IN THE COURT OF APPEALS OF IOWA

No. 5-256 / 94-181

FILED
AUG 17 1995
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES BOLDEN,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Defendant appeals from judgment and sentence, following jury trial, entered upon conviction of third-degree sexual abuse, in violation of Iowa Code sections 709.1 and 709.4(1) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., Cady, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

CADY, J.

Defendant, James Bolden, appeals from his conviction for third-degree sexual abuse, in violation of Iowa Code section 709.1 and 709.4(1) (1993). He contends he was denied due process when the district court refused to exclude the victim, A.C., from the courtroom prior to her identification testimony. Upon our review, we conclude Bolden was not denied due process, and affirm the conviction.

A.C., a seventeen-year-old girl, alleged she had been raped by an African-American male. She described him to police as about six foot, stocky build, 200 pounds, approximately thirty-five years old, with a mustache, wearing black pants, a white tank top and white and black tennis shoes. On the day of the assault, A.C. was shown a photographic array and was unable to select Bolden's picture. Following an investigation, Bolden was arrested and charged with third-degree sexual abuse.

The case subsequently proceeded to a jury trial. After the testimony of the State's first witness, Bolden requested the exclusion of all witnesses until they were called to testify. The court granted the request.

On the morning of the second day of trial A.C. was present in the court room. She was the State's first witness that day. Bolden and the jury were not yet present in the courtroom. Bolden's counsel objected to A.C.'s presence in the courtroom and the following exchange occurred:

[DEFENSE COUNSEL]: Judge, I just ask on the Motion to Exclude to have the witness who is currently in the courtroom go outside and be called in when it is her time to testify because I believe there is an issue of identification in the case.

. . .

[PROSECUTOR]: Your Honor, I don't believe -- I do agree that there may be an issue of identification, a minor issue; but I do not believe that having the victim present at this time would prejudice the defense in any respect. There is always the issue of the Defendant sitting at the defense table for the purposes of identification. Whether he walks in the courtroom or sits at defense table, I don't think it makes much difference.

I think as a matter of fundamental fairness here, the victim is in the courtroom ready to take the witness stand. I can have her on the witness stand; but I don't believe there is any need to have her taken out and brought back in.

[DEFENSE COUNSEL]: Judge if I may add for arguments sake, there is a case . . . about whether a person is entitled to counsel at an arraignment. But anyway one of the footnotes in *Moore* states that had the Defendant been represented by counsel at the time, they would have been able to prevent suggestive identification. Since what happened in *Moore* is the Defendant was right there and the victim merely just pointed at him.

The facts in this case indicated the Defendant [sic] was never able to identify the Defendant from the photographic line-up and my contention is that it's very suggestive and violating his rights and also effects the State's burden of proof identification beyond a reasonable doubt.

THE COURT: The Court notes the objection and overrules the objection. I don't find it to be unduly suggestive and goes to the nature of any testimony given by the case. The objection is overruled.

During her testimony A.C. identified Bolden as the man who raped her. Bolden was convicted as charged. The district court sentenced him to a prison term not to exceed ten years.

Bolden now appeals. He asserts the court's failure to exclude A.C. from the courtroom prior to her testimony was impermissibly suggestive violating his due

process rights, and the court should have taken protective procedures to avoid suggestiveness as recommended in *Moore v. Illinois*, 434 U.S. 220, 231 n.5, 98 S. Ct. 458, 465-66 n.5, 54 L. Ed. 2d 424, 435 n.5. (1977).[1]

I. *Moore* Protections

During appellate arguments Bolden's counsel asserted the trial court violated Bolden's right to due process by failing to take the protective procedures suggested in *Moore*, such as allowing Bolden to sit in the audience. Upon our review of the record, we conclude Bolden failed to preserve this issue.

In his objection at trial Bolden simply cited *Moore* in support of his argument that A.C. should leave the courtroom until he entered and took his place at the counsel table. This oblique reference to *Moore* does not refer to the specific grounds of unconstitutionality Bolden's counsel asserted during appellate arguments. Moreover, defendant's appellate brief does not even make this assertion. We will not allow a party to make a general reference to a constitutional issue in the district court and then seek to develop the argument on appeal to this court. *Kartridg Pak Co. v. Department*

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[1] In *Moore*, the United States Supreme Court reversed a defendant's rape conviction where the victim was permitted to testify that she had identified the defendant as her assailant at the defendant's preliminary hearing, during which the defendant was not represented by counsel. The decision turned on the defendant's Sixth Amendment right to counsel; however, in a footnote the Court noted means by which the suggestiveness of the pretrial identification could be prevented. *Moore*, 434 U.S. at 232, 98 S. Ct. at 466, 54 L. Ed. 2d at 436. The Court stated counsel could have requested the hearing be postponed until a line-up could be arranged. *Id.* at 231 n.5, 98 S. Ct. at 465-66 n.5, 54 L. Ed. 2d at 435. Counsel could have asked that the victim leave the courtroom while the charges were read and the evidence against the defendant was recited, and that the defendant be seated with other people in the audience when the victim attempted an identification. *Id.*

of Revenue, 362 N.W.2d 557, 561 (Iowa 1985). The objections must be sufficiently specific to alert the trial court to the basis of the complaint.

