FILED
MAY 31 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

147

STATE OF IOWA,)

Plaintiff-Appellee,) Filed May 31, 1979

vs.)

LORRAINE ROBINSON,) 99
62394

Defendant-Appellant.)

Appeal from Polk District Court - Ray Hanrahan, Judge.

Defendant appeals from conviction and sentence for burglary in the second degree in violation of sections 713.1 and 713.3, Supplement to the Code 1977. AFFIRMED

Gordon E. Allen of Allen, Babich and Bennett, Des Moines, Iowa, for appellant.

Thomas J. Miller, Attorney General of Iowa; Ann Fitzgibbons, Assistant Attorney General; Dan L. Johnston, Polk County Attorney; Mark Pennington, Assistant Polk County Attorney; attorneys for appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals from a judgment of conviction for the crime of burglary in the second degree, a violation of section 713.1 and 713.3, Code Supp. 1977. She asserts the trial court erred in excluding certain allegedly relevant evidence, and that the State failed to prove beyond a reasonable doubt that she was one of the persons involved in the burglary. We affirm the decision of the trial court in all respects.

The residence of Tom and Kitty Stoner was burglarized on the evening of March 23, 1978. When the Stoners returned home at approximately 8:40 p.m., they observed two individuals loading some of the Stoner's personal property into a car. The car proceeded up the driveway and attempted to push the Stoner's vehicle back out of the driveway. The Stoners were able to observe the burglars for about a minute before they escaped. Mrs. Stoner was able to get a good look at the driver of the car whom she described as a rather small young woman, about eighteen or nineteen years old, very attractive with long black hair pulled back. Mr. Stoner also got a fairly good look at the driver and described her as a slightly built, attractive young woman, with dark brown eyes and black hair. Defendant fits both descriptions.

On the day following the burglary, Officer Drew Burham took three photographs to Mrs. Stoner's house for identification. None of the photographs were of defendant, but one was a mug shot of her twin sister, Linda Robinson. Mrs. Stoner was inclined toward this shot but would not state unequivocally that this individual was one of the burglars. At the police station on April 12, 1978, the Stoners viewed a lineup of female individuals who were similar to the descriptions they had given police. Mrs. Stoner was immediately able to identify defendant as the driver of the vehicle involved in the burglary. Mr. Stoner was unable to identify defendant in the lineup, but later testified at trial that he was 98% certain defendant was the driver. Both Mr. and Mrs. Stoner identified the defendant in court.

A few days before the Stoners viewed the lineup of females, they went down to the police station for a similar lineup involving males similar to their earlier descriptions. Mrs. Stoner positively identified one Jack Thompson as a participant in the burglary. At trial the defense attempted to establish an alibi for Mr. Thompson. The state moved to strike this testimony on the grounds of relevance and materiality and the trial court sustained the motion.

I. The defendant's first issue is that the trial court erred in striking the testimony offered to establish an alibi for Jack Thompson. The state's objections to this testimony was its lack of relevancy. The determination of what is relevant and material is a matter largely within the trial court's discretion. State v. Fuhrman, 257 N.W.2d 619, 625 (Iowa 1977). The trial court in the case at bar exercised its discretion and sustained the State's motion to strike the testimony. On appeal defendant contends that this evidence would discredit Mrs. Stoner's identification of the defendant because her opportunities to view defendant and Jack Thompson were similar and part of the same transaction. Thus, it is urged that the evidence should have been admitted for the limited purpose of contradicting Mrs. Stoner's identification testimony. Although there may be merit to this theory of admissibility, we find nothing in the record indicating that the trial court was ever apprised of the limited purpose for which the evidence was offered. When evidence which is apparently inadmissible is offered for a limited purpose, the party offering it has the duty of alerting the court to the theory of admissibility. State v. Davis, 269 N.W.2d 434, 442 (Iowa 1978). Here, defendant failed to advise the trial court of the theory of admissibility now urged on appeal. We therefore find that the defendant is now precluded from raising this theory as a ground for reversal.

II. Defendant also argues that the state failed to prove guilt beyond a reasonable doubt as a matter of law and therefore, the trial court erred in overruling her motion for a directed verdict and motion for a new trial. We disagree. The evidence presented at trial and all reasonable inferences therefrom are viewed in the light most favorable to the state when considering the propriety of the trial court's rulings on defendant's motion for a directed verdict. State v. Williams, 179 N.W.2d 756, 758 (Iowa 1970). It is only necessary to consider evidence lending support to the verdict and if substantial evidence supports the charge the decision of the trial court will be upheld. Id.

Defendant's claim is based upon the premise that when two persons have the same opportunity to commit a crime, and the prosecution proves one of the two committed it, but not which one, then the defendant must be acquitted. 23 C.J.S., "Criminal Law," section 920 (1961) at p. 648. This claim is based entirely upon the fact that defendant had a twin sister. But other than a tentative identification, later rejected, there is nothing to connect defendant's sister with the crime. Defendant's argument is without merit. Her motion for directed verdict was properly overruled.

Defendant's motion for a new trial was also properly denied by the trial court. The same identification evidence connecting defendant up with the crime which supported the court's decision to overrule the motion for a directed verdict also supports the court's overruling of a motion for a new trial. In addition, the jury was given the picture of Linda Robinson that Mrs. Stoner was shown and they were able to view defendant throughout the course of the trial. They had the opportunity to decide for themselves if they had reasonable doubt concerning the identification of defendant as one of the perpetrators of the crime. We, therefore, uphold the trial court's ruling on defendant's motion for a new trial.

We have considered all issues presented and find no ground requiring reversal.

AFFIRMED.