

IN THE COURT OF APPEALS OF IOWA

No. 6-260 / 95-1202

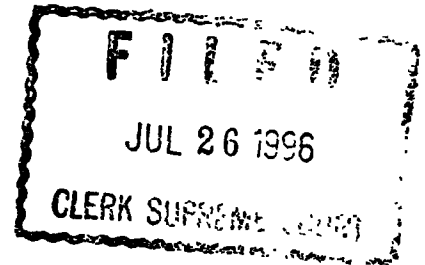
STATE OF IOWA,

Appellee,

vs.

CHARLES PRINCE WISE,

Appellant.



Appeal from the Iowa District Court for Linn County, Lynne E. Brady and Thomas M. Horan, Judges.

Defendant appeals judgment and sentence, following jury trial, entered upon his conviction of first-degree burglary in violation of Iowa Code section 713.1 and .3 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John F. Fatino and Patricia Reynolds, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Cady, P.J., Huitink and Vogel, JJ.

CADY, P. J.

Charles Wise appeals judgment and sentence entered on his conviction for first-degree burglary. On our review, we affirm.

In the early morning hours of August 30, 1994, three men entered the apartment of Brian Holmes and Noelle Merck. Two of the intruders wore bandanas over their faces. The third man wore a hat, but did not have anything covering his face, and carried a handgun.

Holmes heard voices in his apartment and got out of bed. He was soon confronted by the armed man. Holmes “back pedaled” toward his bedroom. He was told to lie down on the floor. The armed man told Merck to stay in the bedroom, and shut the bedroom door. He demanded money and “dope.” Holmes told the man he did not have any drugs. The three intruders rummaged through the living room and emptied Merck’s purse. As the three men left the apartment, the armed man fired a shot into the wall of the apartment. Holmes got off the floor and called the police. Officers arrived within minutes.

Soon after the robbery, officers observed a vehicle near Holmes’ apartment, which matched the description of a vehicle that left Holmes’ apartment complex shortly after the encounter. When officers approached the car, its occupants fled on foot. A search of the car revealed a leather jacket, hats, gloves, and jackets consistent with those described as worn by the intruders, as well as ammunition and Wise’s driver’s license. The vehicle was registered to Wise.

An officer returned to Holmes' apartment with Wise's driver's license. The officer showed Holmes the license and asked if the picture on it looked familiar. Holmes stated it "looked a lot like the guy that had the gun." Merck stated it was possibly one of the intruders, but was not sure.

Later that day Holmes and Merck went to the police station to make statements. While at the station, officers showed them eight photographs of black men. Holmes selected Wise as the armed man, however Merck was unable to make any identification. When asked if anyone looked somewhat similar to the gunman, she identified a different photo.

The State charged Wise with first-degree burglary. Following a brief hearing, the district court denied his pretrial motion to suppress the identifications. At trial, Holmes identified Wise as the armed man who had been in his apartment. He stated he assumed the police had apprehended the person pictured in the license. Merck did not make an in-court identification.

Wise claimed his car had been stolen on the evening of August 30, 1994, after his girlfriend returned from the grocery store in the late evening. Wise's girlfriend testified she left the keys in the vehicle when she returned home and noticed the car gone the following morning. Wise, his girlfriend, and another roommate all testified Wise was home asleep at the time of the burglary. Wise also testified he reported his car stolen when he woke up the next day and realized it was gone.

The jury found Wise guilty of first-degree robbery. The district court sentenced Wise to an indeterminate prison term not to exceed twenty-five years.

Wise appeals. He contends the district court erred in denying his motion to suppress identification evidence. He also argues there was insufficient evidence to support his first-degree burglary conviction.

I. Identification Evidence

Wise claims his due process rights were violated when the district court denied his motion to suppress the out-of-court identifications made by Holmes and Merck and the in-court identification by Holmes. We review a claim involving a violation of constitutional rights de novo. *State v. Caya*, 519 N.W.2d 419, 422 (Iowa App. 1994).

A two-step process must be used to analyze challenges to out-of-court identifications. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). First, we must determine whether the out-of-court identification procedure was "impermissibly suggestive." *State v. Rawlings*, 402 N.W.2d 406, 409 (Iowa 1987) (citing *Manson v. Brathwaite*, 432 U.S. 98, 108-09, 97 S. Ct. 2242, 2250, 53 L. Ed. 2d 140, 150 (1977)). Second, if an impermissibly suggestive procedure was used, we then determine whether, under the totality of the circumstances, the procedure created a substantial likelihood of irreparable misidentification. *State v. Holderness*, 301 N.W.2d 733, 738 (Iowa 1981).

A. Impermissibly Suggestive

Generally, the display of a single photograph to a witness is an inherently suggestive procedure. *State v. Mark*, 286 N.W.2d 396, 404-05 (Iowa 1980). We recognize the “improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals.” *Simmons v. United States*, 390 U.S. 377, 383, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968). Moreover, the opportunity for error is increased when an officer displays a single picture to the witness of an individual who generally resembles the persons he or she saw committing a crime. *Id.* See also *Mark*, 286 N.W.2d at 404; *State v. Ash*, 244 N.W.2d 812, 815 (Iowa 1976). The danger of a witness retaining the memory of the photograph’s image, instead of his or her own sensory perception of the person they observed, tends to reduce the trustworthiness of subsequent line-up or in-court identifications. *Simmons*, 390 U.S. at 383-84, 88 S. Ct. at 971, 19 L. Ed. 2d at 1253.

