**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-0203**

State of Minnesota,
Respondent,

vs.

Johnson Dean TeJohn,
Appellant.

**Filed March 31, 2014**
**Affirmed**
**Schellhas, Judge**

Beltrami County District Court
File No. 04-CR-12-2111

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

Timothy R. Faver, Beltrami County Attorney, David P. Frank, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Adine S. Momoh, William Anders Folk, Special Assistant State Public Defenders, Stinson Leonard Street LLP, Minneapolis, Minnesota; and

Cathryn Middlebrook, Chief Appellate Public Defender, Bridget K. Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

**SCHELLHAS**, Judge

Appellant challenges his convictions of felony domestic assault and second-degree driving while impaired, arguing that (1) his convictions are not supported by sufficient evidence and (2) the district court erred by (a) admitting an audio recording of a witness's statement to police, and (b) ruling that respondent could use appellant's prior felony convictions and probationary status to impeach him. We affirm.

## FACTS

On June 24, 2012, A.H. called the police to report an ongoing fight that possibly involved a knife. When the Bemidji police arrived at the scene, they encountered J.T., K.T., and appellant Johnson TeJohn. J.T., who is TeJohn's brother, had a knife wound in his left bicep. TeJohn had superficial cuts and was bleeding from his knuckles. K.T., who was J.T.'s girlfriend, gave a recorded statement to a police officer in which she described a drunken brawl between TeJohn and J.T., in which TeJohn was the aggressor, and stated that TeJohn had driven to the location. Officer Leffelman arrested TeJohn, and an Intoxilyzer 5000 test revealed that TeJohn's alcohol concentration was 0.19. J.T. and K.T. also were intoxicated.

At trial, K.T. testified that, on the date of the incident, she drove TeJohn and J.T. to a Cass Lake bar and was "pretty sure" that all of them drank alcohol at the bar. From the bar, K.T. drove the group to her apartment to get more alcohol and then drove to the North Star Apartments in Bemidji, where all three continued to drink alcohol. J.T. testified that he was unsure what happened after he left the bar because he had 15 to 16

shots of alcohol over the course of an hour and a half or two hours. J.T. remembered that the parties discussed driving from the bar back to the North Star Apartments in Bemidji, but he remembered nothing after that until waking up in "the drunk tank." J.T. testified that he did not believe that his brother assaulted him.

A.H. testified that he and his wife were on their back porch with a view of the street when a vehicle stopped about 30 feet from them. A.H. heard yelling in the vehicle and saw a woman, who was holding a twelve-pack of beer, exit the vehicle from the passenger side. Someone else exited the vehicle from the rear driver's side door, and A.H. heard a tire-popping noise. A.H.'s wife told him that the person had a knife. A.H. and his wife then entered their home, and A.H. saw the vehicle's driver exit the vehicle and he heard a noise like a pipe dropping. A.H.'s wife called the police, who arrived quickly. A.H. could not identify the vehicle's driver.

A jury found TeJohn guilty of felony domestic assault of J.T. and second-degree DWI. The district court imposed concurrent sentences for each offense, staying execution of a prison sentence on the felony conviction.

This appeal follows.

## D E C I S I O N

### *Admission of K.T.'s Police Statement*

Respondent State of Minnesota offered K.T.'s audio-recorded police statement as a recorded recollection under Minn. R. Evid. 803(5). Over TeJohn's objection, the district court received the audio recording into evidence and granted the state's request to publish it to the jury. The state informed the district court that the jury might miss some things in

the audio recording and asked the court to allow the jurors to read a transcript of the audio recording while they listened to it. The court granted the request, marked the transcript as "Court's Exhibit 1," and stated that the transcript would not be sent to the jury room with the jurors. In the police statement, K.T. told the police interviewer what happened on June 24 and affirmed that the facts she offered were honest and true.

TeJohn argues that the district court erred by admitting the audio recording under rule 803(5) because K.T. did not "make or adopt the statement while it was fresh in her memory" and that, once the statement was admitted, the court erred by giving the jury a copy of the transcript while the state played the audio recording. Appellate courts "will not reverse evidentiary rulings absent a clear abuse of discretion." *Miles v. State*, 840 N.W.2d 195, 204 (Minn. 2013). "[T]he question of whether the district court properly interpreted Minn. R. Evid. 803(5) is a question of law that [appellate courts] review de novo." *State v. Stone*, 784 N.W.2d 367, 370 (Minn. 2010) (addressing admissibility of witness's audio-recorded statement to police under rule 803(5)).

Rule 803(5) defines a recorded recollection as

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

To be admissible as a recorded recollection under rule 803(5), the state was required to show that K.T.'s audio-recorded statement (1) constituted a "memorandum or record";

(2) K.T. had "insufficient recollection to testify fully and accurately"; and (3) the statement was "made or adopted by [K.T.] when the matter was fresh in [K.T.'s] memory." *Stone*, 784 N.W.2d at 370−71 (quotation omitted). "The plain language of Minn. R. Evid. 803(5) requires an insufficient recollection to testify '*fully* and accurately,' but does not require the witness to have total absence of memory of the event about which [s]he is testifying." *Id.* at 372.

