IN THE COURT OF APPEALS OF IOWA

No. 7-756 / 97-0182

000453

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BRIAN KEITH LARSON,

Defendant-Appellant.

FILED
FEB 25 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Henry County, John C. Miller and John G. Linn, Judges.

Defendant appeals from his convictions for third-degree burglary and second-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Michael A. Riepe, County Attorney, for appellee.

Considered by Cady, C.J., and Sackett and Mahan, JJ.

MAHAN, J.

Brian Larson appeals his conviction for third-degree burglary and second-degree theft. After the district court denied Larson's motion to suppress evidence, the parties stipulated to a trial based on the minutes of testimony. Larson contends the trial court erred: (1) when it ruled the State did not violate Iowa Code chapter 810; (2) when it ruled the State did not violate his due process rights; and (3) when it failed to suppress all of the evidence obtained as a result of the identification procedure, as a fruit of the poisonous tree. We affirm.

Around 6:30 a.m. on July 30, 1996, Willie Mullen saw two young white males carrying items, including stereo equipment, from the home of Daniel and Michelle Lumadue. Concerned not only for the Lumadues but also because of problems his son had been having, Mullen wrote down the license number of their car, which was parked in the driveway Mullen shares with the Lumadues. Mullen also got a clear look at the individuals. Later that day, the Lumadues returned home and discovered their stereo and computer equipment missing.

The police found fingerprints they believed belonged to the burglars and submitted them to the DCI laboratory. Mullen gave the police a description of the two men he had seen: one was five feet seven inches tall with a medium brown goatee and short brown hair; the other was taller and wearing a baseball cap. Mullen also gave the police the license plate number he had recorded. The police discovered the

car used by the men had been stolen earlier that day. The owner of the car reported that a 9mm Glock pistol was in the car when the car was stolen.

On August 4, the Lumadues' son, Eric, and his friend, Brock Hoover, were playing basketball at a neighborhood school when Brian Larson took Hoover aside and offered to sell Hoover a 9mm Glock pistol. Hoover told Eric, who in turn told his parents. Eric also told his parents Larson was approximately five feet seven inches tall and had a small brown goatee. Officer Dana Kuster checked with Hoover to confirm the story.

On August 5, Kuster contacted Larson at an apartment located about one block from the Lumadue residence. Kuster told Larson he was investigating a burglary and Larson matched the description of one of the suspects. Kuster asked Larson if he could take Larson's photograph to show to a witness for identification purposes; Larson consented. Kuster showed the photograph, and only that photograph, to Mullen. Mullen identified Larson as one of the men he saw at the Lumadue home on the morning of July 30. The police arrested Kuster on August 5 and fingerprinted him that day and again on August 6. Both sets of fingerprints were sent to the DCI laboratory, as were fingerprints previously taken at the Boys State Training School in Eldora.

On September 2, the police located the car Mullen saw at the Lumadues' home. The police found CD cases in the car. Daniel Lumadue identified the CD's as having been in his home on the day of the burglary. Fingerprints found on the CD

cases were sent to the DCI laboratory. The DCI determined Larson made some of the fingerprints found in the home and also some of the prints found on the CD cases.

I. APPLICATION OF IOWA CODE CHAPTER 810. Larson contends Iowa Code chapter 810 requires the police to notify a suspect he has a right to remain silent and is entitled to counsel during all nontestimonial identification procedures. Larson argues the trial court incorrectly determined chapter 810 did not apply in this instance. The State contends chapter 810 does not apply unless the identification procedures are conducted pursuant to a court order. The trial court determined chapter 810 does not apply when a suspect voluntarily submits to a photographic lineup.

When the admission of evidence turns on the interpretation of a statute, we review for errors of law. *State v. Adams*, 554 N.W.2d 686, 689 (Iowa 1996). We are not bound by the trial court's determinations of law. *State v. Davis*, 271 N.W.2d 693, 695 (Iowa 1978).

We have previously stated:

> [Chapter 810] provides *when ordering a person to submit* to nontestimonial identification procedures, a court order must inform the party that the right to counsel shall apply during nontestimonial identification procedures, including the right of indigent persons to appointed counsel.

State v. Nagel, 458 N.W.2d 10, 12 (Iowa App. 1990) (quoting Iowa Code § 810.8(8) (1987) (emphasis added). We find chapter 810 applies only when a court enters an order requiring a person to submit to a nontestimonial identification procedure.

Chapter 810 does not apply, as in the present case, where a suspect voluntarily submits to such a procedure. Taken to its fullest extent, Larson's argument would require police officers to inform suspects of their right to silence and their right to counsel prior to conducting undercover surveillance involving photographing the suspect. It is clear this was not the intent of the legislature when it drafted chapter 810. We find Kuster did not violate Iowa Code chapter 810.

II. VIOLATION OF DUE PROCESS. Larson next contends the use of the single photograph was impermissibly suggestive and tainted the witness's recollection of the suspect. The State contends: (1) the identification procedure did not create a very substantial possibility of irreparable misidentification and (2) even if the court had erred in admitting the evidence in question over the objection, the error would have been harmless beyond a reasonable doubt.

Our review of constitutional rights is de novo. *State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995). We must look at the totality of the circumstances as shown by the entire record. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995). In determining the propriety of the district court's action, this court may consider the evidence received at trial as well as that received at the suppression hearing. *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996); *Cook*, 530 N.W.2d at 731. The district court's ruling may be upheld on any basis appearing in the record, even though different from the one relied upon by the court. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1993).

We use a two-part analysis to determine whether an identification procedure was unduly suggestive. *State v. Zahner*, 545 N.W.2d 337, 339 (Iowa App. 1996); *Nagel*, 458 N.W.2d at 12. First, we must decide whether the out-of-court identification procedure was impermissibly suggestive. *Zahner* 545 N.W.2d at 339. If so, we must then examine the totality of the circumstances to determine whether the procedure gave rise to a very substantial likelihood of irreparable misidentification. *Id.*

We find a single photograph shown to a witness by police officers is impermissibly suggestive. *See id.* ("We find this incident does not evoke the degree of suggestibility as would have occurred if Schipper had been shown a single photograph by police officers.").

Next, we must determine whether the procedure gave rise to a very substantial likelihood of irreparable misidentification. *Nagel*, 458 N.W.2d at 12. When determining the effect of impermissible suggestiveness we must consider:

> [T]he 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.

Nagel, 458 N.W.2d at 13.

Mullen testified he looked out the window because he heard a noise outside. He was particularly attentive because there were kids picking on his son and they had tried to break into his home, so he was watching out more. Mullen said he saw the

two men standing in the doorway on the back porch of the Lumadues' home. According to Mullen, the suspects faced him for approximately fifteen seconds at a distance of approximately twenty to thirty-five feet in good lighting conditions. Mullen testified he tried to memorize their features in case something came up. Mullen admitted he did not know anything about the eyes, facial features, or facial markings of the individuals.

We have carefully reviewed the record and find there is no substantial likelihood of irreparable misidentification. Mullen viewed Larson for approximately fifteen seconds from a distance of twenty to thirty-five feet in good lighting. He took concern because of the situation involving his son. His description of the person he saw fit closely with Larson. Further, like in *Nagel*, the identification was made within a week of the crime, lending credibility and reliability to the identification. *See id.*

Because we have determined the court ruled properly regarding the identification, we find it unnecessary to address Larson's contention the trial court erred when it refused to suppress the evidence obtained as a result of the identification procedure.

For the reasons stated above, we affirm the conviction.

AFFIRMED.