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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1506**

State of Minnesota,
Respondent,

vs.

Blanyon Toe Davies,
Appellant

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

Hennepin County District Court
File No. 27-CR-17-24864

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

In this direct appeal from his conviction for first-degree aggravated robbery, appellant argues that the cumulative effect of the district court's evidentiary errors deprived

him of a fair trial, and that he is entitled to a new trial based on newly-discovered evidence. We affirm.

FACTS

In September 2017, appellant Blanyon Toe Davies lured J.O. to an apartment building in Brooklyn Park to discuss the sale of a car. Appellant and several other men physically attacked J.O., threatened to shoot him, and took his money, his car keys, and his phone. The state charged appellant with one count of first-degree aggravated robbery in violation of Minnesota Statutes section 609.245, subdivision 1 (2016). The district court conducted a jury trial in April 2018. Jurors heard testimony from J.O., police officers, and witnesses present at the apartment building. The court received into evidence the emergency calls, video surveillance tapes, and footage from an officer's body camera. The jury also heard testimony from appellant, who testified in his own defense at trial and denied hitting or robbing J.O. The jury returned a verdict on April 30, finding appellant guilty of the charged crime. On May 16, appellant filed a motion for a new trial. The district court denied appellant's motion as untimely and imposed the guidelines sentence. This appeal follows.

D E C I S I O N

I. The district court's evidentiary rulings do not constitute an abuse of discretion.

Appellant raises several challenges to the district court's evidentiary rulings. "We review the district court's evidentiary rulings for an abuse of discretion." *State v. Peltier*,

874 N.W.2d 792, 802 (Minn. 2016). On appeal, appellant bears the burden of establishing that the district court abused its discretion and that he was prejudiced as a result. *Id.*

a. Admissibility of appellant’s prior convictions

Appellant argues that the district court abused its discretion by permitting the state to impeach appellant with two of his four prior felony convictions. A district court may admit evidence of a defendant’s prior felony convictions for impeachment purposes if “the probative value of admitting this evidence outweighs its prejudicial effect.” Minn. R. Evid. 609(a)(1). In determining whether the probative value of a prior conviction outweighs its prejudicial effect, district courts 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 . . . , (4) the importance of the defendant’s testimony, and (5) the centrality of the credibility issue.” *State v. Hill*, 801 N.W.2d 646, 653 (Minn. 2011) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). We will not reverse a district court’s ruling absent a clear abuse of discretion. *Id.* at 651 (quotation omitted).

Before trial, the state moved to impeach appellant with four criminal convictions: (1) aiding and abetting burglary in 2013, (2) criminal conspiracy in 2014, (3) possession or sale of stolen checks in 2013, and (4) conspiracy to engage in the interstate transportation of stolen goods in 2014. The district court ruled that the state could impeach appellant with his convictions for possession or sale of stolen checks and for conspiracy to engage in the transportation of stolen goods, but could not impeach appellant with the remaining two convictions. In reaching this determination, the district court properly analyzed each of the *Jones* factors, balanced those factors, and explained its reasoning.

First, the district court determined that the first factor weighed in the state's favor because the two convictions allowed the jury "to see the whole person and better evaluate [appellant's] testimony." The admission of prior convictions allows the jury "to see the 'whole person' and thus to judge better the truth of his testimony." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted). The rules of evidence sanction the use of felonies "not directly related to truth or falsity for purposes of impeachment, and thus necessarily recognizes that a prior conviction, though not specifically involving veracity, is nevertheless probative of credibility." *Id.* at 708. The district court did not abuse its discretion by determining that appellant's two prior convictions had impeachment value because they allowed the jury to view appellant as a whole person.

Under the second factor, a prior conviction is admissible if the conviction occurred within ten years of the offense for which the defendant is currently on trial. Minn. R. Evid. 609(b). The two relevant convictions occurred in 2013 and in 2014. Appellant acknowledges that this factor weighs in favor of admission.

Under the third factor, we recognize that "if the 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." *State v. Grassler*, 505 N.W.2d 62, 67 (Minn. 1993). However, the potential for the jury to misuse the prior conviction is substantially reduced if the past crimes are sufficiently different from the crime charged. *State v. Ihnot*, 575 N.W.2d 581, 586-87 (Minn. 1998) (quotation omitted). Here, appellant's two prior convictions are sufficiently different from the current charge of aggravated robbery, reducing the potential for misuse.

Finally, Minnesota courts often consider the fourth and fifth factors together. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). “If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.” *Id.* Credibility is generally a critical issue in the case if “the issue for the jury narrows to a choice between defendant’s credibility and that of one other person.” *Ihnot*, 575 N.W.2d at 587. The district court determined that both factors were satisfied because credibility was a central issue at trial, and the record supports this determination.

