IN THE COURT OF APPEALS OF IOWA

No. 0-246 / 99-0967
Filed June 14, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

JEREMIAH JAMES CANADA,
Appellant.

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

Jeremiah James Canada appeals the court's judgment and sentence, entered upon a jury verdict, for willful injury. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Krull & Blumberg, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, John P. Sarcone, County Attorney, and Steven M. Foritano and Teresa A. Vens, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

Jeremiah James Canada appeals the trial court's judgment and sentence, entered upon a jury verdict, for willful injury. Because we find the trial court did not abuse its discretion in playing a taped statement for the jury, in finding the identification procedure was not irreparably tainted and that the trial court's instructions to the jury were proper, we affirm.

Background facts. In the early morning hours of October 10, 1998, Brent Miklus and Ricky Green went out to purchase cocaine. While traveling down 21st Street in Des Moines, Green stopped the vehicle while Miklus spoke to someone on the passenger side of the car. The two men were suddenly attacked and dragged out of the car. Green was injured and fled on foot to a nearby convenience store. Witnesses testified that an argument ensued between Miklus and the assailants. He attempted to run away but was caught and beat on by several people. Medical testimony concluded Miklus died from stab wounds to the heart.

There were four people in the neighborhood that witnessed the incident. Three of the four could not provide an identification of the assailants because of the poor lighting at the location of the attack. Lynette Thorton[1] was the only eye-witness who was able to provide two identifications of people involved in the attack. Three to four hours after the incident had occurred, Thorton participated in a taped interview with the police. She was then asked to identify several

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[1] The appellate briefs alternately refer to this witness as Lynette Thornton or Lynette Thorton. When asked to spell her name at a deposition, she spelled it as Thorton. We will refer to her as such.

people who may have been involved in the attack, and made two positive identifications. Several months later, when the trial began, Thorton admittedly feared for her safety and testified that she could remember nothing of the incident. Consequently, the prosecutor sought to have her taped interview played for the jury. The trial court allowed the recording to be played over the objections of Canada. He now appeals his guilty verdict and sentence for willful injury to Brent Miklus.

Scope of review. In the case of hearsay rulings, our review is for correction of errors at law because admission of hearsay evidence is prejudicial to the non-offering party unless the contrary is shown. *State v. Ross,* 573 N.W.2d 906, 910 (Iowa 1998). We review constitutional challenges de novo. *State v. Mitchell,* 568 N.W.2d 493, 499 (Iowa 1997).

Playing of the taped interview. Although reluctant to become involved, Thorton gave a taped statement to Lieutenant Dawson at the police station shortly after the attack occurred in October of 1998. She provided detailed information to the officer and was able to identify two of the people involved in the beating. However, when attempts were made to depose Thorton on two occasions in February of 1999, she was guarded in her responses. She admitted that she was afraid for her safety if she spoke to the attorneys involved in this case. She did, however, state that she had reviewed the transcript of the taped interview and confirmed the accuracy of her prior statement. At trial in April of 1999, Thorton testified she did not recall any information from that morning, as she was attempting to "block out" the events she had witnessed. After

establishing Thorton's lack of memory, the county attorney sought to play her taped interview for the jury. Canada's attorney lodged his objections, insisting the tape was hearsay, lacked foundation, and did not meet the exception under Iowa Rule of Evidence 803(5) for past recollection recorded as Thorton had not verified and adopted the tape as her own statement while it was fresh in her memory. Iowa Rule of Evidence 803(5) states:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

When admitting a document made outside the trial process into evidence as a recorded recollection, there must be adequate evidence to establish the validity and accuracy of the record sought to be admitted. *State v. Thompson,* 397 N.W.2d 679, 683 (Iowa 1986). The court has previously decided two criteria must be met to determine the accuracy. *Id.* Both the "freshness" of the witness's recollection of the event at the time the recording process took place and the accuracy of the process utilized to record that recollection must be considered. *Id.*

Thorton, in this case, provided her taped interview several hours after the incident occurred. Clearly, this time period adequately meets the "freshness" requirement under 803(5). However, at no time following the interview did Thorton review the tape. She reviewed the written transcript and declared it to be accurate, both during a deposition in February of 1999 and at trial. Canada

argues that because Thorton's memory of the events was poor at both the deposition and at trial, she never adopted her police interview as her own, based on facts she could remember at that time. We find her statements verifying the accuracy of her police interview to satisfy the requirements under 803(5). *Compare Thompson*, 397 N.W.2d at 683 (finding witness's failure to review and testify as to the accuracy of the statements after being reduced to a written record by the court reporter prevented the application of rule 803(5)).

