STATE OF MINNESOTA
IN COURT OF APPEALS
A09-476

State of Minnesota,
Respondent,

vs.

Jose Andres Munguia, Jr.,
Appellant.

Filed March 16, 2010
Reversed and remanded
Stoneburner, Judge

Olmsted County District Court
File No. 55K705002390

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

Mark A. Ostrem, Olmsted County Attorney, Karen Sullivan Hook, Assistant County Attorney, Rochester, Minnesota (for respondent)

Marie Wolf, Interim Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of gross-misdemeanor harassment, arguing that the district court committed reversible error by admitting *Spreigl* evidence and that

the jury instructions deprived him of the right to a unanimous verdict. We conclude that the district court did not abuse its discretion in admitting *Spriegl* evidence except for the evidence that one *Spriegl* witness saw his exposed penis, but the jury instructions deprived appellant of his right to a unanimous verdict, entitling him to a new trial. Therefore, we reverse and remand.

FACTS

On August 31, 2004, 15-year-old S.M. was delivering newspapers in a residential area in Rochester when a black car with tinted windows kept circling and passing her at a slow speed. The driver's side and passenger's side windows were down and the driver leaned far back in his seat and stared at S.M. as he passed her. S.M.'s paper route was on a street that makes a loop and was not usually travelled by nonresidents. S.M. estimated that the car passed her ten times. After it passed her, the car would speed up, then come around the loop and slowly pass her again. At one point, when S.M. was coming down a driveway, the car was either stopped or was going very slowly, and the driver leaned back so that S.M. could not see his hands. The car continued to pass her until one of her customers arrived home, at which point the car left the area. On September 2, 2004, while S.M. was on her paper route, the same car again drove around the loop. Other people were outside at the time, and the car only passed S.M. once.

On September 7, 2004, while S.M.'s mother was driving S.M. on part of her paper route, they saw that police had pulled over a black car for a traffic stop. S.M. recognized the car and the driver as the car and driver that passed her repeatedly on August 31 and once on September 2. S.M.'s mother stopped at the scene and told the officers about her

daughter's experience with the car and driver. S.M. later gave a formal statement to the police and identified appellant Jose Andres Munguia, Jr., as the driver of the car.

Munguia admitted that he had been in the vicinity of S.M.'s paper route on August 31. He told police that he was in the neighborhood looking for the house of a person who was going to sell him a book he needed for a class.[1] At trial he testified that he got the directions mixed up and was looking for the person's vehicle. He testified that he saw a girl on her paper route and wanted to ask her if she knew where the person lived, but she looked away when he put his window down so he drove away. Munguia was charged with gross-misdemeanor harassment of S.M. in violation of Minn. Stat. § 609.749, subd. 2(a)(2) (2004),[2] "committed on August 31 through September 2, 2004."

The state introduced *Spreigl* evidence from H.M. and B.Z. They testified that H.M. reported a suspicious incident to police on August 24, 2004. That day a small black car passed H.M. and her 16-year-old friend B.Z. about ten times as they walked with H.M.'s six-year-old daughter to the Boys and Girls Club in Rochester. When they turned off one street onto another, the car followed. The car would come up behind them and travel very slowly alongside them, then would speed up and reappear from behind them a few moments later. The behavior continued for 15-20 minutes on different streets, until they reached their destination. H.M. testified that the driver stared at them as he crept by, and he would lean back in his seat. The last time he passed by, H.M. saw

[1] Munguia's trial testimony differed in some respects from what he initially told police.
[2] The statute provides that "[a] person who harasses another by committing any of the following acts is guilty of a gross misdemeanor: . . . stalks, follows, monitors, or pursues another…" Minn. Stat. § 609.749, subd. 2(a)(2).

the driver's exposed penis near the steering wheel as he leaned back. H.M. and B.Z. were disturbed. They noted the description of the car, including the license-plate number. They described the driver as Hispanic with dark hair and wearing an orange shirt. Munguia, who is Hispanic with dark hair, drives a car owned by his father that matches the description of the car involved in the August 24 incident. Munguia admitted that he is the only person who drives that vehicle but denied that he saw H.M. and B.Z. on August 24 or engaged in the conduct described by them.

