IN THE COURT OF APPEALS OF IOWA

No. 3-235 / 92-756

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STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAN E. HAMPTON,
Defendant-Appellant.

Appeal from the Iowa District Court of Woodbury County, Richard J. Vipond, Judge.

Dan Hampton appeals from a judgment and sentence entered, following a jury trial, on his conviction of kidnapping in the first degree in violation of Iowa Code section 710.1(3) and 710.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Karrie S. Kelly, Assistant County Attorney, for appellee.

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

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OXBERGER, C.J.

The victim and her husband were staying at a motel in Sioux City, Iowa, on September 18, 1991. The victim went to the car to get a blanket. She observed a man walking towards a pick up truck. As the victim entered the building, the man grabbed her from behind, putting one arm around her neck and dragged her behind the building and then farther out into a nearby field.

The man told her to take off her pants and he performed vaginal intercourse. Afterwards, he demanded she perform oral intercourse on him and she complied. The man then took her behind a building in the field where he again forced intercourse. The man then allowed her to get dressed and go. The attack lasted approximately forty-five minutes. She went to her motel room and woke her husband who called the police. The police arrived at approximately 1:41 a.m.

The victim was taken to the hospital where she was examined and treated. She described her assailant as a slender man with a mustache wearing a white t-shirt with red and blue lettering, a dark colored windbreaker, and dark pants and having a southern accent. Before she was released from the hospital, she agreed to identify a suspect for the police. Although she was not wearing her glasses at the time of the incident or at the hospital, she positively identified Dan Hampton as the perpetrator. Hampton was handcuffed and standing with a police officer. A second officer was standing with the victim. The identification took place at approximately 2:57 a.m.

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On September 24, 1991, the State filed a trial information charging Hampton with first degree kidnapping and second degree sexual abuse. The State later dismissed the sexual abuse charge. On February 6, 1992, Hampton filed a motion to suppress based upon the "show-up" identification. The district court overruled the motion finding nothing made the identification more suggestive than is inherent in a one-on-one confrontation.

A jury trial commenced on March 17, 1992. The jury found Hampton guilty of first degree kidnapping. Hampton filed a motion for a new trial which the trial court overruled at the time of sentencing. On April 9, 1992, the court sentenced Hampton to a term of life imprisonment. Hampton has appealed.

I. Denial of Motion to Suppress Evidence

Hampton argues the district court erred in failing to grant his suppression motion on the basis of an allegedly impermissively suggestive identification procedure. The State argues Hampton failed to timely file his motion to suppress evidence based on Iowa Rules of Criminal Procedure 10(2), 10(3) and 10(4). In essence, these rules require that motions to suppress evidence on the ground that it was illegally obtained be filed within forty days of arraignment. Failure to do so results in waiver unless the court, for good cause shown, grants relief from such waiver. Iowa R. Crim. P. 10(3). The State failed to raise this

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argument to the trial court and the trial court ruled on the merits of the motion. Although pursuant to State v. McGowen, 297 N.W.2d 226, 227-28 (Iowa 1979), failure to raise this is not fatal to the State's argument, we find some question as to whether Iowa R. Crim. P. 10(2)(c) actually applies to motions to suppress grounded on the basis of impermissibly suggestive identification procedures. Because neither party raised nor briefed this issue, we assume, without deciding, the inapplicability of Iowa R. Crim. P. 10(2)(c) to these facts. We thus turn to the merits of the issue and affirm the ruling of the trial court.

First, we must determine whether the out-of-court identification procedure was "impermissibly suggestive." State v. Rawlings, 402 N.W.2d 406, 409 (Iowa 1987) (citing Manson v. Brathwaite, 432 U.S. 98, 108-09, 97 S. Ct. 2242, 2250, 53 L. Ed. 2d 140, 150 (1977)). If we determine the identification procedure was impermissibly suggestive, then we determine whether, under the totality of the circumstances, the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. State v. Holderness, 301 N.W.2d 733, 738 (Iowa 1981).

While Hampton argues the identification was unduly suggestive due to the fact he was handcuffed and accompanied by a police officer, this has been held to be a usual and necessary element in the ordinary identification procedure. See State v. Salazar, 213 N.W.2d 490, 493-94 (Iowa 1973);

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State v. Jackson, 387 N.W.2d 623, 631-32 (Iowa App. 1986). From this, we are simply unable to find the identification procedure employed by law enforcement to be impermissibly suggestive. Like the defendants in Jackson and Salazar, Hampton was handcuffed and officers were present. This, without more, does not rise to the level of impermissibly suggestive. We affirm the trial court's decision allowing the "show-up" identification in evidence.

II. Sufficiency of Evidence

Hampton also contends the State failed to prove beyond a reasonable doubt he committed kidnapping in the first degree. Hampton points to the following facts: the victim initially identified the perpetrator as wearing a maroon or navy jacket and her story changed after the identification; it was dark; she did not have her glasses on during the incident. In addition no seminal fluid was found on the victim's underwear. Spermatozoa were identified on the vaginal smears and swabs. No blood group factors foreign to those of the victim were found on the vaginal swabs. No blood, hair, or saliva samples tied Hampton to the victim, although sperm was found on Hampton's t-shirt, shorts and blue jeans. Thus, Hampton contends, his conviction was based on no more than speculations and conjecture.

We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). When reviewing a

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challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984); State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Bass, 349 N.W.2d at 500; Hall, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); Hall, 371 N.W.2d at 188.

We find substantial evidence to support the jury's verdict. Hampton was positively identified, without hesitation, by the victim. She had spent forty-five minutes with him and had observed him in a doorway light and moon light. Her identification occurred within hours of the incident while the victim's memory was still fresh. Accordingly, we affirm Hampton's conviction for kidnapping in the first degree.

AFFIRMED.

Hayden, J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

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I respectfully dissent.

From the record in this case, I find it impossible to say substantial evidence exists to support the charge.

The only evidence tying this defendant to the crime was the victim's very questionable identification of her assailant. Her description of the assailant was not borne out in its details when she viewed the defendant. She then changed her mind about the color of his clothes and other details.

The victim had poor eyesight; described the assailant's clothes incorrectly; changed her mind when she saw the defendant; and made her observations in darkness, without her glasses. The suggestive nature of the identification certainly rendered it unreliable. When these facts are combined with the lack of matching bodily samples connecting defendant to the crime, it is clear that substantial evidence did not exist to support the charge.

This defendant was convicted of kidnapping in the first degree and was sentenced to life in prison on flimsy evidence--insufficient to satisfy the substantial evidence test.

I would reverse.