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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1628**

State of Minnesota,  
Respondent,

vs.

Carlos Heard,  
Appellant.

**Filed August 13, 2012  
Affirmed  
Hudson, Judge**

Hennepin County District Court  
File No. 27-CR-10-34107

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County  
Attorney, Minneapolis, Minnesota (for respondent)

David Merchant, Chief Appellate Public Defender, Susan Andrews, Assistant Public  
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, 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## UNPUBLISHED OPINION

**HUDSON**, Judge

On appeal from his conviction of intentional second-degree murder and third-degree murder, appellant argues that the district court abused its discretion by ruling that appellant could be impeached with a prior conviction of manslaughter. Although the district court erred by not analyzing on the record the five factors under *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978), we conclude that the error was harmless and the district court did not abuse its discretion in admitting appellant's prior conviction for the purpose of impeachment.

### FACTS

On June 9, 2005, Leroy Kennedy and Jermaine Heard, appellant Carlos Heard's younger brother, were fatally shot near a North Minneapolis alley. Approximately five years later, appellant was charged by complaint with two counts of second-degree murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2004), and one count of second-degree felony murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2004). He was also indicted by grand jury for first-degree murder, Minn. Stat. § 609.185(a)(1) (2004); second-degree felony murder, Minn. Stat. § 609.19, subd. 2(1) (2004); and third-degree murder, Minn. Stat. § 609.195(a) (2004). Appellant was acquitted of first-degree murder and second-degree felony murder and convicted of intentional second-degree murder and third-degree murder. He was sentenced to 180 months for the third-degree murder conviction and a consecutive sentence of 313 months for the conviction of intentional second-degree murder.

On the night of the shooting, A.T. was working on his Suburban in an alley in north Minneapolis when two black men in their early twenties walked past him. A.T. testified that he glanced at the men but did not see their faces. He testified that one man was taller and thinner than the other, both wore shorts, and the shorter man wore a blue-striped shirt. A.T. was backing up his Suburban when he heard shots fired. A.T. testified that he looked north and saw the taller of the two men he had just seen walk across the alley fire a gun. But A.T. could not see what the man was shooting at.

When deputies arrived, Jermaine Heard was alive, but he later died at the hospital. His shorts and a blue-striped shirt were entered into evidence. Kennedy died at the scene. Police did not recover a murder weapon, but forensic evidence was presented that the same gun killed both men.

The prosecution offered the testimony of six others who either witnessed the shooting or spoke with appellant after the shooting. J.W. testified that he was with Kennedy before and after he was shot. J.W. testified that he spent time at the 200 Club that night with Kennedy and they ultimately left in a van and parked to the east of A.T.'s alley. He stated that as they crossed the street, two men emerged from the alley walking quickly. Both wore shorts and one was wearing a striped shirt. But J.W. was unable to identify the shooter because he ran as soon as he saw one of the men pull out a gun. He heard gunfire and, when he thought it was safe, returned to look for Kennedy and saw two men talking, heard another shot, and saw one of the men fall down.

Witness D.C. testified that he saw Kennedy at the 200 Club that night and knew that Kennedy owed Jermaine Heard money. D.C. called Jermaine Heard to tell him that

Kennedy was at the club. D.C. testified that about 25 minutes later Jermaine Heard arrived at the club and told D.C. that he had just seen Kennedy leave the parking lot. D.C., along with witness L.G. and appellant, accompanied Jermaine Heard in his van as he followed Kennedy.

D.C. testified that, after Jermaine Heard parked the van, D.C. walked around the block with Jermaine Heard and that they planned to confront Kennedy when he emerged from his van while L.G. and appellant “[f]all back for a minute.” D.C. further testified that, when Kennedy got out of the van, appellant and L.G. emerged from the alley. He testified that Jermaine Heard ran up to appellant and told him to “chill out” and the two started “tussling.” D.C. testified that he saw a gun in appellant’s hand, heard a shot, and saw Jermaine Heard fall down. He stated that he saw appellant chase Kennedy around the van and then heard a gunshot. D.C. testified that the following day appellant told him that he “just wanted to see his brother buried and then he’d turn himself in.”

