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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0719**

State of Minnesota,
Respondent,

vs.

Davante Atkins,
Appellant.

**Filed January 22, 2018
Affirmed
Larkin, Judge**

Olmsted County District Court
File No. 55-CR-15-8932

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney,
Rochester, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Larkin, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Following a jury trial, appellant was convicted of felony fourth-degree assault of a peace officer and obstructing legal process. Appellant challenges his fourth-degree-assault conviction, arguing that the evidence was insufficient to sustain the jury's guilty verdict. Appellant also argues that he is entitled to a new trial because the district court erred in ruling that if he were to testify at trial, the state could impeach him with both a felony conviction of receiving stolen property and a conviction of using a false name. We affirm.

FACTS

Respondent State of Minnesota charged appellant Davante Atkins with felony fourth-degree assault of a peace officer, obstructing legal process, and driving while impaired (DWI) after he allegedly resisted arrest and bit a police officer on December 24, 2015. The DWI charge was dismissed, and the state tried the remaining charges to a jury.

The state presented evidence that Rochester Police Officer James Ratelle responded to a citizen report of erratic driving. Officer Edward Fritz also responded to the scene. At that point, the suspect vehicle was parked in a parking lot. Officer Ratelle testified that he observed two individuals slumped over in the front seat of the vehicle. Atkins was in the driver's seat. Officer Ratelle woke Atkins and observed signs of impairment, including slurred speech and glassy eyes. Atkins performed poorly on field sobriety tests, and Officer Ratelle arrested him for DWI.

Atkins physically resisted when Officer Ratelle attempted to place him in a squad car. Officer Fritz intervened. Officer Fritz testified that Atkins bit him as he attempted to

place Atkins in the squad car. Officer Ratelle testified that Officer Fritz said, “He bit me.” Officer Ratelle also testified that he observed obvious teeth marks on Officer Fritz’s finger. Officer Fritz testified that he experienced pain, that the skin on this finger was torn and bleeding, and that a paramedic told him his finger was likely broken. However, the leather glove that he was wearing to prevent puncture wounds was not torn.

The civilian witness who reported the erratic driving, J.K., also testified. J.K. followed Atkins’s vehicle to the parking lot where he was arrested. J.K. observed Atkins struggle to avoid being placed in the squad car, and he testified that he saw Atkins bite one of the officers.

The court received four exhibits. Exhibit one consisted of footage from Officer Ratelle’s body camera. Exhibits two, three, and four were pictures of the injury to Officer Fritz’s finger, which were taken in an emergency room.

Atkins waived his right to testify at trial. The jury found Atkins guilty of felony fourth-degree assault of a peace officer and obstructing legal process. The district court entered judgments of conviction and sentenced Atkins to a 45-day jail term. Atkins appeals.

D E C I S I O N

I.

Atkins contends that the evidence was insufficient to sustain the jury’s guilty verdict on the charge of felony fourth-degree assault of a peace officer. When considering a claim of insufficient evidence, this court carefully analyzes the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit

the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court “assume[s] that the jury believed the state’s witnesses and disbelieved contrary evidence.” *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). This court will not disturb the jury’s verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was proved guilty of the offense charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

To prove Atkins guilty of felony fourth-degree assault of a peace officer as charged, the state had to prove that Atkins assaulted a peace officer and inflicted demonstrable bodily harm. Minn. Stat. § 609.2231, subd. 1 (2014). Atkins does not dispute that Officer Fritz suffered demonstrable bodily harm. Instead, he contends that the state did not prove that he caused the harm. Specifically, Atkins argues, “because the alleged act of biting was not on the video and the officer’s leather glove had not been damaged, as a matter of law, the evidence was insufficient.”

Three witnesses testified that Atkins bit Officer Fritz. Officer Fritz testified that Atkins bit his finger, that the bite was painful, that he observed tooth marks on his finger consistent with a bite, and that he received medical treatment for the resulting injury. Officer Ratelle testified that Officer Fritz said that Atkins bit him and that he observed an injury to Officer Fritz’s finger that was consistent with having been bit. J.K. testified that he saw Atkins bite one of the officers. The state also introduced photographs of Officer Fritz’s finger, which showed that his finger was swollen, torn, bruised, and bleeding. The photographs corroborated Officer Fritz’s testimony that Atkins bit his finger.

Atkins argues that the photographs purporting to show the injury are not probative because there were no tears in the leather glove that covered Officer Fritz's finger. Atkins also argues that it was "physically impossible" for J.K. to see Atkins bite the officer. Lastly, Atkins argues that the state did not provide forensic evidence such as DNA to verify that Atkins bit Officer Fritz. Atkins concludes: "It is just as likely that Fritz sustained the injury to his finger during the struggle to place [Atkins] in the squad car as that the injury occurred by [Atkins] biting the glove." Essentially, Atkins invites us to assess the credibility of the witnesses and to weigh the evidence on appeal. That is not our role.

