IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	6-538 86-654
RICKY LEE LINGNER,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Boone County (No. 7383) - Russell J. Hill, Judge, Paul E. Hellwege, Judge (on motion to suppress).

Defendant appeals from his conviction of second-degree burglary. Defendant contends the trial court erred in denying his motion to suppress any identification testimony resulting from an allegedly impermissibly suggestive photographic identification. **AFFIRMED.**

Charles Harrington, Appellate Defender, and James R. Huff, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; and Steven J. Oeth, Boone County Attorney, for plaintiff-appellee.

Heard by Snell, P.J., and Hayden, and Sackett, JJ.

SACKETT, J.

Defendant Ricky Lee Lingner appeals from his conviction, following a jury trial, of burglary in the second degree in violation of Iowa Code §§713.1 and 713.5 (1985). Defendant contends the trial court erred in denying his motion to suppress any identification testimony resulting from the allegedly impermissibly suggestive use of a photographic identification. He argues the combination of a photographic array depicting the defendant as the only person with red hair and subsequent use of defendant's family picture was impermissibly suggestive and a violation of defendant's fourteenth amendment right to due process. We affirm.

On July 3, 1985, defendant's brother, Terry Lingner, discovered a large replica of a beer bottle containing approximately $350 in change had been stolen from his Boone apartment between noon and 4 p.m. while he was absent from the apartment.

Witness Marty Jones, who lived in the apartment building next to the victim, testified he observed defendant standing beside a white sports car near the victim's apartment between 10 a.m. and 2 p.m. that day. Kim Paschal testified she loaned defendant her white Camaro on the day of the burglary so he could visit one Harold Hagaman to borrow money. Hagamon testified he did not loan money to defendant on the day of the burglary.

Bonnie Zylstra, another witness who was the victim's downstairs neighbor, testified she saw a red-haired male who resembled the defendant drive into the parking area at approximately 1:30 p.m. on the day of the burglary. He got out of a white sports car and walked past her apartment window on the north side of the building. Zylstra had her apartment door open at the time and was sitting on her living room couch about three to six feet from the window

which the man passed. Zylstra stated she was not alarmed because she thought he was just there to visit the victim. Approximately 20 minutes later Zylstra saw the same man return carrying a large, heavy object shaped like a telescope. Zylstra testified he put the object into the white sports car and talked to her next door neighbor for about 10 minutes before leaving.

When Terry Lingner returned from work and discovered the bottle missing he went downstairs to ask Zylstra whether she had seen anyone come to his apartment. Zylstra described the man she had seen.

That same day after Terry Lingner reported the burglary, the police interviewed Zylstra. The police showed a five-photograph array to Zylstra for identification purposes. She told police the defendant's picture resembled both the victim and the individual she had seen earlier that day. Defendant alleged that of the five photographs only he had red hair. Later that evening the police also showed Zylstra a photograph of defendant's family. This photograph contained two females and three males — the defendant, the victim and brother Rob Lingner. Of the three brothers, only the defendant had red hair. After being shown this photograph Zylstra positively identified the defendant as the individual in question. Zylstra also positively identified defendant at trial.

Defendant was arrested that evening and charged with second-degree burglary. He did not have any money or the bottle in his possession when he was arrested. In addition, defendant's parents testified he was at their home during the probable time of the burglary, from noon until approximately 2:30 p.m.

Prior to trial defendant filed a motion to suppress. After a hearing the trial court overruled defendant's motion. At trial the five-photograph array

and family photograph were admitted as evidence. The jury returned a verdict finding defendant guilty as charged. This appeal followed.

I.

Because we are confronted with an alleged constitutional violation, we resolve the issue by making our own independent evaluation of the totality of the circumstances. State v. Conger, 375 N.W.2d 278, 279 (Iowa App. 1985); State v. Losee, 353 N.W.2d 876, 878 (Iowa App. 1984). Our review is de novo. State v. Hillesheim, 291 N.W.2d 314, 316 (Iowa 1980). In determining whether the district court erred in overruling the motion to suppress we may consider not only evidence adduced in the motion to suppress but also later trial testimony. State v. Donnell, 239 N.W.2d 575, 578 (Iowa 1976).

II.

The defendant contends the trial court erred in overruling his motion to suppress the photographic identification testimony by Bonnie Zylstra because the procedures involved were allegedly impermissibly suggestive. To succeed on this claim, defendant must establish by a preponderance of the evidence (1) the identification procedures were suggestive and (2) the irregularities gave rise to a very substantial likelihood of irreparable misidentification in the totality of the circumstances. Manson v. Brathwaite, 432 U.S. 98, 109, 116, 97 S.Ct. 2243, 2250, 2254, 53 L.Ed.2d 140, 151, 155 (1977); State v. Mark, 286 N.W.2d 396, 403 (1979). Short of meeting both prongs of the Manson test, identification evidence and its shortcomings or credibility are issues for the jury to weigh. Manson, 432 U.S. at 116, 97 S.Ct. at 2254, 53 L.Ed.2d at 155; Neal, 353 N.W.2d at 87; State v. Newman, 326 N.W.2d 788, 794 (Iowa 1982). In Neal, the court summarized the necessary steps of its analysis:

> [W]e must first consider whether the procedures used to identify defendant were suggestive. If not, the evidence

> was not suppressible, and any shortcomings in the identifications only go to the weight or credibility assigned to the evidence by the fact finder. Conversely, if the procedures were impermissibly suggestive, we must determine whether, in the totality of the circumstances, the identification of defendant as the perpetrator was nonetheless reliable.

Neal, 353 N.W.2d at 87.

