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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0756**

State of Minnesota,
Respondent,

vs.

Timothy Wayne Mallick,
Appellant.

**Filed March 11, 2019
Affirmed
Rodenberg, Judge**

St. Louis County District Court
File No. 69VI-CR-16-833

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Bonnie A. Thayer, Assistant County Attorney,
Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
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Considered and decided by Reilly, Presiding Judge; Rodenberg, Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal from his conviction of conspiracy to commit second-degree
controlled-substance sale in a public housing zone under Minn. Stat. § 152.022, subd.
1(7)(ii) (2016), appellant Timothy Wayne Mallick argues that he was deprived of his right

to a fair trial when an internal court document containing prejudicial information not admitted in evidence was inadvertently included with the materials sent with the jury during its deliberations. We affirm.

FACTS

M.E. was enlisted by the Boundary Waters Drug Task Force as a paid informant. In that capacity, M.E. informed law enforcement that he could buy methamphetamine from appellant and D.S. M.E. met with task-force officers in a parked vehicle, where he was given a cell phone to record audio and a video recorder that looked like a key fob and was instructed concerning how to work the devices.

While M.E. was meeting with the officers in the vehicle, he received a phone call from D.S. With officers recording the call, D.S. said that M.E. would be able to buy methamphetamine from appellant at D.S.'s apartment located in a publicly-funded apartment building. M.E. walked approximately two blocks from the parked vehicle to D.S.'s apartment. M.E. testified that he talked to appellant inside the apartment, agreed on a price, and gave appellant money. M.E. further testified that appellant weighed some methamphetamine and gave it to M.E. M.E. walked back to the vehicle to again meet with the task-force officers and gave them the substance that he received from appellant. The substance was confirmed to be methamphetamine by a Minnesota Bureau of Criminal Apprehension forensic scientist.

The audio and video recording devices that law enforcement provided M.E. were recording from the time M.E. left the task-force vehicle until his return. At trial, the state

played the audio and video recordings of the transaction. M.E. identified appellant as the person depicted in the video holding a small bag containing a white powder.

Appellant waived his right to testify and presented no witnesses. The jury found appellant guilty of the charged offense. After the jury was discharged, it was discovered that a document not admitted into evidence had been sent with the jury along with the exhibits and printed jury instructions. The inadvertently included document was an internal court document entitled “St. Louis, Virginia Calendar Detail Listing—Internal.” The document contained, in relevant part, the following information: “IN CUSTODY; B 10,000; ISR REVOKED,” indicating the bail amount and fact that appellant’s intensive supervised release was revoked, and the notation “FEL” indicating the felony level of the charged drug offense.

Appellant moved for a new trial based upon the jury having received the calendar detail listing, arguing that Minn. R. Crim. P. 26.04, subd. 1(1)(2), permits the district court to grant a new trial for any irregularity in the proceedings that deprived the defendant of a fair trial. The district court held an evidentiary hearing and questioned all of the jurors individually concerning their exposure to the document. After each juror was questioned, he or she was excused without returning to the jury room where the remaining jurors were located.

The district court had prepared and asked six questions to the jurors:

1. Do you remember seeing a document in the jury room, during deliberations, that was not an exhibit received during the trial, a verdict form or a copy of the instructions?
2. Do you remember seeing this document before? (showing the juror the Calendar Detail Listing)
3. Did you look at it?

4. Do you know if other jurors saw it?
5. What did it mean to you?
6. Was it discussed during your deliberations?

Counsel for both parties were given the opportunity to request that the district court ask specific additional questions. In response to the general questions about what they had been given to review, none of the jurors mentioned the calendar detail listing. When shown the calendar detail listing, two of the jurors stated that it had been present in the material that was circulated in the jury room, but none of the other jurors recalled seeing the document. The two jurors who recalled seeing the document were asked what the document meant to them, one of the jurors stated that “it meant who the plaintiff was, who the defendant was.” The other juror did not assign any meaning to the document.

The district court concluded that it was error to send the calendar detail listing to the jury, but that the error was harmless beyond a reasonable doubt. It denied appellant’s motion for a new trial.

