IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 1-092 / 00-0475
Filed June 13, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL L. SCHAWITSCH,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee (South) County, D. B. Hendrickson, Judge.

The defendant appeals from his convictions for two counts of first-degree robbery, two counts of unauthorized possession of an offensive weapon, and one count of first-degree burglary. **AFFIRMED.**

James F. Dennis, Keokuk, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael P. Short, County Attorney, and Bruce C. McDonald, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Zimmer and Hecht, JJ.

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HECHT, J.

Defendant appeals his convictions for two counts of robbery in the first degree, two counts of unauthorized possession of an offensive weapon, and burglary in the first degree. He claims: (1) the district court should have suppressed evidence of an impermissibly suggestive photographic lineup; (2) the court should have granted his motion to strike two witnesses; (3) an exhibit should have been introduced into evidence; (4) the State did not present sufficient evidence to support his convictions; (5) he should not have been sentenced to consecutive prison terms; and (6) Iowa Code section 902.12 is unconstitutional. We affirm on appeal.

On February 6, 1999, at about 6:30 p.m., a man armed with a gun came into the Joy Mart convenience store in Keokuk, Iowa. He demanded money from the clerk, Renee Merydith. She gave him cash, and he left. Merydith then called the police.

The next day, on February 7, 1999, a man came through an unlocked back door into the McDonald's Restaurant in Keokuk at about 10:30 p.m., after the main restaurant had closed, but drive-through service was still available. The man went up to the front counter, displayed a gun, and demanded money from an employee, Michael Burchett. Two other employees, Mandy Hendricks and Rory O'Connell, were able to observe the man. The employees gave the man cash, and he left.

While the McDonald's robbery was taking place, an employee alerted a drive-through customer the business was being robbed. The customer drove to

the police station and informed them of the robbery. Police officers quickly arrived at the scene and observed a white Chevrolet Corsica leaving the restaurant. The car did not have any license plates. The driver led officers on a high-speed chase into Illinois along Nauvoo River Road. Officers were not able to stop the vehicle.

On February 8, 1999, a sawed-off shotgun was found along the escape route. Merydith and Hendricks identified the shotgun as similar to the one used in the robberies. In April 1999, blue jeans, two bank bags marked McDonald's, another bank bag, and $1098 in cash were found hidden under a boat near Nauvoo River Road. No identifiable fingerprints were found on any of the items.

Police officers received information Michael Schawitsch owned a car similar to that used in the McDonald's robbery. Officers prepared a photographic lineup of six individuals, including Schawitsch. Merydith, Hendricks, and O'Connell all identified Schawitch's photograph as that of the robber. Burchett was unable to make a selection from the photographic lineup.

Defendant's former girlfriend, Christine Jordan, testified she had owned a white Corsica. In February 1999, after Jordan and defendant separated, defendant had the vehicle in his possession. Jordan took the license plates off the car and signed the title over to him. The vehicle was left at an auto body shop in April 1999. Later, an unidentified female called and told the shop owner to junk the vehicle. The owner of a salvage yard in Illinois testified he took possession of a white Corsica in August 1999. When he received the car the title

was in the name of "Michael Schauitsch." One of defendant's pay stubs was found in the vehicle.

Schawitsch testified that on February 6, 1999, he spent the evening at the house of his brother, Kevin Schawitsch. He stated the next day, February 7, 1999, Kevin and Kevin's girlfriend, Lora Aden, drove him to his mother's house. His mother corroborated his testimony he was at her house on the evening of February 7, 1999. Aden's testimony also supported that of defendant.

Defendant filed a motion to suppress the photographic lineup as impermissibly suggestive. The district court denied the motion. The court also denied defendant's motion to strike two witnesses. The case was tried to a jury. Defendant raised an alibi defense. The jury found defendant guilty of two counts of robbery, two counts of unauthorized possession of an offensive weapon, and one count of first-degree burglary.

The district court sentenced Schawitsch to a term of imprisonment not to exceed twenty-five years on each count of robbery, to run consecutively. He was sentenced to a term of imprisonment not to exceed five years on each count of unauthorized possession of an offensive weapon, and a term of imprisonment not to exceed twenty-five years for first-degree robbery. The sentences for these last three offenses are to run concurrently with the sentences for the first two offenses. Defendant appeals.

I. PHOTOGRAPHIC LINEUP

Schawitsch contends the district court should have suppressed the identifications of him based on the photographic lineup. Police officers created a

photo array using a picture of defendant, plus five pictures of other men. He asserts the photo array was unduly suggestive because the appearance of the other men were not similar enough to his appearance, and this violated his due process rights. Some of the men had hair longer than defendant's, some of the men had facial hair and defendant did not, and one of the men wore glasses, which defendant did not wear.

