IN THE COURT OF APPEALS OF IOWA

No. 5-383 / 94-1118

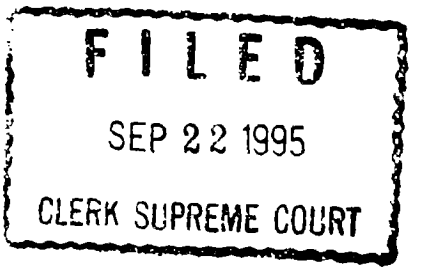
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES W. SOPER,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

James Soper appeals from the judgment and sentence entered upon his convictions, following a jury trial, of second-degree robbery, second-degree theft, and false imprisonment in violation of Iowa Code sections 710.7, 711.3, and 714.2(2) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon Ruth Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., Hayden, Sackett, Cady and Huitink, JJ. Habhab, J. takes no part.

PER CURIAM

At approximately 8:15 p.m. on August 15, 1993, Mary Beth Saigh finished her jog at the Dowling High School track in West Des Moines and walked toward her parked car, a red Dodge Spirit. As she unlocked her car door, a man put his arm around her neck, his hand across her mouth, and told her, "Don't scream. I don't want to hurt you." The man shoved Saigh into the front seat of her car and told her to put her hands underneath him. The man had difficulty starting Saigh's car and she helped him. Once the car was started, Saigh pushed the electric window mechanism to roll the windows down telling the man it was getting fogged up in the car. He told her to roll the windows back up and she did; however, she also unlocked the passenger's side door. The man told Saigh he had just gotten out of the penitentiary and needed to be seven miles out on Interstate 35. They drove out of the Dowling High School parking lot and Saigh directed the man to take a right on Buffalo Road. As they were traveling on Buffalo Road, Saigh opened the passenger's side door and jumped out of the car. The man in her car drove on.

Saigh described the man to the police as a white male, thirty-two to thirty-eight years old, bald with no facial hair, ears sticking out, wearing only blue jeans, tan chest with not much chest hair, and a tattoo on his right arm that was blue ink of unknown design.

Police showed Saigh photo array number one, which contained a picture of defendant James Soper taken two years earlier in the number two slot. Saigh could not positively identify her assailant but noted there was something familiar about the subject in the number two slot. Saigh was shown photo array number two which did not contain a photograph of Soper. She made no identification from this photo array. Finally, Saigh was shown photo array number 3 which contained a photo of Soper taken on August 19, four days after the incident, in the number four slot. However, Saigh stated that the subject in the number one slot looked like the man who took her car.

On August 19, Soper was arrested at the Bethel Mission in Des Moines. Soper's hair was about a quarter inch long all around his head, he wore a light beard and mustache, and he had the name "Jim" tattooed on his right arm.

Police officers Gordon and Coppess questioned Soper. At first Soper stated he had been working in Duluth, Minnesota from August 13 to August 19; however, Soper eventually acknowledged he had been in Des Moines during this time period. When asked about driving a car and the lady in the car, Soper at first stated that he did not remember this. However, upon further questioning Soper stated he remembered a red car but could not remember a lady. Police officer Gordon asked Soper, "What did you feel like when the lady left the car?" Soper responded that he thought he pushed her. Soper then admitted he remembered the lady. He stated that after she left the car he drove about two blocks and parked the car behind a building.

Soper told the police he had been drinking all day Sunday before the incident, he thought probably about twelve beers.

At Soper's jury trial Saigh positively identified Soper as her assailant. Edward Hebl testified that he found Saigh's car parked behind the Walnut Creek YMCA in West Des Moines on August 17.

James Penney testified that he had worked with Soper until 4:30 p.m. on August 15 at 1271 East 37th Court in Des Moines. Penney stated he returned to this address about 6:45 p.m. to bring Soper, who slept in a small building on the property, some water. Penney took Soper to buy some beer and was with him until 7:10 p.m.

Anthony Bonanno testified that he was playing football near the Dowling High School track on August 15, 1993 from approximately 4:00 p.m. until 7:00 p.m. He stated he saw a person hanging around the softball field who resembled the description of Saigh's assailant he heard on the news.

Cynthia Davis, a clinical psychologist at Broadlawns Medical Center, testified about her evaluation of Soper. She stated he was "borderline intellectual functioning, alcohol dependency with passive-aggressive traits, also dependent personality disorder." Davis, in explaining that persons with these traits often have poor memories, stated, "It may be that they remember bits and pieces of an event, but they don't remember the exact event, so they may rely on other people to help them fill in the gaps."

The jury found Soper guilty of second-degree robbery, second-degree theft, and false imprisonment.[1] He was sentenced to a term not to exceed ten years on the robbery charge, to a term not to exceed five years on the theft charge, and to a term of one year on the false imprisonment charge.

Soper appeals.

Soper's sole contention on appeal is the evidence was insufficient to prove beyond a reasonable doubt that he committed the offenses because the State did not establish the element of identity. The standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983).

A verdict will be upheld where there is substantial evidence to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

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[1] After convictions on these counts, Soper pled guilty to the charge of escape in violation of Iowa Code section 714.4(1).

Soper contends there was insufficient evidence of identification. Soper does not argue any of the identifications were inadmissible; rather, he challenges the reliability and sufficiency.

Saigh was provided with three separate photo arrays, two of which had pictures of Soper in them. The first and third arrays included different pictures of Soper. While Saigh was not able to identify Soper in the first array, she did point to his picture in the first array and said he looked familiar. She further stated that when she was shown the third array, she told the officer one picture looked like her assailant, but that Soper's picture had her assailant's eyes.

In making an identification for a composite drawing, Saigh described her assailant as having no hair, a long face, a thin lip line, deep set eyes, ears sticking out, and a long, thin nose. Saigh's description describes Soper, and the resulting composite resembles Soper. Saigh also told police her assailant had a blue tattoo on his right arm. Soper has a blue tattoo on his right arm.

Finally, Saigh also made an in-court identification. Saigh was asked how she could identify Soper at trial, since she was unable to see his tattoo in court and he was not shirtless or bald in court as she described him after the crime. Saigh stated:

> Because I know that profile. I looked at it just like this when I was in the car while he was trying to drive my car. I was facing the side of his head. I'll never forget that profile.

We find the reliability of Saigh's in-court identification to be strong.

When viewed in the light most favorable to the State, we find there was substantial evidence to support the conviction.

AFFIRMED.