S.J. also testified at Munguia's trial about an incident on September 2, 2004, when she was ten years old. S.J. was walking home from school and, as she passed a junkyard, a car pulled out of the driveway and blocked her path. The driver stared at her as she walked around the front of his car. She described the driver as Hispanic with golden-colored skin and spiky black hair.[3] The car then paced her as she walked to the corner, creeping along beside her. The car turned the corner but then came back and passed her once more. S.J. was frightened and told her parents about the incident. She later made a report to police that resulted in the issuance of a "be-on-the-lookout" (BOLO) for the car and driver that she described. The BOLO led to the stop of Munguia on September 7, 2004, and it was during this stop of Munguia that S.M. and her mother saw the car and stopped to report that this was the car and driver that had followed S.M. on August 31 and September 2. Munguia admitted that he was the driver of the vehicle described by S.J. and had pulled his car out in front of an 8- or 12-year-old girl who appeared to be

[3] One of the officers who stopped Munguia on September 7 testified that Munguia had "spiked hair in front."

walking home from school. He said he was on his way to work but had forgotten his badge, so he turned around and went to his house to get it.

The state offered evidence of the August 24 incident involving H.M. and B.Z. and the September 2 incident involving S.J. to show common scheme or plan, motive, and absence of mistake or accident. The district court gave a separate, standard, CRIMJIG-2.01[4] cautionary instruction before the testimony about each incident, and the same cautionary instruction was given in the final instructions.

During the discussion of final instructions, the prosecutor initially amended the complaint to omit any reference in the charge to September 2, 2004. Munguia's attorney then requested an instruction to the jury that, despite all of the evidence about the incident involving S.J. on September 2, 2004, the charges against Munguia relating to September 2, 2004, were dismissed. The prosecutor, candidly admitting that perhaps the September 2, 2004 incident "doesn't fully meet all the elements," nonetheless withdrew the amendment and reinstated the September 2, 2004 charge. During closing argument, the prosecutor told the jury that it did not have to find that Munguia's act took place on August 31 and September 2: "either one is sufficient." The jury was instructed that they

[4] The district court instructed the jury pursuant to 10 *Minnesota Practice*, CRIMJIG 2.01, that the evidence

> was admitted for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the complaint. This evidence is not being offered as proof of the character of the defendant or that the defendant acted in conformity with such character. The defendant is not being tried for and may not be convicted of any offenses other than the charged offense. You are not to convict the defendant on the basis of an alleged occurrence on [the date of each incident] . . . To do so might result in unjust double punishment.

could find Munguia guilty of harassment of S.M. if they found that his act took place on or about August 31, 2004 and/or September 2, 2004.

The jury found Munguia guilty as charged. The district court stayed imposition of sentence and put him on probation for three years with conditions. This appeal followed.

D E C I S I O N

I. Instructing the jury that Munguia could be convicted of harassment for an act that occurred on August 31 and/or September 2 constituted plain error and deprived him of a unanimous verdict.

Munguia did not formally object to the "and/or" jury instruction. "A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver" of the right to challenge the instructions on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). "Nevertheless, a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights . . . ." *Id.* Plain error is (1) error; (2) that is plain; and (3) affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

Minnesota requires unanimous jury verdicts in criminal cases. Minn. R. Crim. P. 26.01, subd. 1(5); *State v. Hart*, 477 N.W.2d 732, 739 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992). Juries must unanimously agree on whether a defendant committed the act or acts that constitute an element of the crime charged. *See State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001) (holding that unanimity requirement was violated when one count of possession was charged but two distinct acts of possession in time and

place, and two distinct defenses, were argued to the jury). "Where jury instructions allow for possible significant disagreement among jurors as to what [criminal] acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." *Id*. at 354 (*citing State v. Begbie*, 415 N.W.2d 103, 105 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988)).

This court has cautioned against the use of "either/or" jury instructions as unclear and potentially raising doubt about the unanimity of the jury verdict. *Hart*, 477 N.W.2d at 739. In this case, the district court instructed the jury that it had to find that the state proved beyond a reasonable doubt that "the defendant's act took place on or about August 31, 2004 and/or September 2, 2004." The instruction leaves in doubt what act constituted harassment. The instruction is particularly troubling in light of the lack of any evidence of harassment of S.M. on September 2 and the considerable *Spreigl* evidence from S.J that could have constituted harassment of her on September 2.