Here, the officer showed both Holmes and Merck a single photograph in a driver’s license. We, however, need not determine if the procedure used was impermissibly suggestive if we find the identifications were reliable enough to indicate there was no substantial likelihood of irreparable misidentification. *Mark*, 286 N.W.2d at 405.

B. Irreparable Misidentification

Reliability is the critical issue in determining the admissibility of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2252, 53 L. Ed. 2d 140, 154 (1977). Our prior appellate decisions employ a five factor analysis to

assess reliability of the identifications. These factors include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *State v. Thornton*, 506 N.W.2d 777, 779-80 (Iowa 1993); *State v. Holderness*, 301 N.W.2d 733, 738 (Iowa 1981); *State v. Moore*, 469 N.W.2d 269, 273 (Iowa App. 1991).

We find Holmes' in-court and out-of-court identification of Wise exhibited sufficient guarantees of reliability.¹ Testimony at trial indicated Holmes had sufficient opportunity and adequate lighting to view the gunman, including his clothing and uncovered face. He was particularly attentive to the appearance of the armed man for fifteen to twenty seconds prior to being forced on the floor and had no other distractions.

Holmes' gave officers a reasonably accurate description of the armed man. He described him as a black male in his mid-twenties five feet ten inches to six feet tall, and weighing around two-hundred pounds. Wise's driver's license lists his height as

¹ Since Merck made no clear identification of Wise as the armed perpetrator, we need not address her identifications. At trial Merck testified she did not get a good look at the armed man's face, but rather concentrated on the what the man was wearing. She further testified she told the officer the photograph in the driver's license "possibly could be" the armed man, but she was not sure. Merck never identified Wise's photograph when she gave a statement. Moreover, she never identified Wise in-court as the armed man she saw in her apartment. The failure of Merck to make a positive identification of Wise was presented at trial, and Wise had ample opportunity to cross-examine Merck on this issue.

five feet ten inches tall,² weight as one hundred and eighty pounds, and age as twenty-five years old. Minor discrepancies go to the weight of the identification evidence. *State v. White*, 530 N.W.2d 77, 81 (Iowa App. 1994) (inconsistencies in identification testimony left to the jury to resolve). Moreover, Holmes was thoroughly cross-examined on these issues. *See Simmons*, 390 U.S. at 383-84, 88 S. Ct. at 971, 19 L. Ed. 2d at 1253 (the danger of misidentification at trial can be substantially lessened through the use of effective cross-examination).

Holmes' also expressed certainty and confidence each of the three times he identified Wise as the armed man. Moreover, Holmes testified his viewing of the driver's license did not affect his subsequent photograph identification of Wise. At trial, he also testified he had no doubt Wise was the armed robber.

Finally, the time span between the witnessed crime and the identifications was short. The officer presented the driver's license to Holmes within thirty minutes after the crime had taken place. Holmes made his second identification the following afternoon. The very short time span further enhances the reliability of Holmes' identifications. *See also Mark*, 286 N.W.2d at 406 (time span of one-week between crime witnessed and identification did not defeat reliability).

² At trial, however, Wise and his roommate stated he was five feet seven inches tall.

We find there was no substantial likelihood of irreparable misidentification at trial. Accordingly, we find no error in the district court's denial of Wise's motion to suppress the in-court and out-of court identifications.

II. Sufficiency of Evidence

Our standard of review for claims of insufficient evidence is well settled. A verdict will be upheld where substantial evidence, or such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt, exists to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

We find substantial evidence supports Wise's verdict. Holmes' clearly identified Wise as the man who entered his apartment with the gun, demanded money and drugs, and forced him to lie on the floor. While he did not mention Wise's two-inch forehead scar in his description of the armed perpetrator, he testified the armed man wore a baseball hat. Both Merck and Holmes testified there was abundant lighting in the apartment on the night of the robbery.

Moreover, a neighbor testified he heard yelling and a shot in the apartment complex. He stated he viewed a two-toned Chevy Caprice or Impala speeding away from the complex, and later identified the same vehicle to be the abandoned vehicle found by police. Another neighbor stated he saw three persons drive up to the

apartment complex in a Chevy Impala, and later left in the vehicle.³ Officers later discovered a red Chevy Impala, registered to Wise, abandoned by its occupants near Holmes' apartment. The search of the vehicle revealed similar clothing described by Merck and Holmes to those worn by the perpetrators. Moreover, while Wise contends his car was stolen prior to the burglary, a jury need not believe a defendant's version of the facts. *State v. Wilkens*, 346 N.W.2d 16, 20 (Iowa 1984).

We find ample evidence to support Wise's conviction for first-degree burglary.

AFFIRMED.

³ We note while this witness first testified he thought one of the persons had long blonde hair and might be a woman, he later stated he could really only see silhouettes he did not get a good look at the persons from his apartment. He also testified it was possible he could have been mistaking a light-colored bandana or hood for blonde hair.