STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0448

State of Minnesota,
Respondent,

vs.

Stephen Louis Cobenais,
Appellant.

Filed April 15, 2013
Affirmed
Larkin, Judge
Dissenting, Rodenberg, Judge

St. Louis County District Court
File No. 69DU-CR-09-4022

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Mark D. Nyvold, Assistant State Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

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

LARKIN, Judge

Appellant challenges his convictions of second-degree intentional murder and unlawful possession of a firearm, arguing that the district court abused its discretion by allowing the state to introduce impermissible *Spreigl* evidence. Because we conclude that there was no reasonable possibility that the wrongfully admitted *Spreigl* evidence significantly affected the verdict, we affirm.

FACTS

Respondent State of Minnesota charged appellant Stephen Louis Cobenais with second-degree intentional murder and unlawful possession of a firearm based on an August 26, 2009, early morning incident during which Cobenais shot an acquaintance, M.H., in the head. The complaint alleged that the day before the shooting, Cobenais learned that his son had been removed from his care, leaving Cobenais "very angry and upset." A witness told police that she was in Cobenais's apartment that evening with Cobenais and M.H., and that they were "partying and listening to music." The witness heard M.H. say: "Get that gun out of my face." Cobenais said: "You better not say anything about my son again." The witness heard a shot a few minutes later, after which Cobenais said, "Everybody get the f-ck out." The witness had seen Cobenais with a gun earlier that evening. A second witness also had seen Cobenais with a gun earlier in the evening. The second witness told the police that she was sitting two feet away from Cobenais and M.H. when she heard a loud shot and saw M.H. fall to the ground. She and the other individuals in the apartment immediately fled.

Prior to trial, the state notified the district court and Cobenais that it would "offer evidence of [Cobenais's] acts on March 7, 2010, while at the Douglas County, Wisconsin, jail toward D.L." to "show intent, absence of mistake or accident." The state supplemented the notice with police reports alleging that Cobenais repeatedly punched D.L., a fellow inmate, in the face after D.L. told a correctional officer that Cobenais had stolen Pop-Tarts from him. D.L. suffered significant injuries, including several fractures around his left eye. Officers had to use pepper spray and a Taser to restrain Cobenais during the incident. The jail's surveillance system recorded the incident on video.

The district court held a hearing on the state's motion to admit evidence regarding the jail incident. Cobenais argued that the incident was not relevant or material to the state's case, that the danger of unfair prejudice and confusion of the issues substantially outweighed the probative value of the evidence, and that the "[s]tate's purpose in admitting this incident into evidence is as an 'end run' around the prohibition against character evidence." The state argued that the incident was relevant because "such behavior tends to show an intent to retaliate against those who [Cobenais] perceived as having wronged him; a pattern, if you will, of resorting to immediate self-help to maintain control over a situation. . . . [Cobenais] has displayed a *modus operandi* of intractable vengeance."

The district court ruled that the state could introduce testimony regarding the jail incident. Regarding the relevance of the incident, the district court stated that Cobenais's "response to [D.L.'s] accusation of stealing poptarts is relevant to whether [Cobenais's] response to [M.H.'s] statements about [Cobenais's] son was accidental. Therefore, the

jail assault is relevant and material to the [s]tate's case." The district court further stated that "it is fairly clear that the weakest point in the [s]tate's case is whether [Cobenais] intended to shoot [M.H.]," and "[b]ecause the jail assault is probative on the issue of whether [Cobenais] intended to harm another when he felt wronged in some way, its value outweighs the prejudicial effect."

At trial, the state called three witnesses to testify about the jail incident: a corrections officer from the jail, a detective with the Douglas County Sheriff's Department, and D.L. Additionally, the state played a portion of the jail's surveillance video depicting the assault for the jury. The district court provided a cautionary instruction regarding the evidence twice during the presentation of evidence and once during final instructions. The final instruction, which was identical in substance to the other two, warned the jury that the evidence regarding the "occurrence on March 7, 2010, at the Douglas County Jail . . . was admitted for the limited purpose of assisting you in determining whether [Cobenais] committed those acts with which [he] is charged in this [c]omplaint. . . . You are not to convict [Cobenais] on the basis of any occurrence on March 7, 2010, at the Douglas County Jail."

