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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0050**

State of Minnesota,
Respondent,

vs.

Ellando Lee James,
Appellant

**Filed March 18, 2008
Affirmed
Halbrooks, Judge**

Clay County District Court
File No. K0-06-1017

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

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John M. Stuart, State Public Defender, Susan J. Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Ellando Lee James challenges his convictions of second-, third- and fifth-degree assault and terroristic threats on the ground that the district court abused its discretion by admitting evidence of his past convictions. Appellant also asserts in a pro se supplemental brief that there was insufficient proof to support his convictions. We affirm.

FACTS

Appellant was with a group of friends at multiple bars on the evening of May 12, 2006. The group included Charity Maack and Kayla Disher. At the time, appellant was dating a friend of Maack named Kendra Miller, who was not with appellant that evening. After 2:00 a.m., Maack went to Disher's apartment to sleep; appellant and Disher arrived at Disher's apartment shortly after Maack did.

While trying to sleep, Maack heard what she believed to be sexual noises coming from Disher's bedroom. Because she thought that appellant was cheating on Miller, Maack went to the bedroom to confront appellant and Disher. Disher told Maack to mind her own business, and the two argued so loudly that their argument was heard by Disher's downstairs neighbor, Whitney Schneider. Appellant became angry with Maack and moved toward her. Maack then began to pack up her belongings and called her brother to pick her up. Maack testified that while she was talking to her brother, appellant was yelling statements like, "Tell your brother the address here and I'll kick his butt," that made Maack uncomfortable. As appellant continued to argue with Maack, he took a

knife from the kitchen, and Maack grabbed a can of hairspray and a lighter. Maack stated she grabbed the hairspray and lighter only after appellant threatened her with the knife, saying, "I'll kill you, b-tch."

Maack ran into the bedroom, locked the door, and called her stepmother, Kimberly Wahl. Maack told Wahl that she needed help and that a man was going to slit her throat. Wahl later testified that Maack was crying so hard that Wahl could barely understand her. When Maack came out of the bedroom, she gathered her things in the living room of Disher's apartment to wait for Wahl. While Maack was waiting, appellant punched her in the face, causing Maack to fall back into the couch. Appellant then continued to beat Maack as she tried to hit, kick, and scratch him.

After appellant stopped, he left the apartment by jumping off the balcony. Wahl was waiting in the parking lot. She testified that appellant approached her vehicle and was "very aggressive," screaming at her to roll down her car window. Schneider also saw appellant approach Wahl's car. He stated that when Wahl mentioned calling 911, appellant said, "If you call 911, I'll shoot the b-tch. I swear that. I swear to you now." Wahl refused to roll down the window and kept the doors locked. After yelling for over two minutes, appellant left, and Wahl then called the police on her cell phone.

Maack attempted to leave the building through the back door. But appellant returned to the building and confronted her there, kicking her in the stomach. Maack fell to the ground, got up, and started running. Appellant tried to kick her again, and as appellant ran to the bottom of the stairs, the police arrived. Officers observed that Maack had blood on her hands, lips, and face and had a swollen left eye. Maack told officers

that she had been assaulted by appellant in the apartment complex. The officers found appellant in a public hallway of the apartment complex and arrested him. Appellant admitted that he had assaulted a female but stated that he did so because she had called him the “N-word.”

Before trial, the state sought admission of appellant’s five prior felony convictions for impeachment purposes if appellant chose to testify. The district court reserved its decision on the matter until appellant decided whether or not to testify. Appellant ultimately decided to testify and claimed that he acted in self defense when Maack came after him with the hairspray and lighter.

The district court ruled that only two of appellant’s prior convictions were admissible for impeachment purposes. Appellant’s 1992 conviction for armed robbery was excluded because it was more than ten years old. Two 1996 battery convictions were excluded because the district court concluded that their probative value was outweighed by the potential prejudicial impact. But the district court ruled that appellant’s 1997 robbery and 2004 fourth-degree assault convictions were admissible, provided that the prosecutor referred to the assault conviction as a “fourth-degree felony” and not use the term “assault.” A jury subsequently convicted appellant of second-, third- and fifth-degree assault and terroristic threats. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by admitting for impeachment purposes two of his five prior felony convictions. A district court’s ruling on the impeachment of a witness by prior conviction is reviewed, like other evidentiary

rulings, under a clear abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Balancing the probative value and the prejudicial effect of a prior conviction is a matter for the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985). An appellant has the burden of establishing that the district court abused its discretion and that he or she was prejudiced by that abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Evidence of a criminal defendant's prior conviction for a crime punishable by imprisonment of more than a year may be admitted into evidence for impeachment purposes if the district court concludes that the probative value of the impeachment evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a). In determining whether the probative value of the impeachment evidence outweighs its 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 (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. Jones, 271 N.W.2d 534, 537-38 (Minn. 1978). A district court should demonstrate on the record that it has considered and weighed these factors when making a decision regarding the admissibility of prior convictions for impeachment purposes. *State v. Swanson*, 707 N.W.2d 645, 654-55 (Minn. 2006). The district court here did not address the *Jones* factors on the record. But where an appellate court can review the factors and determine that evidence of a prior conviction was properly admitted into

evidence, the district court's failure to consider the factors on the record is harmless error. *Id.* at 655-56.