II. In-Court Identification

Bolden also repeats his argument that allowing A.C. to remain in the courtroom while he entered was impermissibly suggestive. Upon our review, we affirm the trial court's ruling.

There is no constitutional entitlement to particular methods of lessening the suggestiveness of in-court identification. *United States v. Domina*, 784 F.2d 1361, 1369 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987); *see also, United States v. Ostertag*, 619 F.2d 767, 771 (8th Cir. 1980) (no constitutional right to a line-up); *United States v. Edward*, 439 F.2d 150 (3d Cir. 1971) (no abuse of discretion to refuse defendant's request to sit among spectators). These are matters left to the discretion of the trial court. *See Moore*, 434 U.S. at 231 n.5, 98 S. Ct. at 466 n.5, 54 L. Ed. 2d at 435 n.5 (defendants' requests for protective measures are "ordinarily addressed to the sound discretion of the court."); *U.S. v. Matthews*, 20 F.3d 538, 547 (2d Cir. 1994); *U.S. v. Robertson*, 19 F.3d 1318, 1323 (10th Cir. 1994); *Domina*, 784 F.2d at 1369; *United States v. Brown*, 699 F.2d 585, 593 (2d Cir. 1983); *State v. Sibley*, 444 N.W.2d 391, 391-92 (Wis. App. 1989). Generally, the question of the suggestiveness or credibility of the in-court identification is to be ultimately resolved by the jury after the defendant has had an opportunity to test the accuracy of an identification through cross-examination. *United States v. Davies*, 768 F.2d 893, 904

(7th Cir.), *cert. denied*, 474 U.S. 1008 (1985); *State v. Webb*, 516 N.W.2d 824, 829 (Iowa 1994).

A defendant's constitutional due process rights may be implicated, however, if the resulting in-court identification procedure is so impermissibly suggestive, under the totality of the circumstances, that it creates a substantial likelihood of irreparable misidentification. *United States v. Archibald*, 734 F.2d 938, 942-43 (2d Cir. 1984); *U.S. v. Murdock*, 928 F.2d 293, 297 (8th Cir. 1991); *see also, Webb*, 516 N.W.2d at 829 (discussing the circumstances under which an in-court identification that followed an impermissible pretrial identification had to be excluded). The relevant factors for evaluating the reliability of identification testimony include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Webb*, 516 N.W.2d at 830 (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977). Reliability is the linchpin of the test. *Webb*, 516 N.W.2d at 830.

In the present case, the trial court did not abuse its discretion by refusing Bolden's request to have A.C. leave the courtroom prior to her testimony. Because A.C. was the first witness of the day, Bolden's request would have amounted to requiring A.C. to leave the courtroom while Bolden entered and took his place at the counsel table, and then to immediately reenter for her testimony. Bolden does not

contend A.C.'s in-court identification of him while he sat at the counsel table was impermissibly suggestive. Nor did he request the court to take precautionary measures such as allowing him to sit in the audience or providing an in-court line-up. We cannot conclude allowing A.C. to remain in the court room while Bolden entered and took his place at the counsel table would be any more suggestive then viewing him at the counsel table after he entered.

Moreover, we find the identification was reliable under the totality of the circumstances. A.C. had ample time in which to view Bolden both outside, in the daylight, and in his apartment. Bolden approached A.C. on the sidewalk and spoke to her. When she requested to use the telephone, he led her by the hand into his apartment. Inside the apartment, Bolden urged her sit at the table and talk with him. He subsequently locked the door and forced her to engage in several sex acts. A.C. was not a casual or passing observer. She had an extended time in which to view Bolden, and her attention was clearly focused on him from the time he approached her until he allowed her to leave his apartment. Her description to the police included his age, height, weight, race, complexion, hairstyle, facial hair, and what he was wearing.

Furthermore, A.C. did not hesitate in her in-court identification of Bolden. In response to the question whether the man who raped her was present in the courtroom, A.C. pointed at Bolden and described his clothing.

Although there was a lapse of approximately three months between the rape and the in-court identification, and A.C. was unable to identify Bolden in a previous photographic array, we do not believe this fatally flawed the identification. Bolden's counsel vigorously cross-examined A.C. regarding her previous inability to identify Bolden. She also suggested to the jury that the reason A.C. was able to make an in-court identification was because Bolden was sitting next to her at the counsel table. Thus, weighing all of the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.

AFFIRMED.

Hayden, P.J., and Cady, J., concur; Schlegel, S.J., concurs specially.

SCHLEGEL, S.J. (concurring specially)

I concur specially.

I believe defense counsel sufficiently alerted the court to the problem, so that I do not agree that waiver should be a reason to affirm this conviction. Nor do I believe the failure to specify a fair way to address the problem is fatal.

The trial court was advised that the victim had been unable to identify her attacker from a photo array. It is true that the incident leading to this trial was such that she might well identify the attacker in a line-up, or in a group of men, in person. There is little doubt that she would identify the defendant as her attacker, since he was seated at the counsel table with defense counsel.

I don't believe it is a novel feeling that in such cases the trial court has a duty to assure the fairness of the identification procedure, once the issue was raised. The court clearly failed in that obligation.

Other evidence, circumstantially, at least, connects the defendant to this crime. Reluctantly, I concur in the result.