STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1707

State of Minnesota,
Respondent,

vs.

Gary Curtis Weidner,
Appellant.

Filed August 25, 2009
Affirmed
Ross, Judge

Cottonwood County District Court
File No. 17-CR-06-640

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Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Some rumors should rest untested. Four teenage girls aimlessly driving in Windom ten days before Halloween recalled rumors about a "scary house" that, "if you

honked your horn at the property," the crazy owner "would come out and shoot at you." The girls drove a car equipped with the requisite horn and had a bit more curiosity than caution. So when nothing happened after they drove by once, honking, they just had to try again. This seemed reasonable because one of the girls remembered that the *specific* rumor was that "if you came back around the second time, they would shoot at you." As they made their second pass, the teenagers heard a gunshot, one of them yelled, "He shot at us!" and all the girls screamed in unison. The young driver panicked, immediately accelerated, and drove the car out-of-control into a ditch where it rolled onto its side. Police arrived six minutes later to help the uninjured-but-terrified teenagers, and officers found a bullet lodged in the car's door.

The owner of the "scary house," Gary Weidner, now appeals his conviction of four counts of second-degree assault that followed a bench trial in Cottonwood County. Weidner argues that his convictions should be reversed for two reasons. He contends that the district court abused its discretion by admitting irrelevant and unduly prejudicial evidence of his past conduct and that the evidence introduced at trial is insufficient to sustain his convictions. Because we conclude that it was not unduly prejudicial to admit the evidence of Weidner's prior conduct and because sufficient evidence supports the convictions, we affirm.

FACTS

On October 20, 2006, four teenage girls were "cruising the strip" in Windom, Minnesota. At around 11:00 p.m., the girls decided to drive outside of town to a "scary

house" they had heard rumors about. The girls had heard "a little myth" that "if you honked your horn at the property" the owner "would come out and shoot at you."

At around 11:15 p.m., Kaylee Grove drove the girls past the house in her parents' Mercury Sable. They noticed one light on in the yard and a surveillance camera on the mailbox. They saw no one in the yard. They passed the driveway while Grove honked the horn twice. No one shot at them.

The girls continued approximately half a mile. Grove turned the car around and they decided to drive by the house again because one of the girls had heard that "if you came back around the second time, they would shoot at you." As the girls approached the house on the second pass, they saw change; a second light near the house was on. But they noticed no one in the yard. As they passed the driveway, Grove again honked the horn. The girls heard a sudden gunshot and almost simultaneously heard a "thud" on the passenger's side of the car, which faced the "scary house." April Buhler, sitting in the front passenger seat, yelled, "He shot at us!" and all the girls screamed. Grove accelerated in fear and quickly lost control of the car. It veered into the ditch and onto its side.

The girls crawled out the rear passenger door and used a cellular phone to call for help. They hid behind the car and awaited the police. Police arrived six minutes later. Officers tipped the car back onto all four wheels and found a bullet hole in the front passenger door. Lead fragments from a bullet were lodged in the door. Grove testified at trial that the bullet hole had not been there earlier.

The scary house belongs to Gary and Marian Weidner. It is the only house in the immediate vicinity of the shooting. The day after the shooting, police executed a search warrant at the residence. Deputy Jeff LaCanne found more than 20 guns and interviewed Gary Weidner about the incident. Weidner admitted that he was home the night before and that he heard a car drive northbound at 11:17 p.m. He told the deputy that, five minutes later, he heard a car traveling southbound. Weidner also recalled that both times the vehicle passed, he heard its horn honk. But he denied shooting at the car and claimed to have heard no gunfire. Deputy LaCanne asked Weidner if the bullet in the car door would match any of his guns, and Weidner admitted it was possible.

The state charged Gary Weidner with four counts of second-degree assault with a dangerous weapon. It moved to introduce evidence of other incidents in which Weidner either threatened people with guns or shot at people that came near his property. Weidner opposed the state's motion, and he moved to dismiss the charges for lack of probable cause.

The district court held a hearing in which several individuals testified about Weidner threatening them with guns or firing at them when they came near his property. The state also offered police reports detailing those incidents. The district court denied Weidner's motion to dismiss and held that the state could introduce evidence of Weidner's prior acts.