This appeal followed.

D E C I S I O N

A district court’s decision to grant or deny a new trial because of a juror’s exposure to improper material is reviewed for abuse of discretion. *State v. Cox*, 322 N.W.2d 555, 558 (Minn. 1982). 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. Spann*, 574 N.W.2d 47, 53 (Minn. 1998). “[T]he district court is in the best position to evaluate whether prejudice, if any, warrants a mistrial.” *State v. Marchbanks*, 632 N.W.2d 725, 729 (Minn. App. 2001). When potentially prejudicial

matters inadvertently come before a criminal jury, we apply the *Cox* four-part test to determine whether a new trial is warranted: “the nature and source of the prejudicial matter, the number of jurors exposed to the influence, the weight of evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice.” *Cox*, 322 N.W.2d at 559.

I. The district court’s questioning of individual jurors was improper in this circumstance.

We begin by observing that the district court’s questioning of the individual jurors concerning the document that was inadvertently included among the jury instructions and exhibits was improper. Although neither party advances this argument, appellate courts have a responsibility “to decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.” *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted).

The district court followed the Minn. R. Crim. P. 26.03, subd. 10, procedure providing: “If the court determines that material disseminated outside the trial proceedings raises questions of possible prejudice, the court may on its initiative, and must on motion of either party, question each juror, out of the presence of the others, about the juror’s exposure to that material.” Minn. R. Crim. P. 26.03, subd. 10. Such an examination “must take place in the presence of counsel, and a record of the examination must be made.” *Id.* This procedure is to be used for circumstances in which the court becomes aware *during the trial proceeding* that a jury is exposed to improper information. *State v. Greer*, 635

N.W.2d 82, 93 (Minn. 2001).¹ The appropriate course of action when the defendant becomes aware of such a violation either *during deliberations or after a verdict is reached*, is to move for a *Schwartz* hearing under Minn. R. Crim. P. 26.03, subd. 20(6).² *Id.* Here, because the jury had already delivered its verdict when the impropriety was discovered, the proper procedure was under rule 26.03, subdivision 20(6), and not under rule 26.03, subdivision 10.

A defendant may move the court for a hearing to impeach the verdict. Juror affidavits are not admissible to impeach a verdict. At an impeachment hearing, jurors must be examined under oath and their testimony recorded. Minnesota Rule of Evidence 606(b) governs the admissibility of evidence at an impeachment hearing.

Minn. R. Crim. P. 26.03, subd. 20(6). Minn. R. Evid. 606(b) generally prohibits juror testimony to impeach a verdict, but the rule allows exceptions including juror testimony concerning improper evidence. Jurors may be questioned “whether extraneous prejudicial information was improperly brought to the jury’s attention.” Minn. R. Evid. 606(b). But they may not be questioned about the effect of any matter, whether properly or improperly considered, “upon that [juror’s] or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict.” *Id.* “[T]he rule is clear that even though the jurors may testify concerning the improper contacts, they may not testify concerning the

¹ The language in rule 26.03, subdivision 10, was, at the time *Greer* was decided, contained in subdivision 9 of the rule.

² The rule has since been renumbered from 26.03, subdivision 19(6), as it was when *Greer* was decided, to 26.03, subdivision 20(6).

effect the improper contacts [or material] had on their minds.” *State v. Hill*, 287 N.W.2d 918, 921 (Minn. 1979).

Consequently, the district court’s questions to the jurors concerning the calendar detail listing such as, “What did it mean to you” and “Was it discussed during your deliberations,” were outside the scope of Minn. R. Evid. 606(b). The supreme court’s opinion in *Cox* reflects this understanding:

We do not, however, permit inquiry into the validity and reliability of a verdict to infringe on the jury’s freedom at deliberation. Minn.R.Evid. 606(b) protects the juror’s thought processes and mental operations from later scrutiny. Therefore, the proper procedure for reviewing a jury verdict is to determine from juror testimony what outside influences were improperly brought to bear upon the jury and then estimate their *probable effect on a hypothetical average jury*.

Cox, 322 N.W.2d at 559 (emphasis added).

