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CLERK SUPREME COURT

268

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 25, 1987
vs.	)	
WILLIAM EARL PACE,	)	6-496 86-420
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (29243) - James P. Denato, Judge.

Defendant appeals from his conviction, following a bench trial, of robbery in the first degree. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Dory A. Sutker, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; David L. Dorff, Assistant Attorney General; and A. Patricia Houlihan, Assistant Polk County Attorney; for plaintiff-appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

On June 22, 1985, a short black male approached the victim, Robert E. Dorsey, while the latter was sitting in his car watching fireworks. After the two men talked for awhile, the stranger left and Dorsey fell asleep. When the stranger returned, he joined Dorsey inside of his car. After picking up three of the stranger's friends, the group moved to a city park. At the park, Dorsey's shorts were pulled down and his keys taken. When Dorsey demanded his keys back, he was severely beaten until he lost consciousness. Dorsey awoke to find the four men, his car, his camera, and his wallet were gone. Although he was bleeding profusely, he managed to walk to a nearby hospital. He was hospitalized for four days and treated for injuries including a broken nose, broken neck vertebras, a partial severing of his right ear requiring reconstructive surgery, and eye damage causing permanent dyslexia.

The next day, the victim's car was found abandoned, heading south, on the interstate between Minneapolis and Des Moines. Near the abandoned car a Mr. Hibdon was found and when questioned replied he had abandoned the car because it had run out of gas. No testimony from a Mr. Hibdon was presented by either side at trial. The victim's car was taken into custody at a local police station. During the search of the vehicle defendant's fingerprints were found on the car's exterior and a belt buckle bearing his name was found inside the trunk. The defendant's alibi was that a man fitting Mr. Hibdon's description offered him a ride to Des Moines from Minneapolis, but after defendant put his clothing into the trunk of the car and gave the man twenty dollars for gas, this man left him stranded.

Defendant appeals from his conviction, following a bench trial, of first-degree robbery. He contends the trial court's finding of guilt was not based upon substantial evidence. Specifically he argues the victim's identification

testimony was unreliable due to impermissibly suggestive identification procedures, and the physical evidence of the crime is insufficient to support a finding of defendant's guilt beyond a reasonable doubt.

Our scope of review is limited to the correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact have the force of a special verdict and are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We are not bound by the trial court's determination of law and are free to decide whether the court's findings were the result of legal error. Rouse v. State, 369 N.W.2d 811, 813 (Iowa 1985).

When considering a challenge to the sufficiency of the evidence we view the evidence in a light most favorable to the State and consider all evidence and inferences that may be drawn from it. State v. Craney, 347 N.W.2d 668, 680 (Iowa 1984), cert. denied, 469 U.S. 884, 105 S. Ct. 255, 83 L. Ed. 2d 192 (1984); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Evidence is sufficient to sustain the verdict where there is substantial evidence from which a rational jury could determine defendant guilty beyond a reasonable doubt. Robinson, 288 N.W.2d at 330; State v. Mitchell, 371 N.W.2d 432 (Iowa Ct. App. 1985) (emphasis added).

I.

Defendant argues the victim's testimony was unreliable due to impermissibly suggestive identification procedures, creating a substantial likelihood of irreparable misidentification. We disagree.

When initially questioned by the police, Mr. Dorsey said he did not know his assailants and he could not identify them. In the hospital, several days after the crime, the police showed him a photographic array of eight persons, included within the array was a photograph of defendant. Mr. Dorsey picked defendant out of the group but stated he was not completely sure because of the vision

problems he suffered as a result of the beating he took during the robbery. Prior to viewing the photographs the police told Mr. Dorsey a possible suspect's picture was included therein. Once he had chosen the defendant's photograph the police told him that he had identified their suspect. No further identification procedure took place until approximately three weeks prior to trial, at which time Mr. Dorsey again chose defendant's photograph from the array. He again stated he was not entirely secure in the selection. At trial, on December 3, 1985, Mr. Dorsey positively identified the defendant as one of his assailants.

