STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1391

State of Minnesota,
Respondent,

vs.

Jeffrey Allen Costillo,
Appellant.

Filed June 11, 2012
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-10-28622

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

WORKE, Judge

Appellant challenges his convictions of one count of attempted first-degree aggravated robbery, in violation of Minn. Stat. §§ 609.245, subd. 1, .17 (2008), and three counts of second-degree assault, in violation of Minn. Stat. §§ 609.222, subd. 1, .101,

subd. 2, .11, subd. 5 (2008), arguing that (1) he was deprived of a fair trial when the jury heard evidence about a prior incident that the court had ruled inadmissible; and (2) the evidence was insufficient to support his convictions of attempted first-degree aggravated robbery and two counts of second-degree assault. We affirm.

D E C I S I O N

Constitutional right to a fair trial

Appellant Jeffrey Allen Costillo argues that he was deprived of his constitutional right to a fair trial when the jury heard evidence about a prior incident that the district court had previously ruled was inadmissible. The jury found appellant guilty of one count of attempted first-degree aggravated robbery and three counts of second-degree assault for an incident that occurred at a party. During the trial, several witnesses testified that they saw appellant at the party with a gun. Appellant argues that one witness's testimony that appellant was banned from the party because of a prior incident constituted prejudicial error and the district court abused its discretion when it denied his motion for a mistrial.

"A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted). In general, "any error which may occur by reason of the erroneous admission of evidence is cured when that evidence is stricken from the record and accompanied by a clear instruction to disregard so that the evidence is not put to use by the jury." *State v. Johnson*, 291 Minn. 407, 415, 192 N.W.2d 87, 92 (1971) (quotation omitted). And when

a "reference to a defendant's prior record is of a passing nature, or [when] the evidence of guilt is overwhelming, a new trial is not warranted because it is extremely unlikely that the evidence in question played a significant role in persuading the jury to convict." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quotations omitted); *see also State v. Ebert*, 346 N.W.2d 350, 351 (Minn. 1984) (stating that the district court did not err when it denied a motion for a mistrial after a witness blurted out information in violation of the district court's order because it was "a passing reference" and the jury could have interpreted it in a non-prejudicial manner). The district court "is in the best position to determine whether an outburst creates sufficient prejudice to deny the defendant a fair trial." *Manthey*, 711 N.W.2d at 506. This court reviews the district court's decision to deny a mistrial motion for an abuse of discretion. *Id.*

Here, counsel for appellant filed a motion in limine to exclude evidence of prior bad acts shortly before the jury trial began, and the prosecutor stated on the record that he planned to use impeachment evidence but did not plan to introduce evidence of prior bad acts. During the direct testimony of one of the state's witnesses, the following exchange occurred:

> [PROSECUTOR]: Can you describe your arrival at the party?
> [WITNESS]: We showed up about ten minutes after midnight. There was about five cars following me. Me and my friend Marjorie got into the house and we met Gabby at the door, and she'd asked us who was all with us and whatever, so we had told them, and Jeff Moe and Day-Day were walking up to the door. And Gabby told us that they weren't allowed in because of what had happened the previous weekend. So she said that she had to run upstairs and that we had to watch door. So when they came to the

> door, we had told them that they weren't allowed in. By that time Gabby had come downstairs and—

Counsel for appellant objected. The district court sustained the objection and instructed the jury to "disregard the entire answer as hearsay." Appellant's counsel then moved for a mistrial, out of the presence of the jury, because the witness "went directly into a prior incident." The district court denied the motion.

Appellant also objects to a second exchange that occurred during the same witness's testimony. While questioning the witness about whether she saw appellant go downstairs to the basement at the party, the prosecutor asked, "Were you keeping track of [appellant] that night?" The witness answered, "In a way, in my mind, yes." Appellant's counsel objected and the district court told the prosecutor, "You can ask her if she saw [appellant] come up the stairs or go down the stairs, but nothing about her motive, keeping track of him." No further reference to appellant's prior acts was made during the jury trial.

While it was error for the witness to refer to appellant's past conduct, the reference was "of a passing nature." *See Clark*, 486 N.W.2d at 170 (quotation omitted). The statement was made briefly in the context of the witness describing her own arrival at the party. It was one moment in a trial that lasted several days, during which numerous witnesses testified. In addition, the witness's statement was vague. *See id.* ("[T]he challenged phrase [of 'from a past incident'] was only a passing remark that could have described many types of interactions between [the defendant] and the police."). The witness merely mentioned that appellant was not allowed in the party "because of what

had happened the previous weekend." But the witness did not specify what had happened the previous weekend to cause appellant to be excluded. Similarly, the witness's testimony that she was "keeping track of" appellant was vague. It is not clear that she was paying attention to his actions at the party because of his prior behavior or for another reason.

Appellant further contends that the district court erred by not giving a curative instruction to the jury after it heard the witness's testimony. But the district court told the jury to disregard the witness's entire statement about her arrival at the party as hearsay. Appellant has not demonstrated that there is a reasonable probability that the outcome would have been different without the witness's statement. Thus, we conclude that the district court did not abuse its discretion when it denied appellant's motion for a mistrial.

Sufficiency of the evidence

Appellant next argues that the evidence was insufficient to support his conviction for attempted first-degree robbery and two of his assault convictions. Specifically, he contends that the state did not prove beyond a reasonable doubt that he assaulted and attempted to rob one victim, S.S., and assaulted another victim, C.G.[1]

In reviewing a claim of insufficient evidence, this court considers the record "in a light most favorable to the verdict to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Hanson*, 800 N.W.2d 618,

[1] Appellant does not claim that the evidence was insufficient to support his conviction for second-degree assault against the third victim.

