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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1674**

State of Minnesota,  
Respondent,

vs.

Luke Brandon Scott,  
Appellant.

**Filed July 30, 2012  
Reversed and remanded  
Cleary, Judge**

Ramsey County District Court  
File No. 62-CR-10-8293

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

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

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant  
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Judge; and  
Willis, Judge.\*

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

## UNPUBLISHED OPINION

**CLEARY**, Judge

Appellant was convicted of assault in the first degree under Minn. Stat. § 609.221, subd. 1 (2010), assault in the second degree under Minn. Stat. § 609.222, subd. 2 (2010), terroristic threats under Minn. Stat. § 609.713, subd. 1 (2010), and false imprisonment under Minn. Stat. § 609.255, subd. 2 (2010). Appellant challenges his convictions, arguing that the district court erred by allowing the state to recall appellant to testify after both parties had rested, abused its discretion by admitting evidence of appellant's prior assault conviction, erred in instructing the jury about the proper use of prior-conviction testimony, erred by imposing a sentence that was an upward durational departure from the Minnesota Sentencing Guidelines, and erred by sentencing appellant for both false imprisonment and first-degree assault. Because we hold that the district court erred in instructing the jury about the proper use of appellant's prior assault conviction, we reverse and remand for a new trial.

### FACTS

Appellant Luke Scott was charged with first-degree assault, second-degree assault, terroristic threats, false imprisonment, and kidnapping as a result of events that took place in the early morning hours on September 26, 2010. The previous evening, appellant, C.H., appellant's roommate, and others watched movies and drank alcohol at appellant's home in Saint Paul. Most of the group left around midnight and appellant, his roommate, and C.H. were the only ones who remained. Appellant and C.H. were in a relationship at the time.

The events that took place after the guests left were disputed at trial. Appellant testified that he tried to prevent C.H. from driving because she had been drinking. Appellant also testified that C.H. became angry about his refusal to let her drive, she started slapping him, and they were biting each other. C.H. testified that she tried to end her relationship with appellant and that he became angry and would not let her leave the house. Over the next several hours, a series of physical altercations occurred. C.H. suffered various injuries, including a torn lip, lost tooth, and cuts on her face. C.H. testified that appellant caused her injuries, but appellant claimed that C.H. incurred the injuries on her own. C.H. left the house early the next morning, went to a nearby gas station, and called the police.

Before trial, the state notified appellant of its intent to present evidence of appellant's prior felony conviction of aggravated assault. Appellant had been convicted of aggravated assault in Hays County, Texas. The original sentencing for the conviction was January 2, 2000, and appellant was resentenced September 27, 2006.

Just before appellant testified at trial, the court made a record, outside the presence of the jury, regarding the admission of the prior conviction. Both appellant's attorney and the prosecutor made arguments regarding the admissibility of the prior conviction, and the court determined that it was admissible.

The appellant then testified and was cross-examined by the prosecutor. Appellant did not testify about the prior conviction on direct examination, nor did the prosecutor question him about it on cross-examination. Immediately after appellant finished testifying, the defense rested and the prosecutor stated that she had no rebuttal. The court

then called both attorneys to the bench and held a discussion off the record. Following that discussion, the court asked the prosecutor if she wished to recall appellant to the stand. The prosecutor replied that she did, and appellant returned to continue cross-examination. The prosecutor asked, “[Appellant], you have a conviction—a prior conviction for Aggravated Assault in the Second Degree out of Hays County, Texas, that was sentenced February 2nd of 2000 and resentenced on September 27th of 2006; is that correct?” Appellant answered in the affirmative, and no more questions were asked.

Immediately following the questioning, the court issued the following cautionary instruction to the jury:

Ladies and Gentlemen of the Jury, the state has just introduced evidence of a prior conviction, as you’ve just heard, and I’d like to instruct you that this was admitted for the limited purpose of assisting you in determining whether the [appellant] committed those acts with which he is charged in the instant complaint.

This evidence is not to be used as proof of the character of the [appellant] or that the [appellant] acted in conformity with that character.

The [appellant] is not being tried for and may not be convicted of any offense other than the charged offenses. You must not convict the [appellant] on the basis of any of [sic] previous conviction. To do so might result in unjust double punishment.

Appellant did not object to this instruction. At the close of the trial, the court issued an impeachment instruction to the jury and sent a written copy of that instruction with the jury into deliberations. Appellant did not object to the final jury instructions. The jury

found appellant not guilty of the kidnapping charge and guilty of all of the other charges. This appeal followed.