Based upon a review of the *Jones* factors and the record as a whole, we conclude that the district court did not abuse its discretion by ruling that the state could impeach appellant with two of his convictions at trial.

b. Admissibility of witness’s prior convictions

Appellant argues that the district court abused its discretion by excluding evidence of J.O.’s prior convictions. Different considerations apply to the impeachment of a defendant with a prior conviction and a witness with a prior conviction. *State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995). “[W]hen evaluating whether to admit a prior conviction of a prosecution witness, the major concerns are to protect the witness from being harassed and unduly embarrassed, the jury from being confused and misled, and everyone involved (court, jury, parties) from having to endure an unnecessarily prolonged trial.” *Id.* We apply an abuse-of-discretion standard of review to a district court’s ruling on this issue. *Id.* at 641.

Appellant sought to impeach J.O. with evidence of his prior convictions for (1) giving police a false name in 2015, (2) drug possession in 2017, (3) domestic assault in

2013, and (4) domestic assault, by strangulation, in 2011. The district court allowed the defense to impeach J.O. with the false-name conviction, but excluded evidence of the remaining three offenses based on its “overriding concerns” that the jury “might be confused or might make a decision based on an improper basis.” The district court’s reasoning is consistent with Minnesota caselaw that cautions against admitting convictions that may lead “the jury to conclude that [the witness] was a bad person who deserved to be the victim of a crime, which would amount to a decision being made on an improper basis.” *Id.* at 639. The district court was “concern[ed] with getting into criminal conduct that does not touch on someone’s credibility or veracity.” For that reason, the district court allowed the false-information conviction, which touched on J.O.’s credibility, but excluded the remaining convictions, which did not. We discern no abuse of discretion in this ruling.

c. Admissibility of testimony that another participant was not charged

Appellant argues that the district court abused its discretion by permitting a witness to testify that R.G., who also participated in the attack, was not charged with a crime. Relevant evidence is generally admissible, while evidence that is not relevant is not admissible. Minn. R. Evid. 402. Relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Minn. R. Evid. 403. “Generally, evidence is relevant and has probative value when it logically tends to prove or disprove a material fact in issue.” *State v. Mosley*, 853 N.W.2d 789, 797 (Minn. 2014).

Here, the jury heard testimony that J.O. and R.G. fought in the apartment building. The prosecutor moved to introduce evidence that R.G. was not charged with a crime,

despite hitting J.O. The prosecutor argued that such evidence could be used to show bias, in that appellant was trying to place responsibility for the crime solely on R.G. The district court permitted the state to ask two questions about whether the witness knew that R.G. was not charged with a crime. We determine that the evidence was relevant to the state's case, and the probative value of the questions was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury. The district court's ruling does not constitute an abuse of discretion.

d. Prosecutorial misconduct

Appellant argues that he was deprived of a fair trial because the state failed to prevent a police officer from testifying that appellant had an outstanding probation warrant from the United States Marshals. The standard of review depends on whether the defendant objected at trial. *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). Where, as here, the defendant objects, we use a two-tiered harmless-error test based on the seriousness of the misconduct. *Id.* We review “unusually serious” prosecutorial misconduct to determine whether the misconduct was harmless beyond a reasonable doubt, while less-serious prosecutorial misconduct requires an analysis of “whether the misconduct likely played a substantial part in influencing the jury to convict.” *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quotation omitted). We conclude that appellant is not entitled to relief under either standard because, even assuming misconduct occurred, the alleged misconduct was harmless beyond a reasonable doubt.

“The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements.” *State v. McNeil*, 658 N.W.2d 228, 232 (Minn.

App. 2003). Improper testimony by a state's witness may be considered prosecutorial misconduct and justify reversal. *State v. Mahkuk*, 736 N.W.2d 675, 689-90 (Minn. 2007). We are "much more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony." *McNeil*, 658 N.W.2d at 232. "[A]n intentional elicitation of impermissible testimony, although erroneous, will warrant reversal only when it is likely that the impermissible testimony substantially weighed on the jury's decision." *Id.*

The state presented evidence from a Brooklyn Park police officer who spoke with appellant during a traffic stop. The officer testified that appellant could not provide an identification card and gave the officer an incorrect name. The testimony continued:

PROSECUTOR: Okay. What did you do to find out the correct ID of the person?

OFFICER: Well, with the previous information I had received I looked up the previous report with the suspect from this robbery or assault issue which was [appellant]. I ran his full name and date of birth. I brought up a photograph of him and it was clearly the driver that I had been speaking with.

PROSECUTOR: Okay. And do you see that person in the courtroom today?

OFFICER: Yes, I do. [Witness identifies appellant.]

...

PROSECUTOR: Okay. And then after you identified [appellant] as the driver what did you do next?

OFFICER: I knew he was lying and I also saw that a warrant appeared for his arrest, I did have that previous information that he had a warrant from the U.S. Marshals for a probation—

Even if we assume an error occurred, we determine that the alleged misconduct is harmless beyond a reasonable doubt. Factors relevant to this determination include "how

the improper evidence was presented, whether the state emphasized it during trial, whether the evidence was highly persuasive or circumstantial, and whether the defendant countered it.” *State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007). Here, the evidence amounted to a single phrase and the prosecutor did not deliberately attempt to elicit the information from the officer. *See State v. Wilford*, 408 N.W.2d 577, 580 (Minn. 1987) (concluding that brief and isolated comments from witness were unlikely to have had a substantial impact on the verdict). The defense attorney objected and moved to strike. The district court sustained the objection and instructed the jury to disregard the officer’s last statement. The prosecutor did not attempt to elicit the information again after the court sustained the objection. *See Whitson*, 876 N.W.2d at 304-05.

