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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1222**

State of Minnesota,
Respondent,

vs.

Richard Thomas Badow,
Appellant.

**Filed July 16, 2018
Affirmed
Bratvold, Judge**

Washington County District Court
File No. 82-CR-15-3600

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

Peter Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges his conviction of second-degree aggravated robbery, arguing that he is entitled to a new trial, first, because the district court abused its discretion by

ruling that the state could impeach appellant, if he chose to testify, with a prior conviction. Second, appellant contends that the state committed prejudicial prosecutorial misconduct during his trial. Additionally, in his pro se brief, appellant argues he received ineffective assistance of counsel at trial. Because we determine that any error in the district court's ruling on appellant's prior conviction was harmless, the prosecutor did not commit prejudicial misconduct, and appellant's pro se arguments lack merit, we affirm.

FACTS

On May 17, 2015, a man wearing a "fishnet mask," a headlamp, gloves, a hooded sweatshirt, and pajama pants approached the clerk at a Woodbury gas station, and demanded "all of the money in the registers" and "scratch-off" lottery tickets. The man held his hands near his waist, leading the gas station clerk to believe he was carrying a weapon. The clerk handed over \$989 in cash and 14 lottery tickets and told the man that he would be caught if he redeemed a lottery ticket. The man drove off in a purple Monte Carlo.

The police recovered the Monte Carlo the next day. At the impound lot, police spoke with the registered owner, A.B, an ex-girlfriend of appellant, Richard Thomas Bandow. On May 20, 2015, police obtained a security video (the lottery video) from a St. Paul gas station; the video showed a man redeeming what was later determined to be one of the stolen lottery tickets.

In June 2015, police showed a security video (the robbery video) from the Woodbury gas station robbery to A.B., who identified the robber as Bandow. In July 2015,

police showed the robbery video to another of Badow's ex-girlfriends, C.D., who also identified him as the robber.

The state charged Badow with first-degree aggravated robbery, but later amended the charge to second-degree aggravated robbery under Minn. Stat. § 609.245, subd. 2 (2014). The district court held a jury trial on February 28, 2017. The jury heard testimony from the gas station clerk who spoke to the robber, the store clerk who redeemed the stolen lottery ticket, a police detective, a state lottery official, and former girlfriends A.B. and C.D. The state introduced both the robbery and lottery videos. The detective identified the man in the lottery video as Badow and testified that the redeemed lottery ticket was one of the 14 stolen tickets. Also, A.B. and C.D. testified and identified Badow in the robbery video based on his mannerisms, voice, pants, and bag. A.B. also testified that only she and Badow had keys to the Monte Carlo at the time of the robbery.

After the state rested, Badow informed the court, outside the jury's presence, that he would testify. The state responded that, as indicated in a pretrial notice, it intended to impeach Badow with a prior conviction of first-degree aggravated robbery (the prior conviction). After hearing Badow's objection to the impeachment evidence, the district court determined that the prior conviction was "proper under the rules." The district court continued: "I am allowing the specific conviction to come in. I am not allowing any discussion, or questions, or answers regarding the specifics of what the details of that crime were." After the district court's ruling, Badow decided not to testify.

The jury found Badow guilty. The district court convicted him and sentenced him to 39 months in prison. This appeal follows.

DECISION

I. Any error by the district court in ruling that the state could impeach Badow with a prior conviction was harmless.

We review a district court's ruling "on the admissibility of prior convictions for impeachment of a defendant" under a clear abuse of discretion standard. *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006). We review for harmless error if the appellant objected to admission and the district court abused its discretion. *See State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011).

Minnesota Rule of Evidence 609 allows impeachment of a witness by evidence of a criminal conviction if the proponent of the evidence satisfies specific requirements, which differ depending on whether rule 609(a) or rule 609(b) applies.¹ Badow argues that the district court's ruling was reversible error under rule 609(b). The state initially contends that rule 609(a) applies. The state also argues that Badow failed to object by specifically citing rule 609(b), therefore, he should receive plain-error review under rule 609(b), and the court did not commit plain error. We first determine that rule 609(b) governs our analysis of the district court's ruling. Second, we conclude that Badow objected

¹ We limit our summary of rule 609's requirements to those relevant to the parties' arguments. Under Minn. R. Evid. 609(a), the district court may admit a prior conviction that is less than ten years old if the crime was "punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." Under Minn. R. Evid. 609(b), the district court may not admit a prior conviction older than ten years unless the court determines, "in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

sufficiently to preserve error under rule 609(b) and receive harmless-error review. Finally, we conclude that any error in the district court's ruling was harmless.

Rule 609(a)'s requirements apply if the prior conviction is less than ten years old; rule 609(b)'s requirements apply if the prior conviction is older than ten years. Minn. R. Evid. 609 (a), (b). The ten-year period under rule 609(b) begins when a witness is convicted or released from confinement arising from that conviction, "whichever is the later date." Minn. R. Evid. 609(b). During trial, both parties told the district court that rule 609(a) applied because ten years had not passed since Bandow's prior sentence had expired. But, according to his presentence investigation, Bandow was released from prison on June 21, 2004, which was more than ten years before trial began in February 2017.