Munguia relies on *Stempf*, 627 N.W.2d 352, to support his argument that the district court erred in not providing a more specific unanimity instruction. In *Stempf*, this court held that the defendant was denied his right to a unanimous jury verdict where the state charged the defendant with one count of possession but introduced evidence of two different acts of possession, either one of which could support a conviction, one at defendant's place of employment and another in the truck he was riding in as a passenger. *Id.* at 357. This court held that the two different acts of possession "lack[ed] unity of time and place," and therefore the defendant was entitled to a jury instruction requiring the jury to unanimously agree upon which act of possession warranted a

conviction. *Id.* at 358–59. In this case, there was evidence that Munguia drove past S.M. once on September 2, but there was also evidence that Munguia followed S.J. on September 2. The record demonstrates that the prosecutor did not believe that Munguia's conduct of driving past S.M. on September 2 met the elements of the charge. And, on appeal, the state concedes that the jury could not possibly have convicted Munguia for harassment based on his having driven past S.M. once on September 2. Because there is insufficient evidence in the record to support a verdict against Munguia for his act of driving past S.M. on September 2, the instruction and the prosecutor's argument made it likely that, despite the cautionary instruction about the use of *Spreigl* evidence, some of the jurors may have convicted Munguia based on his acts toward S.J. on September 2, thereby not only depriving him of a unanimous verdict but also finding him guilty of an uncharged offense. Because it is not possible to tell whether the jury unanimously convicted Munguia for the acts committed against S.M. on August 31, we conclude that he is entitled to a new trial. We address the admission of evidence of Munguia's uncharged conduct because that issue may recur in a new trial.

II. Admission of *Spreigl* evidence that Munguia followed other young girls was not an abuse of discretion.

Spreigl evidence is evidence of other crimes or bad acts. *See State v. Spreigl*, 272 Minn. 488, 497, 139 N.W.2d 167, 173 (1965) (establishing procedures for introduction of additional crimes and misconduct). The admission of *Spreigl* evidence lies within the district court's sound discretion and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996).

Spreigl evidence is not admissible to prove the defendant's character or to show that the defendant acted in conformity with that character during the commission of the charged offense. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But *Spreigl* evidence may be admissible to prove motive, intent, common scheme or plan, or absence of mistake or accident. *Kennedy*, 585 N.W.2d at 389. If the district court erred in admitting evidence, the reviewing court determines whether 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). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.* To prevail, an appellant must therefore show both error and prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Five requirements must be met before *Spreigl* evidence is admitted: (1) notice provided by the state; (2) an offer of proof; (3) clear and convincing evidence that the defendant participated in the prior acts; (4) relevance and materiality to the state's case; and (5) probative value outweighing any potential for unfair prejudice. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 685–86 (Minn. 2006). Munguia argues that the district court committed reversible error when it admitted *Spreigl* evidence in this case because there was not clear and convincing evidence that he was the driver in the August 24 incident; neither the incident on August 24 nor the incident on September 2 was relevant; both incidents lacked probative value; and both incidents were unduly prejudicial.

A. Clear and convincing evidence of August 24 incident

Whether evidence of a prior act is clear and convincing "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). The clear and convincing standard is met when the truth of the facts sought to be admitted is "highly probable." *Id.* Uncorroborated testimony of a single witness can meet the standard of proof by clear and convincing evidence. *Kennedy*, 585 N.W.2d at 389 (stating that there is no apparent reason to require that a *Spreigl* victim's testimony must be corroborated in order to meet the clear and convincing standard). The supreme court has on numerous occasions admitted *Spreigl* evidence supported only by the testimony of the victim in the *Spreigl* offense. *See, e.g., Kennedy*, 585 N.W.2d 385; *State v. Wermerskirchen*, 497 N.W.2d 235 (Minn. 1993); *State v. DeBaere*, 356 N.W.2d 301 (Minn. 1984).

