STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0446

State of Minnesota,
Respondent,

vs.

Aaron Dwayne Downing,
Appellant.

Filed February 19, 2013
Affirmed in part and reversed in part
Kalitowski, Judge

Clay County District Court
File No. 14-CR-11-2712

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

Brian J. Melton, Clay County Attorney, Pamela Harris, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Mark D. Nyvold, Special Assistant State Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Aaron Dwayne Downing challenges his convictions of third-degree criminal sexual conduct (CSC) in violation of Minn. Stat. § 609.344, subd. 1(d) (2010)

(sexual penetration of a physically helpless person) and fifth-degree CSC in violation of Minn. Stat. § 609.3451, subd. 1(1) (2010) (nonconsensual sexual contact). Appellant argues that (1) the district court abused its discretion when it allowed the state to impeach appellant with prior felony convictions without conducting a *Jones* analysis; (2) the prosecutor committed reversible misconduct by eliciting from appellant testimony regarding a prior uncharged domestic-abuse incident and by improperly referencing the criminal histories of appellant and other witnesses during closing argument; and (3) the fifth-degree CSC conviction must be vacated as a lesser-included offense of the third-degree conviction. We affirm in part, but reverse and vacate appellant's fifth-degree CSC conviction.

D E C I S I O N

I.

Appellant argues that the district court erred by allowing the state to impeach him with his prior felony convictions of delivery and sale of marijuana and second-degree burglary without completing a *Jones* analysis on the record. We review a district court's ruling on the impeachment of a witness by prior conviction under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

A witness may be impeached with evidence of prior felony convictions only if "the court determines that the probative value of admitting [the] evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a). To make this determination, district courts consider five factors provided in *State v. Jones*:

> (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.

271 N.W.2d 534, 537-38 (Minn. 1978).

The 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); *see also* Minn. R. Evid. 609(a) 1989 comm. cmt. ("The trial judge should make explicit findings on the record as to the factors considered and the reasons for admitting or excluding the evidence."). But a failure to do so is harmless error if the convictions would have been admissible even after a complete analysis. *Swanson*, 707 N.W.2d at 655. Thus, we consider the *Jones* factors.

Impeachment value of the prior crimes

A prior felony conviction has impeachment value because it helps the jury see the "whole person" of the defendant and better evaluate his truthfulness. *Id.* The district court considered this factor and concluded that the jury was "entitled to see [appellant] as a whole." This factor weighs in favor of admissibility.

The date of the convictions

Evidence of a prior conviction is not admissible "if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction." Minn. R. Evid. 609(b). The district court recognized that appellant's prior convictions were "within the last couple of years," and

appellant does not dispute that the three prior convictions were within the ten-year time limit. This factor weighs in favor of admissibility.

The similarity of the past crimes to the charged crime

"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). And "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. The district court found that appellant's prior controlled substance and burglary convictions were not similar to the CSC charges for which he was being tried. Thus, this factor weighs in favor of admissibility.

The importance of appellant's testimony and the centrality of credibility

We commonly consider the fourth and fifth *Jones* factors together. *See, e.g.*, *Swanson*, 707 N.W.2d at 655 (grouping the fourth and fifth factors together); *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (same). "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. Here, credibility was a central issue because appellant's testimony directly conflicted with the victim's testimony. And because appellant and the victim were the only two people present when the sexual contact occurred, the jury necessarily was tasked with assessing their credibility to resolve the case. Therefore, although the district court did not directly address these factors on the record, they weigh in favor of admissibility.

We conclude that, although the district court did not consider every *Jones* factor on the record, it did not abuse its discretion by admitting appellant's prior felony convictions for impeachment purposes because the convictions would have been admissible under a complete *Jones* analysis.

II.

Appellant argues that the prosecutor committed reversible misconduct at trial when she questioned appellant about a prior uncharged domestic-abuse incident and referenced the criminal histories of appellant and other witnesses during closing argument.

We review a claim of unobjected-to prosecutorial misconduct for plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under the plain-error analysis, we determine whether there was (1) error, (2) that was plain, and (3) that affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If all three prongs are met, we "address the error only if it seriously affects the fairness and integrity of the judicial proceedings." *State v. Kuhlmann*, 806 N.W.2d 844, 852-53 (Minn. 2011). An error is "plain" if it is clear or obvious. *Ramey*, 721 N.W.2d at 302. An error affects substantial rights if it was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741.

Here, we conclude that the plain-error standard is not met because even if there was error, it did not affect appellant's substantial rights. During cross-examination, the prosecutor responded to appellant's misstatement of his student status by directly questioning him about a prior incident in which he strangled his girlfriend in his college

dorm room. We do not condone the prosecutor's introduction of bad character and bad acts evidence under the guise of impeachment. But we conclude that the question did not affect the outcome of the case because of the overwhelming evidence of appellant's guilt. Specifically, we note (1) appellant's admissions in text messages he sent to the victim after the incident; (2) the victim's clear, consistent reports; and (3) testimony from several witnesses confirming the absence of any evidence that the victim would have consented to the sexual contact.

Likewise, the prosecutor's improper but brief references to the criminal histories of appellant and other witnesses during closing argument did not affect the outcome of the case. The prosecutor reiterated the judge's instructions to the jury that appellant's prior convictions were to be considered only to evaluate his credibility. And we conclude that the overwhelming evidence of appellant's guilt precluded any improper reference from impacting the jury's decision.

Because we conclude that any prosecutorial misconduct did not affect appellant's substantial rights, we need not address whether the prosecutor's actions constituted plain error or affected the fairness and integrity of the judicial proceedings. *Kuhlmann*, 806 N.W.2d at 853.

III.

Appellant and respondent agree that appellant's fifth-degree CSC conviction must be vacated as a lesser-included offense of the third-degree CSC conviction. We agree.

Minn. Stat. § 609.04, subd. 1 (2012)[1] provides that an accused "may be convicted of either the crime charged or an included offense, but not both." An "included offense" includes a lesser degree of the same crime. *Id.*, subd. 1(1). Section 609.04 prohibits "multiple convictions based on the same conduct committed against the same victim." *State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000). We conclude that fifth-degree CSC is an included offense of third-degree CSC: both are based on the same conduct committed against the same victim, and therefore constitute the same crime in differing degrees. Because appellant may not be convicted of both, we reverse and vacate appellant's conviction of fifth-degree CSC.

Affirmed in part and reversed in part.

[1] The statute in effect at the time of appellant's sentencing has not changed. Therefore, for ease of reference we refer to the current version of the statute in this opinion.