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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1615**

Travis Clay Andersen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 15, 2017
Affirmed
Kalitowski, Judge***

Carver County District Court
File No. 10-CR-11-445

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Mark Metz, Carver County Attorney, Angella Erickson, Assistant County Attorney, Chaska, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Kalitowski, Judge.

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

Following his conviction of violation of an order for protection (OFP), appellant Travis Clay Andersen argues that the district court committed reversible error by (1) permitting his prior convictions to be used to impeach him, (2) giving a cautionary jury instruction that did not conform to the suggested wording of the jury instruction guidelines, and (3) making a spontaneous statement at trial that contradicted Andersen's sworn testimony. We affirm.

DECISION

I.

At Andersen's trial, the district court permitted Andersen to be impeached with some of his prior convictions after he testified on direct examination that he would not have had contact with the victim "if I was ever told not to have contact with her, especially by a judge of the law." "A district court's ruling on the admissibility of prior convictions for impeachment of a defendant is reviewed under a clear abuse of discretion standard." *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006). In balancing whether the probative value of impeachment evidence outweighs its prejudicial effect under the balancing test of Minn. R. Evid. 609(a)(1), a district court applies the *Jones* factors, which 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.

Swanson, 707 N.W.2d at 654 (quotation omitted) (citing *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978)). “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).

The district court did not make the required findings on the *Jones* factors. The failure to make these findings is error, but the supreme court has declined to reverse when application of the *Jones* factors “makes clear that the error was harmless.” *Swanson*, 707 N.W.2d at 655.

Here, application of the *Jones* factors supports the district court’s decision to allow Andersen to be impeached with the prior felony convictions. Andersen’s prior crimes had impeachment value because they assisted the jury in learning more about Andersen in order to evaluate his propensity for truthfulness and for failing to follow court orders. *See State v. Gassler*, 505 N.W.2d 62, 66-67 (Minn. 1993) (stating that “impeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony”) (quotation omitted)). We reject Andersen’s contention that his prior felony conviction for violating an OFP should have been excluded as too similar to the charged offense because that conviction was highly probative of whether Andersen would violate a court order. Most of the convictions were for offenses that occurred within a few years of the current offense and favor their admission. *See State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998) (recognizing that even “fairly old” convictions may establish “a pattern of lawlessness” that negates the effect of time passage); *see also Hooper v. State*, 838 N.W.2d 775, 785 (Minn. 2013) (stating that “any felony conviction is probative of a witness’s

credibility” (quotation omitted)). The prior felony convictions, for terroristic threats, simple robbery, and fourth-degree assault, are not similar to the current offense, again favoring their admission.

Finally, when “credibility is a central issue . . . , the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.” *Swanson*, 707 N.W.2d at 655. The key issue at trial was whether Andersen knew of the existence of the OFP when he violated it. *See id.* He testified that he did not know of the OFP’s existence, but the law enforcement officer who served the OFP on Andersen testified that he knew Andersen personally and that he explained to Andersen the prohibitions of the OFP at the time of service. Thus, credibility was the determinative issue for the jury to decide in reaching a verdict and favors admission of the prior convictions. Because application of the *Jones* factors favors admission of the prior felony convictions for impeachment purposes, we conclude that the district court’s failure to make explicit *Jones*-factors findings was harmless error.

Further, although impeachment by prior misdemeanor convictions that do not involve dishonesty or false statement is not permitted under Minn. R. Evid. 609, appellant’s non-felony convictions were for prior domestic assaults and violations of OFPs or domestic-abuse no-contact orders. As such, they were admissible under Minn. Stat. § 634.20 (2014) as relationship evidence unless their “probative value [was] substantially outweighed by the danger of unfair prejudice.” *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006). Applying this balancing test, we conclude that the district court did not abuse its discretion by admitting the non-felony convictions, which informed the jury on how appellant interacts with those close to him or his propensity for following district court

orders. *Id.* (recognizing “inherent value of evidence of past acts of violence committed by the same defendant against the same victim”).

II.

Before allowing Andersen to be impeached, the district court gave the following cautionary instruction to the jury:

Ladies and gentlemen, the state is going to be offering some testimony, listing some testimony from Mr. Andersen, concerning some prior criminal convictions that he has on his record. That evidence is being added only for your consideration in deciding whether Mr. Andersen is telling the truth in this case. You may also consider that evidence as – or conviction of – evidence of his character as it reflects upon believability. In other words, you’re not being asked to judge any other criminal matters against him. It’s being provided with you for what we call impeachment purposes on believability and also character evidence, which also gets back to believability. There will be several incidents. And we will deliver them by dates to you, but there will be no incidents discussed. But, again your focus in deciding the questions here is on his conduct on April 3rd of 2011. That’s what you will be utilizing, like you’re utilizing this information for believability, credibility, character.

