

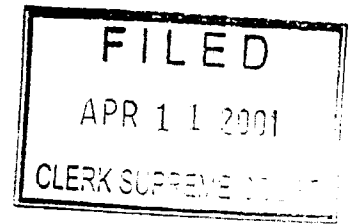
IN THE COURT OF APPEALS OF IOWA

No. 0-802 / 00-0095
Filed April 11, 2001

STATE OF IOWA,
Appellee,

vs.

TATE OWEN STEBURG,
Appellant.



Appeal from the Iowa District Court for Webster County, Joel E. Swanson,
Judge.

Defendant appeals the judgment and sentence entered upon his drug-related convictions. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Ron Robertsen, County Attorney, and Ricki Williamson, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

000464

VOGEL, P.J.

Tate Owen Steburg appeals the judgment and sentence entered upon his convictions for various drug-related offenses¹. Steburg claims the district court abused its discretion when it allowed proof of two prior drug crimes into evidence, and when it denied his motion for a new trial based on newly discovered evidence. We affirm the trial court's ruling on the admission of prior crimes evidence, but reverse and remand for further findings on the new trial issue.

Background Facts and Proceedings. On March 21, 1999, Steburg was driving in his vehicle with a passenger. He stopped in a parking lot and was approached by Officer David Beshey, who had been informed that Steburg's license was suspended. Officer Beshey ran a license check before advising Steburg that he was going to be arrested for driving while his license was under suspension. The passenger, Mike Mallinger, requested permission to drive Steburg's vehicle home. However, when Mallinger was questioned about his name and license status, he provided false information and his behavior became increasingly nervous. A subsequent search of the interior of the vehicle divulged a marijuana cigarette in the ashtray and a large amount of cash concealed in the dashboard. While conducting a pat down of Mallinger, Officer Dennis Mernka felt a concealed object in his pants. Mallinger then fled from police, discarding a

¹ Steburg's convictions include possession of methamphetamine with intent to deliver as a second or subsequent offender in violation of Iowa Code sections 124.401(1)(b)(7) (1999) and 124.411, possession of mescaline with intent to deliver in violation of section 124.401(1)(c), failure to affix a drug tax stamp in violation of sections 453B.1, 453B.3, and 453B.12, possession of marijuana in violation of section 124.401(5), and driving under suspension or revocation in violation of section 321.218(1). The sentences were set to run consecutively and totaled a ninety-year term of incarceration.

black pouch while running. The pouch contained a large quantity of illegal narcotics, drug paraphernalia, and a credit union card bearing Steburg's name.

Prior to trial Steburg moved in limine to preclude any evidence of his prior history of drug dealing. Upon hearing, the district court ruled the evidence would be allowed, and at trial the State elicited proof of a February 1995 conviction of and a March 1995 charge for possession of methamphetamine with intent to manufacture or deliver. Both cases had been resolved by a plea agreement wherein Steburg pled guilty to one offense in return for dismissal of the other. The dismissed offense was established through the testimony of the arresting officer.

Mallinger became a witness for the State and admitted to using and selling drugs. He testified at trial that although he and Steburg had used methamphetamine that evening, he did not own the black pouch, had never seen it before and was not aware of the cash in the car. He maintained Steburg handed him the pouch when the police car pulled into the parking lot. Conversely, Steburg asserted he had no knowledge of the presence of the drugs or money, either in his vehicle or on Mallinger's person and Mallinger was the guilty party. Mallinger also claimed that prior to trial, Steburg had attempted to bribe him to claim possession of the drugs. Steburg denied that accusation. The jury found Steburg guilty on all counts and he now appeals.

Scope of Review: admission of prior crimes evidence. Challenges to evidentiary rulings are reviewed for an abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). Abuse is found where a district court exercised its

discretion on clearly untenable grounds, for clearly untenable reasons, or to an clearly unreasonable extent. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996). Evidence of prior crimes is not admissible to show a general propensity to commit wrongful acts, but such evidence may be admitted for certain other purposes, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See Iowa R. Evid. 404(b). This list is not exclusive, however.

As was stated in *State v. Plaster*, 424 N.W.2d 226 (Iowa 1988):

The key is whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts. If the evidence meets this litmus test, it is prima facie admissible, notwithstanding its tendency to demonstrate the accused's bad character.

