IN THE COURT OF APPEALS OF IOWA

No. 1-261 / 00-0762
Filed August 29, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERROLD STEPHEN MOLOSKY,
Defendant-Appellant.

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

Jerrold Molosky appeals from his 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. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ., but decided by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Jerrold Molosky appeals from a judgment entered following jury verdicts finding him guilty of conspiracy to manufacture more than five grams of methamphetamine, possession of ephedrine or pseudoephedrine with the intent to use as a precursor, and receipt of a precursor substance (ephedrine or pseudoephedrine) with the intent to manufacture a controlled substance, in violation of Iowa Code sections 124.401(1)(b), 124.401(4), and 124B.9 (1997).

I. Background Facts and Proceedings.

The trial information charging Molosky and codefendant Jennifer Bergmeier alleged that they committed the above offenses "on or about the 11th day of February, 1998." The State's case against Molosky included evidence that Molosky and Bergmeier purchased a large quantity of Sudafed or an equivalent pseudoephedrine product from a local Wal-Mart store on that date. The State's case also included evidence concerning surveillance and search of Molosky's motel room and Bergmeier's automobile on February 11, 1998. The State offered expert testimony indicating that the chemicals and other items seized as the result of these searches were consistent with the manufacture of more than five grams of methamphetamine by the red phosphorous method.

In addition to evidence obtained on February 11, 1998, the State relied on similar evidence obtained from searches of the Gayle Howard residence on February 17, 1998 and Geraldine Fitzgerald's garage on October 26, 1998. Like the evidence obtained on February 11, expert testimony described the evidence seized during these searches as consistent with the manufacture of more than five grams of methamphetamine. A police investigator testified that Howard told

him that the items seized at her residence belonged to Molosky. Other evidence obtained subsequent to February 11, 1998 included Molosky's February 22, 1999 purchase of plastic tubing at a local farm supply store and report of this transaction to the police by the store's manager. The store manager testified that she called the police because she recalled a police flyer indicating the plastic tubing purchased was commonly used to manufacture methamphetamine.

Molosky's objections claiming all evidence seized or testimony concerning events subsequent to February 11, 1998 was irrelevant, unfairly prejudicial, or inadmissible evidence of other crimes were overruled. The trial court also overruled Molosky's hearsay objection to testimony concerning his February 22, 1999 purchase of plastic tubing.

Molosky was found guilty as charged and was sentenced as an habitual offender. Molosky received an indeterminate fifty-year sentence on the conspiracy charge and indeterminate fifteen-year terms on the other counts. Those counts were merged, and the court ordered that they be served consecutive to the conspiracy charge.

On appeal Molosky contends the trial court erred in overruling his relevancy, unfair prejudice, subsequent wrongful conduct, and hearsay objections to evidence obtained subsequent to February 11, 1998. Molosky also claims he was denied effective assistance of trial counsel. Because we find the district court abused its discretion by admitting evidence of Molosky's subsequent wrongful conduct, we limit our opinion to that issue.

II. Standard of Review.

The trial court's ruling on admissibility of evidence will not be disturbed on appeal unless an abuse of discretion is found. *State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Zeliadt*, 541 N.W.2d 558, 560 (Iowa Ct. App. 1995).

III. Other Crimes Evidence.

Iowa Rule of Evidence 404(b) provides that "[e]vidence 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." However, such evidence may be admitted as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 404(b). The scope of the rule includes evidence of subsequent as well as prior acts. *See State v. Munz*, 355 N.W.2d 576, 581-82 (Iowa 1984) (subsequent act of sexual abuse admissible in sexual abuse case to show propensity for illicit sexual relation); *State v. Larsen*, 512 N.W.2d 803, 807 (Iowa Ct. App. 1993) (in aiding and abetting charge, participation can be shown by conduct subsequent to crime charged).

