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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1790**

State of Minnesota,
Respondent,

vs.

Fitzgerald Calvin Stewart,
Appellant.

**Filed September 3, 2013
Affirmed
Cleary, Judge**

Sherburne County District Court
File No. 71-CR-11-1509

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Suzanne Bollman, Assistant County Attorney, Elk River, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Tania K. M. Lex, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Cleary, Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct, arguing that the district court abused its discretion in admitting two prior convictions for impeachment purposes. We affirm.

FACTS

On October 18, 2011, respondent State of Minnesota charged appellant Fitzgerald Calvin Stewart with first-degree criminal sexual conduct and second-degree criminal sexual conduct. The state alleged that Stewart touched an 11-year-old boy's penis and "put his mouth on [the boy's] penis for approximately five seconds."

Prior to trial, the state filed a motion in limine requesting the district court to "[allow] the [s]tate to use the defendant's prior convictions for purposes of attacking the credibility of the witness" under Minnesota Rule of Evidence 609. Specifically, the state requested to impeach Stewart with an aggravated-battery conviction and an armed-robbery conviction. Both convictions occurred in Cook County, Illinois in 2005.

The district court heard oral arguments on the motion at a pretrial hearing. In opposing the state's motion, Stewart argued that the convictions did not "do anything to impugn his credibility" and did nothing "more than to show . . . or suggest . . . a propensity toward violation and criminal activity." Stewart further argued that his "testimony is important" because "there's only two folks that were even alleged to have been in the room . . . [he] and the complaining victim." Stewart informed the court that

“it is his intention to definitely not testify, if the court allows impeachment with his prior convictions.”

The district court ruled “that it’s appropriate to permit the state to impeach [Stewart] with his prior convictions for aggravated battery from 2005.” The court reasoned as follows:

Minnesota operates under the rule of allowing impeachment for the jury to assess the whole person, and to know enough of that person’s history, if not outweighed by prejudicial effect so that the jury can assess credibility within the terms of that whole history.

The impeachment value of the prior crime therefore falls within the whole person exception. While they are not crimes of dishonesty or false statement, I do think that they have impeachment value as defined by the rules. The date of conviction, again, is within the ten year time period.

It is not so significantly dated as to be irrelevant to the defendant’s current—assessment of the defendant’s current credibility, particularly in light of the fact that the defendant has been incarcerated for a significant time period since the entrance of these convictions.

Similarity of the crime is very dissimilar than the crime that’s to be considered here, that is, there is minimal danger of the jury convicting because of the similarity of the crimes. The defendant’s testimony is important. The issue of credibility is central to the determination here.

The district court limited the impeachment evidence to the “fact of conviction,” excluded “facts underlying those convictions,” and instructed the state not to mention that Stewart’s aggravated-battery conviction was for aggravated battery of a police officer.

Stewart did not testify at trial. The jury found Stewart not guilty of first-degree criminal sexual conduct but guilty of second-degree criminal sexual conduct. The district court sentenced Stewart to serve 109 months in prison. Stewart appeals his conviction.

D E C I S I O N

Stewart argues that the district court abused its discretion in admitting his prior convictions for impeachment purposes. “We review a district court’s decision to admit evidence of a defendant’s prior convictions for an abuse of discretion.” *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009). When ten or fewer years have elapsed since a felony conviction, evidence of the conviction may be admitted for impeachment purposes, provided that the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). In determining whether the probative value of the evidence outweighs its prejudicial effect, a district court is guided by the following five factors: “(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 [the] defendant’s testimony, and (5) the centrality of the credibility issue.” *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978).

Stewart argues that the district court “failed to properly analyze the *Jones* factors in determining whether to admit [his] prior convictions.” Specifically, Stewart argues that “the district court misinterpreted the fact that [his] testimony was important as a factor favoring admission, and thus failed to properly weigh this factor against the others.”