Here, we note that K.T.'s intoxicated state at the time of giving her statement is certainly admissible "to show the impairment of [the witness's] powers of observation and the likelihood of impaired recollection." *State v. Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977) (quotation omitted). But K.T. agreed that the audio recording contained her voice, that it accurately recorded her words, and that the written transcript of the recorded statement was accurate. The evidence is undisputed that K.T. gave the police statement when the facts were fresh in her mind. We conclude that the district court did not abuse its discretion by admitting K.T.'s recorded police statement under rule 803(5). We further conclude that the district court did not abuse its discretion by providing the jurors with copies of the transcript of K.T.'s audio-recorded statement while the state played the recording. *See State v. Czech*, 343 N.W.2d 854, 857 (Minn. 1984) (concluding that the district court "properly let the jurors use the transcript" of an audio recording where "parts of the tape apparently were hard to hear" and the court "properly instructed the jurors concerning the use of the transcript when they listened to the tape").

***Sufficiency of the evidence***

"When the sufficiency of evidence is challenged, we review the evidence to determine whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Fairbanks*, 842 N.W.2d 297, 306−07 (Minn. 2014) (quotation omitted). We "view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Chavarria-Cruz*, 839 N.W.2d 515, 519 (Minn. 2013) (quotation omitted). We "will not disturb the jury's verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged." *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotation omitted).

To prove the commission of felony domestic assault, the state must prove that a defendant committed a misdemeanor domestic assault or fifth-degree assault "within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions."[1] Minn. Stat. § 609.2242, subd. 4 (2010). An individual commits misdemeanor domestic assault if he (1) "commits an act with intent to cause fear in another of immediate bodily harm or death; or . . . intentionally inflicts or attempts to inflict bodily harm upon another" (2) "against a family or household member as defined in section 518B.01, subdivision 2." *Id.*, subd. 1 (2010). "Family or household

[1] TeJohn stipulated that he had a prior domestic-assault conviction and a prior violation of a domestic-abuse no-contact order within the last ten years.

members" include "persons related by blood." Minn. Stat. § 518B.01, subd. 2(b)(3) (2010).

TeJohn argues that, even if all the evidence was properly admitted, the evidence was insufficient to prove that he "intentionally inflicted or attempted to inflict bodily harm on [J.T.]." "[I]ntent is a state of mind and is, therefore, generally provable only by inferences drawn from a person's words or actions in light of all the surrounding circumstances." *State v. Johnson*, 719 N.W.2d 619, 630–31 (Minn. 2006) (quotation omitted). "If a conviction, or a single element of a criminal offense, is based solely on circumstantial evidence, such evidence, viewed as a whole, must be consistent with guilt and inconsistent with any other rational hypothesis except that of guilt." *Fairbanks*, 842 N.W.2d at 307. We "apply heightened scrutiny when reviewing . . . verdicts based on circumstantial evidence." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). When assessing the sufficiency of circumstantial evidence, we "first identify the circumstances proved. Consistent with our standard of review, we defer to the jury's acceptance of the proof of these circumstances as well as to the jury's rejection of evidence in the record that conflicted with the circumstances proved by the State." *Hanson*, 800 N.W.2d at 622 (citations omitted). We next "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt." *Id.* (quotation omitted).

Here, based on all the evidence, including K.T.'s police statement, the circumstances proved are that J.T. and TeJohn argued in a motor vehicle, TeJohn called J.T. "a f-gg-t," told J.T. "to kill [TeJohn]," and gave J.T. a knife. TeJohn headbutted J.T.,

and TeJohn, J.T., and K.T. exited the parked car. J.T. grabbed a pool cue from under a car seat and handed it to TeJohn. TeJohn hit J.T. with the pool cue. The altercation ended and the three got back into the vehicle. TeJohn then drove to the location where A.H. and his wife observed the vehicle and brawl. The police found a knife on J.T.'s person and a stab wound on his left bicep.

TeJohn argues that K.T.'s police statement is "untrustworthy" but, consistent with our standard of review, we "defer to the jury's acceptance of the proof of these circumstances as well as to the jury's rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* We conclude that the only reasonable inference is that TeJohn intentionally inflicted bodily harm on J.T.

