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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,) Filed April 24, 1984

vs.)

TERRY LEE HAYES,) 4-55
83-671

Defendant-Appellant.)

Appeal from the Iowa District Court for Monroe County - Phillip R. Collett, Judge.

Defendant appeals from his conviction of theft in the second degree, asserting that there was insufficient evidence to support his conviction because of uncertainty of the witnesses in his identification. AFFIRMED.

LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven M. Foritano, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

PER CURIAM

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Defendant Terry Lee Hayes was charged with theft for taking a 1981 Oldsmobile from an Albia auto dealer for a test drive and not returning it. He was convicted of theft in the second degree. See Iowa Code §§ 714.1(2), .2(2) (1981). He appeals the conviction. We review criminal proceedings on assigned error.

I. Sufficiency of the Evidence. Defendant claims there was insufficient evidence presented at trial to identify him as the perpetrator. The standard of review for challenges to the sufficiency of the evidence is well established. See State v. Welton, 300 N.W.2d 157, 159-60 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). We will uphold a verdict if there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

Two witnesses, who were at the dealership when the car was driven away, chose defendant's picture out of a photo array. Between his arrest and the trial, defendant had grown a full beard and had gained weight. At trial, the witnesses were less sure about defendant's identity because his appearance was different than the man they remembered had taken the car. Yet one witness still was fifty percent sure, the other, eighty percent sure, that defendant was the man who had driven off with the car. The second witness said he recognized defendant on the date of the theft as the same person who had test driven a car six months to a year earlier.

A third witness had seen a man driving the stolen car; in a photo lineup she chose defendant's photograph as the man she saw. She also noted that defendant looked different at trial than she remembered the man she had seen driving the car, yet she was quite sure he was the same man only with a heavier beard and extra weight.

The credibility of witnesses and the weight to be given their testimony is a function of the factfinder. Schrier, 300 N.W.2d at 309; Robinson, 288 N.W.2d at

341. We find the three witnesses, along with the rest of the evidence presented in the case, provided "such evidence as could convince a rational trier of fact that defendant is guilty beyond a reasonable doubt." Robinson at 339.

II. Ineffective Assistance of Counsel. Defendant claims he was not provided effective assistance of counsel. We find that there is insufficient evidence on the record to allow us to review this issue.

AFFIRMED.