The state argues that this court should review Bandow's argument under rule 609(a) because the record does not definitively establish that Bandow was not reincarcerated for violating the terms of his probation. It is true that the supreme court has stated that "periods of reconfinement for violations associated with the crime sought to be introduced" will toll the running of the ten-year period. *State v. Ihnot*, 575 N.W.2d 581, 584 n.2 (Minn. 1998). But the state's argument fails because it is based on speculation. The record indicates that Bandow was released from confinement on June 21, 2004. Because more than ten years had passed since Bandow was released from confinement for the prior conviction, we conclude that rule 609(b) governs our analysis of this issue.

The state also argues that Bandow did not object by specifically citing rule 609(b), and so we should review the district court's ruling for plain error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Bandow contends that he objected to admission of the

prior conviction and should receive harmless-error review. We agree with Bandow. While Bandow's objection did not specifically cite rule 609(b), the record reflects that Bandow sufficiently identified the grounds for his objection by stating, "So Your Honor, we are asking the court to apply the factors outlined in 609, and to rule that this cannot come in." See Minn. R. Evid. 103(a)(1). Bandow is entitled to harmless-error review.

Bandow argues that the district court failed to apply the correct law when it ruled on the admissibility of the prior conviction. Under both rule 609 (a) and (b), the district court should make explicit findings to determine the admissibility of a previous conviction. These five factors, also known as the *Jones* factors, are:

(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 (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)) (applying *Jones* factors to Minn. R. Evid. 609(a)); *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001) (applying *Jones* factors to Minn. R. Evid. 609(b)). A district court errs by failing to make explicit findings as to each *Jones* factor. *Swanson*, 707 N.W.2d at 655.

In this case, the district court failed to make explicit findings and apply the *Jones* factors, therefore, we conclude that the district court abused its discretion. See *id.* Typically, when a district court fails to apply the *Jones* factors, we review each factor to determine if the decision to admit a prior conviction for impeachment was harmless error.

See Ihnot, 575 N.W.2d 586-87. But we decline to take this approach here because we conclude that any error in the district court’s ruling was harmless.

Initially, we note that Bandow was not actually impeached by his prior conviction because he did not testify. Bandow nonetheless argues that the district court’s decision allowing impeachment by prior conviction was not harmless because it deprived him of his right to testify. *See Jones*, 271 N.W.2d at 538 (holding defendant was deprived of his right to fair trial because trial court erroneously ruled prior conviction was admissible and discouraged defendant from exercising his right to testify). We are not persuaded. A district court’s erroneous decision to allow impeachment by prior conviction does not implicate a defendant’s right to testify if the defendant’s proffered testimony was not critical to his defense. *See State v. Zornes*, 831 N.W.2d 609, 628 (Minn. 2013). Also, if the district court’s erroneous ruling does not implicate a defendant’s right to testify, then the error is harmless “if there is no reasonable possibility that it substantially influence[d] the jury’s decision.” *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015) (alteration in original) (quotation omitted); *see also State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009) (stating harmless error standard when constitutional right is not implicated).

Bandow asserts that his testimony was critical because he was the only person who could testify about “how he came to possess the stolen scratch-off.” We disagree. Bandow’s proposed alibi evidence about the lottery tickets was of “mixed persuasive value” because two people identified Bandow in the robbery video. *See Zornes*, 831 N.W.2d at 628. Further, Bandow was, for the most part, able to offer his defense theory by impeaching A.B. and C.D., and by criticizing the police investigation. Accordingly,

Bandow's constitutional right to testify was not implicated by the district court's impeachment ruling.

Also, the case against Bandow was strong and included, in addition to A.B.'s and C.D.'s testimony, the lottery video, and evidence that Bandow was one of two people with keys to the Monte Carlo. Because Bandow's proffered testimony was not critical to his defense, and because the state's case was strong, we conclude that there was no reasonable probability that any error in the district court's impeachment ruling substantially influenced the jury's verdict.²

II. The state did not commit prejudicial prosecutorial misconduct.

During direct examination of C.D., and after showing the robbery video, the prosecuting attorney elicited the following testimony:

PROSECUTION: Anything else that is of interest to you when you see the video at this point?

C.D.: I would probably say the scratch offs.

PROSECUTION: Why?

C.D.: [Bandow] really loves scratch offs.

Then, during direct examination of A.B., the prosecuting attorney elicited the following testimony:

PROSECUTION: When you reviewed [the robbery video] before, you see that this individual is getting lottery tickets?

A.B.: Yes.

PROSECUTION: Correct?