621 (Minn. 2011) (quotation omitted). This court applies heightened scrutiny to convictions that are based on circumstantial evidence. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). "In circumstantial evidence cases, the circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011) (quotation omitted). The first step in analyzing whether the evidence was sufficient in a circumstantial-evidence case is to identify the circumstances proved. *Id.* A reviewing court must assume that the "jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The second step in the analysis is to "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with rational hypotheses other than guilt." *Al-Naseer*, 788 N.W.2d at 473-74 (quotation omitted). In doing so, this court does not give "deference to the fact finder's choice between reasonable inferences." *Id.* at 474 (quotation omitted).

Attempted first-degree aggravated robbery

Appellant first argues that the state did not prove beyond a reasonable doubt that he committed attempted first-degree aggravated robbery against S.S., pursuant to Minn. Stat. §§ 609.245, subd. 1, .17. He contends that the state did not present any direct evidence and the circumstantial evidence was insufficient.

A person is guilty of first-degree aggravated robbery if he, "while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily

harm upon another." Minn. Stat. § 609.245, subd. 1. A person is guilty of an attempt to commit a crime if he "does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1.

Here, while S.S. did not testify at trial, four witnesses testified about the circumstances surrounding the alleged robbery. The circumstances proved indicate that the jury could reasonably infer that appellant committed attempted first-degree aggravated robbery against S.S. One witness testified that he saw S.S. get down on the ground after he saw appellant come down the stairs to the basement, point a gun, and tell people to get down on the ground and take everything out of their pockets. Similarly, another witness testified that appellant come downstairs with a gun, pointed it at his friends, and told "them to get down and basically empty[] their pockets." A third witness testified that she saw S.S. lying on the floor and a fourth witness testified that she saw S.S. lying "on the floor with [his] pockets out and [his] shoes off."

The record establishes that multiple witnesses saw appellant pointing a gun at S.S., that appellant told S.S., among others, to empty his pockets, and that one witness saw S.S. lying on the floor with his "pockets out." While appellant argues that there is no evidence in the record that appellant took anything from S.S., the state only had to prove that appellant took a "substantial step" towards committing first-degree aggravated robbery against S.S. On this record, the jury could reasonably infer that appellant took a substantial step toward committing aggravated robbery against S.S. by pointing a gun at him and ordering him to lie on the ground and empty his pockets. Thus, we conclude that

sufficient evidence supports appellant's conviction of attempted first-degree aggravated robbery.

Second-degree assaults

Finally, appellant argues that the state did not prove beyond a reasonable doubt that he committed second-degree assault against S.S. and C.G., pursuant to Minn. Stat. §§ 609.02, subd. 10, .222, subd. 1.

A person is guilty of second-degree assault if he "assaults another with a dangerous weapon." Minn. Stat. § 609.222, subd. 1. A "dangerous weapon" includes "any firearm, whether loaded or unloaded." Minn. Stat. § 609.02, subd. 6 (2008). Minnesota law defines an assault as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." *Id.*, subd. 10. The term "intentionally" is defined as "the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result." *Id.* subd. 9(3) (2008). The term "with intent to" means that "the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." *Id.*, subd. 9(4) (2008). Intent may be proved by circumstantial evidence, including evidence of the defendant's conduct, the character of the assault, and events that occurred before or after the crime. *Davis v. State*, 595 N.W.2d 520, 525-26 (1999). Intent to cause fear may be established by demonstrating that a defendant pointed a gun at another person. *See State v. Cole*, 542 N.W.2d 43, 51 (Minn. 1996) (stating that the defendant's "intent to cause fear in [the victim] was carried out by his intentional pointing of a gun at

her"); *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 770 (Minn. App. 2001) ("Pointing a weapon at a police officer or another person has been held to supply the requisite intent to cause fear.").

Here, the circumstances proved establish that multiple witnesses saw appellant point a gun at S.S. Based on this evidence, the jury could make no reasonable inference other than that when appellant pointed a gun at S.S. he intended to cause fear and, thus, that appellant committed second-degree assault against S.S.

The evidence in the record that appellant committed second-degree assault against C.G. is weaker, but we conclude that it is sufficient. The circumstances proved include evidence that C.G. was in the basement when appellant came downstairs pointing a gun and that C.G. was "[l]ike five, ten feet" away when appellant fired a shot. There is no evidence in the record that appellant pointed the gun directly at C.G. But intent to cause fear may also be established by evidence that the defendant brandished a dangerous weapon in the close vicinity of the victim. *See, e.g., State v. Patton*, 414 N.W.2d 572, 574 (Minn. App. 1987) (concluding that the defendant "brandished the knife in such a manner" to cause fear of immediate bodily harm when the defendant displayed the knife "within one to two feet of [the victim]"); *State v. Soine*, 348 N.W.2d 824, 827 (Minn. App. 1984) (concluding that the defendant caused fear of immediate bodily harm when, while holding a knife, he told the victim to "shut up or 'I'll use it on you'" and was "within striking distance"), *review denied* (Minn. Sept. 12, 1984). Appellant was very close to C.G. when appellant fired the shot and the jury could infer that it was "within striking distance." Thus, the jury could reasonably infer that appellant intended to cause

C.G. to fear immediate harm or death by brandishing a dangerous weapon in his close vicinity.

Accordingly, we conclude that sufficient evidence supports appellant's convictions of second-degree assault against S.S. and C.G.

Affirmed.