IN THE COURT OF APPEALS OF IOWA

No. 6-308 / 05-0833
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MELISSA MARIE DEBRUIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, James D. Scott, Judge.

Debruin appeals her judgment and conviction based on allegations of juror misconduct. **REVERSED AND REMANDED FOR NEW TRIAL**.

Michael Jacobsma of Klay, Veldhuizen, Bindner, De Jong & Jacombsma, Orange City, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Melissa O'Rourke, County Attorney, and Coleman McAllister, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

Jurors improperly learned of Melissa Debruin's prior drug conviction. The key question before us is whether jurors' receipt of this information during deliberations entitles Debruin to a new trial. We conclude a new trial is warranted.

I. Background Facts and Proceedings

The Sioux County Sheriff's office arranged to have friends of Debruin purchase drugs from her. Following the controlled buys, the State charged Debruin with several drug-related offenses and noted that these were second offenses. Debruin gave notice of her intent to rely on an entrapment defense. Pursuant to an oral motion in limine, Debruin asked the court to exclude evidence of her prior drug conviction. The State did not resist the motion, and the court sustained it.

The issue of Debruin's prior conviction did not arise during trial. During jury deliberations, however, reference was made to Debruin's criminal history. Shortly thereafter, the jury found Debruin guilty of three counts of delivery of marijuana, and one count of failure to affix drug tax stamps. Iowa Code §§ 124.401(1)(d); 124.411(1); 453B.3, B.12 (2003). Debruin subsequently stipulated to the prior drug offense.

On appeal, Debruin contends: (1) the finding of guilt was tainted by juror misconduct and (2) the district court erred in refusing to instruct the jury on a crime which she believes was a lesser included offense.

II. Juror Misconduct

A. Juror Activity During Deliberations. Although the focus of this appeal is on information jurors learned near the end of deliberations, the circumstances surrounding the trial are important to an understanding of why the information was introduced.

First, after deliberating about one hour and thirty minutes, the jury informed the judge that one member was holding out. The communication was as follows:

> Judge Scott,
> We, the jury, are currently at a stand-still with one member of the jury not [convinced] of the following:
> -Can't tell who's selling drugs to whom.
> -Can't distinguish voices on the tape
> -Feels that Todd and Valora are hiding/lieing [sic] something to get off from their charges
> We, as a jury, do not want a hung jury, we need your guidance on how to [proceed].

The judge advised the jury in open court this was the normal time for the courthouse to close, and "suggested" the jury retire for the day and return the next day. The following morning, the judge gave the jury a supplemental instruction essentially stating he could not answer the questions or comment on the evidence. The judge also reiterated the role of each juror and the jury as a whole.

Later that afternoon, the jurors sent the judge a second question seeking clarification of the entrapment defense. The judge gave the jury another supplemental instruction. The instruction reaffirmed the entrapment instruction he had already given and reiterated the standard for causing "a normally law-abiding person to commit a crime."

Approximately thirty minutes before the normal time for adjournment, jurors sent the judge a third question, stating:

> Judge Scott-
> We have been deliberating for a majority of the time in which 11 jurors feel strongly that the defendants are guilty on all accounts [sic]. One juror has been stuck on the entrapment question. As a group of 11, who feel very unified of the verdict, also feel very strongly that [J] is not able to be reasonable in this decision. We are not willing to be hung or vote no[t]-guilty based on this one unreasonable juror.

The note was signed by eleven jurors. By this time, the jury had been deliberating for nine hours.

Three minutes after the court received the third question, jurors sent the court a fourth note stating, "The jury will have a decision in five minutes!" Seven minutes later, the jury informed the court that it had found Debruin guilty.

Debruin filed a motion for new trial alleging the jury received evidence not authorized by the court and the finding of guilt was decided by means other than a fair expression of opinion on the part of all jurors. Attached to the motion was a juror affidavit attesting that while the jury was deliberating, another juror said, "'[S]he's been convicted on drug charges before.'" According to the affidavit, this statement was made in front of the "entire jury."

The district court held a hearing on Debruin's motion. At the hearing, the court questioned the jurors about the contents of the affidavit.

One juror testified that he recalled a "question somebody asked if [Debruin] had been convicted before of a similar or like cause or whatever and we all said that it was irrelevant and it wasn't passed as evidence and that's – that was about it."

