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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0757**

State of Minnesota,
Respondent,

vs.

Abdiaziz Ali Adan,
Appellant.

**Filed May 13, 2019
Affirmed
Cochran, Judge**

Rice County District Court
File No. 66-CR-17-1406

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John L. Fossum, Rice County Attorney, Terence Swihart, Assistant County Attorney,
Faribault, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Appellant challenges his conviction for third-degree criminal sexual conduct,
arguing that (1) the district court abused its discretion in ruling that the state could impeach

him using his prior felony convictions, and (2) the prosecutor committed misconduct by mischaracterizing the evidence. Because the district court did not abuse its discretion by ruling that the state could impeach appellant, and the prosecutor did not commit misconduct, we affirm.

FACTS

In December 2016, S.H. drove to appellant Abdiaziz Ali Adan's residence to purchase marijuana. When S.H. entered the residence, Adan and three other men were in the apartment. Adan and S.H. went into a bathroom to complete the drug transaction. While they were in the bathroom, Adan told her that he wanted to have sex with her. S.H. told Adan that she did not want to have sex. Adan instructed S.H. to take her clothes off. Because S.H. was scared of Adan, she removed her clothes. Adan then penetrated her vagina with his penis.

In order to get Adan to stop penetrating her, S.H. repeatedly told him that someone was waiting for her and might come to the door looking for her. Adan left S.H. and went to the bathroom door to look around. S.H. then grabbed her phone and texted someone asking for help. When Adan saw that S.H. was using her phone, he grabbed it. S.H. then ran out of the apartment and drove home.

When she arrived at her home, S.H. immediately contacted the police. The police interviewed her and drove her to the hospital for an examination. S.H. described the incident with Adan to both the police and a sexual-assault nurse examiner. S.H. told the police officers that she did not think Adan had ejaculated and told the nurse that she was not sure whether he had ejaculated. An examination of S.H.'s clothing revealed sperm

from two other men, including her boyfriend, but no sperm from Adan.¹ A vaginal swab indicated the presence of male DNA, but the sample was insufficient to conduct a more detailed DNA analysis that could have identified a specific individual profile.

The state charged Adan with third-degree criminal sexual conduct. Before trial, Adan filed a motion requesting that the court exclude evidence of his prior criminal convictions for impeachment purposes. The state argued that it should be allowed to impeach Adan with evidence of four prior felony convictions. The district court ruled that if Adan testified, the state could introduce evidence of the convictions. Adan ultimately chose not to testify. A jury found him guilty after a trial in December 2017.

This appeal follows.

D E C I S I O N

Adan appeals the judgment of conviction, arguing that the district court abused its discretion in ruling that the state could impeach him with evidence of four prior felony convictions and that the prosecutor committed misconduct by mischaracterizing the evidence. We address each argument in turn.

I. The district court did not abuse its discretion by ruling that the state could impeach Adan with evidence of four prior felony convictions.

The district court ruled that if Adan testified, the state could impeach him with evidence of four prior felony convictions: a 2010 conviction for fifth-degree controlled substance crime, a 2011 conviction for robbery, a 2011 conviction for second-degree

¹ The district court ruled that the evidence of sperm from two other men was inadmissible, and Adan does not challenge that ruling on appeal.

burglary, and a 2013 conviction for second-degree assault. Adan ultimately chose not to testify. Adan argues that the district court abused its discretion because his testimony was important to his defense and the district court's ruling chilled his right to testify.

An appellate court “will not reverse a district court’s ruling on the 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). Prior-conviction evidence is admissible under Minn. R. Evid. 609(a)(1) for the purpose of attacking the credibility of a witness if the crime is a felony “and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.” In conducting this balancing test, the district court considers 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 (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, 537-38 (Minn. 1978). Because the district court is in “a unique position” to assess and weigh the *Jones* factors, “it must be accorded broad discretion.” *State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001). “[A]ny felony conviction is probative of a witness’s credibility, and the mere fact that a witness is a convicted felon holds impeachment value.” *Hill*, 801 N.W.2d at 652. “If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.” *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006).

Here, the district court considered each of the five *Jones* factors. It found that each of the crimes had impeachment value, the crimes were recent enough to be probative, the crimes were not similar to the charged crime, appellant's testimony would be important, and credibility would be a central issue. The district court found that, because Adan's testimony was important, the fourth factor weighed against admitting the prior convictions but that the other four factors favored admitting the prior convictions. Having considered each of the five *Jones* factors, the district court ruled that the state could introduce evidence of the four felony convictions to impeach Adan.

Adan argues that his testimony was particularly important because S.H.'s "credibility was severely compromised" and that the fourth factor weighed strongly against admitting the prior convictions. But where credibility is a central issue, the fourth factor weighs *in favor* of admitting the prior convictions, not against. *Swanson*, 707 N.W.2d at 655. It is undisputed that credibility was a central issue in this case because of the lack of physical evidence. As such, the fourth factor weighed in favor of admitting the prior convictions.

