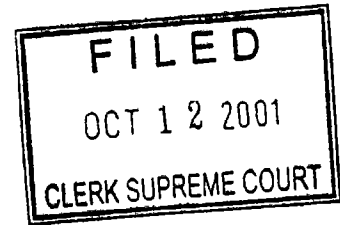


IN THE COURT OF APPEALS OF IOWA

No. 1-434 / 00-1051
Filed October 12, 2001



**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**JENNIFER LYNN BERGMEIER,
Defendant-Appellant.**

Appeal from the Iowa District Court for Black Hawk County, James L. Beeghly, Judge.

Jennifer Bergmeier appeals from her convictions and sentences for conspiracy to manufacture more than five grams of methamphetamine, possession of a precursor, and receipt of a precursor with intent to manufacture a controlled substance in violation of Iowa Code sections 124.401(1)(b), 124.401(4), and 124B.9 (1997). **AFFIRMED.**

Michael M. Lindeman of Lindeman Law, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

MILLER, J.

Jennifer Lynn Bergmeier appeals from her convictions for conspiracy to manufacture more than five grams of methamphetamine, possession of ephedrine or pseudoephedrine with intent to use it as a precursor to an illegal substance, and receipt of a precursor substance with intent to manufacture a controlled substance, in violation of Iowa Code sections 124.401(1)(b), 124.401 (4), and 124B.9 (1997) respectively. She contends the district court erred in (1) failing to grant a mistrial due to jury misconduct relating to the evacuation of the courthouse, and (2) allowing the co-defendant's subsequent conduct into evidence. We affirm.

I. BACKGROUND FACTS

In February 1998 an officer from the Tri-County Drug Task Force received information that Bergmeier and Jerrold Molosky were staying at the Shady Rest Motel. It was reported that they would be going to Nashua, Iowa to manufacture methamphetamine and bring it back to the Waterloo/Cedar Falls area. Pursuant to this information the drug task force established surveillance of the motel room. When a male and female left the motel, members of the task force followed their vehicle. Bergmeier was operating the motor vehicle and Molosky was in the passenger seat. They proceeded to Wal-Mart and purchased several boxes of Equate brand Sudafed which contains pseudoephedrine, a precursor of methamphetamine.

Bergmeier and Molosky stopped at a trailer home for approximately an hour and then returned to the motel. Officers continued surveillance of their motel room. After coming out of the room briefly and then going back in several

times, Molosky and Bergmeier began to load several items into their vehicle. The officers then decided to do a "walk by" of the room to see what they could see, smell or hear. When the officers walked past the vehicle they observed a black five-gallon container and saw Molosky carrying a green Tupperware container, both of which were then subsequently observed in the trunk of the vehicle. Molosky then got into the passenger side of the car with a glass container, while Bergmeier got in the drivers' seat. After Bergmeier and Molosky had left the motel the investigators saw that one of the windows of their motel room was left open and noticed a strong chemical smell, consistent with the manufacturing of methamphetamine, coming from the room.

Other officers involved in the investigation stopped Bergmeier and Molosky a short time later and searched their vehicle. They found the essentials for the manufacture of methamphetamine in the vehicle and believed the vehicle was a "mobile clandestine lab." They arrested Molosky and Bergmeier, who were both subsequently charged with conspiracy to manufacture more than five grams of methamphetamine, possession of ephedrine and/or pseudoephedrine with the intent to use it as a precursor, and receipt of a precursor (ephedrine and/or pseudoephedrine) with the intent to use the substance to manufacture methamphetamine.

A joint jury trial commenced on March 30, 1999. Bergmeier failed to appear for the fourth and all consecutive days. A warrant for her arrest was issued based on her absence.

On the second day of the trial some of the chemicals seized from the defendants' vehicle were brought to the courthouse and then removed. Later

that day it was brought to the court's attention that some of these chemicals might have leaked and were potentially hazardous. The court recessed the trial, stating as the reason an unspecified "unexpected development." Courthouse supervisors were told of the incident and instructed they could allow their subordinates to leave if they wished. Apparently many of the employees did leave. That evening and the next morning the local news reported the incident as an "evacuation" of the courthouse.