² The district court ruled that the state would be allowed to inform the jury about the specific conviction also over Bandow's objection. Under rule 609, a witness is often impeached with unspecified felony convictions. See *State v. Hill*, 801 N.W.2d 646, 652-53 (Minn. 2011). Bandow argues that the district court abused its discretion by failing to limit the reference to an unspecified felony conviction. But Bandow's argument fails because the specific prior conviction was never referenced.

A.B.: Yes.

PROSECUTION: And what do you know, if anything, about [Bandow] and lottery tickets?

A.B.: At the time, he was pretty much addicted to scratch offs. When he was with me, we would do them all the time together. The crossword ones.

PROSECUTION: The crossword ones?

A.B.: Yes.

During closing argument, the prosecutor said:

The scratch offs. Now, in the testimony and the video evidence, when you listen to it even [one of the store clerks] is like, you don't want to take those. They can track them. But you heard the testimony, he's addicted to them. He loved those scratch offs. He loved that crossword scratch off, and that's what was taken. That's what he redeemed, the stolen ones, a couple days later.

Bandow did not object to the questions, move to strike the testimony, or object to the prosecuting attorney's argument.

On appeal, Bandow contends the prosecuting attorney committed prejudicial plain error by eliciting character evidence and relying on that evidence in closing argument. Under the modified-plain-error test that applies to prosecutorial misconduct, the appellant must show that there was (1) error and (2) that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Plain error must be clear or obvious, which may be the case if the error “contravenes case law, a rule, or a standard of conduct.” *Id.* After the appellant has proven a plain error, the burden shifts to the state to (3) “demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights.” *Id.* In effect, the state must show that there is no “reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Id.* (quotations

omitted). If the three steps of the plain-error test are satisfied, this court “may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (alteration in original) (quotations omitted).³

We determine that the state has met its burden to prove that the alleged prosecutorial misconduct did not affect Bandow’s substantial rights; as a result, we decline to address whether any prosecutorial misconduct actually occurred. To determine if a prosecutor’s misconduct affected the defendant’s substantial rights, this court considers: “(1) the strength of the evidence against [the defendant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [the defendant] had an opportunity to rebut any improper remarks.” *Peltier*, 874 N.W.2d at 805-06.

As previously discussed, the evidence against Bandow was strong. Two witnesses identified Bandow in the robbery video, he was one of two people who had the keys to the Monte Carlo used to flee the crime scene, and the lottery video showed him redeeming one of the stolen lottery tickets. Additionally, the alleged prosecutorial misconduct was not pervasive; the comments about Bandow’s character were infrequent and a small part of the state’s case. *See id.* Lastly, Bandow’s attorney made his closing argument after the prosecuting attorney made the comments challenged on appeal, and thus had the

³ Initially, the state argues that this court should not address the prosecutorial misconduct issue because Bandow did not raise it at trial and because it is better understood as an evidentiary issue. But given the importance of Bandow’s right to a fair trial, we will review prosecutorial misconduct for plain error. *See Ramey*, 721 N.W.2d at 301 (noting that prosecutorial misconduct may deny the defendant’s right to a fair trial).

opportunity to rebut the prosecuting attorney's remarks. *Id.* Because the state has proven the alleged prosecutorial misconduct did not affect Bandow's substantial rights, it is not necessary to address the other steps of the modified-plain-error test. *See State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

III. Bandow was not denied effective assistance of counsel.

While Bandow raises ineffective assistance in his pro se brief to this court, there is no record of the issue in district court proceedings. Usually, an ineffective-assistance-of-counsel claim must be raised in a postconviction petition for relief, rather than on direct appeal. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000)). But when an ineffective-assistance-of-counsel claim may be resolved based on the trial record, the claim must be brought on direct appeal. *Ellis-Strong*, 899 N.W.2d at 535 (citing *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013)). When reviewing an ineffective-assistance-of-counsel claim on direct appeal, we analyze the claim under the two-step standard set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Ellis-Strong*, 899 N.W.2d at 535 (citing *Andersen*, 830 N.W.2d at 10).

Under *Strickland*, Bandow must demonstrate that (1) his attorney's performance "fell below an objective standard of reasonableness," and (2) a reasonable probability exists that "the outcome would have been different but for counsel's errors." *Andersen*, 830 N.W.2d at 10. Courts presume that counsel's representation was reasonable. *Id.* This court generally will not review an ineffective-assistance-of-counsel claim that is based on trial strategy. *Id.* Trial strategy includes "the selection of evidence presented to the jury." *Id.*

After carefully reviewing each of Bandow's cited instances of ineffective assistance of counsel, we determine that most instances challenge the selection of evidence presented to the jury. Accordingly, we conclude that Bandow's challenges either may be ascribed to trial strategy, or would not have affected the outcome of the trial, especially given the strong evidence against Bandow. *See id.* Accordingly, we reject Bandow's ineffective-assistance-of-counsel claims.

Affirmed.