Weidner waived his right to a jury trial and the case was tried to the district court. At the beginning of the bench trial, Weidner renewed his objection to the evidence of his prior acts. But based on the district court's prior ruling, he stipulated that the transcripts

and exhibits from the prior hearing would be included in the trial record. The district court found Weidner guilty of four counts of second-degree assault and sentenced him to 45 months in prison. This appeal follows.

D E C I S I O N

I

Weidner argues that his convictions should be reversed because the district court abused its discretion by admitting evidence of Weidner's prior acts, which he contends was irrelevant and more prejudicial than probative. As a general rule, evidence of other crimes or bad acts, known as *Spreigl* evidence, is inadmissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But *Spreigl* evidence may be admitted to prove other things, such as motive, opportunity, intent, preparation, knowledge, identity, or common scheme or plan. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 687–88 (Minn. 2006). The district court has broad discretion in determining the admissibility of *Spreigl* evidence and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996).

To prevail on his challenge, Weidner must establish that the district court erred by admitting the evidence and that he was prejudiced by the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). The supreme court has developed a five-step process to determine whether *Spreigl* evidence should be admitted:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and

> convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Ness, 707 N.W.2d at 685–86.

Weidner does not challenge the district court's analysis in the first two steps of the process. And the record plainly establishes that the state gave Weidner adequate notice that it intended to use *Spreigl* evidence at trial. Additionally, the state indicated that the basis for admitting Weidner's prior acts was "to show identity and common scheme or plan." But Weidner contends that the *Spreigl* evidence was inadmissible under steps three, four, and five. We therefore review each of the prior acts to determine whether (1) the evidence that Weidner committed the alleged acts was clear and convincing, (2) the *Spreigl* evidence is relevant and material to the state's case, and (3) the probative value of the *Spreigl* evidence outweighs its prejudicial effect. *See State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

Clear and Convincing Evidence

Weidner argues that clear and convincing evidence does not establish that he committed the prior acts because "only one of the previous incidents . . . resulted in criminal charges" and because one of the witnesses could not identify Weidner as the perpetrator. The district court found that all of the prior bad acts offered by the state were proved by clear and convincing evidence. We conclude that the district court did not abuse its discretion in concluding that four of the prior acts were proved by clear and

convincing evidence, but we conclude that the district court should not have admitted one of the alleged *Spreigl* incidents for lack of evidentiary support.

"The clear and convincing standard is met when the truth of the facts sought to be admitted is 'highly probable.'" *Kennedy*, 585 N.W.2d at 389. Uncorroborated testimony of the victim of a *Spreigl* offense can satisfy the clear and convincing standard. *Id*. The five *Spreigl* incidents were introduced by the state through the testimony of the eyewitness–victims. The state also offered police reports detailing several of the incidents. All witnesses, with the exception of Pat Engstrom, testified about how they encountered Weidner on or near his property and how Weidner used a gun to frighten them.

Conservation Officer Timothy Jenniges testified about his experience with Weidner. During deer-hunting season in November 1989, Weidner was outside on his property with a high-powered rifle. Jenniges approached Weidner to determine whether Weidner had a valid deer-hunting license. Although Jenniges was wearing his officer uniform, Weidner pointed the rifle at him as he approached. Weidner did not have a hunting license, but he informed Jenniges that he was not hunting; instead, he was patrolling his property, protecting it from trespassers.

Curtis Johnson, an employee of South Central Electric Association, testified about his 1995 encounter with Weidner. Johnson went to the Weidners' residence in February 1995 to read the electric meter. As Johnson read the meter, he heard the sound of a round being chambered for discharge in a pump-action shotgun. He turned to see Gary Weidner standing beside him, holding the gun. Weidner warned Johnson to call ahead

before coming onto his property. Johnson reported the incident and the police investigated, but the state filed no charges.