Most of the jurors were aware of the news report of the "evacuation" and the presence of chemicals, and several associated the incident with the trial. Both Bergmeier and Molosky made motions for mistrial, arguing the incident had exposed the jurors to extraneous evidence which would unfairly prejudice them. The court then questioned the jurors individually regarding their knowledge of the news report and any influence it might have on them. After hearing arguments of counsel the court overruled the motions for mistrial.

During the trial the court admitted evidence, over objections by both defendants, regarding a subsequent investigation which took place in October of 1998, eight months after the events giving rise to the charges against Bergmeier. The challenged testimony related to an investigation conducted by authorities in Chickasaw County in which they found co-defendant Molosky in possession, on his aunt's farm, of chemicals and paraphernalia consistent with the intent to manufacture methamphetamine. Molosky was subsequently arrested in connection with that investigation. However, as of the time of the trial in this case he had not yet gone to trial in Chickasaw County. Bergmeier objected to the admission of this evidence as irrelevant to the charges against her and

prejudicial to her. The trial court overruled the objection and allowed the testimony. Bergmeier requested a standing objection to all of the prosecutor's inquiries into Molosky's alleged subsequent bad acts. The standing objection was allowed by the court. The Chickasaw County Sheriff testified that to his knowledge Bergmeier was not involved in Molosky's activities in Chickasaw County.

The jury returned verdicts of guilty on all three counts. On the date of sentencing Bergmeier once again failed to appear in court. A motion for new trial was filed on the basis that Bergmeier was not present for the entire trial. The court denied the motion for new trial on June 4, 1999. Bergmeier was arrested on April 25, 2000 and was subsequently sentenced to twenty-five, five and ten year terms, to be served concurrently. Bergmeier appeals from her convictions.

II. SCOPE AND STANDARDS OF REVIEW

Bergmeier's appeal raises no issues concerning constitutional safeguards. Our scope of review is therefore for correction or errors of law. Iowa R. App. P. 4. *State v. Puffinbarger*, 540 N.W.2d 452, 455 (Iowa Ct. App. 1985); *State v. Tinius*, 527 N.W.2d 414, 415 (Iowa Ct. App. 1994).

We apply an abuse of discretion standard to rulings on juror misconduct claims. *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). The trial court has broad discretion in ruling on a motion for mistrial based on alleged juror misconduct. *State v. Proctor*, 585 N.W.2d 841, 845 (Iowa 1998); *State v. Wells*, 437 N.W.2d 575, 581 (Iowa 1989). "We do not find an abuse of discretion unless the court's action was clearly unreasonable under the attendant circumstances."

Wells, 437 N.W.2d at 581 (citing *State v. Sauls*, 391 N.W.2d 239, 240 (Iowa 1986)).

We review an evidentiary ruling admitting evidence of other crimes for an abuse of discretion. *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997). We find an abuse of discretion when the district court has exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996). We reverse only on finding a clear abuse of discretion. *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997). “Even if an abuse of discretion is found, reversal is required only when the abuse is prejudicial.” *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999).

III. MERITS

Bergmeier contends the court should have granted a mistrial based upon juror misconduct because the jurors considered and discussed extraneous evidence relating to the evacuation of the courthouse. She further argues the court erred in allowing evidence of Molosky's subsequent misconduct into evidence because it was irrelevant and prejudicial as to her. We address these issues separately.

A. Jury Misconduct

It is well settled law that in order to impeach a verdict on the basis of jury misconduct, three conditions must be met: (1) evidence from the jurors must consist only of objective facts concerning what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the

verdict. *State v. Arnold*, 543 N.W.2d 600, 605 (Iowa 1996). The State has conceded that the first two parts of this test have been met. Therefore, we focus our attention on the third part, whether the jurors' awareness and alleged discussion of the "evacuation" of the courthouse "was calculated to, and with reasonable probability did, influence the verdict." *Id.*

In the context of alleged juror misconduct based on consideration of extraneous evidence the burden rests on the party seeking to overturn the verdict to prove this element of the test. *State v. Atwood*, 602 N.W.2d 775, 778 (Iowa 1999); *State v. Henning*, 545 N.W.2d 322, 324-25 (Iowa 1996).