This rule is a codification of our common-law rule that one crime cannot be proved by proof of another. *State v. Castaneda*, 621 N.W.2d 435, 439 (Iowa 2001). Its purpose is to exclude from the jury's consideration evidence that has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question. *State v. Nebinger*, 412 N.W.2d 180, 186 (Iowa

Ct. App. 1987). To admit evidence under rule 404(b), the evidence must be relevant and there must be clear proof the individual against whom the evidence is offered committed the acts claimed. *State v. Jones*, 464 N.W.2d 241, 243 (Iowa 1990). The basic test of relevancy is whether the evidence offered would make the desired inference more probable than it would be without the evidence. *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992). The clear proof rule is intended to prevent the jury from engaging in speculation or drawing inferences based on mere suspicion. *Jones,* 464 N.W.2d at 243.

Even where the requirement of relevancy is met, however, the evidence must be excluded if the prejudicial effect of the evidence outweighs its probative value. Iowa R. Evid. 403. Probative value gauges the strength and force of the relevance of the evidence presented. *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988). Unfair prejudice is an undue tendency to suggest decisions on an improper basis, commonly, though not necessarily, an emotional one. *State v. Bayles,* 551 N.W.2d 600, 607 (Iowa 1996).

Rule 403 does not make inadmissible all prejudicial evidence; it only prohibits evidence that is unfairly prejudicial. *Id.* In order for the prejudice engendered by the evidence of another crime to outweigh its probative effect, the evidence must be of a nature that engenders prejudice extending beyond its tendency to show the defendant guilty of an element of the offense charged. *State v. McDaniel,* 512 N.W.2d 305, 308 (Iowa 1994).

> Evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that 'unfair prejudice' occurred

> because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence."

Plaster, 424 N.W.2d at 231-32 (quoting 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 403[03], at 403-33 to 403-40 (1986)). Evidence of this sort may convince an appellate court that "unfair prejudice" occurred because the theory upon which this evidence was offered was designed to elicit a response from the jurors not justified by the evidence. *Bayles*, 551 N.W.2d at 607.

In making this determination, we consider the following 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 *Zeliadt*, 541 N.W.2d at 562). The first three factors help determine the probative value of the evidence, i.e. the strength of the evidence's relevance, whereas the fourth factor gauges the degree of prejudice in the evidence.

With these principles in mind, we turn to the issues raised on appeal.

February 17, 1998 Evidence

The record indicates Molosky and Bergmeier stopped at Howard's residence for nearly an hour shortly after they purchased precursor medications at a local Wal-Mart store on February 11. The February 17 search of Howard's residence began with the retrieval of trash bags from outside the residence. The bags contained a number of empty packages and boxes for the same precursor

medications Molosky and Bergmeier purchased at Wal-Mart, as well as other evidence associated with the manufacture of methamphetamine. Other items found in Howard's trash bags included notes and a receipt bearing Molosky's name. A subsequent search of the interior of Howard's home yielded additional evidence of methamphetamine manufacturing and documents bearing Molosky's name. Howard also told investigators that Molosky and Bergmeier opened some of the precursor packages while in her home on February 11 and that other drug paraphernalia found there belonged to Molosky.

We, contrary to Molosky's claims, find the evidence obtained from Howard's residence and trash bags on February 17 was relevant to show Molosky possessed or received a precursor with intent to manufacture methamphetamine on February 11. Additionally, the probative value of this evidence was substantial because it provided an essential link between Molosky's acquisition of a precursor and its subsequent use in the manufacture of methamphetamine on February 11. Because the evidence obtained on February 17 was substantially probative and relevant to Molosky's commission of the offenses charged on February 11, the provisions of rule 404(b) are not implicated. We find no abuse of discretion resulting from admission of the physical evidence seized and testimony concerning the search of Gayle Howard's residence on February 11. We affirm on this issue.

October 26, 1998 Evidence

The record indicates investigators "visited" the Fitzgerald residence on October 26 based on undisclosed information. Investigators testified they found Molosky in a garage where he was apparently living while awaiting trial. The

record also includes testimony concerning the discovery and seizure of chemicals and other items consistent with the manufacture of methamphetamine by the red phosphorous method.