Plaster, 424 N.W.2d at 229 (citation omitted). If the evidence is not relevant, it is inadmissible. See Iowa R. Evid. 402. If the evidence is deemed relevant, the district court must then assess whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice its admission could cause. See Iowa R. Evid. 403; *Plaster*, 424 N.W.2d at 231. If the evidence is more prejudicial than probative, admission is precluded. *Plaster*, 424 N.W.2d at 231.

Admission of Prior Crimes Evidence. The State contends that the prior conviction and prior charge were relevant to the issues of intent, knowledge and modus operandi. Evidence is relevant if it tends to make the existence of any fact in issue more or less probable. Iowa R. Evid. 401. In dealing with prior crimes, relevancy is found when that crime tends to establish an element of the

pending charges. See *State v. Mendiola*, 360 N.W.2d 780, 782 (Iowa 1985) (citing *State v. Kern*, 307 N.W.2d 22, 26-27 (Iowa 1981)).

Here, Steburg was charged with possession of methamphetamine and mescaline with the intent to deliver. To obtain a conviction for possession with intent to deliver, the State had to show Steburg knew he was in possession of the item identified as a controlled substance, that he knew what he possessed was in fact a controlled substance, and that he intended to deliver the same. Iowa Code § 124.401(1) (1999). As such, intent and knowledge were integral to the State's case, and proof of prior possession of controlled substances and an associated intent to deliver tends to substantiate those key facts. See *State v. McDaniel*, 512 N.W.2d 305, 308 (Iowa 1994); *Mendiola*, 360 N.W.2d at 782. In addition, some similarity exists between this case and the March 1995 charge, in that each time the drugs and drug paraphernalia were found concealed in a black vinyl bag or pouch. Given the foregoing, the trial court correctly found the evidence of the prior charge and conviction to be relevant to this matter and it was properly admitted so long as the probative value of the evidence was not outweighed by its prejudicial effect. See Iowa R. Evid. 403.

Evidence will not be excluded merely because it tends to demonstrate a defendant's guilt. *McDaniel*, 512 N.W.2d at 308. To be unfairly prejudicial, evidence must create an undue tendency in the jury to make a decision on an improper, and often emotional, basis. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997). In determining whether evidence rises to this level, we consider four factors:

(1) the actual need for the evidence in view of the issues and the other available evidence, (2) the strength of the evidence showing that the prior bad acts were committed by the accused, (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven, and (4) the degree to which the jury will probably be roused by the evidence improperly.

State v. Howell, 557 N.W.2d 908, 912 (Iowa Ct. App. 1996) (quoting *State v. Zeliadt*, 541 N.W.2d 558, 562 (Iowa Ct. App. 1995)).

In making its evidentiary ruling the district court found the Rule 403 balancing test weighed in favor of admission, citing the probative value of aiding the State in establishing knowledge, intent, and modus operandi. The court then added, "Nothing suggests that the evidence will rouse a sense of horror or provoke a jury's instincts to punish or detract from the correct decision making process of a jury." We concur with that assessment.

The outcome of this case turned on circumstantial evidence and credibility assessments. As such, the State's need to rely on the prior crimes in making its case was considerable. The State also presented reliable and credible evidence to show that Steburg committed the prior crimes, using court documentation and testimony by an arresting officer. This evidence in turn provided significant support on the issues of knowledge and intent, and was not of such a nature that it would appreciably inflame the jury. *Cf. State v. Castaneda*, 621 N.W.2d 435 (Iowa 2001) (objectionable evidence did not bear on an element of the crime for which defendant was convicted, and "would arouse a jury's sense of horror and would provoke its instinct to punish and base its decision on this testimony rather than on the issue of specific intent").

Moreover, the trial court gave the jury a cautionary or limiting instruction as to the use the jury might put the evidence of other crimes.² When such an instruction is given, “it is only in extreme cases that the instruction is insufficient to nullify the danger of unfair prejudice.” *State v. Wade*, 467 N.W.2d 283, 285 (Iowa 1991) (citing *State v. Plaster*, 424 N.W.2d 226, 232 (Iowa 1988)). As the evidence’s probative value was not outweighed by the danger of unfair prejudice, we affirm the trial court’s admission of the prior crimes evidence.