The jury heard other evidence regarding the issue of intent, including that M.H. told Cobenais that he was sleeping with the mother of his son; M.H. brushed up against Cobenais and "got in his face"; M.H. refused to leave the apartment when asked; M.H. told Cobenais "he didn't deserve to have his son," "he's not a fit father for him," and at six or seven months of age his son "ain't functioning right"; M.H. told Cobenais that the mother of his son was a "meth whore"; and that right before the gun discharged, M.H.

and Cobenais had a verbal altercation during which M.H. asked Cobenais, "[h]ow are you going to let the dopehead b-tch get your baby tooken?" The state also introduced evidence that during a standoff with the police, Cobenais stated "[M.H.] thought I was playing. I f-cking shot that N-gger."

Cobenais testified in his own defense. He told the jury that right before he pulled out the gun, he felt scared and disrespected because M.H. "pushed [him] in [his] face." Cobenais testified that after M.H. pushed him, he had "a really bad need for him to leave." He pulled the gun out from his pants, waved it, and told M.H.: "Let's go." After M.H. said, "[g]et that gun out of my face," Cobenais apologized by saying "[m]y bad." Cobenais testified that M.H. then hit the inside of his forearm, "[the gun] went off, and I shot him." Cobenais stated that he did not intend to shoot M.H. He summarized the shooting as follows: "I pulled [the gun] out. I believe I cocked it. As I was pulling it out, my finger was on the trigger, and I believe I thought he was maybe attempting to disarm me, and more of a reflex, I accidentally discharged it."

In addition to the charged offenses, the district court submitted the following lesser-included offenses to the jury: second-degree felony murder, first-degree manslaughter, and second-degree manslaughter. The jury found Cobenais guilty of second-degree intentional murder and unlawful possession of a firearm and not guilty of the lesser-included offenses. The district court sentenced Cobenais to serve 426 months in prison for second-degree murder and imposed a concurrent 60-month sentence for unlawful possession of a firearm. Cobenais appeals his convictions, arguing that the district court erred by allowing the state to introduce evidence regarding the jail incident.

D E C I S I O N

The admission of evidence of other crimes or bad acts, so-called *Spreigl* evidence, is reviewed for an abuse of discretion. *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007). If the evidence was erroneously admitted, this court must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009). If such a possibility exists, then the error is prejudicial and a new trial is required. *Id.*

Spreigl evidence is not admissible 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). "The overarching concern behind excluding such evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *Fardan*, 773 N.W.2d at 315 (quotations omitted). But the evidence may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b).

The supreme court has developed five requirements for admission of other-acts evidence:

> (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.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006). "*Spreigl* evidence may be admitted as relevant to the defendant's criminal intent, and the closely associated issue of absence of accident. The admission of such evidence requires an analysis of the kind of intent required and the extent to which it is disputed in the case." *Fardan*, 773 N.W.2d at 317 (quotation and citations omitted). "When it is unclear whether *Spreigl* evidence is admissible, the benefit of the doubt should be given to the defendant and the evidence should be excluded." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

Cobenais argues that the district court erred because the evidence regarding the jail incident was not relevant to whether he "intentionally pulled the trigger with the intent to cause [M.H.'s] death . . . since the jail incident involved neither a gun, nor even a situation in which [Cobenais's] intent was in question." Cobenais further argues that the evidence shows "only that [he] had a propensity to act violently." Cobenais's argument is persuasive.

