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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-398**

State of Minnesota,
Respondent,

vs.

Mardi Jewetteast McNeal,
Appellant.

**Filed May 14, 2012
Affirmed
Peterson, Judge**

Ramsey County District Court
File No. 62-CR-08-4689

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

John J. Choi, Ramsey County Attorney, Beth G. Sullivan, Thomas R. Ragatz, Assistant
County Attorneys, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Crippen,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of third-degree criminal sexual conduct, appellant argues that (1) the district court committed prejudicial error by allowing the prosecution to impeach his trial testimony with evidence of a 2001 conviction of first-degree aggravated robbery, and (2) he was denied the effective assistance of counsel. We affirm.

FACTS

Appellant Mardi Jewetteast McNeal met a 13-year-old girl, B.P., during an evening in April 2008. That evening, B.P. had arranged to spend the night with her friend L.D. The two went to a mall and, afterwards, met up with L.D.'s boyfriend C.J. and appellant. C.J. told L.D. that appellant was 17 years old. Appellant was actually 23 years old. Neither L.D. nor B.P. had met appellant before. Appellant told the girls that his name was "Marcus."

The four went to L.D.'s house, where appellant had sexual intercourse with B.P. against her will. After the sexual assault, B.P. told L.D. what had happened, and L.D. told B.P. to clean herself up. At some point, appellant and C.J. left. After L.D. fell asleep, B.P. called her sister, who called their mother. The mother drove to L.D.'s house, where she found B.P. standing outside waiting for her and crying. B.P. told her mother that "a guy named Marcus" had forced sex on her.

Four days after the incident, B.P. went to her school liaison officer and told him "that she felt that she had been raped." B.P. told the officer that appellant had forced oral

and vaginal sex on her. Law enforcement was unable to obtain any physical evidence from B.P.

Law enforcement arranged two meetings with appellant, but appellant did not attend the meetings. Appellant was later found in Kansas City. He testified at trial that he went to Kansas City “[b]ecause the police threatened to take [his] kids.” Appellant denied having sexual contact with B.P. and stated that he had been accused of the offense because he had verbally abused B.P. and L.D.

Appellant was charged with one count of third-degree criminal sexual conduct. The state moved to impeach appellant with evidence of a November 2001 first-degree aggravated-robbery conviction. The state argued that execution of the sentence for the 2001 offense initially had been stayed, but appellant had several probation violations, and probation had recently been revoked and appellant was sent to prison. The state argued that appellant’s history following the 2001 offense should weigh in favor of admission and that the conviction should be admitted to allow the jury “to see this defendant as a whole person.” Appellant objected, arguing that the conviction was untimely and that the prejudicial effect of admission outweighed “the probative value of admitting an aggravated robbery from approximately nine years ago.”

The district court ruled that the conviction was admissible and addressed the *Jones*¹ factors as follows:

¹ *State v. Jones*, 271 N.W.2d 534 (Minn. 1978).

[T]he charge that the State wishes to use for impeachment is not similar in nature[.] . . . [A]lthough it's 2001, date of occurrence, but it's also relevant when the release from confinement imposed for the conviction, when that date is, and that has not yet occurred. So I think it's timely

. . . The probation violations are not admissible or particularly relevant except that they provide the reason that the confinement has not expired.

Credibility is important, the centrality of the defendant's testimony is important. . . . [A]nything probative about this conviction would be probative only for purposes of impeachment and not because of the nature of the charge, I don't think it's extremely prejudicial

Appellant's attorney questioned appellant about the conviction and referred to the conviction during closing argument. The prosecutor did not mention the conviction during closing argument. The jury found appellant guilty as charged, and appellant was sentenced to 60 months in prison. This appeal followed.

DECISION

I.

Minn. R. Evid. 609(a)(1), (b) allow evidence of a felony conviction to be admitted for impeachment purposes provided that ten or fewer years have elapsed since the conviction and that the probative value of the evidence outweighs its prejudicial effect. The district court's ruling on the impeachment of a witness by prior conviction is reviewed under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998); *see also State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985) (stating that determination whether probative value of prior convictions outweighs prejudicial effect is committed to district court's discretion).

In determining whether probative value outweighs prejudicial effect, a district court considers “(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; (4) the importance of defendant’s testimony; and (5) the centrality of the credibility issue.” *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

Impeachment Value

The supreme court has concluded that Minn. R. Evid. 609 “clearly sanctions the use of felonies . . . 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.” *State v. Brouillette*, 286 N.W.2d 702, 708 (Minn. 1979); *see also State v. Head*, 561 N.W.2d 182, 186 (Minn. App. 1997) (explaining that, under rule 609(a), crime involving dishonesty or false statement is automatically admissible and that admission of other crimes is discretionary with district court, *review denied* (Minn. 1997)). “[I]mpeachment by prior crime aids the jury by allowing it to see ‘the whole person’ and thus to judge better the truth of his testimony.” *Brouillette*, 286 N.W.2d at 707 (quotation omitted). “Lack of trustworthiness may be evinced by [an] abiding and repeated contempt for laws [that one] is legally and morally bound to obey” *Id.* (quotation omitted).