But, even if the fourth factor did weigh against admitting the prior convictions, as Adan argues, a single factor does not automatically outweigh the other factors. *See id.* at 656 (concluding that a district court did not abuse its discretion in admitting evidence of prior convictions where only one of the *Jones* factors weighed against admission). Here, the district court considered all five factors and accepted Adan's argument that the fourth factor weighed against admitting the prior convictions. After considering all five *Jones* factors, the district court concluded that the factors favored admitting the evidence of the

prior convictions. On this record, the district court did not clearly abuse its discretion in weighing the *Jones* factors and ruling that the state could impeach Adan by introducing evidence that he had four prior felony convictions.

II. The prosecutor did not commit misconduct.

Adan next argues that the prosecutor committed misconduct by mischaracterizing the evidence during closing arguments and that this court should reverse his conviction and remand for a new trial. Adan did not object to the prosecutor's closing arguments during the trial. "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is 'plain' if it is clear or obvious." *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). "Typically, a 'plain' error contravenes case law, a rule, or a standard of conduct." *Id.*

We review a claim of unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If an appellant establishes that the prosecutorial misconduct is error that is plain, the burden shifts to the state to show that the misconduct did not affect the appellant's substantial rights. *Id.* If the state fails to show that the misconduct did not affect the appellant's substantial rights, "the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*

During closing arguments, a prosecutor "may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence." *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009). But a prosecutor may not argue facts

not in evidence. *State v. Lehman*, 749 N.W.2d 76, 86 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008). A prosecutor may not intentionally misstate the evidence. *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993).

In this case, the prosecutor told the jury during closing arguments that S.H.'s vaginal swab contained male DNA, but that the amount was insufficient to complete a DNA profile. The prosecutor went on to say that those facts would be consistent with S.H.'s belief that Adan did not ejaculate.

Adan argues that the prosecutor misstated the evidence because S.H. testified that she did not remember whether Adan ejaculated, rather than testifying that she did not believe he ejaculated. Adan's argument is not supported by the record. In response to the prosecutor's question, "Do you remember did the defendant ejaculate?" S.H. answered with a single word, "No." Immediately following that question, the prosecutor asked, "Do you know what prevented him from doing that," and S.H. answered, "Him going to the door." S.H. then described how she fled the residence after Adan went to the door. Viewing the exchange in its full context shows that S.H.'s single word answer "no" meant that Adan did not ejaculate, and not that she did not remember whether Adan ejaculated.

Furthermore, the record contains other evidence supporting the prosecutor's statement that S.H. believed Adan had not ejaculated. S.H. testified that she told police and the nurse that Adan had not ejaculated, and the state introduced her recorded statement to police in which she stated that she did not think that Adan ejaculated. Because there is ample evidence in the record supporting the prosecutor's statement that S.H. believed that Adan did not ejaculate, the prosecutor did not misstate the evidence in this regard.

Adan also argues that the prosecutor misrepresented the evidence by suggesting that had there been enough male DNA on the vaginal swab to conduct a full DNA analysis, the analysis would have shown it was Adan's DNA. The state presented evidence that Adan penetrated S.H.'s vagina with his penis but did not ejaculate. The state's suggestion that the male DNA on S.H.'s vaginal swab could have come from Adan was a proper inference that could be drawn from the evidence at trial. *See Pearson*, 775 N.W.2d at 163 (stating that prosecutors may make "all proper inferences that can be drawn from [the] evidence"). Accordingly, the prosecutor did not commit misconduct by arguing that the male DNA from S.H.'s vaginal swab could have come from Adan.

Adan argues that because he was precluded from mentioning the sperm of two other men on S.H.'s clothing, the prosecutor should not have been allowed to suggest that the male DNA from the vaginal swab was his. But Adan does not challenge the district court's decision prohibiting the admission of evidence of the other men's sperm. Nevertheless, we note that Adan's argument that he was unable to counter an inference that the male DNA came from him is inconsistent with the record. The report from the nurse, which was submitted to the jury, indicated that S.H. had intercourse with her boyfriend 48 hours before the incident, and the defense argued during closing arguments that the male DNA from the vaginal swab could have come from S.H.'s boyfriend. Adan fully presented his argument that the DNA from the vaginal swab could have come from another source and specifically suggested that her boyfriend was a possible source.

The record does not support that the prosecutor made any error, much less a plain error. The prosecutor's closing arguments were not improper and did not contravene "case

law, a rule, or a standard of conduct.” *Peltier*, 874 N.W.2d at 799. Accordingly, the prosecutor did not commit misconduct.

Affirmed.