We use a two-prong analysis when considering defendant's challenge to the identification procedure: (1) whether the procedure used was impermissibly suggestive; and (2) if it was, whether under the totality of circumstances the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. State v. Mark, 286 N.W.2d 396, 403-04 (Iowa 1979); State v. Whetstine, 315 N.W.2d 758, 764 (Iowa 1982).

Initially, we consider whether the pretrial identification procedure was suggestive. The procedure in which a police officer's comment, following the selection of a suspect's picture from a photo spread, that the witness has chosen the individual under suspicion is not encouraged and is criticized by this court. See United States v. Leonardi, 623 F.2d 746, 755 (2d Cir.), cert. denied, 447 U.S. 928, 100 S. Ct. 3027, 65 L. Ed. 2d 1123 (1980). This type of postidentification comment tends to reinforce an otherwise weak or tentative identification and therefore gives a later in-court identification greater conviction than it deserves. United States v. Moskowitz, 581 F.2d 14, 20 (2d Cir.), cert. denied, 439 U.S. 871, 99 S. Ct. 204, 58 L. Ed. 2d 184 (1978). However, where an identification is strong and unequivocal, a misguided postviewing remark will not render it invalid, and will not preclude a subsequent in-court identification. United States v. Leonardi, 623 F.2d at 755,

In the present case the police erred in telling the victim he had chosen their suspect and in also informing the victim, prior to seeing the photo spread, their suspect was included in the eight photographs. With this and the victim's indecisiveness in mind, we conclude that the pretrial identification procedure used was impermissibly suggestive.

This finding of suggestiveness does not, however, sound the death knell for the victim's in-court identification. We must also consider whether the identifications were reliable under the totality of the circumstances. Whetstine, 315 N.W.2d at 764-65. When addressing a pretrial identification in which suggestive police procedures have been used, the Supreme Court has utilized five factors to determine reliability. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1972). These factors are:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's 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.

Id. See also State v. Mark, 286 N.W.2d 396, 405 (Iowa 1979), and State v. McManus, 263 N.W.2d 556, 558 (Iowa Ct. App. 1977).

The victim's ample opportunity to view the perpetrator is evidenced by his conversation with the robber in the parking lot and the trip around Des Moines with the assailant in the front seat of his car. The events surrounding the night of the robbery strongly indicate the victim was attentive to the events that night. The victim described his assailant as a black male, medium to stocky in build, and under six feet tall. Defendant is 5'4" tall, a black male, and weighs 140 pounds. We find this to be a relatively accurate description. The weakest element of the victim's identification is his degree of certainty. At the time of his initial identification his eyesight was impaired by the injuries he suffered

in the robbery. As already mentioned, he added to his identification that he was not completely sure due to his blurred vision. He also qualified his last pretrial identification with the existence of his uncertainty. He had no qualms at trial. Finally, considering the number and frequency of the victim's identifications of the defendant, we consider any lapse of time insignificant.

Along with the five factors of Manson v. Brathwaite, we consider the following:

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error.

Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968).

The only factor which the victim's identification failed to completely fulfill was the level of certainty. At trial, to the court, the victim was subjected to rigorous cross-examination regarding his certainty. Under the circumstances of this case we determine there was not a substantial likelihood of irreparable misidentification and the identifications were reliable under the totality of the circumstances.

II.

Defendant contends the evidence of defendant's belt and clothing in the victim's automobile is insufficient evidence to support a finding of defendant's guilt beyond a reasonable doubt.

After the victim's car was discovered, it was impounded and thoroughly searched. Defendant's fingerprints were discovered on the trunk of the car

and a belt bearing his name was found in the trunk. Along with this physical evidence, the victim made a positive in-court identification. The trial court considered this evidence, the victim's identifications, and defendant's alibi. The trial court found defendant guilty beyond a reasonable doubt. We find the evidence sufficient to sustain the verdict finding defendant guilty beyond a reasonable doubt.

AFFIRMED.