The district court's stated rationale regarding the relevancy of the jail assault—that it "is probative on the issue of whether [Cobenais] intended to harm another when he felt wronged"—relies on the type of character evidence proscribed by rule 404. *See* Minn. R. Evid. 404(b) ("Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith."). The implicit logic behind the district court's rationale impermissibly relies upon character evidence as an inferential step between the jail assault and the intent element in the current case, i.e., the jail assault proves Cobenais's propensity to "harm another when . . . wronged" and shows that he acted in conformity with that propensity when he shot M.H. In sum, the

evidence invited the fact-finder to consider whether Cobenais acted in conformity with his propensity to "harm another when he felt wronged" when he shot M.H.

The state argues that the jail assault "showed a specific pattern of immediately responding to perceived challenges in an extreme manner," and "demonstrated a willingness to intentionally act without regard to the presence of witnesses or the certainty of significant criminal sanctions." Thus, the state advances a broad and explicit propensity argument to establish the relevancy of the jail assault: because the jail assault demonstrated Cobenais's "willingness" to act in a way that would bring "criminal sanctions," the evidence is relevant to show that Cobenais again acted like a criminal when he shot M.H., that is to say, it "dispelled any suggestion that [Cobenais] would not immediately and intentionally shoot [M.H.] in the presence of multiple witnesses and under circumstances in which arrest and conviction are certain."

But to be admissible, *Spreigl* evidence must be relevant to the issue of intent or absence of mistake without reliance on character. *See Fardan*, 773 N.W.2d at 315 (stating that propensity to commit the crime is an improper purpose for *Spreigl* evidence). The supreme court has stated:

> When deciding the relevance of other-crime evidence pursuant to Rule 404(b) the preferred approach is for the [district] court to focus on the closeness of the relationship between the other crimes and the charged crimes in terms of time, place and modus operandi. The closer the relationship, the greater the relevance or probative value of the evidence and the lesser the likelihood that the evidence will be used for an improper purpose. The ultimate issue is not the temporal relationship but relevance.

State v. Bolte, 530 N.W.2d 191, 198 (Minn. 1995) (quotations and citation omitted). Modus operandi is of particular importance when determining the relevance of other crimes and acts to intent because the repetition of similar acts "tends to show that an act was intentional and lessens the probability of mistake." *State v. Jansen*, 207 Minn. 250, 255, 290 N.W. 557, 560 (1940); *see also* 2 John H. Wigmore, *Evidence in Trials at Common Law* § 302, at 241 (James H. Chadbourn, rev. ed. 1979) (explaining that the argument to prove intent from uncharged conduct derives from "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all").

But in this case, because the jail assault was not similar to the shooting, it is relevant to show Cobenais's intent only by recourse to proscribed character evidence or propensity for violence. If the state had other-acts evidence that involved Cobenais's discharge of a gun or a situation in which Cobenais's intent was in question, its relevancy to show lack of mistake in this case would be more plausible. *See Jansen*, 207 Minn. at 255, 290 N.W. at 560 ("While one isolated act [of willful false representation] in investigating and reporting on a claim [for old age assistance] might be explained upon the ground that it was innocently committed through mistake or otherwise, other similar acts with respect to the same claim, as well as others at or about the same time, have a reasonable and natural tendency to show that the specific act was knowingly committed with unlawful intent."). But the evidence regarding the *single* jail incident in which Cobenais's intent was not in question did not tend to show that Cobenais intentionally

fired the gun that killed M.H. *Cf. id.* ("Repetition tends to show that an act was intentional and lessens the probability of mistake."). We therefore conclude that the evidence regarding the jail incident was not relevant and that the district court clearly abused its discretion by admitting it.

But that conclusion does not end our analysis; we must also determine whether the error is reversible. *See Fardan*, 773 N.W.2d at 320 (assessing whether erroneously admitted *Spreigl* evidence warranted a new trial). Cobenais is not entitled to a new trial unless there is "a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id*. (quotation omitted). The supreme court has considered three factors when determining if erroneously admitted *Spreigl* evidence significantly affected a verdict: (1) whether other evidence was presented on the issue for which *Spreigl* evidence was offered, (2) whether the court gave a limiting instruction, and (3) whether the state dwelled on the evidence in its closing argument. *Id*. "The defendant bears the burden of demonstrating that he was prejudiced by the admission of the evidence." *Id*. (quotation omitted).

