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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1326**

State of Minnesota,
Respondent,

vs.

Kerry John Conrad,
Appellant.

**Filed July 1, 2019
Affirmed
Cochran, Judge**

Dakota County District Court
File No. 19HA-CR-18-137

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

James C. Backstrom, Dakota County Attorney, Tori K. Stewart, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Florey, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

In this direct appeal from final judgment of conviction and sentence for felony fifth-degree assault, appellant argues that the district court abused its discretion and

deprived appellant of a fair trial by ruling that he could not claim self-defense, and by ruling that the state could introduce appellant's prior convictions for impeachment purposes. We affirm.

FACTS

On January 11, 2018, officers responded to a neighborhood in Eagan after appellant Kerry John Conrad told dispatch that he had been punched several times by an unnamed assailant. Upon arriving, police found Conrad standing on a street corner wearing pants, a jacket, but no shirt. Police officers spoke with Conrad about the assault, but he would not give the officers any information about where the fight had taken place or who had hit him. Shortly after this conversation, L.M. drove up to the officers. L.M. was crying and had a cut above her eyebrow. Officers asked to speak with her and L.M. reported that Conrad hit her with an open hand and caused her to fall into a dresser. Officers placed Conrad under arrest. He was later charged with fifth-degree assault, fear of bodily harm or death in violation of Minn. Stat. § 609.224, subd. 4(b) (2016), and fifth-degree assault, inflict or attempt bodily harm in violation of Minn. Stat. § 609.224, subd. 4(b).

L.M. and Conrad lived together in the basement of a house. On January 11, three separate incidents took place within the home. Conrad's charged offenses stem from the third incident. The first incident involved a verbal confrontation between Conrad and L.M. The second incident involved an argument between L.M. and Conrad concerning some money he had found in the bedroom. Conrad discovered the money, took it, and proceeded to walk back upstairs. As he was going upstairs, L.M. followed him. He attempted to kick L.M., and she grabbed his leg, which caused him to fall backwards. The third incident

involved the charged offenses. Conrad went downstairs and woke L.M. up to accuse her of taking his cellphone. He pulled her out of bed and hit her with an open hand across the chin. This caused L.M. to fall back onto a dresser, and she cut her face above her left eye. As she was getting up off the ground, Conrad stomped on her hands, which fractured a finger. At some point, Conrad grabbed L.M.'s phone and held it above her head. She tried jumping up towards it and may have scratched him.

At a pretrial hearing, the district court considered whether to admit Conrad's prior convictions for impeachment purposes. Conrad's four prior convictions include: two felony violations of an order for protection (OFP) in 2016, one felony violation of a domestic-abuse no-contact order (DANCO) in 2013, and one felony domestic assault in 2012. The district court found that these prior convictions were admissible for impeachment purposes.

At trial, L.M. testified to the above incidents that occurred on January 11. The police officers who responded to the scene testified regarding their interactions with Conrad and L.M. The officers also testified that they did not see any injuries on Conrad's body. After L.M. and one of the officers had testified, Conrad waived his right to testify. The state then called three additional witnesses, including a doctor who treated L.M. The doctor testified that he treated her for a fractured finger and a laceration above her eye.

After resting its case, the state moved to bar Conrad from arguing self-defense. The district court found that Conrad had not met his burden of production to present a sufficient threshold of evidence in order to make a self-defense claim and submit it to the jury. The

district court granted the state's motion and denied Conrad's request to continue with his claim of self-defense. Conrad then rested his case without calling any witnesses.

The jury found Conrad guilty of both counts of fifth-degree assault, and the district court sentenced him to 30 months on count two. This appeal follows.

D E C I S I O N

Conrad argues that the district court abused its discretion by denying his request for a self-defense instruction and by ruling that the state could introduce his prior convictions for impeachment purposes. We address his arguments in turn.

I. The district court did not abuse its discretion by denying Conrad's request to continue with his self-defense claim or by failing to instruct the jury on self-defense.

The determination of whether a jury instruction should be given "lies within the discretion of the district court and will not be reversed but for an abuse of that discretion." *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006) (quotation omitted). A district court abuses its discretion if it refuses to give an instruction on the defendant's theory of the case when there is evidence to support the theory. *Id.* If the district court refuses to give an instruction, but the defense is not prejudiced, then there is no reversible error. *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). Conrad argues that the district court abused its discretion by failing to instruct the jury on self-defense.

To be entitled to a self-defense instruction, the defendant bears the burden to establish evidence that supports a claim of self-defense. *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). A defendant must provide reasonable evidence showing: "(1) an absence of aggression or provocation; (2) an actual and honest belief that . . . bodily harm

would result; (3) a reasonable basis existed for this belief; and (4) an absence of reasonable means to retreat or otherwise avoid the physical conflict.” *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003) (holding that these principles of self-defense apply to assault cases), *review denied* (Minn. Apr. 29, 2003). The duty to retreat does not exist if acting in self-defense within the home. *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001). Additionally, the degree of force used in self-defense must not exceed what is deemed necessary to a reasonable person in similar circumstances. *Basting*, 572 N.W.2d at 286.