Brent Hanson also had a firearm encounter with Weidner in 1995. Hanson testified that he was hunting deer on property adjacent to the Weidner plot in November. He saw a sign posted on the west edge of the Weidners' property and approached it to read its details. But as he got close to it, someone fired a shot and Hanson heard a bullet whiz over his head. He looked in the direction of the shot and saw Gary Weidner dressed in camouflage and carrying a rifle equipped with a banana-style magazine. Hanson slowly backed away from the edge of Weidner's property, and Weidner followed him until Hanson got into his vehicle and drove away.

Keith Oeltjenbruns and Adam Schroeder had their Weidner episode in 1996. They testified about an incident during deer-hunting season in November. They explained that they shot a deer near the Weidners' property and were following its blood trail toward the property. Oeltjenbruns and Schroeder walked towards the Weidners' property to ask permission to enter and pursue the deer. But as they approached the property, they noticed Gary Weidner holding an assault rifle with a large magazine. Another person in the hunting group told Oeltjenbruns that the deer was getting up and Oeltjenbruns ran onto the road to observe it. Members of the hunting group then saw Weidner point his rifle at them, and they immediately took cover. Weidner did not fire at the group, and he eventually agreed to let them on the property to retrieve the downed deer.

After listening to this testimony, the district court determined that the state had proven by clear and convincing evidence that Weidner was involved in each of these

prior incidents. The district court did not abuse its discretion by drawing this conclusion because each witness was a victim of Weidner's prior conduct and the district court had the opportunity to judge the witnesses' credibility.

But we conclude that the district court lacked sufficient evidence and therefore exceeded its discretion by finding that the state had proven by clear and convincing evidence that Weidner was involved in the Pat Engstrom incident. Engstrom testified that she drove by the Weidner property in "early 1990–something" and that a friend traveling with her saw a man holding a gun. Engstrom did not identify Gary Weidner as the man with the gun and admitted that although she saw "a figure of a man" and a gun barrel, she could not identify the man and only "figured it was a [man]" because her friend said "Look, there is a guy." The district court admitted the testimony as *Spreigl* evidence because it found that it was "highly probable" that Weidner was the individual that was involved because Weidner owned the property at the time and "Engstrom's testimony was believable."

But it is not enough that Engstrom's testimony was believable because her testimony cannot clearly and convincingly establish that Weidner was the man that brandished the gun. The clear and convincing standard "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Kennedy*, 585 N.W.2d at 389 (quotation omitted). Engstrom's testimony falls short of that standard. Engstrom did not see Weidner, had no first-hand basis to testify convincingly that a man was holding the gun, could not identify or describe either the man or the gun, and could not recall even what year the incident occurred in. Considered with the other

Spreigl incidents, it becomes much more likely that Weidner was the person holding the gun when Engstrom's friend relayed the observation to Engstrom, but the state must prove each *Spreigl* incident by clear and convincing evidence. We are aware of no authority establishing that a district court may rely on factually supported *Spreigl* evidence as a basis to bolster otherwise factually unsupported *Spreigl* evidence, and the states points us to none.

Relevant and Material

Weidner contends that all the *Spreigl* incidents should have been excluded because none are relevant. He asserts that the prior acts were dissimilar to the current incident and they occurred more than 10 years ago. These arguments are unpersuasive. The prior incidents establish that Weidner had a common plan or scheme to patrol and protect his property with guns, and they are relevant to establish his identity as the person that shot at the teenagers' car. The district court did not abuse its discretion by concluding that the prior incidents show that Weidner had a common scheme or plan to defend his property by brandishing or discharging a firearm.

Additionally, merely because the incidents occurred more than 10 years earlier does not render them irrelevant. Timing is only one of several factors in determining the relevance of *Spreigl* incidents. District courts should consider "the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place or modus operandi." *Kennedy*, 585 N.W.2d at 390 (quotation omitted). And "the more distant the *Spreigl* act

is in terms of time, the greater the similarities as to place and modus operandi must be to retain relevance." *Ness*, 707 N.W.2d at 689.