The impact of the misconduct is judged objectively to determine whether the extraneous information would prejudice a typical juror. The standard has been expressed in terms of whether the material was of a type more likely than not to implant prejudice of an indelible nature upon the mind.

Henning, 545 N.W.2d at 325 (citations omitted). "A common sense approach is followed in considering whether jury misconduct was designed to influence the verdict and likely did influence the verdict." *Tinius*, 527 N.W.2d at 417. "[T]he trial court may 'examine the claimed influence critically in light of all the trial evidence, the demeanor of witnesses and the issues presented before making a common-sense evaluation of the alleged impact of the jury misconduct'." *State v. Johnson*, 445 N.W.2d 337, 342 (Iowa 1989) (quoting *State v. Christianson*, 337 N.W.2d 502, 506 (Iowa 1983)); see also *Tinius*, 527 N.W.2d at 417 (same). Prior decisions show that this prong is not easily satisfied. *Id.*

The trial judge made a full inquiry into the issue when he questioned each of the jurors individually. All of the jurors who had heard of the incident said it would not influence their decision, and none of the jurors expressed any doubt

that they would be able to make an impartial decision. The court personally admonished nine of the eleven jurors who stated they had heard of the incident to not discuss it with the other jurors. The court also instructed the jury when the case was submitted that its verdict was to be based only upon the evidence and the instructions, and that the evidence did not include anything seen or heard about the case outside the courtroom. We may presume the jurors followed the court's admonition, *Atwood*, 602 N.W.2d at 780, and the court's instructions, *Proctor*, 585 N.W.2d at 845.

We find no abuse of discretion by the trial court in refusing to grant a mistrial. Any misconduct by the jurors based on knowledge and discussion of the "evacuation" of the courthouse was not the type of misconduct more likely than not to implant prejudice of an indelible nature upon the mind of the average juror. Assuming some jurors discussed and considered this extraneous information, we find Bergmeier has failed to meet her burden to prove there is a reasonable probability that this misconduct influenced the verdict. Furthermore, the trial court made a full inquiry into relevant facts, properly admonished and instructed the jury as to the matter, and thereby took steps reasonably calculated to prevent the information from influencing the verdict.

Bergmeier makes two additional, ancillary claims related to the issue of alleged jury misconduct surrounding this incident. First, she claims the court should have instructed the jurors that they were in no danger from the chemicals which had been in the courtroom. When the trial court denied Bergmeier's motion for mistrial it reserved ruling on her request to inform the jury about the absence of any risk. The court stated it did not have enough information to know

whether such an instruction would be correct and appropriate and therefore would defer a decision until it had heard any additional arguments or more specific information the parties wished to provide on the issue. No additional information or argument was given to the court on this issue during the remainder of the trial and the court therefore did not rule on the request. It is elementary that we do not consider on appeal issues not presented to or decided by the district court in the first instance. *State v. Gogg*, 561 N.W.2d 360, 368 (Iowa 1997). As the trial court did not rule on this request error was not preserved on this issue and it is not now properly before us on appeal.

The second subsidiary claim Bergmeier makes on this issue is that the court should have questioned the jurors at the end of the case to establish if the news story had any influence on the jury whatsoever. Again, error was not preserved on this claim because Bergmeier did not request that the trial court conduct such interviews at the close of the proceedings. *See id.* Furthermore, not only was the previous questioning by the court sufficient to determine whether exposure to the news story and any discussion of it were calculated to, and with reasonable probability did, influence the verdict, but any statements by the jurors as to what influenced their verdicts could not be considered by the trial court. *See State v. Cullen*, 357 N.W.2d 24, 29 (Iowa 1984) (“[O]ur cases are clear that statements by jurors, subsequent to deliberations, as to whether they were influenced by certain matters or to what degree they were influenced, are incompetent for the purpose of impeaching a verdict and must be ignored.”). The court cannot have erred by not conducting an inquiry which would have been of no benefit to Bergmeier.

