FILED
APR 24 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-85 / 89-544

STATE OF IOWA,

Plaintiff-Appellee,

vs.

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STEVEN PATRICK TAYLOR,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Defendant appeals his conviction, following a jury trial, of first-degree robbery. **AFFIRMED.**

Kevin M. Kirlin, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and James Smith, County Attorney, for appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Defendant Steven Patrick Taylor appeals his conviction of robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2 (1987). He contends his trial counsel rendered ineffective assistance. We disagree and affirm the trial court.

The charge followed an alleged robbery of a QuikTrip convenience store in Des Moines. At the time of the alleged robbery, a manager was alone in the store. The robber aimed a sawed-off rifle at the manager, who was behind the cash register, and instructed the manager to open the register, which he did. The robber reached across the counter, took $75 from the register, and fled. The alarm system in the store did not go off. The manager called the police.

The day after the robbery, the manager reviewed hundreds of photos and was unable to identify a suspect. The police then received a tip that defendant might be the robber. The manager was given an array of six photos, including defendant's picture. The manager identified defendant from the array and a subsequent line-up. The array was introduced at trial without objection from defendant's attorney.

I.

On appeal, defendant contends his trial counsel was ineffective in failing to move to suppress evidence of

defendant's identification and in failing to object to introduction into evidence of the photo array. Defendant admits the array was not impermissibly suggestive, except as to the fact that the pictures were mug shots and defendant's photograph had height markings, and was the only one of the six having such markings. We have examined the array and do not find it to be impermissibly suggestive. Specifically, we do not find the height calibrations in the background to render the array impermissibly suggestive. See State v. Davison, 245 N.W.2d 321, 323-24 (Iowa 1976), cert. denied, 430 U.S. 955 (1977).

II.

Defendant next contends his counsel was ineffective in starting his examination of the store manager with the following question:

> Q. Ralph, a few questions for you. First, I want you to understand that nobody's disputing you didn't get robbed. Okay?
>
> A. Okay.

Defendant's guilt or innocence hinged on his identification as the robber, not on whether or not the robbery happened. We do not find his trial counsel ineffective on this ground.

III.

Defendant also contends his trial counsel should have sought an instruction regarding the reliability of eyewitness identification. Reviewing the instructions in

their entirety, we find no basis to support a claim of ineffective assistance of counsel on this issue.

IV.

Defendant's last contention is that trial counsel should have objected to certain alleged hearsay. The investigating officer testified on direct examination that the defendant's photograph had not been included in the hundreds shown to the assistant manager on the day of the robbery. The officer explained he put together the array with the defendant's photograph after receiving information "that possibly a Steven Taylor might have been involved in the robbery."

The fact of a complaint is admissible to explain an investigating officer's responsive action, but a complainant should not, for hearsay reasons, become more specific by repeating definite complaints of a particular crime by the accused. State v. Doughty, 359 N.W.2d 439, 442 (Iowa 1984); see also C. McCormick, Evidence § 248, at 587 (1972).

We therefore agree that an objection to strike the portion of the answer that identified defendant, if made, might well have been sustained. Viewing this record, and trial counsel's overall performance, we reject defendant's argument on this issue. See State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982). We affirm the trial court.

AFFIRMED.