FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 30, 1983
vs.	)	3-133 / 68443
KENNY B. JOHNSON,	)	
Defendant-Appellant.	)	

Appeal from Black Hawk District Court, Roger F. Peterson, Judge.

Defendant appeals from his conviction, after a bench trial, of robbery in the first degree as defined in Iowa Code §§ 711.1, 711.2. Defendant asserts (1) certain testimony went beyond the scope of the minutes of testimony and should have been excluded; (2) suggestive photographic identification and the resulting in-court identification of defendant should have been excluded; and (3) there was insufficient evidence to convict defendant of the crime. AFFIRMED.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

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

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

PER CURIAM

Defendant Kenny B. Johnson was charged with first-degree robbery after an incident which occurred in April 1981. The victim of the robbery, Shane Henninger, had stopped to give a ride to two men, one of whom he recognized as a schoolmate named Timmy Fisk, and the other of whom he later identified as defendant. The three decided to go buy beer and marijuana.

When they stopped at a pool hall to buy the marijuana, Henninger took out his wallet to contribute money, and the man Henninger later identified as defendant grabbed the wallet, took out the money, and said, "I think I'll keep this." Timmy Fisk then left the car and went into the pool hall. Henninger and the other man argued in the car about the money for a few minutes, and then, according to Henninger, the other man pulled a knife from his jacket, pointed it at Henninger, and said if he ever saw Henninger again he would "cut me up good." The man then got out of the car and walked away. Henninger called the police.

I. Minutes of Testimony

Defendant challenges the adequacy of the minutes of testimony to apprise him of the testimony Henninger actually gave in the case. The minutes of testimony indicated that Henninger would testify that the robber went by the initials "K.P., or something similar." Henninger testified in court that the robber had said "my name's Kenny Johnson and they call me K.J."

Our scope of review is on assigned error. Assuming, without deciding, the objection was timely made, we find the trial court did not commit error when it overruled defendant's objection to Henninger's testimony. The minutes alerted defendant "generally to the source and nature of the evidence against him"—it is not necessary that the minutes detail each circumstance of the testimony. See State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). There are cases in which reversible error was found in the admission of testimony that had not been set out

exactly in the minutes, but these were cases in which the challenged testimony concerned a subject which was material to the charge against defendant and the minutes did not indicate the witness would testify about that subject. See State v. Olson, 293 N.W.2d 216, 220-21 (Iowa), cert. denied, 449 U.S. 993, 101 S. Ct. 530, 66 L. Ed. 2d 290 (1980); State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). Although defendant's identity as the robber was material to the charge against defendant in this case, we agree with the trial court that the minutes of testimony apprised defendant that Henninger would identify defendant, so testimony regarding the subject of identity should have been no surprise to defendant.

What constitutes a "full and fair statement of the witness's expected testimony," Iowa R. Crim. P. 5(3), must be decided on a case-by-case basis. Walker at 614. The State claims Henninger's testimony was not expected; therefore, the State was not required to include it in the minutes of testimony. There is insufficient evidence on the record to allow us to decide whether or not the testimony was expected by the State. However, we feel the minutes provided by the State were adequate to allow defendant to prepare a defense to identification testimony. See Walker at 613. In light of the rest of the testimony at trial, in which the changes in Henninger's stories to the police were thoroughly investigated, we do not view the admission of the challenged testimony as prejudicial to defendant.

II. Impermissibly Suggestive Identification Procedures

Henninger identified Timmy Fisk from a six-photograph identification lineup. Timmy Fisk then implicated defendant as the person with him in Henninger's car. Police showed Henninger a six-photo lineup which included pictures of defendant, Fisk and one person who was in the photo lineup in which Henninger picked out Fisk. Defendant claims the second photo lineup was

therefore effectively reduced to four photographs because Henninger could eliminate from consideration the two photographs that had appeared in the previous lineup.

In criminal cases on issues involving violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). We find defendant's argument to be without merit. In the circumstances of this case, the second photographic lineup was acceptable. Therefore we do not reach the issue of whether a substantial likelihood of irreparable misidentification existed. Because the case was heard by the trial court without a jury, we feel the court was sufficiently able to take the identification procedures into account when determining the identity of defendant as the perpetrator of the crime.

III. Sufficiency of the Evidence

Defendant claims there was insufficient evidence to support the trial court's findings regarding four aspects of the case: (1) the identity of defendant as the perpetrator of the crime; (2) the occurrence of an assault; (3) the commission of an assault to assist in the theft or escape from the crime; and (4) the use of a dangerous weapon during the commission of the crime.

The standard of review in challenging the sufficiency of the evidence is well established. 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). The credibility of the witnesses and the weight to be given their testimony is a function of the factfinder. Robinson at 341. We find sufficient evidence on the record to uphold the conviction of defendant for robbery in the first degree.

AFFIRMED.