The district court correctly observed that "all bad acts occurred in close proximity to [Weidner's] property." It also reasonably emphasized that "[Weidner] was always on his property while the individuals were either on his property or near it." The district court reasoned that all the prior incidents involved Weidner "either pointing his gun at the individuals or holding it in a way to scare them, even when they were not on his property." And there can be no contest to the district court's observation that these acts "establish[] that [Weidner] intended to portray force through his firearms, creating fear in the individuals near his property." This reasoning highlights the great similarity between the prior incidents and the incident giving rise to the conviction and links them tightly in both place and modus operandi. We recognize that only one of the prior acts included a firearms discharge, but all included the use of a firearm to defend property, making them markedly similar to the present offense. The district court concluded that "[b]ecause the place and modus operandi between the *Spreigl* evidence and the crimes charged are so similar, the Court does not feel that any remoteness in time makes the *Spreigl* evidence irrelevant." This reasoning is unassailable. We affirm the district court's conclusion that Weidner's prior acts were relevant and material.

Probative Value versus Prejudicial Effect

Weidner argues that the probative value of the *Spreigl* evidence is greatly outweighed by its prejudicial effect. He also argues that the district court erred by

considering the state's need for the *Spreigl* evidence in determining whether to admit it. These arguments fare no better than the last.

The supreme court recently noted that "[t]he use of *Spreigl* evidence to show common scheme or plan has been endorsed repeatedly, despite the particular risk it poses for unfair prejudice." *Ness*, 707 N.W.2d at 687. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. The supreme court has explained that "when balancing the probative value of *Spreigl* evidence against the potential for unfair prejudice . . . court[s] must consider how necessary the *Spreigl* evidence is to the state's case." *Kennedy*, 585 N.W.2d at 391 (quotation omitted).

And when "other evidence is weak or inadequate, and the *Spreigl* evidence is needed as support for the state's burden of proof," the evidence should be admitted. *Id*. As the supreme court has noted, many commentators agree that "the need for the evidence is . . . perhaps even the major factor[] to be considered in deciding whether the danger of unfair prejudice outweighs the probative value of [*Spreigl*] evidence." *Ness*, 707 N.W.2d at 690. The *Ness* court directed district courts to "address the need for *Spreigl* evidence in the context of balancing the probative value of the evidence against its potential for unfair prejudice." *Id*. The district court's order addressing the *Spreigl* evidence demonstrates that it did exactly that. The district court did not err by considering the state's need for the *Spreigl* evidence, and it did not abuse its discretion by concluding that the probative value of the *Spreigl* evidence was not outweighed by any unfair prejudice.

Although the district court exceeded its discretion by admitting evidence of the Pat Engstrom incident, for Weidner's convictions to be reversed, Weidner must establish that he was prejudiced by the error. *State v. Loebach*, 310 N.W.2d at 64. He cannot meet this burden in light of the short parade of witnesses who testified convincingly about his armed, terroristic, property-patrolling pattern of intimidation.

Prejudice is shown when "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). In considering this issue, a reviewing court examines the entire record. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995). Reviewing the entire record, including all the other properly admitted *Spreigl* incidents and the circumstantial evidence implicating Weidner as the shooter (*see* Issue II, below), there is no reasonable possibility that the wrongfully admitted incident significantly affected the verdict.

II

Weidner also argues that the evidence is insufficient to convict him on four counts of second-degree assault. He specifically contends that the state introduced "no hard evidence" and the circumstantial evidence does not "exclude all other reasonable hypothes[es]." He insists that because no witness actually saw him holding a gun in this incident and the state offered no evidence of his intent, his convictions must be reversed. We are not convinced by his arguments.

We review a claim of insufficiency of the evidence to determine whether a factfinder could reasonably conclude that the defendant is guilty of the charged offenses beyond a reasonable doubt. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). When

making this review, we consider all the facts in the record and all legitimate inferences that can be drawn in favor of the convictions from those facts. *Id*. Weidner's convictions were based entirely on circumstantial evidence. "[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). But circumstantial evidence nevertheless has "the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). A factfinder is in the best position to balance circumstantial evidence, and its verdict is entitled to deference on appeal. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

The district court found Weidner guilty of four counts of second-degree assault in violation of Minnesota Statutes section 609.222, subdivision 1 (2006). For his convictions to be sustained, the evidence must reasonably support the conclusion that Weidner "assaulted" the four girls with a "dangerous weapon." *See* Minn. Stat. §§ 609.222, 609.02, subds. 6, 7, 10 (2006); 10 *Minnesota Practice* CRIMJIG 13.10 (2006). An assault includes "an act done with intent to cause fear in another of immediate bodily harm or death," and a firearm is a "dangerous weapon." Minn. Stat. § 609.02, subds. 6, 10. Intent may be proven with circumstantial evidence "by drawing inferences . . . in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

The evidence presented at trial, viewed in the light most favorable to the verdict, amply supports the guilty verdict. The evidence leads to the reasonable conclusion that a bullet was fired from a gun on the Weidners' property and that Gary Weidner fired it.