A second juror testified as follows:

> [Juror]: And there was a 30- to 45-second exchange by one gentleman that I can't say the exact words but I replayed it over in my mind. And we instantly said, [']You cannot consider that today,[] you know. [']We cannot bring that to the table[] so.
>
> THE COURT: Do you remember who the juror was and what exactly was said?
>
> [Juror]: I do know the juror if you would like for me to say that.
>
> THE COURT: I think you better.
>
> [Juror]: It was [M]. He was laying on the floor throwing up a water bottle out of frustration.
>
> THE COURT: Okay. And what did he say?
>
> [Juror]: [']Well, you know, [J][], I can't say exactly, but she – I don't know. Do I have to be exact?
>
> THE COURT: Well, to the best of your recollection.
>
> [Juror]: [']She has a previous[] – what would you call it? – a – I don't know, a conviction probably is not the right word.
>
> THE COURT: Well, could be.
>
> [Juror]: [']History[], I don't know, and we instantly said, [']No, you cannot bring that here,[] and we stopped it.
>
> THE COURT: And that happened on the first day of deliberations?
>
> [Juror]: No, Thursday.
>
> THE COURT: The second day of deliberation?
>
> [Juror]: Yes, and very emotional day. And like I say, it was like a 30- to 45-second exchange and it was instantly stopped.
>
> * * *
>
> THE COURT: That's okay. How many do you believe heard it?
>
> [Juror]: Oh, we were all around the table so it's hard to say. But there was an instant, [']No.[] Like a loud, [']No, you can't take that into consideration. We can't do that.[]
>
> * * *
>
> [Assistant County Attorney]: Finally, Your Honor, with the court's permission, how many – was any knowledge shared about the nature of the prior conviction?
>
> [Juror]: No. No. Nope. We instantly put a stop to it. Like I say, it was a 35- to 45-minute – or second exchange. It was not very long --

A third juror testified that late in the afternoon, someone made a comment such as "[']It's not like – it's not like she hasn't done this before. It's not like this

hasn't happened before[,]['] or something like that." The juror stated that immediately after the comment was made other members of the jury said, "[']Well, that doesn't matter at all to us. That wasn't brought up in the courtroom. It has no bearing on the conversation here at the table.[']" She estimated that the whole reference lasted 15 to 20 seconds. When asked how many jurors overheard the comment, the juror stated, "He was laying [sic] on the floor. He was laying [sic] on the floor in a back corner when he said it, so I don't know who heard it."

The juror who completed the affidavit testified that the statement made during deliberations was, "'[J], she's already been convicted on drug charges before.'" He testified the comment was made on the second day of deliberations, at approximately 3:30 p.m. He stated the conversation lasted five to ten minutes and that "almost everyone heard it, had to have heard it because it was shouted in a loud and emotional voice." He said there was also a statement made that "[Debruin] was in trouble with the law." The juror testified that there was a woman on his left and the foreman on his right and they were quietly talking to him, stating, "'Come on, [J], you know she's been in trouble before. She's guilty. Come on.'"

The juror who was identified as making the statement about Debruin's prior conviction also testified. When asked whether he or another juror made a statement that Debruin had a criminal record, he responded, "Not that I'm aware of." When asked whether he heard such a statement, he said, "I do not remember that being said," and "I don't remember hearing that."

The remaining jurors had no specifics relating to extraneous information.

B. Federal Standard. As a preliminary matter, Debruin asks us to adopt the federal juror misconduct standard, which presumes prejudice when the extraneous material relates to factual evidence not developed at trial. Our highest court explicitly rejected this aspect of the federal standard in *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991). *See also State v. Atwood*, 602 N.W.2d 775, 778 (Iowa 1999) (declining invitation to make any communication between judge and jury, outside the presence of the defendant, per se prejudicial under Iowa R. Evid. [5.606(*b*)]); *State v. Henning*, 545 N.W.2d 322, 324-25 (Iowa 1996). *Doe* is controlling.

C. Application of State Standard. A court may grant a new trial if "the jury has received any evidence, paper or document out of court not authorized by the court." Iowa R. Crim. P. 2.24(2)(*b*)(2). Iowa R. Evid. 5.606(*b*) sets forth the parameters of a court's inquiry:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Iowa courts have articulated a three-part test to determine whether the jury finding of guilt must be set aside because of jury misconduct: (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. Smith*, 573 N.W.2d 14, 18 (Iowa 1997).

The district court concluded the first two requirements were met. Based on the evidence cited above, we discern no abuse of discretion in this aspect of the court's ruling. *Id.* (setting forth standard of review).

We turn to the third requirement: whether the misconduct "was calculated to, and with reasonable probability did, influence the verdict." *Id.* The standard is "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. Applying this objective standard,[1] we have a "firm conviction that sufficient prejudice was shown to warrant the granting of a new trial." *Id.* at 323.

