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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

267

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 28, 1987
vs.	)	
PATRICK GENE WHITE,	)	6-429 85-1871
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County (8969) - John F. Siebenmann, District Associate Judge.

Defendant appeals from his conviction, following a jury trial, of third-degree theft and assault. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard J. Bennett, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

HAYDEN, J.

On December 6, 1984, defendant was charged by trial information with third degree theft in violation of Iowa Code sections 714.1(1) and 714.2(3) (1985), and assault, in violation of Iowa Code sections 708.1 and 708.2(3) (1985). After a jury trial on October 14 and 15, 1985, defendant was found guilty on all charges.

The victim, Rebecca Evans, testified on October 6, 1984, at approximately 2:00 a.m., she awoke to find a man in her apartment. The door had been left open and the victim had fallen asleep on the couch while watching television. The intruder told her he had paid fifty dollars at an adult bookstore below the victim's apartment to have sexual intercourse with a "Christine Miller" and asked the victim if she was Miller. Ms. Evans replied that she was not Miller. The intruder proceeded to sit on the couch next to the victim and ask her various questions. The interrogation continued for approximately fifteen minutes. As the intruder left he took Ms. Evans' purse, containing two barbers' shears. Approximately three weeks after this theft Ms. Evans, while visiting a friend, saw defendant in the hallway of an apartment building. She recognized his face as that of the intruder who had stolen her purse, called the police, and had the defendant arrested.

At the close of the State's evidence, defendant's motion for a directed verdict, on the ground the State had failed to identify defendant as the intruder, was overruled. The defendant's motions in arrest of judgment and for a new trial were also overruled.

On appeal the defendant contends the State failed to produce sufficient evidence to enable a rational jury to conclude that defendant was guilty beyond a reasonable doubt. The defendant also asserts the police officer's testimony concerning the identification of a prime suspect should have been excluded as inadmissible hearsay.

Our scope of review is at law for correction of errors only. Iowa R. App. P. 4.

I.

Defendant contends the State failed to prove beyond a reasonable doubt that he was the intruder who entered Ms. Evans' apartment on October 6, 1984. The defendant argues the State lacked sufficient evidence because: (1) the victim's initial police description of the intruder did not match the defendant; and (2) the defendant's wife testified that he was with her at the time of the crime.

The victim described the intruder, while first reporting the incident to the police, as being a five-foot, seven or six inches tall, twenty-five-year-old male with "skuzzy" hair, a noticeable limp, a southern accent, and no obvious facial hair. As mentioned, several weeks later Ms. Evans identified defendant as the intruder. Defendant is a six foot one-inch tall, eighteen-year-old male with no limp or southern accent. No physical evidence, i.e. fingerprints or the contents of the purse, was produced at trial. The only evidence was Ms. Evans' identification.

When considering a challenge to the sufficiency of the evidence we view the evidence in a light most favorable to the State and we consider all evidence and the inferences that may be drawn from it. State v. Craney, 347 N.W.2d 668, 680 (Iowa 1984), cert. denied, 469 U.S. 884, 105 S. Ct. 255, 83 L. Ed. 2d 192 (1984); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Evidence is sufficient to sustain the verdict where there is substantial evidence from which a rational jury could determine defendant guilty beyond a reasonable doubt. Robinson, 288 N.W.2d at 330; State v. Mitchell, 371 N.W.2d 432 (Iowa Ct. App. 1985).

When addressing a pretrial identification in which suggestive police procedures have been used, the Supreme Court has utilized five factors. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1972). These factors are:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. See also State v. Mark, 286 N.W.2d 396, 405 (Iowa 1979), and State v. McManus, 263 N.W.2d 556, 558 (Iowa Ct. App. 1977). Here the defendant questions the sufficiency of the evidence, specifically arguing that the victim's initial description and defendant's alibi created a reasonable doubt. We disagree.

Of the five factors from Brathwaite, defendant contends the prior description was fatal to the State's case. Although some discrepancies do exist between Ms. Evans' initial description and defendant's actual appearance, we do not consider them fatal to the jury's verdict. The victim sat with the intruder for approximately fifteen minutes, they sat side-by-side, close enough for the intruder to put his left hand over the victim's mouth. Defendant was identified by Ms. Evans during a spontaneous, chance meeting. Her certainty at the time of the confrontation was unquestionable, as was evidenced by defendant's cross-examination of Ms. Evans at trial. She did not identify defendant based upon his height, weight, age, accent, or physical handicap, rather she conclusively recognized his face. Ms. Evans was extensively questioned at trial regarding the circumstances surrounding the original theft and her initial identification of defendant and she firmly stood by her identification.

Defendant further contends that his wife's alibi testimony created a reasonable doubt regarding his guilt. She testified that on the night of the theft defen-

dant was at home in bed, asleep. This is the same testimony that defendant gave as to his whereabouts on the night of the occurrence. The only evidence given by the State was Ms. Evans' testimony regarding the theft and the subsequent identification, and the corroborating police officer's testimony.

Upon reviewing all of the evidence in a light most favorable to the prosecution, we conclude that a rational juror could have found guilt beyond a reasonable doubt. There is a direct conflict between Ms. Evans' testimony and defendant's alibi. The jury found her testimony to be more credible than that given by the defense. Robinson, 288 N.W.2d at 341 (determination of the credibility of the witnesses and the weight of evidence is the function of the factfinder). "The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses." United States v. Bailey, 444 U.S. 394, 414, 100 S. Ct. 624, 636, 62 L. Ed. 2d 575, 593 (1980). We affirm defendant's conviction.

II.

Defendant asserts the trial court erred in allowing prejudicial hearsay testimony at trial. At trial the State presented evidence that prior to defendant's arrest the victim failed to identify, as the intruder, a prime suspect. The victim testified that approximately seven days after the crime Detective Robert Parr had her enter a restaurant near her home to determine whether she recognized one of the occupants as the intruder. She testified the intruder was not in the restaurant. Detective Parr initially testified he had observed the suspect in the restaurant on the day Ms. Evans made her visit. He later conceded, when faced with an inconsistent statement from his deposition, that he had not seen the suspect and it possibly had been another officer who observed the suspect in the restaurant on that day. This contradiction was brought forth in front

of the jury through voir dire. No other witness testified as to whether the suspect had been present in the restaurant.

Defendant did object and correct the detective regarding his lack of personal knowledge as to whether the suspect was in the restaurant. The State then withdrew the question, as it related to the detective's personal knowledge, and asked whether Ms. Evans identified anyone in the restaurant as being the person that entered her apartment. Detective Parr answered in the negative. On appeal we question whether the statement was hearsay and if it was hearsay, was it correctly preserved. Even assuming the statement was hearsay we find its existence in the record in no way prejudiced defendant. Admission of hearsay evidence does not amount to reversible error unless it was prejudicial. State v. Mueller, 344 N.W.2d 262, 266 (Iowa Ct. App. 1983). The admission of hearsay evidence is presumed to be prejudicial unless the contrary is firmly established. Id.

Regardless of whether the suspect was in the restaurant or not, Ms. Evans positively identified the defendant as the intruder into her home. The State had the burden to prove beyond a reasonable doubt every fact necessary to constitute the crime with which defendant is charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970). The State fulfilled this burden, the victim's failure to identify another suspect is collateral to the determination of defendant's guilt. Any hearsay that might have arisen is not germane to the issue of defendant's guilt and therefore not prejudicial.

AFFIRMED.