The district court erroneously relied on the effect that the document had on *this* jury when it concluded that no prejudice resulted to appellant because “the two jurors who recalled seeing the document did not attach any particular meaning to the document and gave no indication that they concluded from it that [appellant] was in custody or had his Intensive Supervised Release revoked.” *Cf. Cox*, 322 N.W.2d at 559-60 (“We hold there is no reasonable possibility that the sheriff’s remark would affect the verdict of *an average jury* given the nature of the remark, the weight of the evidence supporting conviction and the probable curative effect of the trial court’s voir dire and instructions.” (emphasis added)). But this improper procedure alone does not require reversal. Instead, we review and analyze the *Cox* factors to determine the effect the extraneous material would have on the “hypothetical average jury.”

II. The Cox four-part test does not require reversal.

A. Nature and source of the prejudicial information

The scenario here can be compared with that in *State v. Winningham*, where the defendant was convicted of multiple offenses related to the use of minors in sexual performances and possession of pornographic representations of minors. 406 N.W.2d 70 (Minn. App. 1987), *review denied* (Minn. July 15, 1987). During trial, the state moved to introduce letters allegedly written by the defendant to commercial pornographers and using “vulgar and graphic terms of the writer’s fondness for photos of ‘baby dolls’ or ‘little girls’ in various stages of undress and erotic posture.” *Id.* at 71. The district court ruled that the “highly prejudicial” letters were inadmissible. *Id.* Approximately five minutes after the case had been submitted to the jury, the court’s clerk discovered that the letters had been delivered to the jury room and were spread across the entire length of the table. *Id.* After the letters were removed from the jury room, each of the jurors admitted having viewed the excluded evidence, with one juror testifying that “I read one paragraph in one letter, and it was enough” and described the letter as “garbage.” *Id.* The district court denied the defendant’s motion for a new trial. *Id.* On appeal, we reversed, holding that the defendant was denied his constitutional right to a fair trial because, among other reasons, the letters were highly prejudicial. *Id.* at 72.

In *State v. Cash*, the jury inadvertently received portions of a transcript of the defendant’s police interrogation that the district court had previously ruled inadmissible. 391 N.W.2d 875, 878 (Minn. App. 1986). The defendant was on trial for charges relating to sexual abuse of a minor, and the district court had ruled that portions of the transcript

discussing the defendant's sexual conduct with and supplying liquor to other minors was inadmissible. *Id.* at 879. The district court determined that the error was harmless, and we reversed, explaining that:

We would ignore reality and the common sense of a jury to conclude that a jury will not be unduly prejudiced against a defendant when the jury is allowed to see a written statement by a police officer made to the defendant in which the officer claims to have statements from other young individuals alleging that [defendant] had sexual intercourse with them.

Id. at 880.

The calendar detail listing here is not as inflammatory as the improper material received by the juries in *Winningham* and *Cash*. Moreover, the receipt of the calendar detail listing is less prejudicial than the disclosure in *Cox*, where a new trial was not required after the sheriff made a remark to the jury implying an opinion that the defendant was guilty.³ *Cox*, 322 N.W.2d at 560.

Here, we agree with the district court that “it is unlikely that any juror who was not actively working in the criminal justice system would draw any significant conclusion from the abbreviated statement.” The references to “B 10,000,” “ISR REVOKED,” and “FEL” appear to be of little prejudice to appellant. It is the reference to “IN CUSTODY” that carries the potential of prejudice. The supreme court has found that references to *prior* incarceration of a defendant can be unfairly prejudicial. *See State v. Manthey*, 711 N.W.2d

³ Appellant argues that, under *Cox*, the introduction of unauthorized material to the jury during deliberations creates a rebuttable presumption of prejudice. *Cox* expressly limited such a presumption to statements of a court official about the merits of a criminal case “because the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury.” 322 N.W.2d at 558 (quotation omitted). We do not have that situation here.

