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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed February 5, 1980

vs.)

LESTER DONALD HOLDERNESS,)

225

Defendant-Appellant.)

62689

Appeal from Linn District Court - John L. Hyland, Judge.

Defendant appeals from conviction for burglary in the second degree, in violation of sections 713.1 and 713.3, supplement to the Code 1977. - Affirmed.

John M. Heckel, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Doug Staskal, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

SNELL, J.

Defendant appeals from his conviction for burglary in the second degree, in violation of sections 713.1 and 713.3, supplement to the Code 1977. Defendant contends a photograph was improperly admitted into evidence, and that the trial court erred in denying defendant's motion for a directed verdict. We affirm the judgment of the trial court.

The victim of the burglary, Charles Corrigan, was an insurance claims adjuster who routinely took pictures with a Kodak Instamatic camera in the course of his work. The camera was among the items in a briefcase stolen during the burglary. Corrigan had taken about forty-eight pictures during the week of the burglary and had taken several pictures on a film that was still in the camera when stolen.

Corrigan testified that about two hours after he discovered the burglary a little neighbor boy brought a film cartridge to him. The cartridge was identical to the kind he was using in his camera. The next day Corrigan sent it in a company envelope to be developed. When the developed film came back there were eight pictures that Corrigan had taken of scenes pertaining to claims he was working on in his business. Two prints developed from the film were not taken by Corrigan, one of which is the subject matter of this appeal. No evidence was introduced regarding who took the photograph or when or how it was taken.

Defendant challenges the admissibility of a photograph that depicts an individual with physical characteristics remarkably similar to defendant. The individual in the photograph is kneeling on the ground beside a boat and is holding a briefcase. Corrigan positively identified the boat in the photograph as being his on the basis of the serial number visible in the photograph. Corrigan testified the briefcase looked exactly like the one he reported missing. Other identifications by Corrigan clearly indicated that the photograph was taken in his backyard.

The admissibility of photographic evidence is a matter largely within the discretion of the trial court. State v. Moore, 276 N.W.2d 437, 441 (Iowa 1979); State v. Fuhrmann, 257 N.W.2d 619, 624 (Iowa 1977); State v. Hall, 235 N.W.2d 702, 720 (Iowa 1975). The test of admissibility of photographs is relevancy. Fuhrmann, 257 N.W.2d at 624; Hall, 235 N.W.2d at 720. Unlike other demonstrative evidence for which a chain-

of-custody foundation is required, photographs only require verification as correct and accurate representations of the relevant observation of the witness. State v. Zaehring, 280 N.W.2d 416, 421-22 (Iowa 1979). We may not reverse the trial court's determination of the admissibility of photographs unless a clear abuse of discretion is shown. State v. McGhee, 280 N.W.2d 436 (Iowa 1979); State v. Davison, 245 N.W.2d 321, 324 (Iowa 1976).

Photographs are admissible if they are illustrative of the testimony of witnesses. Maier v. Illinois Central Railroad, 234 N.W.2d 388, 394 (Iowa 1975).

It is not necessary for a witness to be a photographer or know anything concerning the taking of pictures or technical data concerning cameras or lenses. The only requirement is that he know about the facts represented or the scene or objects photographed. After this is established a witness may say whether the photograph correctly and accurately portrays such facts. When the photograph is thus verified it is admissible.

Id. (citing McCormick's Handbook of the Law of Evidence § 214, at 530 (2d ed. E. Cleary 1972)). Thus, the verifying witness need not have been the individual who took the photograph. Id., 2 C. Scott, Photographic Evidence § 1026, at 347 (2d ed. 1969); 3 J. Wigmore, Evidence § 794, at 241 (J. Chadbourne rev. 1970); see United States v. Neal, 527 F.2d 63, 65 (8th Cir. 1975), cert denied, 429 U.S. 845, 97 S. Ct. 125, 50 L. Ed. 2d 116 (1976).

The instant case differs somewhat from the usual situation where photographs are used for merely demonstrative purposes. The exhibit was offered not just to depict a scene, but as direct proof of criminal acts. It depicts a person resembling the defendant in Corrigan's backyard, holding a briefcase which allegedly had been stolen in the burglary. Corrigan identified the photograph as clearly depicting his backyard and the stolen briefcase. To render the photograph relevant to the issues being tried, some indication in the record of the time it was taken is essential. Ordinarily, this should be supplied by the testimony of a witness in order to render the photograph admissible. But here, it was clearly shown that such testimony was unavailable. In lieu thereof, circumstantial evidence was presented which adequately demonstrated, to a reasonable certainty, the approximate time when the photograph was taken with respect to the burglary. Circumstances also negated the opportunity for staging or tampering with the

photograph. Under the circumstances, we cannot conclude that the trial court abused its discretion in admitting the photograph. Compare, United States v. Taylor, 530 F.2d 639, 642 (5th Cir. 1976).

Defendant asserts that the trial court erred in denying his motion for a directed verdict of acquittal. In reviewing a trial court's ruling on a motion for a directed verdict, we view the evidence in the light most favorable to the State, whether or not it is contradicted, and every reasonable inference that can be deduced from the evidence must be considered to support and supplement that evidence. State v. Jones, 281 N.W.2d 13, 18 (Iowa 1979); State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). If there is any substantial evidence tending to support the charge, the case should be submitted to the jury. State v. Dykers, 239 N.W.2d 855, 859 (Iowa 1976); State v. Sheffey, 234 N.W.2d 92, 96 (Iowa 1975).

The photograph at issue depicts an individual closely resembling the defendant in the victim's backyard with a briefcase like Corrigan's missing briefcase. Defendant admitted the similarity between himself and the individual in the photograph. In addition, defendant could not positively recall his whereabouts on the night of the alleged burglary. Viewing these facts in the light most favorable to the State, it was for the jury to determine if the defendant was the subject of the mystery photograph. We hold the trial court did not err in submitting the case.

AFFIRMED.