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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 22, 1979
vs.	)	
KENNETH GRAY,	)	4 / 60991
Defendant-Appellant.	)	

Appeal from Scott District Court - Max R. Werling, Judge.

Defendant appeals from conviction for robbery with aggravation in violation of § 711.2, The Code 1975. Affirmed.

Gary K. Koos, of Davenport, for appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Elizabeth Shaw, Scott County Attorney, for appellee.

Heard by Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant Kenneth Gray appeals his conviction for robbery with aggravation in violation of § 711.2, The Code 1975. He contends that in-court identifications of him by three witnesses were tainted by impermissibly suggestive pre-trial confrontations, and should have been suppressed. We affirm.

On April 2, 1977, two men entered a Randall's grocery store in Davenport just before closing. One of the men, carrying a sawed off shotgun under his coat, forced the store manager to open two safes in the office while the second man stood at the front of the store as lookout. Michael Jones, a store employee, and Andrea Wernentin, a customer, were able to observe the robbers inside the store. The men then fled from the store with the money taken from the safes, and Connie Johnson, another customer who was outside, observed the men under the floodlights illuminating the front of the store.

During the investigation of the robbery, the descriptions of the robbers given by these witnesses varied. However, Jones, Johnson and Wernentin each picked out defendant as the robber armed with the shotgun when shown groups of photographs which contained his picture. Subsequently, Jones and Johnson were separately taken by an assistant county attorney to view defendant who was sitting alone or with the sheriff in a waiting room at the courthouse. Each identified the defendant as the robber. Wernentin's mother, who works at the courthouse, told Wernentin that a group of prisoners would be at the courthouse on a certain day, and that Wernentin should look them over to see if she could identify the robber. Without notifying police, Wernentin went to the courthouse and observed defendant at least three different times, either handcuffed to a group of prisoners or alone. She then informed the investigating officers of her actions, and again identified a picture of the defendant from a photographic line-up. Finally, each witness made a courtroom identification of defendant as the armed man who robbed the store.

Prior to trial defendant moved to suppress all identification testimony of these witnesses because the "in-person" identification of defendant was so unnecessarily suggestive and conducive to irreparable mistaken identification that defendant was denied constitutional due process. State v. Salazar, 213 N.W.2d 490, 492 (Iowa 1973). It

seems clear from the principles set forth in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and State v. Ash, 244 N.W.2d 812 (Iowa 1976) that the trial court did not err when it overruled the motion.

Initially we note that no taint from the in-person viewing of defendant attaches when the procedure used is not the result of coercive pressure from a police-dominated confrontation. "... [T]he purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process." Neil v. Biggers, 409 U.S. at 199, 93 S.Ct. at 382, 34 L.Ed.2d at 411. Wernentin initiated her view of defendant subsequent to her identification of his photograph, without police assistance or sanction. She stationed herself in the courthouse and picked defendant out of a group of prisoners in the hallway. She then arranged to view him in the courtroom and a waiting room to be sure of her identification. Only then did she inform the police of her actions, and again identified his photograph. When the police do not precipitate or arrange a confrontation between witness and suspect, the possibility of impermissible suggestiveness is negated. See State v. Girouard, 373 A.2d 836 (Vt. 1977); People v. Bynum, 38 Ill. App. 3d 573, 348 N.Ed.2d 194 (1976); Hill v. United States, 367 A.2d 110 (D.C. App. 1976).

Assuming that the police-initiated procedure used in showing a handcuffed defendant singly to Jones and Johnson was suggestive and unnecessary, State v. Salazar, 213 N.W.2d at 493, we must make a second inquiry as to whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. Our concern is whether the in-court identification is reliable, considering such factors as the opportunity of the witnesses to view the criminal at the time of the crime, the degree of attention paid, the accuracy of description given, the witness's level of certainty and the time elapsed. Manson v. Brathwaite, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154; State v. McManus, 263 N.W.2d 556, 558 (Iowa App. 1977).

Both Jones and Johnson had the opportunity to view defendant in the well-lighted store area for as long as five minutes. They each identified defendant from a photographic lineup before they viewed him at the courthouse. Testimony at the suppression hearing indicated that Jones and Johnson recognized defendant at the time the robbery occurred as someone they knew, and any delay in identification leading to his arrest resulted not from the witnesses' uncertainty but from fear of reprisal from defendant. They each testified that they were certain of their identification at trial. There is little likelihood of mistake on their parts. See State v. McManus, 263 N.W.2d at 558-559.

Further, under this analysis, witness Wernentin's identification is equally as reliable. She testified that she was able to see defendant in the well-lit store for a minute or a minute and a half from a few feet away. She had taken a course in self-defense from which she had learned identifying techniques. She had also identified defendant from a group of photographs prior to viewing him in person at the courthouse. Wernentin testified that she was very sure of her identification of defendant.

Upon review of all the circumstances, we hold the trial court was right in admitting the identification testimony, and the judgment is affirmed.