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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed January 26, 1983

00179

vs.)

ROBERT J. DIAZ, JR.,) 2-440
67459

Defendant-Appellant.)

Appeal from Linn District Court - Larry J. Conmey, Judge.

Defendant appeals his conviction of first degree robbery in violation of Iowa Code §§ 711.1, .2. AFFIRMED.

Francis J. Hoyt, Jr., Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant appeals his conviction of first degree robbery in violation of Iowa Code §§ 711.1, .2. He claims that the trial court erred in overruling his motion to suppress identification testimony of one of the complaining witnesses and in overruling his motion for acquittal based on allegedly insufficient evidence from which to find guilt beyond a reasonable doubt. We affirm.

Defendant was charged along with Terry Browning and James Doolin with first-degree robbery in connection with an incident in which three men assaulted one Rick Rohr who was shot with a pistol in the process. Defendant asserted an alibi defense, claiming that he was with friends in a bar at the time of the incident. He also filed a motion to suppress any identification testimony of Laura Phillips, Rohr's girlfriend, alleging that the procedure used whereby she identified defendant as one of the three involved was impermissibly suggestive. This motion as well as subsequent motions for judgment of acquittal based on allegedly insufficient evidence of guilt were overruled and defendant was found guilty by the jury. From the resulting conviction and sentence, defendant brings this appeal.

I. In determining the admissibility of out-of-court photographic identification against constitutional claims, we must determine whether the procedure used by the police was "impermissibly suggestive" and, if it was, whether, "under the totality of the circumstances, the suggestive procedure allowed for a very substantial likelihood of irreparable misidentification." State v. Mark, 286 N.W.2d 396, 403-04 (Iowa 1979), quoting Manson v. Brathwaite, 432 U.S. 98, 109, 97 S. Ct. 2243, 2250, 53 L. Ed. 2d 140, 151 (1977). In this case, defendant complains about an identification made by Phillips in mid-January of 1981 in which she was shown three photographs, two of which were of defendant. She identified defendant as the one who forced her to remain in Rohr's bedroom while Rohr was being assaulted elsewhere in the apartment. Defendant claims

that, under these facts, Phillips could not help but identify him as being involved, rendering the entire procedure unduly suggestive and tainting any subsequent in-court identification.

Defendant chooses to ignore, however, what happened during a prior photographic identification session on January 6, 1981. Police detective Donald Rosdail testified without contradiction as follows:

> Q. Why don't you tell—why don't you just relate to us what you did as far as photographic identification of the Defendant, Mr. Diaz, in this case.
>
> A. On at least several different occasions that I recall, Laura Phillips viewed photographs which included, I would say, between eight and ten photographs of black individuals. On January 6th, she was called down to the detective bureau where she again viewed these photographs and where she pulled three photographs, two of which were of Mr. Diaz, an older picture, and I believe the photograph that's presently in front of me now; and also a photograph of Terry Browning and stated that in her opinion these photographs were two of the individuals that had been involved in the robbery and assault on her boyfriend. A statement was taken from her at that time. (emphasis added).

Before the photographic identification challenged here took place, Phillips had already identified defendant as one of the three men involved in the incident. Defendant makes no claim that this earlier identification was in any way constitutionally invalid. Under these circumstances, we conclude that the procedure employed in the later identification, and which is being challenged in this appeal, was not impermissibly suggestive, even though we may assume without deciding that it was suggestive to some degree. See State v. Mark, 286 N.W.2d at 404.

Even if the photographic identification was impermissibly suggestive, we believe Phillips' identification testimony would still be admissible because, under all of the circumstances as disclosed by this record, the procedure used did not allow "for a very substantial likelihood of irreparable misidentification." Mark, 286 N.W.2d at 404. In making this determination, we consider the following reliability factors:

> . . . the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 405. (citations omitted).

A. Opportunity to view. Phillips testified that she was in the room with defendant between fifteen and thirty minutes. Although he tried to keep his face covered, she was still able to see his face on a number of occasions, including once when he said something while looking directly at her.

B. Degree of attention. Although there is no direct testimony on this point, we can assume Phillips had a relatively high degree of attention, especially considering the fact that her boyfriend was being assaulted in the hallway. In addition, it appears that she was deliberately trying to get a good look at his face, for she testified that he kept trying to hide his face with his elbow.

C. Accuracy of prior description. Although the record contains no description of defendant, Phillips did give the police a detailed description of the man in the bedroom with her.

D. Level of certainty at confrontation. Phillips testified that she was "fairly certain" when she picked defendant's photograph at the time being challenged here. In court, she unequivocally identified defendant as the one in the bedroom with her, not basing that identification on seeing any pictures of him, but rather on what happened on the night in question and on: "The way he looks. Just—I saw him out in the hallway and just the way he walks; he had a very bouncy way of going, which I noticed that night at the apartment. He did a lot of bouncing around. I don't know if bounce is the correct word, but I can use it to describe it best."

E. Length of time between crime and identification. The crime occurred on December 28, 1980. The identification challenged here took place in

mid-January of 1981, less than one month later. In light of State v. Holderness, 301 N.W.2d 733, 738-39 (Iowa 1981) (two-month span between crime and identification insufficient to defeat reliability of identification), the length of time here was insignificant.

Upon consideration of these five factors, we iterate our conclusion that the challenged photographic identification was "reliable under the totality of the circumstances." Mark, 286 N.W.2d at 405, and that there was not a substantial likelihood of irreparable misidentification.

> Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Id. (citations omitted).

Since Phillips' identification testimony was admissible in any event, it follows that the trial court properly overruled defendant's motion to suppress.

II. Defendant also claims that he was entitled to a judgment of acquittal because there was insufficient evidence of his involvement in the crime. Guided by the familiar standards of review summarized in State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981), we conclude that the trial court properly ruled to the contrary. The identification testimony of Phillips, as well as the unequivocal in-court identifications by her and Rohr of defendant as one of the three involved, was sufficient to take the case to the jury. The weight and credibility to be given the various items of disputed testimony, as well as defendant's alibi theory, were factual questions to be determined by the jury. See State v. Martin, 274 N.W.2d 348, 349 (Iowa 1979).

Finding no reversible error, we affirm defendant's conviction.

AFFIRMED.