Scope of Review: new trial. A district court is given “unusually broad discretion” in ruling on a motion for a new trial based on newly discovered evidence. *State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992). This broad discretion is particularly appropriate because it is important to distinguish between the unavoidable, legitimate claims and those proposed in desperation by a disappointed litigant. *Id.* From its closer vantage point, the presiding trial court has a clearer view of this crucial question, and we generally yield to its determination. *Id.* In order to prevail on such a motion, the defendant must show that the evidence (1) was discovered after the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) is material to the issues in

² Instruction No. 16 stated:

Evidence has been received concerning other wrongful acts alleged to have been committed by the Defendant. The Defendant is not on trial for those acts.

This evidence must be shown by clear proof, and can only be used to show motive, intent, absence of mistake or accident, common scheme or identity of person charged.

If you find other wrongful acts (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing motive, intent, absence of mistake or accident, common scheme, identity of person charged.

the case and not merely cumulative, and (4) probably would have changed the result of the trial. *Id.* (citing *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991)).

New Trial. Steburg alleges the trial court abused its discretion in denying his motion for a new trial based on newly discovered evidence. Steburg alleges the testimony of John Hayes, a fellow inmate with Mallinger, serves to exonerate his culpability and, therefore, he is entitled to a new trial. Hayes' custody in the Webster County Jail began on August 26, 1999. A verdict was delivered in Steburg's trial on August 27, 1999. In a hearing on the motion, Hayes testified Mallinger told him, in a series of conversations, that prior to being stopped by the police, Mallinger and Steburg had been using Steburg's credit card to make lines of drugs. Mallinger then put Steburg's credit union card into the bag with the drugs so the police would wrongly place ownership of the drugs with Steburg. Hayes further alleged Mallinger admitted the drugs belonged to him rather than Steburg. Mallinger denied making these statements to Hayes.

Iowa Rule of Criminal Procedure 23(2)(b) states:

The court may grant a new trial for any or all of the following causes:

* * *

- (8) When the defendant has discovered important and material evidence in his or her favor since the verdict, which the defendant could not with reasonable diligence have discovered and produced at the trial. . . .

During Steburg's trial, Mallinger, a key witness for the State, had been impeached during his testimony. The new witness, Hayes, appeared to be a neutral witness with no prior dealings or acquaintance with either Steburg or

Mallinger and, therefore, may have a greater credibility before a jury. This was a case of finger pointing between Steburg and Mallinger as to who owned the drugs. Mallinger was caught with the drugs on his person but the pouch contained Steburg's identification or credit union card. The jury needed to sort out these conflicting facts to make their findings. The new testimony proffered by Hayes was not cumulative, nor was there overwhelming evidence apart from Mallinger's testimony to support Steburg's conviction. *Cf. State v. Fox*, 491 N.W.2d 527, 534 (Iowa 1992) (denying the motion for new trial because of overwhelming evidence against the defendant). The new evidence in this case, Mallinger's jailhouse confessions, is both material and would probably have changed the result upon another trial. *State v. Whitsel*, 339 N.W.2d 149, 156-57 (Iowa 1983).

The trial court heard the testimony of Hayes during a hearing on the motion for a new trial. In denying the motion, the trial court stated, "Mr. Hayes' testimony would suggest that Michael Mallinger was not truthful during his testimony at trial." The court summarily found Steburg had not met his burden of proof to obtain a new trial. In its ruling, the trial court stopped short of making any credibility findings regarding either Hayes or Mallinger. Additionally, it failed to set forth any reasons this new evidence would not have had an impact on the jury's findings. Because we review the denial of a motion for new trial for an abuse of discretion, the ruling must contain sufficient findings to demonstrate the trial court exercised its discretion. *Id.* From the limited ruling on this issue we cannot conclude the court properly exercised its discretion.

For these reasons we reverse the trial court's ruling on the motion for new trial, and remand with directions to make specific findings on the credibility of John Hayes and on the four elements of proof outlined in *State v. Miles*, 490 N.W.2d 798 (Iowa 1992).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

000473