Conrad argues that the district court abused its discretion for three reasons: (1) the district court did not view the evidence in the light most favorable to the defense, (2) the district court incorrectly applied the standard for self-defense, and (3) the district court found that Conrad had a duty to retreat. To best address these issues, we analyze the four prongs of a self-defense claim in turn.

A. Absence of Aggression or Provocation

The district court found that there was no evidence to support the first prong of a self-defense claim—the absence of aggression or provocation by the defendant. When evaluating whether a basis exists in the evidence for a jury instruction, the district court must view the evidence “in the light most favorable to the party requesting the instruction.” *State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006). Conrad argues that the district court failed to consider the following evidence: (1) that L.M. admitted to chasing Conrad and grabbing his leg, (2) that he told officers he had been assaulted, and (3) that he fled the scene of the assault without proper winter gear.

There were three separate incidents that occurred the night of the assault. L.M. admitted to grabbing Conrad's leg during the second incident. The second incident occurred when Conrad discovered money hidden in the bedroom, attempted to take it, and kicked his leg backwards towards L.M. as he was climbing the stairs. L.M.'s act of grabbing Conrad's leg during the second incident has no bearing on his self-defense claim, which arises out of the third incident.

Moreover, Conrad did not establish evidence that L.M. initiated the third incident. Although Conrad initially told officers that he was hit by an unnamed woman, this is not sufficient to show an absence of aggression or provocation. *See State v. Stephani*, 369 N.W.2d 540, 546 (Minn. App. 1985), *review denied* (Minn. Aug. 20, 1985) (stating that appellant's statements to dispatch that he had been assaulted were not "probative to identify who initiated the conflict"). And Conrad does not explain how his lack of proper winter clothing demonstrated an absence of aggression. In sum, viewing the evidence in the light most favorable to Conrad, Conrad did not provide sufficient evidence to show an absence of aggression or provocation.

B. Honest Belief that Harm would Result

The district court found that Conrad failed to show an "honest belief or that there was even a perception, that given the facts described by the witnesses in this case so far, that there was any imminent danger of death or great bodily harm on the part of the defendant." Conrad argues that he did not have to establish an honest belief concerning imminent danger of death or great bodily harm. Instead, Conrad contends, he only had to show an honest belief that harm would result.

“In Minnesota, a person may act in self-defense if he or she reasonably believes that force is necessary and uses only the level of force reasonably necessary to prevent the bodily harm feared.” *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014). The right to self-defense in non-deadly force cases is codified at Minn. Stat. § 609.06, subd. 1(3) (2018). The Minnesota Supreme Court has read this statute to require, among other elements: “the defendant’s actual and honest belief that he or she was in imminent danger of bodily harm.” *Devens*, 852 N.W.2d at 258 (quotation omitted).

Conrad was unable to show that he held an honest belief that he was in imminent danger of bodily harm because he did not present any evidence or provide testimony regarding the second prong. “A defendant claiming self-defense is hampered to some extent if he does not testify.” *Stephani*, 369 N.W.2d at 546. Even considering the surrounding circumstances, there is nothing in the record to support an honest belief. L.M. testified that she was asleep immediately prior to Conrad’s assault and there was no other evidence presented that would contradict her statements. Conrad did not provide sufficient evidence to show an honest belief that he was in imminent danger of bodily harm.

C. Reasonable Basis for Belief

This prong involves an objective test of whether an ordinary person would think that harm was imminent and that the defendant’s subsequent actions were necessary. *See Johnson*, 719 N.W.2d at 631. Conrad does not cite to any evidence in his brief that would support reasonable grounds for a belief that harm was imminent and his actions were necessary. Because Conrad did not point to any evidence, he failed to sufficiently establish the third prong.

D. Absence of Reasonable Means to Retreat

Lastly, the district court found that there was no evidence to show that Conrad retreated. When acting in self-defense in the home, a person is not required to retreat before using reasonable force to defend himself. *Glowacki*, 630 N.W.2d at 402. But, even when a defendant does not have the duty to retreat, “the key inquiry will still be into the reasonableness of the use of force and the level of force under the specific circumstances of each case.” *Id.* Conrad did not establish evidence to support that his use of force was reasonable.

Conrad did not establish sufficient evidence to support a self-defense claim. The testimony of L.M. and the police officers does not meet Conrad’s burden of production. In sum, the district court did not abuse its discretion in denying Conrad’s request for a self-defense instruction.

II. The district court did not abuse its discretion by ruling that the state could introduce Conrad’s prior convictions for impeachment purposes.