At trial, Cobenais conceded that he fired the shot that killed M.H., and his only defense was that he did not intentionally discharge the gun. But a significant amount of non-*Spreigl* evidence was presented on the issue of intent. The jury heard that the day after Cobenais learned that social services had removed his son from his care, Cobenais was upset and was drinking alcohol. While Cobenais was in this state of mind, M.H. called his son's mother a "meth whore" and told Cobenais that he was sleeping with her. M.H. further antagonized Cobenais by brushing up against him, getting in his face, and

refusing to leave the apartment when asked. He told Cobenais that "he didn't deserve to have his son," that "he's not a fit father for him," and that at six or seven months of age his son "ain't functioning right." Right before Cobenais shot M.H., Cobenais and M.H. yelled at each other, and M.H. asked Cobenais, "[h]ow are you going to let the dopehead b-tch get your baby tooken?"

During his trial testimony, Cobenais said, "I pulled [the gun] out. I believe I cocked it. As I was pulling it out, my finger was on the trigger." Moreover, during a standoff with the police after the shooting, Cobenais made a statement to a police officer that is arguably an admission of intent: "[M.H.] thought I was playing. I f-cking shot that N-gger." The jury could easily infer from these circumstances that Cobenais intended to shoot M.H. *See State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000) ("A jury is permitted to infer that a person intends the natural and probable consequences of their actions."); *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997) (stating that intent is a state of mind, which is "generally proved circumstantially – by drawing inferences from the defendant's words and actions in light of the totality of the circumstances").

Additionally, the district court provided a cautionary instruction three times during the course of the trial which instructed the jury to limit the use of the jail-incident evidence and not to convict Cobenais based on that evidence. "The jury is presumed to have followed the instruction." *State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005).

During closing argument, the state described the jail incident in some detail, and told the jury "that that's an example of [Cobenais] hearing something that he doesn't like and responding to it in a devastating way, just like on the night in question."

Nevertheless, in light of the district court's instruction not to convict Cobenais on the basis of the jail incident and the strong evidence of Cobenais's guilt, we conclude that there is no reasonable possibility that the wrongfully admitted evidence substantially affected the verdict. *See Fardan*, 773 N.W.2d at 320-21 (holding that erroneous admission of *Spreigl* evidence was not reversible error where other evidence of intent was "'incredibly powerful,'" the district court instructed the jury to limit the use of the evidence, and the state, while mentioning the evidence in closing, told the jury to use the evidence for the limited purpose of determining intent); *State v. Walsh*, 495 N.W.2d 602, 606 (Minn. 1993) (holding that possibly erroneous admission of *Spreigl* evidence "was clearly harmless in view of the overwhelming evidence pointing to defendant's guilt of the crime charged" and use of the standard cautionary instruction). We therefore affirm.

Affirmed.

RODENBERG, Judge (dissenting)

I agree with the majority that the district court erred in admitting the challenged other-acts evidence. I respectfully dissent on the issue of whether that error requires reversal. I would reverse and remand for a new trial.

The district court doubtless erred in admitting the other-acts evidence, and I join in the majority's *Spreigl* analysis. The question then becomes "whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006). "[T]o put it another way, if there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

In assessing the reasonable possibilities attendant to the erroneous admission of evidence of the assault in the Douglas County, Wisconsin jail, it is noteworthy that the evidence at trial was not limited to the fact of the assault. Rather, the jury was shown a portion of a videotape from the jail depicting the incident right up to the first punch delivered by appellant to another inmate, D.L. The state also called as trial witnesses a corrections officer, a detective who investigated the jail assault, and D.L. Despite the district court's pretrial ruling that the videotape be stopped after the point at which appellant first punched D.L., the corrections officer testified that appellant "came up and started repeatedly hitting him" and that appellant "just continued to keep hitting him." The corrections officer testified that the inmate was injured and was "taken by ambulance" to a Duluth hospital. The detective testified that he observed D.L. after the

incident and saw that he had bruising and stitches on his face and "one eye was completely swollen shut."