This court has noted widespread criticism of the whole-person rationale and has also recognized the risk that jurors might misuse prior convictions as propensity evidence. *State v. Flemino*, 721 N.W.2d 326, 328 (Minn. App. 2006). Nevertheless,

admission of prior convictions for impeachment purposes under the whole-person rationale remains within the district court's discretion. *See Williams*, 771 N.W.2d at 518-19 (declining to reconsider use of whole-person test and reaffirming its underlying rationale); *see also State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998) (stating that it is not this court's role to review supreme court decisions); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them.").

Appellant argues that evidence of his robbery conviction presented little impeachment value when evidence of his flight to Kansas City and other conduct sufficed to provide the jury with a view of the whole person. But, considered together with the evidence of flight, appellant's robbery conviction evinces an abiding and repeated contempt for laws that appellant is legally and morally bound to obey. Under the whole-person rationale, appellant's robbery conviction had impeachment value.

Timeliness

Evidence of a prior conviction is admissible if the offense for which the defendant is on trial occurred within ten years after the prior conviction. Minn. R. Evid. 609(b). Convictions that fall within the 10-year limit are not stale. *See Ihnot*, 575 N.W.2d at 586-87 (stating that, while "evidence may be at the margin of admissibility," it was not stale because it fell within 10-year limit).

Appellant's prior offense occurred in November 2001, and the current offense occurred less than seven years later in April 2008. Because the prior offense was within

the 10-year period recognized under the rule, the prior offense was timely, and this factor weighs in favor of admission.

Similarity of Crimes

“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). “The greater the similarity, the greater the reason for not permitting use of the prior crime to impeach.” *Jones*, 271 N.W.2d at 538.

Appellant’s prior offense was aggravated robbery, and the charged offense was third-degree criminal sexual conduct. Because the prior offense and the charged offense are dissimilar, this factor weighs in favor of admission.

Importance of Appellant’s Testimony and 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. Pendleton*, 725, N.W.2d 717, 729 (Minn. 2007) (quotation omitted). Appellant denied having sexual contact with B.P, there was no physical evidence of the alleged sexual conduct, and both appellant and B.P. testified at trial, offering significantly different accounts of what occurred. Because credibility was a central issue in this case, these factors weigh in favor of admission.

The district court did not abuse its discretion in admitting evidence of appellant’s 2001 first-degree aggravated-robbery conviction.

II.

Both the United States Constitution and the Minnesota Constitution guarantee an accused the assistance of counsel for his defense. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. “The purpose of the effective assistance guarantee of the Sixth Amendment is to ensure that criminal defendants get a fair trial.” *Schneider v. State*, 725 N.W.2d 516, 522 (Minn. 2007). To prove an ineffective-assistance-of-counsel claim a defendant must show that (1) his counsel’s representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s error, the result of the trial would have been different. *Id.* at 521.

When determining whether counsel’s representation fell below an objective standard of reasonableness, “[a] strong presumption exists that counsel’s performance fell within a wide range of reasonable assistance. Particular deference is given to the decisions of counsel regarding trial strategy.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (citation omitted). “[M]atters of trial strategy . . . will not be reviewed later for competence.” *Voorhees v. State*, 627 N.W.2d 642, 651 (Minn. 2001); *see also State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (“Appellate courts, which have the benefit of hindsight, do not review for competency matters of trial strategy.”).

“What evidence to present to the jury, including which witnesses to call, represents an attorney’s decision regarding trial tactics and lies within the proper discretion of trial counsel.” *Doppler*, 590 N.W.2d at 633. Decisions about the manner of cross-examination concern matters of trial strategy, and, as such, are not subject to review. *See State v. Miller*, 666 N.W.2d 703, 716-17 (Minn. 2003) (rejecting ineffective-

assistance claim based in part on manner of cross-examination); *State v. Irwin*, 379 N.W.2d 110, 115 (Minn. App. 1985) (noting that manner of cross-examination is tactical decision and that “failure to conduct cross-examination in a certain manner” does not demonstrate ineffective assistance), *review denied* (Minn. Jan. 23, 1986).

In a pro se supplemental brief, appellant argues that his attorney (1) should have cross-examined B.P.’s mother about why she did not immediately take B.P. to the hospital or immediately contact police, (2) unreasonably failed to cross-examine L.D. or a law-enforcement officer about inconsistencies between L.D.’s initial written statement to police and the testimony she gave at trial, and (3) provided ineffective assistance by failing to offer B.P.’s underwear as evidence to prove the lack of blood and fluid on them. All three of these arguments involve either the manner of conducting cross-examination or decisions regarding what evidence to present to the jury, which are matters of trial strategy, and, as such, are not subject to review.

Affirmed.