A. Impermissibly suggestive. In Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253, the United States Supreme Court recognized that even though there are certain hazards inherent in initial identification by photograph, that such procedures are widely and effectively used methods of law enforcement. The Simmons court acknowledged that improper employment of photographs can cause witnesses to err in identifying criminals. Simmons, 390 U.S. at 383, 88 S.Ct. at 971, 19 L.Ed.2d at 1253. That danger is increased where the police display to witnesses "only the picture of a single individual who generally resembles the person [the witness saw]" or where "the police show [the witness] pictures of several persons among which the photograph of a single individual occurs or is in some way emphasized." Id.

In the instant case defendant first argues the five-photograph array was impermissibly suggestive. He contends the procedure unduly emphasized him as being the person Zylstra observed because allegedly he was the only person in the photograph array with red hair. After viewing the five photographs we determine defendant's contention is without merit. Of the five photographs, none of the individuals stands out as having red hair. In the photograph defendant's hair appears far more brown than red. In fact, an individual in one of the other photographs appears to have hair as red or more red than defendant.

Defendant also asserts the use of the family photograph was tantamount to an impermissibly suggestive one-person show-up because (1) two of the five

pictured were female, (2) one of the three males was the victim and (3) defendant was the only male with red hair. Assuming, without deciding, that the family photograph shown to Zylstra was "suggestive," it does not necessarily follow that the procedure was "impermissibly" suggestive.

In Simmons, the court rejected defendants' argument the photographic identification was "impermissibly" suggestive. Simmons, 390 U.S. at 384, 88 S.Ct. at 971, 19 L.Ed.2d at 1253. There, the FBI had obtained from the sister of one defendant a number of photographs consisting mostly of group photos of the defendants. Simmons, 390 U.S. at 382, 88 S.Ct. at 970, 19 L.Ed.2d at 1252. Only these pictures were shown the day after the robbery to five witnesses, each of whom positively identified defendant Simmons in the photographs. Id. It was only at later dates when some of the witnesses were again interviewed by the FBI that they were shown another photograph array of "indeterminate numbers of pictures." Id. The Simmons court held:

> Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal. . . . We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversal under our supervisory authority.

Simmons, 390 U.S. at 385-86, 88 S.Ct. at 972, 19 L.Ed.2d at 1254. (Footnotes omitted).

In our de novo review of the record as a whole, we determine that the use of the family photograph was not "impermissibly" suggestive under the circumstances. Zylstra had already tentatively identified defendant in the five-photograph array. Defendant's picture in that array had been taken some time earlier. The family photograph was more recent. In addition, prior to being shown any photographs of defendant, Zylstra told the police she thought the

man she saw resembled Terry Lingner and thought the man might be related to Terry Lingner.

B. **Irreparable misidentification.** Finally, assuming arguendo, that the family photograph was highly suggestive defendant's claim still must fail. He has failed to show that the suggestive procedure gave rise to any likelihood of irreparable misidentification.

We agree that improper employment of photographs by police may cause witnesses to err in identifying criminals. Simmons, 390 U.S. at 383, 88 S.Ct. at 971, 19 L.Ed.2d at 1253. We also recognize that where a misidentification occurs, the witness thereafter may retain in his memory the image of the photograph rather than of the person actually seen which thereby reduces the trustworthiness of subsequent lineup or courtroom identification. Simmons, 390 U.S. at 383-84, 88 S.Ct. at 971, 19 L.Ed.2d at 1253. However, the standard to which we may reasonably hold the police is not absolute perfection. Rather, the standard we must apply is one of fairness and reliability of the identification under the totality of the circumstances. See Mark, 286 N.W.2d at 405.

In Mark, the Iowa Supreme Court adopted the five-factor standard enumerated in Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972), for determining whether a witness identification was reliable:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. The witness' degree of attention;
3. The accuracy of the witness' prior description of the criminal;
4. The level of certainty demonstrated by the witness at the time of identification; and
5. The length of time between the crime and the identification.

We now apply the five factor analysis to the facts of this case:

1. Opportunity to view. Zylstra had the opportunity to observe in the daylight the defendant when he came to Terry Lingner's apartment. She saw

him twice, once within three to six feet of where she was sitting. Zylstra also observed defendant a second time for 10 minutes while he talked to her neighbor before he left.

2. Degree of attention. Zylstra was watching television when the defendant drove up. However, her attention was drawn to defendant because her dog barked when his car pulled up. Zylstra's attention was also drawn to defendant because when he passed by the window she noticed both his red hair and his resemblance to Terry Lingner. When defendant left the apartment with the heavy bottle Zylstra turned her attention to him. She got up and looked out to see defendant talking with her neighbor. This suggests she was both conscious of defendant's presence and had focused part of her attention on him.

3. Accuracy of prior description. Initially Zylstra told both Terry Lingner and the police the person she had seen had red hair, resembled Terry Lingner and drove up in a white sports car. The defendant accurately matched that description, was driving a white Camaro that day and was placed in the same area at the same time by another witness.

4. Level of certainty. Prior to being shown any photographs of the defendant, Zylstra was positive the person she saw had red hair, resembled Terry Lingner and drove a white sports car. She tentatively identified the defendant in the first photo array as the person who had walked by her apartment. Upon viewing the family photograph Zylstra immediately and positively identified defendant as the person she had seen. Zylstra also identified defendant in court.

5. Time span. The police interviewed Zylstra and showed her the photographs on the same day as the burglary. In addition, the fact that Zylstra observed the defendant so soon after the robbery gives added support and credence to the other factors of the Neil standard.

We have carefully considered the reliability factors as they pertain to the facts in this case. We find that Zylstra's identification of the defendant in the two photograph arrays was reliable and properly admitted into evidence for consideration by the jury. We therefore affirm the trial court.

AFFIRMED.