## DECISION

### I.

“In the interests of justice, the court may allow any party to reopen that party’s case to offer additional evidence.” Minn. R. Crim. P. 26.03, subd. 12(g). Appellate courts review “the disposition of a party’s request to reopen its case after the party has rested under an abuse-of-discretion standard.” *State v. Caine*, 746 N.W.2d 339, 352–53 (Minn. 2008). *See also State v. Daniels*, 361 N.W.2d 819, 831 (Minn. 1985); *State v. Jouppis*, 147 Minn. 87, 89, 179 N.W. 678, 679 (1920). District courts have discretion in managing trials. *State v. Blom*, 682 N.W.2d 578, 609 (Minn. 2004).

Appellant argues that the Minnesota Rules of Criminal Procedure do not allow the state to recall appellant for re-cross-examination. Appellant contends that, because appellant did not testify as part of the state’s case, the district court was actually allowing the state to reopen appellant’s case when the court allowed him to be recalled.

In *Jouppis*, the Minnesota Supreme Court analyzed whether a defendant should have been allowed to reopen his case after he had rested. 147 Minn. at 89–90, 179 N.W. at 679. The defendant wanted to reopen his case to present impeachment evidence. *Id.* at 89, 179 N.W. at 679. The court noted:

The testimony proffered was competent and bore directly upon the credibility of the only direct testimony incriminating the defendant. In prosecutions for crimes of this nature there is seldom any direct evidence on either side except the testimony of the two parties; and, where they

squarely contradict each other, as they frequently do, all the available competent evidence, tending either to corroborate or discredit the testimony of the one or the other, should be submitted to the jury to aid them in determining where the truth lies.

*Id.* The court determined that a defendant should be permitted to reopen his case to present evidence when, before the prosecution presents its rebuttal and before “any further proceedings are taken, [the defendant] asks to reopen his case and tenders material evidence, not cumulative, upon a controlling issue, and there is nothing to indicate any improper purpose in failing to produce such evidence earlier. . . .” *Id.* at 89–90, 179 N.W. at 679.

In a more recent case, the court reiterated its holding in *Jouppis* and found that the district court did not abuse its discretion by denying a defendant’s request to reopen his case. *Caine*, 746 N.W.2d at 353. In *Caine*, the defendant argued that the district court erred when it denied his request to re-cross-examine a witness after the witness’s plea transcript was admitted into evidence. *Id.* at 352–53. The court noted that the defendant did not make his request until just before closing arguments, when both parties had rested, and that the defendant “knew about the admission of the transcript for both impeachment and substantive purposes before he began his case-in-chief and decided to rest his case anyway.” *Id.* at 353. The court also stated that the defendant offered “no reasonable explanation” as to why he needed to question the witness further. *Id.*

The state here wanted to present evidence that weighed upon the credibility of appellant. Like in *Jouppis*, the case here depended heavily upon whose version of the facts the jury found more credible. Appellant and C.H. were the only two individuals

present for most of the events in question. In contrast to *Caine*, the state here requested to reopen the cross-examination of appellant about one minute after it originally ended. As the district court noted, the evidence had already been ruled admissible, and while the record is inconclusive, it appears from the transcript that the prosecutor may have simply forgotten to introduce the evidence.<sup>1</sup> Although the situation was unusual, district courts have discretion in managing trials, and the court did not abuse its discretion by allowing the state to reopen cross-examination to introduce the impeachment evidence.

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<sup>1</sup> The following exchange took place:

[DEFENSE ATTORNEY]:	The defense rests, Your Honor.
[PROSECUTOR]:	No rebuttal, Your Honor.
THE COURT:	Okay. Both parties then have rested their cases in chief. May I see counsel up at the bench, please?
(Discussion at the bench, off the record)	
THE COURT:	Okay. You wish to recall the [appellant] to the stand?
[PROSECUTOR]:	Yes, Your Honor.
THE COURT:	Okay.