L.G. testified that he and appellant were at Jermaine Heard’s apartment when D.C. called, and they then all went to the 200 Club. L.G. also knew that Kennedy owed Jermaine Heard money. L.G. testified that he, D.C., and appellant drove with Jermaine Heard to the alley, and Jermaine Heard stated before he left the vehicle that “[h]e going to give me some money.” L.G. testified to a different version of subsequent events than D.C. provided. L.G. testified that appellant and Jermaine Heard first walked down A.T.’s alley while he and D.C. walked along the street and discussed who Jermaine Heard wanted to give him money. L.G. testified that he and D.C. then headed down the alley and that he was midway down the alley, at A.T.’s location, when the first shot was fired.

L.G. stated that he continued down the alley and heard Jermaine Heard ask, “Why you shoot him?” L.G. testified that he saw Jermaine Heard and appellant “tussle” over a gun, and the gun went off. He further testified that Jermaine Heard stated that appellant shot him and that Jermaine Heard was holding his left side. Then L.G. saw appellant walk to the street corner and shoot a person on the ground who was later identified as Kennedy.

Three additional witnesses testified to statements appellant made after the shooting. K.B. testified that he was at appellant’s apartment about a month before the shooting when appellant told Jermaine Heard, “If I get ahold of [Kennedy], you won’t have to worry about the money,” and, “If I get ahold to him, then I’m going to pop him.” L.R. testified that shortly after the shootings appellant told him that he did not “mean to shoot his brother, but that other dude pretty much had it coming.” L.P. testified that soon after his own brother was killed in the spring of 2007 he was talking with appellant, and appellant began to cry. When L.P. asked him what he did, appellant stated, “I ain’t mean to do it.” L.P. testified that appellant understood that L.P. was asking about how Jermaine Heard had died. Other prosecution witnesses testified that Jermaine Heard’s entrance wound was on his left side and that the bullets in the two victims were fired by the same gun.

Before trial, the district court ruled, over the objection of defense counsel, that the value of appellant’s prior conviction of manslaughter outweighed its prejudicial affect. The district court stated that the evidence would be prejudicial but that jurors take cautionary instructions seriously, that credibility was important to the case, and that appellant’s testimony was important to the case. But the district court did not conduct the

five-factor analysis under *Jones*, 271 N.W.2d 534, to determine whether appellant’s prior conviction could be used to impeach him. Appellant testified and was impeached with the prior conviction of manslaughter. He testified that he did not shoot his brother or Kennedy and did not know Kennedy. He further testified that he was at a drug house that night when he learned his brother had been shot. He testified that he went to see Jermaine Heard’s girlfriend that night, who confirmed news of Jermaine Heard’s death. Appellant testified that he was “very close” to his brother and never would have left him dying on the street. Before the jury began deliberations, the district court provided instruction as to impeachment, stating:

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

In the case of the defendant, you must be specific—you must be especially careful to consider any previous conviction only as it may affect the weight of the defendant’s testimony. You must not consider any previous conviction as evidence of guilt of the offense for which the defendant is on trial.

This appeal follows.

## **DECISION**

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 probative value outweighs the prejudicial effect. Minn. R. Evid. 609(a)(1). To determine whether the probative value of a conviction outweighs its prejudicial effect, the district court must consider

(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.

