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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 25, 1985
vs.	)	
LARRY EVERETT STARKS, JR.,	)	5-197 84-382
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County - Louis A. Lavorato, Judge.

Defendant appeals from a conviction of burglary in the first degree and sexual abuse in the second degree. AFFIRMED.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

After a jury trial, the defendant was convicted of burglary in the first degree and sexual abuse in the second degree. Both charges arose from the same incident.

The defendant has appealed from his convictions. He contends the trial court erred by refusing to suppress evidence relating to the victim's identification of him as one of her assailants. He argues the victim's in-court identification was impermissibly tainted because the victim had previously identified him from a "show-up" procedure and a photographic array, both of which he asserts were suggestive. He asserts the photographic array was suggestive because pictures of him and a codefendant kept recurring; he asserts the "show-up" was suggestive because he was wearing jail cothing and was the only black person in the room. Defendant claims that because the procedures used were unnecessarily suggestive, there was a "substantial likelihood of irreparable misidentification."

On June 26, at 3 a.m., the victim was in bed asleep when the defendant and another black man broke into her apartment. She woke up and realized that she had left a light on in the living room. She first saw the defendant when she started to get up to turn off the light. He jumped on her and pushed her back onto the bed. The victim was raped by both men and the incident lasted "longer than a half hour, maybe an hour."

During most of the incident the victim's face was turned toward the wall or covered with a sheet. The room was dark much of the time, although the light was on in the living room. The victim testified that she saw the faces of both men: she viewed the second man when he was in the bathroom and the light was on; she saw the defendant with her peripheral vision when he was sitting on top of her and a light above the bed was turned on.

Following the attack, the victim called the police. On the way to the hospital, the officer made two stops in order to have the victim view black men

who had been detained by police in her neighborhood on unrelated incidents. The victim positively stated that neither of these men were her attackers. While at the hospital, the victim viewed another man and again stated that he did not fit the facial or body shape of her attackers.

Three days later, or June 29, the victim viewed 400-500 pictures in a mug-book but failed to identify any person resembling the defendant. The victim then looked through 20 individual pictures and again failed to identify the defendant. Finally, the victim was shown five polaroid shots including ones of the defendant and the other man, Hilson. The victim stated that she could not be sure, because she was not good with pictures and needed to see the individual in person.

The following day the victim viewed a photo array of 10 photos. Photos of the defendant and Hilson were again included. They were the only pictures which were shown in both the photo array of 5 and the one on this day. The victim identified Hilson at that time. She indicated that the defendant's photo evoked memories but she had a mental block and couldn't be sure.

The victim identified the defendant after she saw him in person at the deposition on September 29. After seeing the defendant she stated that she was a "hundred and one percent" certain that the defendant had raped her.

In considering whether the identification evidence should have been excluded, we use a two-part analysis. First we must consider whether the identification procedure used by the police was "impermissibly suggestive." If we find that it was impermissibly suggestive, then we must determine if under the totality of circumstances there was a substantial likelihood of misidentification. State v. Newman, 326 N.W.2d 788, 794 (Iowa 1982).

We do not believe that either the various photos which the victim viewed or the identification at the deposition police were impermissibly suggestive. The fact that pictures of the defendant and Hilson were shown in both the array of 5 and 10 does not in and of itself make the procedure "impermissibly suggestive."

This is distinguishable from a case where the same individual's photo appears several times in the same array. C.f. Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968). Likewise, the fact that their photos were polaroid shots while the other photos in the array of 10 were mug shots is not persuasive evidence of an impermissibly suggestive procedure. There is no claim that the police in any way emphasized or otherwise attempted to influence the victim.

We also find that the defendant's presence at the deposition while suggestive, was not impermissibly suggestive. Even if the identification at the deposition was impermissibly suggestive, we find that the identification was properly admitted under the second prong. Under the totality of circumstances, we cannot say there was a substantial likelihood of misidentification.

In analyzing the likelihood of misidentification, the court examines five factors:

> (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 confrontation; and (5) the length of time between the crime and confrontation.

State v. Whetstine, 315 N.W.2d at 764-65 (Iowa 1982).

I. Opportunity to View. We believe that the defendant had sufficient opportunity to view the defendant. Although the room was dark during most of the incident and the victim's head turned toward the wall, she did get a glimpse of him when the lamp over her head was turned on. She also had the opportunity to view his stature and build at various times as the men moved around the room.

II. Degree of Attention. In a rape the victim is not a disinterested spectator. She is vitally concerned in the events taking place. State v. Newman, 326 N.W.2d 788, 794 (Iowa 1982). In this case, the victim stated that when she realized she was going to be raped she began paying attention to her attackers'

"physical appearance, what they were wearing and things like that."

III. Accuracy of Description. The victim described her assailant as a negro male in his early twenties, five feet seven inches tall. The defendant was five feet nine inches tall, and almost 18 at the time he was arrested. In light of the circumstances, we believe this description is accurate.

IV. Degree of Certainty. The victim examined several hundred photographs. She stated several times that she was not good with photographs and that she would like to have a line-up so that she could see the physical build and appearance. After viewing the photo array of 10, the victim identified Hilson and stated that she had a mental block about the defendant's picture because it reminded her of a man at work:

> I said that these were the men, that I wanted to see them in person, that one of them that I was—since I'm lousy at photographs, I didn't want to say I was 100 percent sure, I wanted to see them in person, and that one of them I said he reminded me of a guy that worked at work. When I saw him stand up, I mean, everything fell into place, all the shadows, everything that—it just all fell into place at one time.

When the victim ultimately saw the defendant she stated that she was a "hundred and one percent" certain.

Her initial failure to identify the defendant did not stem from uncertainty. Rather, the record indicates that she was hesitant to make a positive identification until she had the opportunity to view the defendant in person.

V. Time Span. In light of the circumstances of this case, we cannot say that a lapse of three months between the time of the incident and the identification by the victim casts serious doubt on the accuracy of the victim's testimony.

Because the totality of circumstances did not present a substantial likelihood of irreparable misrepresentation, we find that the motion to suppress the victim's identification of the defendant was properly overruled.

AFFIRMED.