruction language and that instructions must be read as a whole to determine whether they accurately describe the law." State v. Smith, 674 N.W.2d 398, 402 (Minn. 2004). When a jury asks questions during deliberations, the district court has discretion to decide whether to amplify or reread previous instructions or give no response at all. State v. Murphy, 380 N.W.2d 766, 772 (Minn. 1986).

B. There was no error in the trial court's answer to the jury question.

A defendant may be convicted of being a felon in possession of a handgun if the State establishes either actual or constructive possession of the gun. State v. Loyd, 321 N.W.2d 901, 902 (Minn. 1982). In order to prove constructive possession, the state must show: (a) that the police found the item in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found the item in a place to which others had access, there is a strong probability, inferable from the evidence, that defendant was consciously exercising dominion and control over it at the time. State v. Florine, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975).

In its final instructions to the jury, the trial court accurately instructed the jury on actual possession and constructive possession:

A person possesses a pistol or a firearm if it is on his or her person. A person also possesses a pistol or a firearm if it was in a place under his or her exclusive control to which other people did not normally have access or if the person knowingly exercised dominion and control over it.

T. 266. During deliberations, there was a jury question regarding possession. The jury asked the following question:

(See “Certain Persons Not To Possess Firearms”) states the defendant must knowingly possess the firearm or knowingly exercise control over it. However, the definition of possession does not appear to require knowledge of the firearm if it was in a place under his exclusive control. Is knowledge required for the defendant to be guilty?

T. 273. The trial court discussed the question with counsel. The defense wanted to simply instruct the jury that “knowledge is required for possession.” T. 274.

The trial court answered the question as follows:

Knowledge is required for possession. Knowledge may be inferred if the firearm was in a place under his exclusive control to which other people did not normally have access.

T. 277.

Appellant’s claim on appeal that the trial court failed to instruct the jury on the knowledge requirement is without merit. Appellant’s Brief at 36. The very first sentence indicated that “Knowledge is required for possession.” T. 277. As this Court explained in State v. Florine, 303 Minn. at 104-05, 226 N.W.2d at 610:

The purpose of the constructive-possession doctrine is to include within the possession statute those cases where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest.

Id. Here, the trial court merely exercised its discretion to amplify its earlier instruction by accurately explaining that knowledge can in fact be inferred if the State proves that the firearm was in a place under Appellant's exclusive control to which other people did not have access.

Moreover, this instruction must be read together with the trial court's other instructions regarding the presumption of innocence and proof beyond a reasonable doubt. T. 260-61, 265-66; State v. Smith, 674 N.W.2d at 402. When viewed as a whole, the trial court accurately instructed the jury regarding constructive possession. Accordingly, Appellant has failed to demonstrate that he is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Respondent State of Minnesota respectfully requests that the decision of the Court of Appeals be in all respects affirmed.

DATED: October 20, 2006

Respectfully submitted,

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A05-213
STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

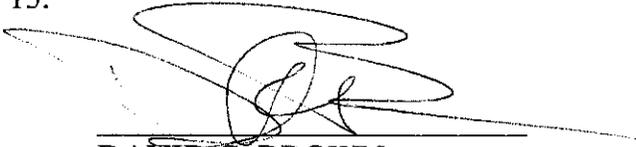
Dontrell Dyna Flowers,

Appellant.

**CERTIFICATION OF BRIEF
LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,262 words. This brief was prepared using Microsoft Word 97, CG Times font face size 13.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).