*Jones*, 271 N.W.2d at 538. A district court's ruling on the impeachment of a witness by prior conviction is reviewed for a clear abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Appellant argues that the district court abused its discretion by ruling that appellant could be impeached with a prior conviction for manslaughter if he testified. The district court considered the probative value of admitting the prior conviction and referred to some of the *Jones* factors but did not conduct the five-factor *Jones* analysis. A district court's failure to consider and weigh the five *Jones* factors on the record is error. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). But a reviewing court may conduct a *Jones* analysis to determine whether the error was harmless because the prior conviction was admissible. *Id.*

#### *Impeachment value of the prior crimes*

Prior felonies allow the jury to see "the whole person" and better judge credibility because "abiding and repeated contempt for laws [that one] is legally and morally bound to obey" demonstrates a lack of trustworthiness. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotations omitted). Appellant argues that the manslaughter conviction had no bearing on appellant's capacity for truthfulness, and, therefore, this factor weighs against admission.

But the supreme court recently re-affirmed the impeachment value of prior convictions, stating that “*any* felony conviction is probative of a witness’s credibility, and the mere fact that a witness is a convicted felon holds impeachment value.” *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). Furthermore, as respondent asserts, any prejudice suffered by appellant is mitigated by his impeachment of multiple other witnesses. *See State v. Owens*, 373 N.W.2d 313, 316–17 (Minn. 1985) (holding impeachment of defendant by prior conviction admissible because defendant impeached prosecution’s witness by prior conviction); *State v. Hochstein*, 623 N.W.2d 617, 624 (Minn. App. 2001) (stating that impeachment of other witnesses mitigates defendant’s impeachment prejudice and loses weight that might otherwise have favored exclusion). Therefore, this factor favored admission.

*Date of conviction and defendant’s subsequent history*

A prior conviction is not admissible if more than ten years has elapsed since the date of conviction or release from confinement imposed for the conviction unless the court determines that, in the interests of justice, the probative value of the conviction substantially outweighs its prejudicial effect. Minn. R. Evid. 609(b). Here, defendant’s prior conviction for manslaughter occurred in 1992, and appellant testified that he was released from prison in 1995. The date of the charged offense is June 9, 2005, though appellant was not charged until 2010.

Appellant argues that the passage of nearly two decades since the date of his conviction undermines any probative value the conviction might have once had and weighs in favor of excluding the conviction.

But rule 609(b) states that the ten-year period begins from the date of conviction or release from confinement, “whichever is the later date.” *Id.* Although the record is not clear, it appears the district court began the ten-year period in 1992 by stating that the “date of conviction is ’92. It[’]s been over a good number of years.” But according to appellant’s own testimony, he was released from prison for the manslaughter conviction in 1995; thus, appellant’s release from confinement occurred in 1995 and is therefore the beginning of the ten-year period.<sup>1</sup> The end point for measuring whether ten years has passed is June 9, 2005, the date of the offenses for which appellant was charged. *See Ihnot*, 575 N.W.2d at 585 (holding that date of charged offense is the end of ten-year period to determine whether conviction is stale under Minn. R. Evid. 609(b)). Therefore, approximately ten years passed between appellant’s release from confinement and the date of the conduct for which appellant was charged. Nevertheless, because appellant did not provide the specific date of his release from prison (and the record is otherwise unclear), it is difficult to determine whether *more than* ten years passed, as required by rule 609(b).

Recognizing that appellant’s conviction was potentially inadmissible under Minn. R. Evid. 609(b), respondent asserts that the district court implicitly determined that the probative value of the conviction substantially outweighed its prejudicial effect. *See* Minn. R. Evid. 609(b) (stating that evidence of prior conviction not admissible if more

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<sup>1</sup> Respondent cites two unpublished court of appeals cases for the proposition that the ten-year period begins in October 2004, when appellant’s probation ended. But the supreme court has stated that release from probation is not release from confinement for purposes of Minn. R. Evid. 609(b). *Ihnot*, 575 N.W.2d at 584 n.2.

than ten years old “unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect”). But the district court never addressed to what degree, if any, the “interests of justice” figured into its Minn. R. Evid. 609(b) analysis.

Given that appellant’s prior conviction was nearly ten years old, if not more than ten years old, we conclude that this factor was neutral or favored appellant.