First, the timing of the disclosure suggests it was calculated to influence the verdict. *Id.* at 325. The information came into the record late in the afternoon on the second day of deliberations around the time that eleven jurors informed the court of their frustration with the twelfth juror. Three minutes after expressing this frustration, the jury indicated it had a verdict. *Cf. State v. Jackson*, 195 N.W.2d 687, 690 (Iowa 1972) (finding no reasonable probability that disclosure

[1] Debruin asserts the district court used a subjective rather than an objective standard to evaluate the third prong of the juror misconduct test. We disagree. To the extent the affidavit and testimony contain information about the jurors' beliefs, we will disregard that information. *See State v. Henning*, 545 N.W.2d at 325 (the impact of the misconduct is judged objectively to determine whether the extraneous information would prejudice a typical juror).

influenced verdict where "fully five hours of deliberation ensued" after the disclosure).

Second, the contents of the disclosure were specific. *Cf. State v. Harrington*, 349 N.W.2d 758, 763 (Iowa 1984) (noting that affidavits contained only "bare assertions" of the defendant's prior conduct). Here, four jurors recalled, at a minimum, the mention of a similar act in Debruin's past. The first juror testified he remembered that someone asked whether Debruin "had been convicted before of a similar or like cause or whatever." A second juror recalled a discussion of Debruin's previous "history." A third juror testified that someone said "It's not like – it's not like she hasn't done this before. It's not like this hasn't happened before or something like that." And, finally, the juror who completed the affidavit testified he was told Debruin had a prior conviction for "drug charges." Thus, the information identified the nature of the prior crime and indicated it was related to the crimes with which Debruin was charged.

We acknowledge some jurors' testimony that they admonished each other to disregard this extraneous information. However, the district court did not have an opportunity to give a similar admonishment because the court was not informed of this information until after the jury rendered a verdict. *Cf. Jackson*, 195 N.W.2d at 689 (noting court instructed jury it could not consider prior conviction).

Finally, the extraneous information had a significant bearing on Debruin's defense.[2] As noted, Debruin raised an entrapment defense. The district court

[2] This distinguishes our opinion from companion case, *State v. Harris*, No. 05-0834 (Iowa Ct. App. July 12, 2006). Harris was Debruin's co-defendant at the same trial.

found sufficient evidence to instruct the jury on this defense. The instruction stated: "'Entrapment' occurs when a law enforcement agent causes the commission of a crime by using persuasion or other means likely to cause a normally law-abiding person to commit the crime." The jury's questions to the court after it retired to deliberate revealed jurors had concerns about the defense. The extraneous information that was introduced after the jury expressed frustration about the defense was paramount to Debruin's defense: whether she was "otherwise a law-abiding citizen." *See State v. Mullen*, 216 N.W.2d 375, 382-83 (Iowa 1974) (stating that although the focus is on government conduct, this does not render the circumstances surrounding the defendant's participation in the drug transaction irrelevant). *See also State v. Agent*, 443 N.W.2d 701, 703 (Iowa 1989). Moreover, the extraneous information was specifically excluded from the trial pursuant to Debruin's oral motion in limine. *Cf. State v. Johnson*, 445 N.W.2d 337, 342 (Iowa 1989) (jurors recounting of rumors did not relate to any of the charges for which the defendant was being tried and "added little to the admissible evidence which the jury was already allowed to consider"). We conclude, therefore, that the information was "sufficiently prejudicial to deny defendant a fair trial." *Henning*, 545 N.W.2d at 325. We reverse and remand for a new trial.

Debruin's prior conviction did not affect the deliberations regarding Harris. It also does not appear he asserted an entrapment defense, nor would Debruin's prior conviction have been relevant to his entrapment defense, if asserted. Moreover, in *Harris* our court stated, "[J]'s 'unreasonable[ness]' specifically related to the charge of entrapment concerning Ms. DeBruin."

III. Possession Instruction

Because it may arise on retrial, we will also address Debruin's challenge to the jury instructions. She argues that the court erred in refusing to instruct the jury on the lesser included offense of possession of marijuana. Our highest court has definitively resolved this issue against Debruin. *State v. Grady*, 215 N.W.2d 213, 214 (Iowa 1974). The holding of *Grady* has since been reaffirmed. *See State v. Spies*, 672 N.W.2d 792, 796 (Iowa 2003); *State v. Welch*, 507 N.W.2d 580, 582 (Iowa 1993). In the face of this precedent, Debruin's challenge necessarily must fail.

REVERSED AND REMANDED FOR NEW TRIAL.