“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). If the district court abuses its discretion, this court will reverse only if the error substantially influenced the jury’s verdict. *State v. Carridine*, 812 N.W.2d 130, 141 (Minn. 2012). Conrad argues that the district court abused its discretion by ruling that the state could introduce four prior convictions as impeachment evidence, if Conrad testified, because the prejudicial effect of admitting his past

convictions greatly outweighed any probative value and the court did not properly consider the *Jones* factors.

Evidence that a defendant has been convicted of a felony within the last ten years is admissible for impeachment if the court “determines that the probative value of admitting this evidence outweighs its prejudicial effect.” Minn. R. Evid. 609(a)(1). When making this determination, the district court must 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.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). The district court should demonstrate on the record that it has exercised its discretion and considered the factors set forth in *Jones*. *State v. Lund*, 474 N.W.2d 169, 172 (Minn. App. 1991).

It is error for the district court “to fail to make a record of its consideration of the *Jones* factors.” *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). Here, the district court failed to make a record of its consideration of the *Jones* factors and therefore erred. But, the error is harmless if a proper application of the factors would have resulted in the admission of the prior convictions. *Swanson*, 707 N.W.2d at 655. We thus examine the *Jones* factors in turn to determine whether the district court abused its discretion by admitting Conrad’s prior convictions.

A. Impeachment Value

Conrad's prior convictions were for felony domestic assault, felony violation of a DANCO, and two felony violations of an OFP. "[T]he fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Prior convictions "can have impeachment value by helping the jury see the 'whole person' of the defendant and better evaluate his or her truthfulness." *Swanson*, 707 N.W.2d at 655. Moreover, the supreme court has held that "it is the general lack of respect for the law, rather than the specific nature of the conviction, that informs the fact-finder about a witness's credibility In other words, *any* felony conviction is probative of a witness's credibility." *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). This factor weighs in favor of admission.

B. Date of Convictions and Subsequent History

Conrad does not argue that the dates of his convictions weigh against admissibility. His four prior convictions all took place within the last ten years and fall squarely within the parameters of Minn. R. Evid. 609(b). This factor weighs in favor of admission.

C. Similarity of Past Crimes to the Crime Charged

When a prior conviction is similar to the charged crime, "there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively." *Gassler*, 505 N.W.2d at 67. Thus the more similar the prior convictions are to the current offense, the more likely that the evidence is more prejudicial than probative. *Swanson*, 707 N.W.2d at 655.

Here, Conrad has a prior conviction for felony domestic assault, which is the same crime he was charged with in this case. His other prior convictions involve domestic-related conduct, including a violation of a DANCO and two violations of an OFP. Because these crimes are similar to the crimes charged, this factor weighs against admission. But, while this factor weighs against admission, the analysis does not end here. *See State v. Frank*, 364 N.W.2d 398, 399 (Minn. 1985) (holding that district court did not abuse its discretion by refusing to bar the use of two prior rape convictions for impeachment purposes when defendant was on trial for criminal sexual conduct); *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (holding that district court did not abuse its discretion by refusing to bar the use of prior conviction even though “prior crime was basically the same crime with which defendant was charged”). Moreover, the state elicited testimony from L.M. regarding Conrad’s prior domestic-assault conviction during its case-in-chief as relationship evidence pursuant to Minn. Stat. § 634.20 (2018). As testimony regarding the prior felony domestic-assault conviction had already been elicited, there is no prejudice in allowing this same conviction as impeachment evidence.

D. Importance of Defendant’s Testimony and the Centrality of Credibility

If credibility is a central issue in the case, then the fourth and fifth factors weigh in favor of admission. *Swanson*, 707 N.W.2d at 655. Thus, “if the issue for the jury narrows to a choice between defendant’s credibility and that of one other person then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater.” *Bettin*, 295 N.W.2d at 546. Here, credibility was a central issue because Conrad gave notice that he intended to claim self-defense while L.M. testified that Conrad initiated

the assault. If Conrad had met his burden of production to go forward with his self-defense claim, the jury would have had to weigh L.M.'s testimony against Conrad's statements. The fourth and fifth factors weigh strongly in favor of admission.

Because only one of the *Jones* factors weighs against the admission of Conrad's prior convictions, and credibility was a central issue in this case giving greater importance to the impeachment evidence, the district court did not abuse its discretion.¹ *See Swanson*, 707 N.W.2d at 656 (holding that one factor weighing against admissibility does not preclude admission of the evidence).

Affirmed.

¹In a pro se supplemental brief, Conrad seems to argue that he received ineffective assistance of counsel. Without further development of the record, this court cannot determine the merit of Conrad's ineffective-assistance claim. *See State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) ("A postconviction hearing provides the court with additional facts to explain the attorney's decisions so as to properly consider whether a defense counsel's performance was deficient." (quotation omitted)). His pro se brief also contains other arguments that have been addressed in this opinion.