B. Admission of Molosky's Subsequent Misconduct

Bergmeier argues the trial court abused its discretion in allowing evidence at trial, in violation of Iowa Rule of Evidence 404(b), regarding the subsequent investigation and arrest of Molosky in October of 1998.

Iowa Rule of Evidence 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The scope of this rule includes evidence of subsequent as well as prior acts. *See State v. Munz*, 355 N.W.2d 576, 581-82 (Iowa 1984) (holding subsequent act of sexual abuse admissible in sex abuse case to show propensity for illicit sexual relation).

As detailed above, at trial evidence was admitted, over Bergmeier's repeated objections, that investigators searched Molosky's aunt's farm in October 1998, they found Molosky in a garage where he was apparently living while awaiting trial, and discovered and seized chemicals and other items consistent with the manufacture of methamphetamine which appeared to be in his possession.

During testimony regarding the October 1998 events the Chickasaw County Sheriff, William Dean, stated that to his knowledge Bergmeier was not involved at all in the October events. At the close of the evidence the court gave the jurors the following limiting instruction, Jury Instruction No. 17, regarding the evidence of other alleged wrongful acts:

Evidence has been received concerning other wrongful acts alleged to have been committed by defendants. The parties are not on trial for those alleged acts in this case.

This evidence must be shown by clear proof, and can only be used to show intent, common scheme or identity of defendants.

If you find other wrongful acts: (1) occurred; (2) were sufficiently 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 intent, common scheme or identity of defendants.

Other wrongful acts of a defendant may be considered for the above purposes only as against that defendant.

(Emphasis added).

The State argues that the challenged evidence was relevant and properly admissible against Molosky and although it may not have been relevant to the case against Bergmeier the limiting instruction by the court was sufficient to protect her from being prejudiced by the evidence. For the reasons that follow we conclude that admission of the challenged evidence was not prejudicial to Bergmeier. We therefore need not decide whether it was admissible against Molosky in order to determine whether the trial court committed reversible error in admitting it over Bergmeier's relevancy and prejudice objections.

None of the witnesses who testified regarding the October events indicated Bergmeier was involved in them in any manner. The only evidence concerning those events which even referred to Bergmeier was the testimony of Sheriff Dean, and he quite specifically testified he was not familiar with Bergmeier and from his investigation she was not involved at all in those events. The emphasized portion of Instruction No. 17 then limited the jury's consideration

of alleged other wrongful acts to the defendant alleged to have committed those acts.

An erroneous evidentiary ruling does not require reversal unless the error is prejudicial. Iowa R. Evid. 103(a); *State v. Boley*, 456 N.W.2d 674, 678 (Iowa 1990). Where, as here, an alleged error is not of constitutional magnitude, the test of prejudice (for harmless error analysis) is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or the party has suffered a miscarriage of justice. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998). A jury is presumed to follow the court's instructions. *State v. Proctor*, 585 N.W.2d 841, 845 (Iowa 1998). Assuming it did so it considered evidence of the October events only against Molosky, as the evidence connected only him to those events and in fact showed Bergmeier was not in any manner connected to them. We therefore find the trial court's instruction protected Bergmeier from any prejudice which might otherwise have resulted from the admission of that evidence. To warrant reversal error must have prejudiced Bergmeier. See *Williams*, 574 N.W.2d at 298. Assuming the trial court erred in admitting the challenged evidence, Bergmeier was not prejudiced and reversal is not warranted.

IV. CONCLUSION

We conclude the trial court did not abuse its discretion in denying Bergmeier's motion for mistrial based on juror misconduct. The information regarding the evacuation of the courthouse was not of the type that was more likely than not to implant prejudice of an indelible nature upon the minds of the jurors. We further conclude the trial court did not commit reversible error in

overruling Bergmeier's objections and admitting evidence of Molosky's subsequent wrongful acts because the court's instruction limited the jury's consideration of that evidence to the charges against Molosky and therefore eliminated the possibility of prejudice to Bergmeier.

AFFIRMED.