*Similarity of past crime with charged crime*

The more similar the alleged offense is to the conduct underlying a past conviction, the more likely it is that allowing the conviction for impeachment will be more prejudicial than probative. *Swanson*, 707 N.W.2d at 655. “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).

Here, appellant’s previous crime was manslaughter; the crimes charged were second-degree and third-degree murder.<sup>2</sup> The district court’s only consideration of this factor in the record was the statement that, “Manslaughter [is] similar to what Mr. Heard has been charged with, but . . . I think that his testimony is important.” Appellant argues that evidence of the manslaughter conviction was so similar to the charged crime that the risk was too high that the jury would misuse the evidence. Given the similarity of

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<sup>2</sup> The record contains few details regarding the previous conviction of manslaughter. But defense counsel stated during a pre-trial hearing that “someone died in [the manslaughter] case . . . two people are dead in this case” when arguing that the crimes were similar.

appellant's manslaughter conviction to the charges at issue, there was a risk that the jury misused the evidence of appellant's prior conviction as substantive evidence. But such risk is diminished when the district court gives the jury a cautionary instruction, which courts presume that juries follow. *See State v. Pendleton*, 725 N.W.2d 717, 729 (Minn. 2007) (holding that instruction that jury may not consider evidence of past convictions as evidence of guilt protects defendant from potential that jury will use past convictions as substantive evidence); *Brouillette*, 286 N.W.2d at 708 (holding that cautionary jury instruction protects defendant from concern that jury will use past convictions as substantive evidence). Here, the district court gave the jury a cautionary instruction to use evidence of appellant's prior conviction only when considering appellant's testimony and not as evidence of guilt. The district court's instruction to the jury protected appellant from the possibility that the jury used his past conviction as substantive, rather than impeachment, evidence, and this factor therefore weighed in favor of admissibility.

*Importance of defendant's testimony*

If a defendant's version of facts is "centrally important" to the jury's result, the admission of impeachment evidence is disfavored if admission would lead to the defendant's version of events not being heard by the jury. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Because appellant could provide the jury his version of events by testifying and he did so knowing that the court would admit his prior conviction, appellant concedes that this factor weighed in favor of admitting the prior-conviction evidence.

*Whether credibility is a central issue*

If the issue for the jury presents a choice between the defendant's and another's credibility, "a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater." *Bettin*, 295 N.W.2d at 546. Although appellant concedes that credibility was an important issue in the case, appellant argues that the district court abused its discretion by not distinguishing between impeachment by prior conviction of a witness and impeachment by prior conviction of a defendant.

The district court stated twice that credibility was important to the case. Appellant provides no Minnesota caselaw supporting his contention that the credibility factor requires the district court to distinguish between defendants and witnesses. This consideration, instead, goes to the overall determination of whether the probative value outweighs any prejudice. Multiple witnesses provided testimony that differed from appellant's. And given that appellant concedes, and the district court recognized, that credibility was important to the case, this factor weighed in favor of admissibility. *See Swanson*, 707 N.W.2d at 655 (favoring admission of prior convictions when credibility is central issue).

Four of the five factors weighed in favor of admitting appellant's prior conviction. But one factor may weigh more heavily than another. *See Hochstein*, 623 N.W.2d at 625 (stating that the district "court is not simply to add up the factors and arrive at a mathematical result" and that "[d]epending on the particular facts of the case, the [district] court may assign different weights to different factors"). Because the cautionary jury instruction protected appellant against the potential for using his prior

conviction as substantive evidence, the only remaining factor that weighed against admission is the date of the prior conviction. Thus, the district court's error in not placing on the record an analysis of the *Jones* factors was harmless. *Swanson*, 707 N.W.2d at 655; Minn. R. Crim. P. 31.01 (stating that error in proceeding that does not affect defendant's substantial rights must be disregarded). We conclude that the probative value of appellant's prior conviction outweighed its prejudicial effect, and the district court did not abuse its discretion in admitting appellant's prior conviction.

**Affirmed.**