The testimony of D.L. was particularly graphic. He testified that when appellant attacked him he "curled up in the fetal position and put [his] arms over [his] face to try to block his punches." When asked what injuries he sustained in the assault, D.L. testified that his "left eye socket had a complete blow-out on the floor, causing [his] eye to drop into [his] skull and needing reconstructive surgery." He testified that he was hospitalized for three days, that he has continuing problems with his eye, and that he will need future surgery. The testimony of D.L. was not limited to appellant's actions during the jail incident. The testimony included a detailed description of the injuries D.L. sustained at the hands of appellant.

In my view, not only was the other-acts evidence admitted at trial in this case exactly the kind of character evidence sought to be excluded by rule 404, but also the extent and form of the evidence admitted by the district court here was extremely prejudicial to appellant. The state went well beyond proof of "another crime, wrong or act" under Minn. R. Evid. 404(b), and informed the jury in graphic fashion of the injuries sustained by D.L. and of his continuing medical problems. The testimony of three witnesses on the subject of the jailhouse assault and the resulting injuries cover almost 41 pages of trial transcript. As a practical matter, the trial of the issue of appellant's responsibility for the death of M.H. was suspended while the state presented a mini-trial of an aggravated assault by appellant on D.L.

I agree that the state may well have been able to convict appellant without using the *Spreigl* evidence. But the issue is not whether the record would have supported a finding of guilt absent the erroneously admitted evidence. The issue is whether the error could reasonably have had a significant effect on the verdict. *Ness*, 707 N.W.2d at 691. The error pervaded the trial here. The state emphasized the erroneously admitted *Spreigl* evidence and prominently argued the evidence in its summation. *Cf. State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009) (noting that the state's reference to erroneously admitted evidence was "brief" and that the state's own argument cautioned against the improper use of *Spreigl* evidence); *State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005) (noting that the state "did not dwell on" erroneously admitted evidence). The supreme court has cautioned that when

> the impact of the asserted error is such that it might be expected to substantially prejudice the jury against the defendant, it should not be disregarded on the ground that the record contains sufficient other evidence to sustain the conviction and that if the defendant were retried the same result would follow. Due process in the trial of a criminal case . . . requires that the same standards of fairness be observed for the guilty as well as the innocent.

State v. Wofford, 262 Minn. 112, 120, 114 N.W.2d 267, 272–73 (1962).

On this record, I cannot concur with the majority that there is no "reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Ness*, 707 N.W.2d at 691. Appellant testified that the gun accidently discharged after M.H. hit the inside of his forearm. If the jury had found this testimony credible, they would have had to acquit appellant of the second-degree murder charge despite the state's

circumstantial evidence of intent. I cannot conclude that there is no reasonable possibility that the verdict would have been more favorable to appellant had the jury been able to determine appellant's credibility without the influence of the improper *Spreigl* evidence.[1] The jail-assault evidence could have easily tainted the jury's impression of appellant. The improper other-acts evidence pervaded the trial. *Cf. Fardan*, 773 N.W.2d at 315 ("The overarching concern behind excluding such evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." (quotation omitted)).

There is certainly a "reasonable possibility" that the extensive and graphic evidence, which was improperly admitted, had a significant impact on the jury's deliberations and verdict. Therefore, I respectfully dissent. I would reverse appellant's conviction and remand the case for a new trial.

[1] Although the district court instructed the jury that evidence of the jail assault 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," it did not instruct the jury as to how to use the evidence or even that use of the evidence was limited to the issue of intent.