Additionally, the district court immediately issued a curative instruction and advised the jury to “disregard that last response about any warrant, that’s totally unrelated to anything here and you shouldn’t consider it in your deliberations at all.” We presume that the jurors follow the district court’s instructions, and that the curative instructions were effective in ameliorating the risk of prejudice to appellant. *See State v. Gatson*, 801 N.W.2d 134, 151 (Minn. 2011) (noting that curative instructions lessen the risk of prejudice). Because the alleged misconduct was harmless beyond a reasonable doubt, we determine that the reversal on the basis of prosecutorial misconduct is not warranted.

e. Violation of discovery rules

Appellant argues that the state violated the discovery rules by failing to timely disclose a body-camera recording. During trial, an officer testified that he interviewed J.O., and that the interview was captured in a body-camera recording. The prosecution and the defense were unaware of the recording. The defense requested a continuance, which the district court granted.

“If a party fails to comply with a discovery rule or order, the court may, upon notice and motion, order the party to permit the discovery, grant a continuance, or enter any order it deems just in the circumstances.” Minn. R. Crim. P. 9.03, subd. 8. The district court is particularly well-suited to determine the appropriate remedy for the violation and has discretion in deciding whether to impose sanctions. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). The district court considers “(1) the reason why the disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors.” *Id.* Whether a discovery violation occurred is a question of law, which we review de novo. *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004). We review a trial court’s decision on whether to impose sanctions for discovery violations for an abuse of discretion. *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998).

The district court considered the relevant factors and granted appellant’s request for a continuance. First, the district court considered the reason for the state’s failure to disclose the evidence to the defense. The district court noted that the wrong case number was assigned to the body-camera recording, and the prosecution was unaware of the

recording. Second, the district court addressed the prejudice to appellant. Even when a discovery violation occurs, the state's violation of a discovery rule will not result in a new trial absent a showing that appellant was prejudiced. *State v. Palubicki*, 700 N.W.2d 476, 490-91 (Minn. 2005). The district court did not believe that the state intentionally withheld the recording, but acknowledged that the late disclosure "might have impacted" how the defense prepared and presented the case. Third, the district court considered the feasibility of rectifying the prejudice with a continuance. Defense counsel requested a three-day continuance to review the recording, which the district court granted. Lastly, the district court considered other relevant factors. Counsel sought to play a portion of the recording to the jury and agreed on an introductory instruction. The district court read the agreed-upon instruction to the jury and played a portion of the recording to the jury.

Based on this record, we determine that the district court adequately considered the relevant factors and determined that a continuance, coupled with an explanatory instruction to the jury, cured any potential prejudice to appellant. We conclude that the district court's decision to grant a continuance based on the state's failure to comply with a discovery rule constitutes an appropriate remedy.

f. Cumulative effect of errors

Appellant argues that the cumulative effect of the alleged evidentiary errors deprived him of a fair trial. In rare cases, "the cumulative effect of trial errors can deprive a defendant of his constitutional right to a fair trial when the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012)

(quotation omitted). Because we determine that there were no trial errors, we conclude that appellant was not denied a fair trial.

II. The district court did not abuse its discretion by denying appellant’s motion for a new trial as untimely.

Appellant argues that the district court abused its discretion by denying his motion for a new trial on the basis of newly-discovered evidence. A district court may grant a new trial in the interests of justice or any of the six grounds for a new trial articulated in Minnesota Rule of Criminal Procedure 26.04, subd. 1(1). The motion must be served within 15 days after the verdict and must be heard within 30 days of the verdict, unless the court extends the period for good cause. *Id.*, subd. 1(3). However, the rules of criminal procedure do not allow a district court to extend the deadline for serving a new-trial motion. Minn. R. Crim. P. 34.02. We review a district court’s denial of a new-trial motion for an abuse of discretion. *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008).

The jury returned its verdict on April 30, 2018. Appellant filed a motion for a new trial on May 16, 2018—more than 15 days after the verdict. The district court denied the motion as untimely under rule 26.04, and advised counsel that the court could not extend the time to file the motion under rule 34.02. Appellant concedes that the new-trial motion was filed after the filing deadline, but urges this court to review the motion on its merits. We decline to do so. “The rules of criminal procedure do not permit the district court to extend the deadline for serving a new-trial motion.” *State v. DeLaCruz*, 884 N.W.2d 878, 884 (Minn. App. 2016). While rule 34.02 allows the district court to extend some deadlines, the rule “specifically excludes the deadline for a defendant’s new-trial motion.”

Id. (citing Minn. R. Crim. P. 34.02 (providing that a court “may not extend the time for taking any action under Rule[] . . . 26.04, subd. 1(3)”). It is uncontested that appellant’s new-trial motion was untimely. Consequently, the district court did not abuse its discretion in denying the motion.

Affirmed.