This exchange does raise a serious concern. It appears that the court may have prompted the prosecutor to recall the appellant so that he could be impeached by a prior conviction, which would be in conflict with the neutral role of the judicial officer in this proceeding. *See State v. Oden*, 385 N.W.2d 420, 422 (Minn. App. 1986) (“The trial judge, as the neutral factor in the interplay of our adversary system, is vested with the responsibility to ensure the integrity of all stages of the proceedings. This pervasive responsibility includes avoidance of both the reality and the appearance of any impropriety by so directing and guiding the proceedings as to afford the jury fair and independent opportunity to reach an impartial result on the issue of guilt.”) (quoting *State v. Mims*, 306 Minn. 159, 168, 235 N.W.2d 381, 387 (1975)); *see also* ABA Standards for Criminal Justice, *Special Functions of the Trial Judge* Standard 6-1.6(a) (3rd ed. 1999). However, the record is inconclusive as to what transpired at the time the case was reopened, and the prosecutor may well have independently requested to reopen the testimony to introduce the evidence.

## II.

“Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

A defendant’s prior conviction may be admitted for purposes of impeachment if the crime is punishable by more than one year of imprisonment and “the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.” Minn. R. Evid. 609(a)(1). District courts are afforded great discretion in determining, under rule 609(a)(1), what prior convictions are admissible. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). A ruling on the admissibility of prior convictions for purposes of impeachment is reviewed for an abuse of discretion. *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006).

In weighing the probative value of prior-conviction impeachment evidence against its prejudicial effect, district courts consider five factors:

- (1) [T]he 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).

### ***Impeachment value of the prior crime***

“Just because a crime is not directly related to truth or falsity does not mean that evidence of the conviction has no impeachment value.” *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979). “[A] prior conviction can have impeachment value by helping the jury see the ‘whole person’ of the defendant and better evaluate his or her truthfulness.” *Swanson*, 707 N.W.2d at 655 (citing *Gassler*, 505 N.W.2d at 66–67).

Appellant argues that his prior conviction has nothing to do with his credibility. The Minnesota Supreme Court has held that, even though a prior conviction is unrelated to a defendant’s veracity, it can still have impeachment value. *Brouillette*, 286 N.W.2d at 707. In *Brouillette*, the defendant argued that his prior conviction for criminal sexual conduct was unrelated to his credibility. *Id.* The court stated that rule 609 “clearly sanctions the use of felonies which are 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.” *Id.* at 708.

Similarly here, appellant’s prior conviction could give the jury a view of his whole person and help the jury to determine whether his testimony was credible. The impeachment value of the prior conviction, in showing the jury the “whole person” of appellant, appears to weigh in favor of its admission.

### ***Date of conviction and appellant’s subsequent history***

A prior conviction is not admissible if more than ten years have elapsed since the date of the conviction, or the release of the individual from the confinement for that conviction, whichever is the later date. Minn. R. Evid. 609(b). Courts “consider recent

convictions to have more probative value than older ones . . . .” *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). Appellant admits that less than ten years had elapsed from the time he was released from the confinement imposed for the conviction until trial. But he argues that the age of the conviction weighs against admitting it. The prior conviction is admissible because it falls within the statutory timeframe, but because it is an older conviction, the age of the conviction weighs against its admission.

***Similarity of past crime with charged crime***

“[I]f the prior conviction is similar to the charged crime, 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. “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).

Appellant argues that his prior conviction was not admissible because it was “far too similar” to the offenses he was charged with here. The state counters that there was evidence presented on the charges of kidnapping, terroristic threats, and false imprisonment, as well as the assault charges; therefore the prejudicial effect of the similarity of the prior conviction to the present assault charges was diminished. But in *Jones*, the court noted that “the greater the similarity [of the prior conviction to the presently-charged crime], the greater the reason for not permitting use of the prior crime to impeach.” 271 N.W.2d at 538. Even though there were other crimes charged in addition to the first- and second-degree assault charges, it appears that the similarity of the prior assault conviction weighs heavily against its admission here.

### *Importance and credibility of defendant's testimony*

“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. “Appellant’s version of the facts may be centrally important to the result reached by the jury. If so, 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.” *Gassler*, 505 N.W.2d at 67. “[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 . . . the need for the evidence is greater.” *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980).

Appellant argues that his testimony was “critically important” to the case because only he and C.H. were present during the “crucial part” of the evening. But appellant chose to testify even after the district court ruled that evidence of the prior conviction would be admissible. The admission of the evidence did not prevent the jury from hearing his account of the events. Further, appellant’s credibility became even more important once he testified, and the court here noted that “[c]redibility is central to this case given the fact that there were two primary actors, and the case will rise and fall on the credibility of either one of them.”