Because defendant has raised a constitutional issue, we make an independent evaluation of the totality of the circumstances. *State v. Lasage,* 523 N.W.2d 617, 620 (Iowa Ct. App. 1994). In order to establish that a photographic lineup violated due process, a defendant must show (1) the procedures were in fact impermissibly suggestive, and (2) the irregularities gave rise to a substantial likelihood of irreparable misidentification. *State v. Caya,* 519 N.W.2d 419, 422 (Iowa Ct. App. 1994). Due process does not require the police to scour their files to come up with a photo array that "would eliminate all subtle differences between individuals." *State v. Rawlings,* 402 N.W.2d 406, 407 (Iowa 1987) (quoting *United States v. Bubar,* 567 F.2d 192, 199 (2d Cir. 1977)); *State v. Neal,* 353 N.W.2d 83, 88 (Iowa 1984). A reasonable effort to harmonize the lineup is normally all that is required. *Rawlings,* 402 N.W.2d at 407.

In the present case, we find the photographic lineup was not impermissibly suggestive. Although there are some differences between Schawitsch and the other five photographs, it appears there was at least a reasonable effort to harmonize the photographs. Even if the photographic lineup was impermissibly

suggestive, defendant has not shown a substantial likelihood of irreparable misidentification.

Reliability is the linchpin in determining the admissibility of identification testimony. *State v. Thornton,* 506 N.W.2d 777, 779 (Iowa 1993). We are to consider:

> [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.

Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2252, 53 L. Ed. 2d 140, 154 (1977); *Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972); *State v. Taft,* 506 N.W.2d 757, 763 (Iowa 1993).

Three eyewitnesses, Merydith, Hendricks, and O'Connell, picked defendant out of the photographic lineup. Merydith and Hendricks had both seen the robber at close range, paid close attention during the crime, and were certain defendant was the robber. O'Connell, who had seen the robber from the back of the McDonald's Restaurant, was also able to identify defendant. A police officer made a statement to Merydith to the effect she had picked the correct suspect, but this statement was made after Merydith had selected defendant's picture. Thus, we determine the statement did not contribute to an irreparable misidentification. The trial court properly denied defendant's motion to suppress.

II. MOTION TO STRIKE WITNESSES

Prior to trial, the State filed notice of additional minutes of testimony listing witnesses David Maas and David Nichols. These two witnesses were added

after being interviewed by the State under a county attorney subpoena issued during the investigation of a case against defendant's brother, Kevin. Defendant argues that under Iowa Rule of Criminal Procedure 13(1) he should have been given an opportunity to cross-examine these witnesses during the interview.[1]

Defendant asked the trial court to strike these witnesses. The court denied the motion to strike. The State filed its notice of additional witnesses more than thirty days before trial, and defendant chose not to depose them. Furthermore, the testimony of the two additional witnesses, Maas and Nichols, was cumulative to other testimony presented in the trial, and therefore was not prejudicial to defendant. *State v. Hensley,* 534 N.W.2d 379, 383 (Iowa 1995) (admission of evidence which is merely cumulative in nature is harmless error).

III. ADMISSION OF EXHIBIT

After the McDonald's robbery, the Keokuk Police Department asked Hendricks to attempt to create a computer composite of the robber. Hendricks spent about five or six hours attempting to develop a picture. She finally gave it up, because there were too many facial feature options and she could not get a close representation of the robber. Defendant attempted to introduce the computer composite, as it looked when Hendricks quit, into evidence. The trial court did not permit the computer composite to be introduced into evidence. On

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[1] Iowa Rule of Criminal Procedure 13(1) provides:

> When a witness subpoened by the prosecuting attorney pursuant to R.Cr.P. 5 is summoned by the prosecuting attorney after complaint, indictment or information, the defendant shall have a right to be present and have the opportunity to cross-examine any witnesses whose appearance before the county attorney is required by this rule.

appeal, defendant contends the computer composite was relevant to show Hendrick's inability to accurately remember the features of the robber.

On appellate review of evidentiary rulings, the district court is granted wide latitude regarding admissibility and its ruling will be disturbed only upon a finding of an abuse of discretion. *State v. Sallis,* 574 N.W.2d 15, 16 (Iowa 1998). Under Iowa Rule of Evidence 402, relevant evidence is generally admissible.