Moreover, even if this requirement had not been met, we find Thorton's taped interview admissible as non-hearsay under rule 801(d)(1)(C), which states that a statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (C) one of identification of a person made after perceiving him;. . .

The taped interview was primarily used to identify the persons involved in the attack and Thorton was subject to cross examination concerning her statement. We conclude, therefore, that her interview was admissible as a prior identification under rule 801 (d)(1)(C).

Admission of witness identification. Canada next argues Thorton's identification of Canada was the result of utilizing an impermissibly suggestive identification procedure. We employ a two-part analysis in making this determination. *State v. Birch,* 479 N.W.2d 284, 286 (Iowa 1991) (citation omitted); *accord State v. Rawlings,* 402 N.W.2d 406, 407 (Iowa 1987); *State v. Neal,* 353 N.W.2d 83, 86-87 (Iowa 1984). First, we must decide whether the identification procedure was, in fact, impermissibly suggestive. *Birch,* 479

N.W.2d at 286. Second, if we find that the procedure was impermissibly suggestive, then we must determine whether, under the totality of the circumstances, the identification was irreparably tainted. *Id.* If the one-on-one showup constitutes an impermissibly suggestive identification procedure, the defendant must still show that the procedure gave rise to "a very substantial likelihood of irreparable misidentification." *Rawlings,* 402 N.W.2d at 408. "Short of this, the identification evidence and its shortcomings or credibility are for the jury to weigh." *Neal,* 353 N.W.2d at 87. Due process is not violated "so long as the identification possesses sufficient aspects of reliability." *Manson v. Brathwaite,* 432 U.S. 98, 106, 97 S. Ct. 2243, 2249, 53 L. Ed. 2d 140, 149 (1977). Under *Manson*, the factors to be considered in assessing reliability include: 1) the opportunity of the witness to view the criminal at the time of the crime, 2) the witness's degree of attention, 3) the accuracy of his prior description of the criminal, 4) the level of certainty demonstrated at the confrontation, and 5) the time between the crime and the confrontation. *Id.* Against these factors is to be weighed the corrupting effect of the suggestive identification itself. *Id.*

On the morning of the incident, the officer conducted about a twenty-minute taped interview of Thorton, during which she described those persons she believed were involved in the attack. At trial Thorton testified that, although she could not remember whom she had identified or verify if they were in the courtroom on that date, she recalled speaking to the officer during the police interview and remembered the identification process. Thorton testified as follows:

Mr. Rosenberg: Okay. Now, why were you supposed to be looking at these people?

The Witness: Because he said that they was involved in beating and stabbing of the guy.

Mr. Rosenberg: So the police officer told you during the 10 minutes that he was going to show you some people that had been involved in this beating?

The Witness: Yes.

Mr. Rosenberg: And then he brought these people in?

The Witness: Yes, one at a time.

While not denying whether he made such a statement, Lt. Dawson testified that this type of statement would be very suggestive and improper. Assuming, without deciding, that Lt. Dawson did make such a statement, we find an officer telling a witness that she was about to see people who were involved in a crime would be impermissibly suggestive.

However, Canada must next demonstrate that the impermissibly suggestive identification procedure led to the substantial likelihood of an irreparable misidentification. This is accomplished by establishing that the identification was unreliable based on the factors set out under *Manson*.

The first factor to consider is the opportunity of the witness to view the defendant at the time of the incident. Canada argues the darkness of the early morning hour, Thorton's failure to have her glasses on, and the absence of a street light hampered her ability to see the individuals involved. It is important to note that, although Thorton requires glasses, she has not worn them at all for the past five years. In addition to this fact, her vision is compromised when viewing

objects that are near but she is able to plainly see objects in the distance. The incident, which took place on the street by the neighbor's lawn, was some distance from her window, allowing her a better opportunity to see because of her farsightedness. During her interview with the police prior to the identification, she was able to give a consistent and detailed accounting of the events that had occurred outside her window that morning.

The next factor is the witness's degree of attention. Thorton testified she was awakened from her sleep by "screaming and hollering," grabbed a soft drink and sat down on her couch in the living room to look out her window and see what was going on. Canada argues that because Thorton was not aware of the damage done by one of the assailants while jumping on the car, she was not paying adequate attention. However, she described the color and types of cars on the scene, the sequence of events, the argument followed by the beating and the people who appeared to be involved. Thorton also observed the fleeing from and return to the scene by various people.