In this case, H.M. and B.Z. indentified, by description and license plate, the car that Munguia admits only he drives. They also described the driver in terms that matched Munguia. The district court's determination that H.M. and B.Z.'s testimony about what occurred was credible, clear-and-convincing evidence of Munguia's participation in the incident was within its discretion. *See State v Ness*, 707 N.W.2d at 686 (stating that district court's determination that *Spreigl* witness was credible and that defendant's participation in incident described by witness was clear and convincing were within the district court's discretion).

B. Relevance and probative value of *Spreigl* evidence

"In determining the relevance and materiality of *Spreigl* evidence, the [district] court 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). *Spreigl* evidence offered for the purpose of demonstrating a common scheme or plan "must have a marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688. "[I]f the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded." *State v. Wright*, 719 N.W.2d 910, 917–18 (Minn. 2006) (quotation omitted). However, "absolute similarity between the charged offense and the *Spreigl* offense is not required to establish relevancy." *State v. Landin*, 472 N.W.2d 854, 860 (Minn. 1991). Our "review for abuse of discretion reflects the fact that the district court is best positioned to weigh th[e] factors" relevant to determining the relationship between the offenses. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005).

Relevance is gauged by similarity in time, place, and modus operandi: "the closer the relationship between the other acts and the charged offense, in terms of time, place, or modus operandi, the greater the relevance and probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose." *Ness*, 707 N.W.2d at 687.

In this case, all of the incidents occurred within a matter of days. Munguia followed H.M. and B.Z. on August 24, seven days before S.M. alleges that he followed

her on August 31. Munguia followed S.J. two days later on September 2. And all of the incidents were "relatively close in terms of place" because all occurred on streets in the same area of Rochester. The three incidents also share a number of similarities in modus operandi. *See Kennedy*, 585 N.W.2d at 391 (noting that modus operandi was "nearly identical" in *Spreigl* incident and charged offense). In all three situations, Munguia drove his car slowly past young girls in a manner that scared them or made them uncomfortable. In two incidents, he maneuvered his car to repeatedly appear behind the girls. And both S.M. and S.J. noted how the driver stared at them. The district court did not err in concluding that the incidents of August 24 and September 2 were relevant to show common scheme, motive, and absence of mistake.

Munguia contends that the *Spreigl* evidence was more prejudicial than probative, and therefore should have been excluded. *Spreigl* evidence, by its nature, is prejudicial, but the balancing analysis focuses on whether it "persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). To determine whether the potential for unfair prejudice outweighs the probative value of the evidence, courts must "balance the relevance of the [*Spreigl* evidence], the risk of the evidence being used as propensity evidence, and the State's need to strengthen weak or inadequate proof in the case." *State v. Fardan*, 773 N.W.2d 303, 309 (Minn. 2009).

Munguia's conduct on August 24, August 31, and September 2 of repeatedly appearing from behind, slowing down to pace the young women, then speeding up only to reappear, was strikingly similar. The evidence was probative of a common scheme or plan and absence of mistake and needed by the state to prove that S.M. was not mistaken

in her perception of the driver's focus on her. As Munguia states in his brief on appeal: "[t]he jury … was to decide if Munguia was intentionally following [S.M.] on her paper route or repeatedly passed her while looking for someone's house." *See State v. Wermerskirchen*, 497 N.W.2d 235, 241–42 (Minn. 1993) (affirming admission of other-crime evidence that was "highly relevant to the specific issue of whether the conduct on which the charge was based actually occurred or was . . . a fabrication or a mistake in perception by the victim"). We conclude that the district court did not abuse its discretion in holding that the probative value of the evidence of Munguia's following and staring at young women on August 24 and September 2, given the similarity of the evidence to the charged offense in terms of time, place, and modus operandi, outweighed the potential prejudicial effect of the evidence.

We agree with Munguia, however, that testimony regarding exposure of his penis should not have been allowed because the crime with which he was charged does not require proof of sexual motivation or intent and the testimony was therefore not relevant to the charge on which he was being tried. We conclude that the potential for prejudice of this evidence outweighed any probative value, and the district court abused its discretion by admitting evidence of this conduct as *Spreigl* evidence.

Reversed and remanded.