1. *Impeachment value*

Appellant asserts that his convictions of fourth-degree assault and robbery do not have a direct bearing on his truthfulness. But the supreme court has held that a prior conviction can have impeachment value by helping the jury to see the "whole person" and to more accurately evaluate the defendant's truthfulness. *Swanson*, 707 N.W.2d at 655; *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). And in this case, the district court instructed the jury that the prior conviction was admitted for impeachment purposes only. On appeal, it is presumed that the jurors followed a district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Therefore, this factor weighs in favor of admissibility. See *Swanson*, 707 N.W.2d at 655 (upholding the district court's admission of past convictions of violent crimes for impeachment purposes); *Gassler*, 505 N.W.2d at 66-67 (same).

2. *The conviction date and appellant's subsequent history*

Prior convictions admitted for impeachment purposes must be less than ten years old. Minn. R. Evid. 609(b). Both of appellant's admitted convictions occurred within the ten-year requirement. When prior convictions show a pattern of lawlessness and occur within the ten-year requirement, this factor weighs in favor of admission. *Swanson*, 707 N.W.2d at 655.

3. *Similarity of prior conviction to the offense charged*

The more similar a prior conviction is to the current charge, the more the prior conviction is likely to be more prejudicial than probative. *Id.* But “Minnesota courts have been liberal in admitting prior convictions for impeachment even when the prior crime is the same as the crime charged.” *State v. Stanifer*, 382 N.W.2d 213, 218 (Minn. App. 1986). A cautionary instruction can lessen the danger of prejudice by directing the jury to consider the past conviction only in regard to credibility. *State v. Brouillette*, 285 N.W.2d 702, 708 (Minn. 1979); *State v. Vanhouse*, 634 N.W.2d 715, 720 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

Here, appellant contends that the fourth-degree-assault conviction should have been excluded because of its similarity to the current charges against him. The district court addressed the potential for prejudice created by the similarity of the prior conviction by prohibiting the prosecutor from using the word “assault” and allowing the prosecutor to refer only to a “fourth-degree felony” when referring to appellant’s prior conviction. Appellant argues that this limitation caused the jury to speculate that he committed a more serious crime than the assault. But in context, we conclude that the district court made an appropriate effort to limit the potential prejudice of appellant’s prior fourth-degree-assault conviction.

4. & 5. *The importance of the defendant’s testimony and defendant’s 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.” *Swanson*, 707 N.W.2d at 655. While

appellant argues that it was the prosecutor's choice to make credibility a central factor, appellant chose to testify and to assert a self-defense theory at trial. Because of the differing accounts of what occurred that night, the jury was placed in the position of deciding who was more credible. Because appellant's credibility was central to the case, these factors weigh in favor of admissibility of the prior convictions. *Id.*

Based on our review of the record, four of the five *Jones* factors weigh in favor of admission of appellant's prior convictions. Further, any potential prejudice because of the similarity between appellant's fourth-degree assault conviction and the charges here was mitigated by the district court's limitation on the prosecutor's reference to the prior conviction and by the instruction to the jury that it was not to consider the prior convictions as evidence of appellant's character. Although the district court did not address the *Jones* factors on the record, we conclude that the failure to do so is harmless error. *Id.* The district court acted within its discretion by admitting appellant's prior convictions.

In a pro se supplemental brief, appellant argues that there was insufficient evidence to prove his guilt beyond a reasonable doubt. This court reviews a challenge to the sufficiency of the evidence by analyzing the record in a light most favorable to the conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A reviewing court must assume that the jury believed the state's witnesses and disbelieved evidence to the contrary when reviewing a conviction. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is particularly true when the verdict depends largely on reconciling conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). If the jury

could have reasonably concluded that the defendant was guilty of the charged offense, the verdict will not be disturbed. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant contends that the conflicting testimony in the record demonstrates that the state lacked sufficient evidence to convict him. But there is sufficient evidence in the record for the jury to have concluded that appellant is guilty.

Affirmed.