Andersen argues that the district court abused its discretion by failing to give the verbatim instruction that is set forth in the jury instruction guidelines (JIGs). *See 10 Minnesota Practice*, CRIMJIG 2.02 (2015) (stating, “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) (credibility).”).

District courts have “broad discretion” to craft a jury instruction, and they abuse that discretion if the instruction given “confuse[s], mislead[s], or materially misstate[s] the law.” *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015) (quotation omitted). When there is no objection to a jury instruction, appellate review is under the plain-error standard. *Id.*

It is error for a district court to refuse to give a cautionary instruction that a defendant’s prior convictions are to be used only for impeachment purposes. *State v. Bissell*, 368 N.W.2d 281, 283 (Minn. 1985). Here, the district court gave a cautionary instruction that generally included the same content as the recommended JIG instruction. The instruction was legally accurate and neither misleading nor confusing. Moreover, the instruction included the admonition that “the evidence is being added only for your consideration in deciding whether Mr. Andersen is telling the truth in this case.” Although the instruction does not follow the CRIMJIG verbatim, the district court is “allowed considerable latitude in the selection of language for jury instructions.” *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). Even though the instruction could have been more clearly articulated, we cannot conclude that it was legally incorrect. And we note that the district court again reminded the jury of the gist of the instruction in its final instructions by advising the jury on the proper use of evidence of Andersen’s other convictions. We conclude that the district court did not abuse its discretion in giving its cautionary instruction.

III.

During Andersen’s testimony about his prior convictions, he was asked whether two of the convictions were the result of trials, and he said, “One trial I was forced to represent

myself.” Following a bench conference, the district court sustained the state’s objection to this statement, telling the jury:

For the jury’s information on the procedural basis, it has been determined by a Court[] [of] competent jurisdiction, [that] in the particular case Mr. Andersen is referring to, he was not forced to represent himself as he has just indicated in his response. That issue was determined by the courts and found to be not an accurate statement. He did represent himself, but the issue of being forced or not is not accurate by judicial determination. So his answer is corrected to that extent.

Defense counsel did not object to the district court’s spontaneous statement.

Because Andersen did not object to the district court’s statement, any error is subject to the plain-error standard of review. “Under the plain-error doctrine, the appellant must show that there was (1) an error; (2) that is plain; and (3) the error must affect [the appellant’s] substantial rights.” *State v. Kelley*, 855 N.W.2d 269, 273-74 (Minn. 2014). “If the appellant satisfies the first three prongs of the plain-error doctrine, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 274 (quotation omitted). “An error is ‘plain’ if it is clear and obvious.” *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). An error is clear and obvious if it “violates or contradicts case law, a rule, or an applicable standard of conduct.” *State v. Bustos*, 861 N.W.2d 655, 660-61 (Minn. 2015) (quotation omitted). “Any error that does not affect substantial rights must be disregarded.” Minn. R. Crim. P. 31.01.

The district court plainly erred by informing the jury that Andersen’s testimony was inaccurate. Under the criminal rules, a district court “must not comment on evidence or

witness credibility.” Minn. R. Crim. P. 26.03, subd. 19(6). The district court should not have made the statement that contradicted Andersen’s testimony.

But Andersen cannot satisfy the third prong of the plain-error doctrine because he cannot show that the error affected his substantial rights. We conclude that the erroneous statement likely had no effect on the jury’s verdict because the state provided strong evidence of Andersen’s guilt. *See State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013) (“An error in instructing the jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury’s verdict.”) (quotation omitted)). Andersen did not assert that he did not violate the OFP; he argued only that he did not know of the OFP’s existence and therefore did not knowingly violate it. The state offered evidence that the OFP was served on Andersen by a law enforcement officer who knew him and personally explained the OFP’s prohibitions to him; the state also impeached Andersen with evidence of his prior convictions to cast doubt on his credibility. Even though the jury’s verdict hinged on credibility, there is little doubt that the law enforcement officer’s testimony was far more believable than Andersen’s testimony, and the jury so found. Thus, under the plain-error doctrine, the district court’s error in commenting on Andersen’s testimony did not affect Andersen’s substantial rights and does not require reversal of his conviction.

Affirmed.