Another factor to be considered is the time between the crime and the identification. The incident occurred between five and six o'clock in the morning. Thorton's police interview was conducted at nine o'clock a.m. This short period of time between the attack and the identification is a strong indicator that the identification was reliable.

The descriptions of the participants, given by Thorton during her interview, were very general. Thorton could not describe the clothes of any of the suspects and only provided broad physical descriptions. However, this generalization in

the record is offset by the fact that Thorton had seen some of the individuals sitting in the halls of the police station on her way to the interview room. The interviewing officer was aware of this fact and that the people in the hallway were available for identification.

The last factor is the level of certainty demonstrated at the identification. Although at trial Thorton was unwilling or unable to identify Canada, that does not diminish the accuracy of the identification which occurred shortly after the incident. The audio-taped identifications were made through a one-way mirror at the police station. Thorton immediately recognized Canada and another individual, Brandon Cason, as being involved in the incident and having actively participated in the attack. She did not hesitate in her identification of Canada and Cason and, in fact, went on to describe Cason as the instigator who chased the victim down and argued with him initially. She also stated she was "100% sure" Canada was involved in the beating. In contrast, when shown three other individuals during the identification procedure, Thorton stated she had seen them at the incident but was not sure of their involvement.

During cross-examination, Thorton answered a series of questions, further demonstrating she was able to observe and recall some of the actively involved participants. Thorton testified she had recognized some people in the hallway at the police station as she passed by them. She testified as follows:

Q: Okay. Now how did you recognize them?

A: Because I looked right dead at them.

Q: Okay. Where had you seen them before?

> A: Outside, the incident scene, and plus a couple of them live next door to me.

Even on cross-examination, she clearly stated that she recognized some of the people immediately as having been at the incident scene. She further testified, on cross-examination, that she had difficulty seeing the people during the identification at the police station. The record, however, does not indicate that she told the officer conducting the identification that she was experiencing difficulty because of the lighting, nor did she hesitate or exhibit any uncertainty during the identification process. For these reaons, Canada has failed to establish the existence of a substantial likelihood of irreparable misidentification. Accordingly, we find the trial court did not err in allowing Thorton's identification of Canada into evidence.

Jury Instructions. Finally, Canada alleged the trial court erred in its marshalling instructions. Trial court determinations regarding jury instructions are reviewed on appeal for errors of law. Iowa R. App. P. 4; *State v. Breitbach,* 488 N.W.2d 444, 449 (Iowa 1992). Error in giving or refusing jury instructions does not merit reversal unless it results in prejudice to the defendant. *State v. Webb,* 516 N.W.2d 824, 831 (Iowa 1994). In criminal cases, the court is required to instruct the jury on the definition of the crime. *State v. Hoffer,* 383 N.W.2d 543, 548 (Iowa 1986).

Although Canada was charged with the first-degree murder of Miklus, he was found guilty of the lesser-included offense of willful injury. Canada contends the jury was improperly instructed concerning the murder charge. The jury instructions included a reference that the jury must find the victim died from the

"beating and stabbing." Dr. Garrity, the medical examiner, testified Miklus died as a result of a stab wound to the heart. Canada, therefore, argues the jury could not find the victim died from the beating and objects to that language in the jury instructions. Further, Canada argues there was no evidence presented at trial to show he stabbed the victim so the jury instructions should not have contained both the beating and stabbing language.

The State, however, was attempting to establish Canada's guilt both as a principal and as an aider and abettor in the death of Miklus. The State advanced its theory at trial and the evidence was sufficient to support the instructions given. Because aiding and abetting was advanced at the trial, the court correctly gave the jury instructions, which included "beating and stabbing." The instructions did not allow the jury to find Miklus died only of a beating. We find, therefore, the jury instructions were supported by substantial evidence and correctly stated the law in this case.

Even if the marshalling instructions on first and second degree may have been confusing to the jury, as Canada argues, we find he suffered no prejudice. Canada was not convicted of the murder of Miklus but rather of willful injury. Therefore, we find Canada's argument on the marshalling instructions fails under a harmless error analysis as well. *State v. Brown,* 589 N.W.2d 69, 75 (Iowa App. 1998).

Because we find the trial court correctly allowed the tape to be played for the jury, the identification procedure was not irreparably tainted, and the jury instructions were proper, we affirm.

AFFIRMED.