The State's theory of admissibility advanced at trial was that this evidence was relevant proof of the intent element of each offense with which Molosky was charged. The State also argued the disputed evidence was admissible under rule 404(b) for the "legitimate purposes of proving intent, common scheme, or conspiracy and identity." According to the State, any resulting unfair prejudice to Molosky was alleviated by the court's jury instruction limiting consideration of this evidence to those issues specified. We disagree.

We assume, without deciding, that the evidence obtained from the search of the Fitzgerald property was relevant for one or more of the purposes claimed. Our review of the record, however, discloses substantial evidence apart from Molosky's subsequent manufacture of methamphetamine from which the State's desired inferences could be made. The State presented testimony indicating Molosky purchased large amounts of pseudoephedrine, Molosky's motel room contained instrumentalities of drug manufacture containing residue of the chemicals used in the manufacture of methamphetamine, and that a liquid resulting from early stages of methamphetamine manufacture was found in Bergmeier's car. Given the State's limited need for the subsequent crime evidence, its probative value was at best nominal.

Against the assumed relevance of this subsequent crime evidence we weigh the danger that it unfairly prejudiced the jury. The State offered testimony from seven witnesses, each detailing Molosky's involvement in

methamphetamine manufacture subsequent to his arrest on February 11, 1998. These witnesses provided exhaustive detail as to the search of the Fitzgerald property, the import of the items seized to the methamphetamine manufacturing process, and a criminologist's evaluation of the chemical residue present on these items.

We believe the primary purposes served by the admission of this evidence were to provoke the jury and distract its attention from the elements of the crimes charged to Molosky's criminal propensities. The inference the jury was most likely to draw was the forbidden one: that because he was caught manufacturing methamphetamine eight months after he was arrested, Molosky must have been guilty of the crimes charged. Given the minimal probative value of the other-crimes evidence, the bulk of gratuitous bad acts evidence, and the prejudice inherent in evidence of drug manufacture, we find the district court abused its discretion in failing to exclude this evidence. *See Castaneda*, 621 N.W.2d at 442 (high likelihood of prejudice when jury receives evidence that defendant committed essentially the same crime as that for which he is on trial); *State v. Liggins*, 524 N.W.2d 181, 188-89 (Iowa 1994) (evidence of narcotics distribution inherently prejudicial because appeals to jury's instinct to punish drug dealers); *State v. Wilson*, 406 N.W.2d 442, 448 (Iowa 1987) (other-crimes evidence properly excluded under rule 403 because it lacked probative value and introduced the dangers of confusion and misleading the jury).

February 22, 1999 Evidence

We find it sufficient to note that the evidence concerning Molosky's purchase of plastic tubing a year after the offense charged was too remote to be

relevant to any element of the crimes charged. *See* Iowa R. Evid. 401. Even if we were to conclude otherwise, the probative value of this evidence was clearly outweighed by the danger of unfair prejudice to Molosky. The district court also abused its discretion by admitting this evidence.

IV. Harmless Error.

Error in the admission of evidence must be prejudicial to an accused to constitute cause for reversal. *Liggins*, 524 N.W.2d at 188. When error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998). When evidence is merely cumulative, it cannot be said to injuriously affect the complaining party's rights. *See id.*

The State argues that because it presented overwhelming evidence for the jury to conclude beyond a reasonable doubt that Molosky was guilty of the crimes charged, any admission of improper wrongful act evidence was harmless error. We disagree.

Even where, as here, the State presented a strong case against Molosky through wholly untainted evidence, we are unable to say that Molosky was not prejudiced by the jury's exposure to large amounts of prejudicial evidence which was intended to provoke or otherwise distract the jury from the issues properly before it. *See State v. Belieu*, 288 N.W.2d 895, 901-02 (Iowa 1980) (court refused to find mitigation of prejudice resulting from other crime evidence despite strength of State's case against the defendant). Molosky was entitled to a jury verdict free from the influences of unfairly prejudicial evidence. The judgment of

the district court is accordingly reversed, and the case is remanded for a new trial.

As noted earlier, our resolution of these issues eliminates the need to consider Molosky's ineffective assistance of counsel claims.

REVERSED AND REMANDED FOR NEW TRIAL.