We view the evidence in the light most favorable to the verdict and assume that the jury believed the state's witnesses and disbelieved contrary evidence. *Brocks*, 587 N.W.2d at 42. We therefore assume the jury believed the three witnesses who testified that Atkins bit Officer Fritz. We also assume the jury believed Officer Fritz's testimony regarding the injury that resulted from the bite. Lastly, we assume that the jury viewed the photographs of the injury as supporting the state's version of the events. In sum, the evidence provided a sufficient basis for the jury to reasonably conclude that Atkins assaulted Officer Fritz and caused demonstrable bodily harm. We therefore do not disturb the verdict.

II.

Atkins contends that the district court erred in ruling that the state could impeach him with both a felony conviction of receiving stolen property and a conviction of using a false name if he were to testify at trial. Minnesota Rule of Evidence 609(a) provides that a witness's credibility may be attacked using a prior conviction only if the crime "was punishable by death or imprisonment in excess of one year . . . and the court determines

that the probative value of admitting this evidence outweighs its prejudicial effect” or if the crime “involved dishonesty or false statement, regardless of the punishment.” Whether the probative value of prior convictions outweighs their prejudicial effect is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985). When determining whether the probative value of a prior conviction outweighs its prejudicial effect, a district court applies the five-factor balancing test set forth in *State v. Jones*. 271 N.W.2d 534, 537-38 (Minn. 1978). The factors to be balanced are as follows:

(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 the use of the prior crime to impeach), (4) the importance of [the] defendant’s testimony, and (5) the centrality of the credibility issue.

Id. A district court’s ruling on the impeachment of a witness by prior conviction is reviewed under a clear-abuse-of-discretion standard. *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011).

Before trial, the state sought permission from the district court to impeach Atkins with the following convictions if he were to testify at trial: two felony convictions of receiving stolen property, one felony conviction of weapons possession, and one conviction of using a false name. The district court ruled that the false-name conviction could be used for impeachment because it is a crime of dishonesty. The district court also ruled that one of Atkins’s convictions of receiving stolen property could be used for impeachment, reasoning that the probative value of the conviction outweighed any prejudicial impact.

In ruling on the prior convictions, the district court addressed the *Jones* factors as follows:

As it relates to the weapons charge, I deny the request to use that for impeachment. I think that's more prejudicial than probative for this trial.

As it relates to the receiving stolen property, there is impeachment value as it relates to the whole person should the Defendant testify. I've heard about the conviction and the dates here. There is no similarity, so that weighs in favor of admissibility rather than keeping it out. And, you know, credibility could be central to the issue, to weigh the whole person.

With that, I will allow only one, receiving stolen property [conviction] . . . I'm excluding the [second] receiving stolen property [conviction] . . . and I'm excluding the weapons [conviction]. I think it becomes too cumulative and prejudicial to have that many counts.

Atkins argues that the district court should not have authorized impeachment with his felony receiving-stolen-property conviction because it was more prejudicial than probative. Specifically, Atkins argues that it “would have been more than sufficient to impeach [him] with using a false name: allowing the jury to know he had two convictions would have had no purpose other than to overly prejudice the jury against [him].”

The district court was entrusted to determine how many, if any, of Atkins's prior convictions were admissible for impeachment purposes if he were to testify. In doing so, the district court was required to consider the *Jones* factors. The district court did so, and it adequately explained its reasoning on the record. The district court ultimately allowed only two of Atkins's convictions to be used for impeachment, attempting to minimize any risk of prejudice. We discern no abuse of discretion in this ruling.

Atkins also argues that the district court “failed to sufficiently take into account the need for [him] to testify.” Although the importance of a defendant’s testimony is one of the *Jones* factors, “appellate courts . . . experience difficulty in evaluating the effect of any abuse of discretion in this area without knowing the substance of any possible testimony.” *State v. Ihnot*, 575 N.W.2d 581, 587 n.3 (Minn. 1998). “It is, of course, the responsibility of the defendant to make an offer of proof as to what would have been the substance of [his] testimony, had it been provided.” *Id.* Atkins did not make such an offer of proof. In fact, when arguing to the district court that his prior convictions should not be admitted for impeachment purposes, Atkins did not mention this factor. We cannot fault the district court for its purported failure to consider the need for Atkins’s testimony when Atkins did not make an offer of proof regarding his proposed testimony or argue the importance of that testimony to the district court.

Lastly, Atkins argues that his “constitutional right to present his theory of defense through his own testimony was chilled” as a result of the district court’s ruling. The supreme court has stated that a defendant is not kept from testifying when he chooses

not to testify based on the evidence that would have been admitted had he taken the stand. . . . The mere fact that a [district] court would allow impeachment evidence if a defendant chooses to testify does not necessarily implicate his constitutional right to testify in his own defense. At a minimum, in order to prevail on this argument, [a defendant] would have to show that the [district] court abused its discretion in ruling that the probative value of the impeachment evidence outweighed its prejudicial effect; *it is only when a [district] court has abused its discretion that a defendant’s right to testify may be infringed by the threat of impeachment evidence.*

Id. at 587 (quotation omitted).

Because the district court did not abuse its discretion in ruling that the probative value of the impeachment evidence outweighed its prejudicial effect, Atkins's claim that he was unconstitutionally prevented from testifying is without merit.

Affirmed.