With regard to the fourth *Jones* factor, the district court found only that “[t]he defendant’s testimony is important.” Stewart concludes that the district court used this factor in support of admitting the prior convictions because the court’s statement regarding the importance of his testimony “is buried within a paragraph that includes other factors that weigh *in favor* of admission.” Stewart argues this was error because “[t]he proper analysis of factor four is that the more important the defendant’s testimony is to his defense, the more crucial it is not to take action to dissuade him from testifying.”

In support of his argument, Stewart cites *State v. Gassler*, which states that when a defendant’s “version of the facts [is] centrally important to the result reached by the jury . . . this fact would support exclusion of the impeachment evidence if by admitting it, [the defendant’s] account of events would not be heard by the jury.” 505 N.W.2d 62, 67 (Minn. 1993). But in *Gassler*, the supreme court noted that the defendant’s “version was presented to the jury via the testimony of other witnesses” and “no offer of proof was made as to any additional testimony [the defendant] would have added if he had taken the stand.” *Id.* The supreme court concluded that “these factors support the trial court’s decision to admit the evidence for impeachment.” *Id.*

Stewart argues that his case is distinguishable from *Gassler* because “[n]o other witnesses presented his version of the facts and there was no other evidence available to assist in his defense.” But Stewart called a witness, C.B., to testify in his defense. C.B. testified that he was present at the residence where the offense occurred and did not observe Stewart touch the boy in an inappropriate manner. Although C.B.’s testimony may not have been as exculpatory as Stewart wanted, it was available to the jury and, as

in *Gassler*, Stewart made no offer of proof as to what additional evidence his testimony would have provided. So while *Gassler* contains language supporting Stewart's position that the importance of his testimony may support exclusion of the impeachment evidence, the supreme court's reasoning in *Gassler* supports the district court's decision to admit it.

The state does not dispute that the district court used the fourth *Jones* factor in support of admitting Stewart's prior convictions for impeachment purposes, but argues that this was appropriate under Minnesota caselaw. The state notes that the district court also "determined that credibility [the fifth *Jones* factor] was a central issue in the case." The state cites *State v. Swanson* to argue that "[i]f credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." 707 N.W.2d 645, 655 (Minn. 2006); *see also State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (explaining that "if the issue for the jury narrows to a choice between defendant's credibility and that of one other person then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater").

The reasoning in *Swanson* is simply that if credibility is a central issue, the fourth factor is subsumed by the fifth and both support admission of the impeachment evidence. *See Swanson*, 707 N.W.2d at 655–56 ("Because credibility was a central issue here, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions."). Stewart does not attempt to distinguish *Swanson* or make any argument as to how the district court erred by reasoning in the manner set forth in *Swanson*. Thus, Stewart has not met his burden. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) ("On appeal,

the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced.”).

Moreover, the district court did not otherwise err in its analysis. The district court correctly found that the impeachment value of Stewart’s prior crimes “fall[] within the whole person exception.” *See State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (stating “that impeachment by [a] prior crime [that did not directly involve truth or falsity] aids the jury by permitting it to see the ‘whole person’ of the testifying witness and therefore to better judge the truth of his testimony”). It found that the impeachment offenses were not so significantly dated as to be irrelevant to an assessment of Stewart’s current credibility. *See State v. Williams*, 757 N.W.2d 504, 509 (Minn. App. 2008) (“Convictions that have occurred within the ten-year period are presumptively not stale.”), *aff’d*, 771 N.W.2d 514 (Minn. 2009). And the district court found that the impeachment offenses, aggravated battery and armed robbery, were dissimilar to Stewart’s criminal sexual conduct charges in this case. *Cf. Swanson*, 707 N.W.2d at 655 (“The more similar the alleged offense and the crime underlying a past conviction, the more likely it is that the conviction is more prejudicial than probative.”). In sum, the district court did not abuse its discretion in admitting Stewart’s prior convictions for impeachment purposes.

Affirmed.