Whether to admit evidence of appellant’s prior assault conviction was a very close call. More emphasis than normal was placed on the admission of the evidence because the district court allowed the prosecutor to recall appellant to present the evidence. Additionally, it was the only issue that appellant testified about once he returned to the

stand; in fact, the prosecutor only asked appellant the one question about the prior conviction. Despite the unusual proceedings, the district court did not abuse its discretion by admitting the evidence.

### III.

Jury instructions not objected to are reviewed for plain error. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Under the plain-error test, the appellant must show (1) an error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “If each of these requirements is met, we then assess whether we should address the error to ensure fairness and the integrity of the judicial proceedings.” *State v. Prtine*, 784 N.W.2d 303, 314 (Minn. 2010).

“The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case. The defendant bears the burden of persuasion on this third prong.” *Griller*, 583 N.W.2d at 741. The Minnesota Supreme Court considers the burden of persuasion on the third prong of the plain-error test to be a heavy one. *Id.* Plain error is prejudicial “if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.” *Id.* (quotation omitted).

The state here concedes that the district court committed plain error by giving the *Spreigl* cautionary instruction instead of the impeachment instruction immediately after appellant testified as to his prior conviction, but argues that appellant has failed to show that the plain error affected his substantial rights. Appellant argues that the cautionary instruction significantly affected the jury because the jury was told to consider evidence

of appellant's prior conviction substantively, rather than to limit its consideration of the prior conviction in relation to appellant's credibility.

The district court here issued an incorrect cautionary instruction to the jury immediately after the impeachment evidence was heard. The jury was given a *Spreigl* warning, instructing it to use the evidence of appellant's prior assault to determine whether he committed the current offenses.<sup>2</sup> The instruction the jury should have received addresses the proper use of impeachment evidence:

The evidence concerning a prior conviction of the defendant is admitted only for your consideration in deciding whether the defendant is telling the truth in this case. You must not consider this conviction as evidence of the defendant's character or conduct except as you may think it reflects on believability.

10 *Minnesota Practice*, CRIMJIG 2.02 (2011).

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<sup>2</sup> The court used an instruction almost identical to the pattern instruction for *Spreigl* evidence, which states:

The State is about to introduce evidence of occurrences on \_\_\_\_\_ at \_\_\_\_\_. This evidence is being offered for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the complaint. [This evidence is not to be used to prove the character of the defendant or that defendant acted in conformity with such character.]

The defendant is not being tried for and may not be convicted of any offense(s) other than the charged offense(s). You are not to convict the defendant on the basis of occurrences on \_\_\_\_\_ at \_\_\_\_\_. To do so might result in unjust double punishment.

10 *Minnesota Practice*, CRIMJIG 2.01 (2011).

Even though, at the close of the trial, the jury was properly instructed that it should limit its consideration of appellant's prior conviction to how it relates to appellant's credibility, the court never issued a curative instruction letting the jury know that the original instruction was incorrect.<sup>3</sup> Furthermore, the incorrect instruction was given by itself immediately after the prior-conviction evidence was admitted. Because of the unusual process by which the evidence was presented, additional emphasis was placed on the evidence and the instruction to consider it substantively. In contrast, the correct instruction was given at the end of the trial among 25 other instructions. Giving the jury the improper *Spreigl* instruction was plain error that affected appellant's substantial

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<sup>3</sup> The impeachment instruction to be given to a jury at the close of a case is slightly different than that to be given during trial. The impeachment instruction that the district court gave to the jury at the close of trial here was:

In deciding the believability and weight to be given the testimony of a witness, you may consider evidence that the witness has been convicted of a crime. You may consider whether the kind of crime committed indicates the likelihood that the witness is telling or not telling the truth.

In the case of the [appellant] you must be especially careful to consider any previous conviction only as it may affect the weight of the [appellant]'s testimony. You must not consider any previous conviction as evidence of the guilt of the offense for which the [appellant] is on trial.

Evidence of a statement by or conduct of a witness on some prior occasion that is inconsistent with present testimony: Evidence of any prior inconsistent statement or conduct should be considered only to test the believability and the weight of the witness's testimony. In the case of the [appellant], however, evidence of any statement that he may have made may be considered by you for all purposes.

rights, and it seriously affected the fairness and integrity of the judicial proceedings below.

Because we reverse and remand for a new trial, we do not reach the sentencing issues.

**Reversed and remanded.**