Hendricks was thoroughly questioned about her inability to generate an accurate composite of the suspect. Consequently, the admission of the inaccurate composite would have added little to the case. Under Iowa Rule of Evidence 403, relevant evidence, which is merely cumulative, may be excluded. *State v. Anderson,* 565 N.W.2d 340, 342 (Iowa 1997). The district court did not abuse its discretion by ruling the composite was inadmissible.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant claims the State did not present sufficient evidence to show he committed the crimes charged beyond a reasonable doubt. He asserts the eyewitnesses' testimony was unreliable. He also asserts the State did not present any physical evidence linking him to the crimes. He points out that he presented alibi witnesses for the times the crimes were committed.

We review challenges to the sufficiency of the evidence for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* Substantial evidence is evidence upon which a rational trier of fact could find a defendant guilty beyond a reasonable doubt. *Id.* We view the evidence in the light most favorable to the

State, but consider all of the evidence, not just the evidence that supports the verdict. *State v. Jacobs,* 607 N.W.2d 679, 682 (Iowa 2000). Circumstantial and direct evidence are equally probative. *State v. Boley,* 456 N.W.2d 674, 679 (Iowa 1990).

Three eyewitnesses picked defendant out of the photographic lineup and identified him at the trial. There was evidence defendant owned a vehicle of the same color, make, and model as the getaway car in one of the robberies. Defendant's explanation for how the car ended up in a junkyard in Illinois, that he sold the car to an unknown man, who then junked it, is less than credible. Although there was conflicting evidence in the record regarding defendant's whereabouts at the time of the robberies, the jury was in the best position to determine credibility. *See State v. Knox,* 536 N.W.2d 735, 742 (Iowa 1995). Generally, it is for the jury and not the court to decide questions of fact and determine the credibility of witnesses. *State v. Gray,* 216 N.W.2d 306, 308 (Iowa 1984). We find there is sufficient evidence in the record to support defendant's convictions.

V. CONSECUTIVE SENTENCES

Defendant asserts the district court did not give sufficient reasons on the record for giving consecutive sentences. He claims the court should have stated how consecutive sentences would help rehabilitate him. He claims the court only considered one factor, that there were two robberies, in sentencing him to consecutive sentences.

Our review of sentencing procedures is for an abuse of discretion. *State v. Duckworth,* 597 N.W.2d 799, 800 (Iowa 1999). Such abuse will only be found if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Millsap,* 547 N.W.2d 8, 10 (Iowa Ct. App. 1996).

Under Iowa Rule of Criminal Procedure 22(3)(d), a trial court must state on the record its reasons for selecting a particular sentence. *State v. Oliver,* 588 N.W.2d 412, 414 (Iowa 1998). A court must also give reasons for its decision to impose consecutive sentences. *Jacobs,* 607 N.W.2d at 690. A statement may be sufficient, even if terse and succinct, as long as the brevity of the court's statement does not prevent review of the exercise of the trial court's sentencing decision. *State v. Johnson,* 445 N.W.2d 337, 343 (Iowa 1989).

The district court gave these reasons for imposing consecutive sentences in this case:

> The reasons for my sentence are as follows: The sentence for Robbery in the First Degree -- the counts of Robbery in the First Degree and Burglary in the First Degree are mandatory.
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> And the only discretion I really had in this whole matter was whether to run them consecutive or concurrent and, as I said, I conclude from the evidence that there were two separate incidents. If there was any relation between the two incidents, I would give some thought to being concurrent, but I'm not -- these are just like you committed two different crimes that were not related to each other whatsoever.
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> And I also took into consideration that you have, albeit some time ago, been convicted of the same crime in 1982.

Thus, the district court considered the fact two separate incidents of robbery were committed and that defendant had a previous conviction for armed robbery.

We conclude the district court's reasons for imposing consecutive sentences were sufficient. We find no abuse of discretion.

VI. CONSTITUTIONALITY OF SECTION 902.12

Defendant contends section 902.12 violates the equal protection and cruel and unusual punishment provisions of the federal and state constitutions. Because this claim raises a constitutional issue, our review is de novo. *State v. Finnel,* 515 N.W.2d 41, 43 (Iowa 1994).

The Iowa Supreme Court recently addressed this issue in *State v. Cronkhite,* 613 N.W.2d 664 (Iowa 2000). The court held, "Iowa Code sections 902.12 and 903A.2 do not violate defendant's right to due process or equal protection of the law. Nor does the sentence imposed constitute a cruel or unusual punishment." *Cronkhite,* 613 N.W.2d at 670. *See also State v. Ceasar,* 585 N.W.2d 192, 199 (Iowa 1998); *State v. Lara,* 580 N.W.2d 783, 785-86 (Iowa 1998). We conclude defendant's claims in the present case must fail.

We affirm defendant's convictions and sentences.

AFFIRMED.