To prove the commission of second-degree DWI, the state must prove that the defendant violated Minn. Stat. § 169A.20, subd. 1 (2010), while two or more aggravating factors were present. Minn. Stat. § 169A.25, subd. 1(a) (2010). Persons violate Minn. Stat. § 169A.20, subd. 1, if they "drive, operate, or [are] in physical control of any motor vehicle" when their "alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more." Minn. Stat. § 169A.20, subd. 1(5). "'Aggravating factor' includes . . . a qualified prior impaired driving incident within the ten years immediately preceding the current offense," Minn. Stat. § 169A.03, subd. 3(1) (2010), and a "'[q]ualified prior impaired driving incident' includes prior impaired driving convictions and prior impaired driving-related losses of license," Minn. Stat. § 169A.03, subd. 22 (2010). TeJohn stipulated to a prior implied-consent revocation of his license and a prior DWI conviction

within the last ten years. But he argues that the evidence was insufficient to prove that he committed the offense of second-degree DWI. Based on our review of the record, we conclude that the evidence was sufficient to prove that TeJohn drove a motor vehicle when he had an alcohol concentration of 0.08 or more within two hours of driving while two or more aggravating factors were present.

***Impeachment***

*Prior Convictions*

TeJohn did not testify at trial. He argues that the district court abused its discretion by permitting the state to impeach TeJohn under Minn. R. Evid. 609(a) with his prior felony convictions of motor vehicle theft and second-degree burglary. Appellate courts "will not reverse a district court's ruling on impeachment of a witness by prior conviction absent a clear abuse of discretion." *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011) (quotation omitted). To determine whether the probative value of admitting a prior criminal conviction outweighs its prejudicial effect, the following factors must be considered:

> (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, 538 (Minn. 1978). TeJohn argues that the district court erroneously analyzed the first, fourth, and fifth factors. We therefore review the court's analysis of those factors.

*First Factor: Impeachment value of the prior crimes*

The district court concluded that this factor weighed in favor of allowing the state to impeach TeJohn with his prior convictions. "Impeachment through prior convictions allows the fact-finder to make credibility determinations by seeing 'the whole person' to judge better the truth of his testimony" and "*any* felony conviction is probative of a witness's credibility." *Hill*, 801 N.W.2d at 651–52 (quotation omitted). We agree with the district court that this factor weighed in favor of admissibility.

*Fourth and Fifth Factors: Importance of defendant's testimony and the centrality of credibility*

The district court concluded that these factors weighed in favor of allowing the state to impeach TeJohn with his prior convictions. Appellate courts may consider the fourth and fifth *Jones* factors together. *See, e.g.*, *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (grouping the fourth and fifth factors together). "If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Id.*

TeJohn's attorney argued in district court that TeJohn's testimony was, or could be, crucial in the case. The district court agreed that TeJohn's testimony was important and noted that the issue of credibility was central to the case. "[I]f the defendant's credibility is the central issue in the case . . . then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). Credibility is central to the case "if the

issue for the jury narrows to a choice between defendant's credibility and that of one other person." *Id.*

To analyze the importance of TeJohn's testimony, we must "ascertain what [TeJohn]'s testimony would have been had he testified." *State v. Hochstein,* 623 N.W.2d 617, 624 (Minn. App. 2001). The defendant bears "the responsibility of . . . mak[ing] an offer of proof as to what would have been the substance of the testimony, had it been provided." *State v. Ihnot,* 575 N.W.2d 581, 587 n.3 (Minn. 1998). TeJohn did not make an offer of proof in the district court. "[A]ppellate courts do experience difficulty in evaluating the effect of any abuse of discretion in this area without knowing the substance of any possible testimony." *Id*. Although we assume that TeJohn would have denied the allegations had he testified, on this record, we cannot evaluate the effect of any abuse of discretion by the district court in admitting TeJohn's prior convictions. We therefore conclude that the fourth and fifth factors weigh in favor of admissibility. *See id.* at 587 ("Because [defendant] did not make an offer of proof as to what his testimony would have been had he testified, this court is left to assume that the thrust of his testimony would have been to deny the allegations of criminal sexual conduct. That being the case, the fourth and fifth *Jones* factors are also satisfied." (footnote omitted)).

The *Jones* factors that TeJohn challenged weigh in favor of admission of TeJohn's prior convictions. The district court therefore did not abuse its discretion by ruling that the state could impeach TeJohn with his prior felony convictions.

*Probationary Status*

TeJohn argues that the district court abused its discretion by ruling that the state could cross-examine TeJohn about his probationary status under authority of *State v. Johnson*, 699 N.W.2d 335 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). In *Johnson*, this court held that impeachment of a defendant with evidence of his status as a probationer is not an abuse of discretion. *Johnson*, 699 N.W.2d at 339.

Appellate courts "will not reverse evidentiary rulings absent a clear abuse of discretion." *Miles*, 840 N.W.2d at 204. "Moreover, even where the district court abuses its discretion, the court's evidentiary ruling will not be reversed unless the error substantially influenced the jury's verdict." *State v. Carridine*, 812 N.W.2d 130, 141 (Minn. 2012) (quotation omitted). TeJohn's reliance on unpublished cases to support his argument is misplaced. Unpublished cases are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2010); *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (stressing that "unpublished opinions of the court of appeals are not precedential"). We conclude that the district court did not abuse its discretion by allowing impeachment of TeJohn with evidence of his status as a probationer.

**Affirmed.**