The facts belie Weidner's argument that there is no evidence that a gun was fired. April Buhler, who was in the passenger seat of the car, testified that just as they passed the Weidners' driveway, she heard a gunshot. She identified the sound because she grew up around guns and is a hunter. She also had a rather unique perspective about the sound of the bullet hitting the car. She explained that she could identify that sound because she remembered hearing the same sound when she accidentally shot her father's truck. After the police tipped the car back onto four wheels, they discovered a bullet hole and bullet fragments in the car door. Grove testified that the hole was not in the car before she began driving it that night.

The evidence proved that the bullet hit the side of the car that was closest to the Weidner property. Grove explained that the car was travelling southbound when it was hit, and the Weidner property sits on the west side of the road. The evidence also established that the bullet hit the car just as it passed the Weidners' surveillance-rigged mailbox. And the nearest house besides the Weidners' is one-quarter mile from the place that Grove's car was shot and on the other side of the road. Plenty of evidence supports the finding that the bullet was fired from the Weidner property.

The evidence also supports the finding that Gary Weidner was the shooter. Marian Weidner testified that both she and Gary Weidner were home when the shooting occurred. After the shooting, neither the victims nor the police saw any person wandering near the area. The testimony and trial exhibits show that the Weidners have a sophisticated surveillance system apparently designed to notify them if someone is on or near their property. The *Spreigl* evidence certainly establishes that Weidner was

unusually vigilant about protecting the integrity of his borders, and in his discussions with police he did not mention any interlopers that evening. When asked by Deputy LaCanne if the bullet in the car door would match any of his guns, Gary Weidner admitted that it was "possible" that it would. Although Marian Weidner testified that her husband did not go outside and that she heard no gunshot, she had previously told the police that Gary Weidner "could have" stepped outside the house during the relevant time without her noticing because she was in the upstairs bedroom. And a factfinder might be inclined to consider the credibility of Mrs. Weidner's exculpatory comments about Mr. Weidner under the intimidating weight of Mr. Weidner's disproportionate, deadly-force reactions to his perception of potential boundary trespasses, even by uniformed officials on official business. The district court was in the best position to weigh the credibility of the testimony, and its conclusion that the shot was fired by Gary Weidner, not someone else, is reasonably supported by the evidence.

Weidner finally contends that no evidence was presented to prove his intent. He also argues that "[i]f there was a gun shot and the shooter had no knowledge that the vehicle was there then the State does not have sufficient evidence to convict." He cites an overruled court of appeals case to support his proposition. *State v. Hough*, 571 N.W.2d 578 (Minn. App. 1997), *rev'd* 585 N.W.2d 393 (Minn. 1998). Weidner's argument fails for at least three reasons.

First, the modus operandi evidence indicates that the shot, fired from the Weidners' property, was intended to "cause fear of immediate bodily harm" by use of deadly force in defense of his real estate. Second, the idea that the shooter was unaware

of the car's presence does not stand well against the testimony that even from inside the house Weidner was aware of a car twice passing the property. And third, the supreme court opinion that overruled the decision that Weidner relies on held that "[w]hen an assailant fires . . . into a home, it may be inferred that the assailant intends to cause fear of immediate bodily harm or death to those within the home." *Hough*, 585 N.W.2d at 397. Intent may be inferred because the factfinder may assume that a person intends the natural and probable consequences of his actions. *Id*. at 396. The factfinder here could infer that Weidner knew the car was passing when he shot, fired intentionally toward the passing car, and intended to cause fear of immediate bodily harm or death to everyone in the car.

We affirm Weidner's convictions as to each count of second-degree assault.

Affirmed.