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MAR 23 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 23, 1982 552

vs.)

TERRY ROSE DUNCAN,) 2-34
67069

Defendant-Appellant.)

Appeal from Dubuque District Court - T. H. Nelson, Judge.

Defendant appeals from her conviction of first degree robbery in violation of sections 711.1 and 711.2, The Code, asserting trial court erred in refusing to admit the minutes of testimony of the alleged robbery victim as impeachment evidence and in overruling defendant's objections to the introduction of photographic evidence of the victim. AFFIRMED.

Steven J. Hodge, Dubuque, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann Ryan, Assistant Attorney General, for plaintiff-appellee.

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

Defendant, Terry Rose Duncan, appeals from her conviction of first degree robbery in violation of sections 711.1 and 711.2, The Code. Defendant argues that trial court erred in refusing to admit the minutes of testimony of the alleged robbery victim as impeachment evidence and in overruling defendant's objections to the introduction of photographic evidence of the victim. We affirm.

On March 4, 1979, defendant was charged by county attorney's information with the crime of robbery in the first degree, in violation of sections 711.1 and 711.2, The Code. The charges stemmed from the alleged robbery of Delbert Hooks on September 18, 1980. At trial, the victim's testimony implicated defendant in the crime. This testimony, however, was inconsistent with defendant's testimony. It was also inconsistent, in some particulars, with the minutes of testimony prepared by the State. Defendant attempted to impeach the victim's testimony by asking if the victim had made earlier inconsistent statements. The victim denied making any such statements. At the close of defendant's case, defendant attempted to introduce the minutes of testimony to impeach the victim. The State objected on the basis that no foundation was established and it was improper impeachment. Trial court sustained the objection on the basis of lack of proper foundation. During the State's case, the prosecution attempted to introduce a photograph of the victim which was taken shortly after he had been assaulted. A police officer stated that the photograph accurately portrayed the appearance of the victim on the date taken. Defendant objected to the admission of the photograph on the grounds that it was inflammatory and prejudicial, the foundation was inadequate because there was no evidence of "who took it," and lack of relevance. Trial was to a jury which returned a guilty verdict. Trial court sentenced the defendant to a term of imprisonment not to exceed 25 years. This appeal followed.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. App. P. 4; Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Minutes of Testimony. Defendant argues that trial court erred in refusing to admit the minutes of testimony for impeachment purposes. We disagree.

Trial court determined in its ruling that a proper foundation had not been laid. Our review of the record leads us to conclude that trial court was correct in this determination. While defense counsel drew the witness's attention to the alleged contradictory statements which were made, the person to whom they were made, and provided the witness with an opportunity to admit, deny, or explain the contradiction, he did not call the witness's attention to the time, place, and circumstances under which the alleged contradictory statements were made. We conclude that the mere direction of the witness's attention to previous statements made to the county attorney does not provide sufficient foundation.

Further, the victim stated that he did not make statements to the county attorney which would be contradictory of his testimony at trial. Defense counsel offered no foundation to indicate that the statements contained in the minutes of testimony were, in fact, statements the victim had made. Defendant apparently would have this court rely on the presumption that the minutes of testimony were drafted by the county attorney, and that the statements contained therein were made to the county attorney. We are not persuaded that this presumption should be made. It is equally possible that a statement contained in the minutes of testimony were merely hearsay, attributable to anyone or no one. See State v. Hillsman, 281 N.W.2d 114, 116 (Iowa 1979) (assistant county attorney compiled the minutes of testimony from a mistaken understanding of police reports). Statements attributable to the witness, from an unknown source, sheds no light on the witness's credibility. Id. at 117. We thus find no basis for disturbing trial court's ruling on this matter.

III. Photographic Evidence. Defendant's next assignment of error is trial court's admission of photographic evidence of the victim taken shortly after he had been assaulted. Defendant argued to trial court that the State did not show "who took it, when it was taken, and whether or not there was any relationship between the alleged acts of the defendant and the matter shown in the photograph." On appeal, defendant also argues that the prejudicial effect of that evidence outweighs its probative value. We find defendant's arguments unpersuasive.

A. Foundation. The witness who lays a foundation for the admission of a photograph "may not be the photographer nor need he know anything of the time, conditions, or mechanisms of the taking." Cleary, McCormick's Handbook of the Law of Evidence, § 214, at 531 (2d ed. 1972). The witness need only know about the facts depicted in the photograph and be able to testify whether the photograph correctly or accurately portrays these facts. Id. In this case, the State established sufficient foundation for the introduction of the photograph. The witness who identified the photograph saw the victim shortly after the alleged robbery and testified that the photograph correctly and accurately portrayed his observations. Nothing more is required.

B. Prejudicial Effect. The test for admissibility of evidence is relevancy. State v. Fuhrman, 257 N.W.2d 619, 624 (Iowa 1977). A photograph will be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Nowlin, 244 N.W.2d 596, 600 (Iowa 1976). The gruesome or grizzly nature of the photograph does not make it inadmissible. State v. Seehan, 258 N.W. 374, 378 (Iowa 1977). The decision to admit photographs is within trial court's discretion and will be reversed only for an abuse of that discretion. State v. McGhee, 280 N.W.2d 436, 440-41 (Iowa 1979).

In the instant case, proof that the victim was seriously injured was relevant to the charge of robbery in the first degree. See § 711.2, The Code 1981. In view of

the charge, we conclude that trial court did not abuse its discretion in admitting the photograph.

We thus find no reason to disturb trial court's judgment.

AFFIRMED.