

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 25 1985

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed June 25, 1985

vs.

)

THOMAS DEAN BILLINGTON,

)

5-200

84-603

Defendant-Appellant.

)

Appeal from the Iowa District Court for Grundy County - William G. Klotzbach, Judge.

Defendant has appealed from conviction for burglary in the second degree.

AFFIRMED.

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

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

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

The defendant, Thomas Billington, appeals from a conviction of burglary in the second degree. He challenges the sufficiency of the evidence to support the conviction and also contends that due to jury misconduct he should receive a new trial. We affirm.

In reviewing Billington's insufficiency of the evidence claim, we view the evidence in a light most favorable to the State. State v. McFadden, 320 N.W.2d 608, 614 (Iowa 1982). All the evidence is considered, not merely the evidence which supports the verdict. Id. We will uphold the verdict if it is supported by substantial evidence which could convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt.

Applying these principles, we conclude that the conviction should be affirmed. The primary evidence linking the defendant to the crime consisted of an eyewitness identification by the burglary victim, Kenneth Van Haven, who saw the burglars as they fled his residence. Billington claims that this identification is open to question based upon the brevity of the initial observation, the generality of his description, and the fact that he was able to view Billington at the station in a "suggestive, one-on-one scenario." To succeed on this claim, the defendant must show "that the identification procedures were suggestive and the irregularities gave rise to a substantial likelihood of irreparable misidentification in the totality of the circumstances." State v. Neal, 353 N.W.2d 83, 86 (Iowa 1984). Absent this showing, the identification evidence and its credibility is for the jury to weigh. Id. at 87. The relevant factors are:

[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.

State v. Mark, 286 N.W.2d 396, 405 (Iowa 1979).

In the case before this court, the witness had an opportunity to view the defendant at the scene of the crime. Van Haven testified that the defendant made no effort to look away from him and, in fact, looked him straight in the eye. Furthermore, it is reasonable to conclude that Van Haven was paying close attention to the person he saw running from his home; his concern was evidenced by the fact that he took note of the license plate number of the vehicle in which the defendant left the scene.

The transcript does not detail Van Haven's initial description of the defendant. However, Van Haven did testify that the person he saw running from his house had a slight dark beard. At the sheriff's office, Billington was clean shaven except for a mustache; a sheriff testified that defendant's face had a red rawness that indicated he had just shaved. Van Haven further testified that when he saw the defendant at the sheriff's office, his hair and clothing were similar to those of the individual who had burglarized his home. In essence, from what we know of Van Haven's description it was accurate. Furthermore, he did not express any degree of uncertainty when he later identified the defendant.

Finally, we note that Van Haven's identifications of the defendant all took place on December 17, 1982, the day of the burglary. He selected the Billington picture from a photographic line-up hours after the crime, as well as on a later occasion that same day. That evening, Van Haven identified the defendant at the sheriff's office.

In considering the totality of the circumstances, we cannot say that there was a substantial likelihood of misidentification. Thus, it was entirely within the province of the jury to weigh Van Haven's identification testimony against conflicting evidence and conclude that defendant was guilty. Substantial evidence supports the conviction and defendant is not entitled to relief on this ground.

Billington also argues that he is entitled to a new trial due to jury misconduct. His claim is based on the fact that during deliberations the jurors consulted

a map of Iowa which had not been admitted into evidence. While we do not condone such conduct, we fail to see how consulting a map would prejudice jury deliberations. "It is only when such conduct results in prejudice that a new trial should be granted." State v. Hall, 235 N.W.2d 702, 729 (Iowa 1975). We believe the trial court properly ruled against the defendant on this ground.

AFFIRMED.