498, 506 (Minn. 2006) (explaining that although the supreme court has “not enunciated a general rule that it is prejudicial for the jury to learn that a defendant is in jail for the crime for which he or she is on trial,” the reference to the defendant’s incarceration arguably damaged the presumption of innocence). In *Manthey*, one of the witnesses testified that the defendant had been in jail. *Id.* at 505. Additionally, the bailiff informed the court that a juror told him that she learned from a supervisor at work that one of her coworkers was in jail with the defendant. *Id.* at 506. The supreme court concluded that these references did not warrant a new trial. *Id.* at 507. Although it may in some circumstances be prejudicial for a jury to learn that a defendant was in custody, the reference to custody in the calendar detail listing here was buried in an otherwise-innocuous-appearing court document. The custody reference does not indicate when, where, for how long, or why appellant was in custody. The remaining references seem unlikely to concern an average juror looking at the document.

As it relates to the source of the calendar detail listing, the district court was unaware of how the document came to be sent back with the jury. Counsel for both parties were given the opportunity to review the items being sent back to the jury before the jury retired. It appears that neither party was involved in sending the document to the jury, and the lawyers apparently took no note of the calendar detail listing. But the court concluded that “I am not blaming anybody other than myself.”

The jury’s receipt of the calendar detail listing would have been minimally prejudicial to appellant at most. Recognizing that the jury’s receipt of the document was neither party’s fault, this factor weighs slightly against granting a new trial.

B. Number of jurors exposed to the influence

Appellant argues that every juror was exposed to the calendar detail listing because it was included among the exhibits and instructions the jury received. The district court noted that only two jurors recalled seeing the document, and “[w]hile it is likely that all of the jurors probably glanced at it as it was passed around, it is unlikely that any of the jurors examined the document in detail let alone drew potentially prejudicial conclusions.” But this factor does not consider what conclusions the jurors drew from the document. Minn. R. Evid. 606(b). The question is the number of jurors exposed to the influence.

Regardless of whether the jurors recalled seeing the document, the entire jury was exposed to the calendar detail listing because it was present throughout deliberations. Consequently, this factor weighs in favor of granting a new trial.

C. The weight of evidence properly before the jury

Appellant argues that this factor weighs in favor of a new trial because the evidence before the jury was not strong. The district court noted that appellant “could clearly be seen [on video] holding the drugs which were passed to the informant in a controlled buy” and the weight of the evidence “heavily supports the verdict.” And since the district court is most appropriately situated to consider this factor, we defer to it.

Appellant argues more specifically that there is no evidence other than M.E.’s testimony that appellant conspired to sell drugs. But in addition to the audio, video, and testimonial evidence, there is strong corroborating circumstantial evidence of appellant conspiring with D.S. to sell drugs because M.E. had arranged for the controlled buy with appellant entirely through D.S., by way of a phone call overheard by task-force officers.

This factor weighs significantly against granting a new trial because the evidence against appellant was strong.

D. Likelihood that curative measures were effective in reducing the prejudice

Given the procedural posture in which the district court became aware of the error, the district court was not able to provide a curative instruction. This factor, therefore, necessarily weighs in favor of a new trial.⁴

Two *Cox* factors favor granting a new trial—the number of jurors exposed and absence of any curative measure. One factor weighs slightly against granting a new trial (the nature and source of the document), and another factor weighs heavily against granting a new trial (the strength of the evidence). We conclude, considering all of the *Cox* factors, that a new trial is not warranted here. Given the strength of the state’s case, there is no reasonable probability that the errant document significantly affected the verdict. We therefore affirm the district court’s denial of the new-trial motion.

Affirmed.

⁴ The state argues, and the district court noted, that the jury was instructed, at both the beginning of trial and in the final instructions, “[t]hat the defendant has been brought before the court by the ordinary processes of the law and is on trial should not be considered by you in any way suggesting guilt.” This standard instruction was proper, and appellant does not suggest otherwise. But it was not a “curative measure.” Further, the state argues that any curative measure would have drawn more attention to the document than actually had occurred, given that none of the jurors attached any significance to the document. See *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978) (discussing the idea that a specific curative instruction would emphasize an inadvertent prejudicial reference). But appellant had no opportunity to request or decline a curative instruction because of the timing of the discovery. And the question here is not whether any juror attached actual significance to the document in deliberations.