IN THE COURT OF APPEALS OF IOWA

No. 5-269 / 94-746

FILED
AUG 17 1995
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

FRANK HAINES ALLOWAY, III,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Ray A. Fenton and Glenn Pille, Judges.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of second-degree sexual abuse, carrying a concealed weapon and possession of a controlled substance-marijuana, in violation of Iowa Code sections 709.3, 724.4 and 124.401 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, John P. Sarcone, County Attorney, and Melodee Hanes, Assistant County Attorney, for appellee.

Heard by Sacket, P.J., and Habhab and Cady, JJ.

CADY, J.

This is an appeal by Frank Alloway, III, following his conviction for sexual abuse in the second-degree, carrying a concealed weapon, and possession of marijuana. Alloway challenges the admissibility of identification testimony and the sufficiency of the evidence to support the conviction. We affirm the conviction.

The relevant facts of this case date back to the afternoon of June 22, 1993 when a mildly retarded seventeen-year-old boy, identified as J.M., went outside to play a game in which he pretended to be a bus driver. As a part of the game, J.M. was sitting on a bus bench near the Botanical Center in Des Moines. J.M. was infatuated with buses and committed most of the Des Moines metro bus schedule to memory. A man soon approached him and asked where he could catch a bus. J.M. gave him appropriate directions. The man then asked J.M. if he had a lighter. J.M. indicated he did not have a lighter and the man walked away toward the indicated bus stop.

J.M. continued to play his game after the man left, and was sitting on another bus bench when the same man approached him again. The man ordered J.M. into some nearby bushes, gagged him with his shirt, and sodomized him at knife point. The man repeatedly warned J.M. not to look at him or he would kill him. After the assault, J.M. remained on the ground for two or three minutes, dressed, ran home and immediately called 911.

When police officer Jack Beardsley arrived minutes later, J.M. described his assailant as a white male with a short, blond buzzed haircut. He indicated he was wearing blue jeans, a yellow t-shirt, and a black hat. J.M. stated the man was last seen walking south on East Riverside. Beardsley advised dispatch of the description, and within five minutes officers detained an individual matching the exact description provided by J.M. Beardsley took J.M. to the suspect's location, and J.M. identified the man as his assailant.

The man J.M. identified was Frank Haines Alloway, III. After taking Alloway into custody, officers found a knife with a blade exceeding five inches and two pipes containing marijuana residue. When the officers placed him in the police car, Alloway appeared to fall asleep. By the time they reached the police station, he was sluggish and slow to respond.

Alloway was charged with second-degree sexual abuse, carrying a concealed weapon, and possession of a controlled substance. He unsuccessfully moved to suppress J.M.'s on-the-scene identification, contending the procedure was impermissibly suggestive.

At trial, Alloway presented the testimony of a clinical psychologist, John Garfield. Garfield diagnosed Alloway as schizophrenic. He opined that there was somewhere between a "distinct possibility and probability" Alloway was experiencing a psychotic episode at the time of the assault, and as a result Alloway was unable to understand or fully appreciate the nature and quality of his acts.

In rebuttal, the State presented the testimony of a psychiatrist, Michael Taylor. Taylor stated that he did not believe Alloway's claim of not remembering the assault. Taylor testified he believed Alloway understood the nature of his acts and knew that what he was doing at the time of the assault was wrong based on his actions in scouting out the victim, secluding him, restraining him, gagging him, threatening him if he told anyone, taking back the shirt, and picking up the knife.

I. Identification Testimony. Identification testimony presented at trial based on pre-trial procedures which are "unnecessarily suggestive and conducive to irreparable mistaken identification" violate the due process rights of the accused. *State v. Salazar*, 213 N.W.2d 490, 493-94 (Iowa 1973). A sequential two-step analysis is employed to determine whether the accused's rights are impaired. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993).

The first step is to decide whether the identification procedure used was impermissibly suggestive. *Id.* If so, the second inquiry is whether "under the totality of [the] circumstances the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." *Id.* (quoting *State v. Whetstine*, 315 N.W.2d 758, 764 (Iowa 1982)). The important question under the second step is whether the identification was reliable. *Id.*

On-the-scene identification procedures held shortly after the crime are unquestionably suggestive. *Salazar*, 213 N.W.2d at 493. At the same time, they can be useful and are supported by substantial countervailing policy considerations. *Id.*

at 493-94. Prompt confrontations allow for the expeditious release of innocent suspects, and can actually enhance the reliability of identification by allowing it to be made before memories and images fade or become distorted. *Russell v. United States*, 408 F.2d 1280, 1284 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969); *Salazar*, 213 N.W.2d at 495. Thus, only unnecessarily suggestive on-the-scene identifications are impermissible under the first step of the analysis. *See State v. Jackson*, 387 N.W.2d 623, 631 (Iowa App. 1986).

We are unable to conclude from our review of the record that the identification procedure was impermissibly suggestive. *See id.* (on-the-scene identification procedure is not impermissibly suggestive because defendant is handcuffed or near a police car). The procedure was obviously suggestive, but not unnecessarily. The officers did nothing to intensify the suggestiveness inherent in the situation. Moreover, we find the likelihood of irreparable misidentification was minimal.

In evaluating the reliability of the identification, we consider five factors. They are: 1) opportunity of the witness to view the perpetrator at the time of the crime; 2) the witness' degree of attention; 3) accuracy of the witness' prior description of the perpetrator; 4) level of certainty demonstrated by the witness at the confrontation; and 5) length of time between the crime and the confrontation. *Taft*, 506 N.W.2d at 763.

In this case, the victim was able to observe defendant on two separate occasions. On the first occasion, the victim observed defendant from a close distance

while the two men engaged in a conversation. The victim gave a very accurate description of defendant, including the clothing he was wearing and the style of his hair. The identification occurred within an hour after the crime occurred. Under all the circumstances, we find the identification testimony was properly admitted at trial.

II. Sufficiency of Evidence. We uphold a verdict in the face of a challenge to the sufficiency of the evidence if there is substantial evidence to support it. *State v. Conyers*, 506 N.W.2d 442, 443 (Iowa 1993). Evidence is substantial if it would have convinced a rational fact finder that defendant was guilty beyond a reasonable doubt. *Id.*

Defendant claimed there was insufficient evidence to refute his evidence of insanity. We disagree. The evidence pertaining to defendant's state of mind at the time of the crime was conflicting. The defense expert believed it was no more than probable that defendant was insane. The State's expert testified that defendant was not insane. We recognize defendant's behavior was odd, even bizarre, following his arrest, but there was ample evidence to support the opinion of the State's expert. We also observe defendant's methodical actions in the commission of the crime, and the course of conduct followed to avoid detection. We find substantial evidence to support the verdict.

AFFIRMED.