

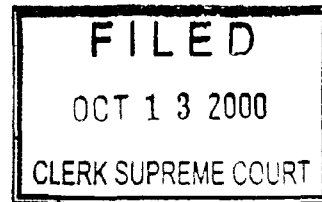
IN THE COURT OF APPEALS OF IOWA

No. 0-394 / 99-973
Filed October 13, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARRELL SMITH,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

Smith appeals from the judgment and sentence entered upon his
convictions for assault causing bodily injury and first-degree kidnapping.
AFFIRMED.

Roman Vald of Phillips, McCollom, Kozlowski & Vald, P.L.C., West Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, John P. Sarcone, County Attorney, and Daniel C. Voogt and Jamie D.
Bowers, Assistant County Attorneys, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

HURTINK, P.J.***I. Background Facts and Proceedings.***

Smith, along with Larry Botts, Joseph Houston, Damon Calaway, and Tohamed Fowler, was charged with murder and kidnapping following the death of Dawue Stigler. Smith was implicated in Stigler's death by Shauntell Brown's statement to investigating officer James Rowley. Brown identified Smith as one of several people present at Calaway's residence while Stigler was confined and assaulted. Brown also identified Smith in a photo line-up arranged by Rowley.

Prior to trial Smith successfully challenged the admissibility of Brown's out-of-court- identification of him during the photo line-up. Although the district court excluded this evidence, Brown's in-court identification of Smith as one of Stigler's assailants was admitted.

Over Smith's objections, Brown testified that Calaway and Botts told her they had beaten Stigler in the basement of Calaway's residence. She further testified that Calaway told her he shot Stigler in the head. Joseph Robinson, a State witness, also testified that Calaway told him they beat up Stigler at Calaway's residence.

Smith was convicted of assault causing bodily injury and first-degree kidnapping. On appeal he challenges the admission of Brown's in-court identification and testimony concerning statements made by Calaway and Botts.

II. Standard of Review.

Because both issues raised implicate Smith's constitutional rights, our review is de novo. *State v. Trompeter*, 555 N.W.2d 468, 470 (Iowa 1996).

III. In-Court Identification.

An identification procedure that is unnecessarily or impermissibly suggestive and that presents a likelihood of irreparable misidentification is a denial of due process. *State v. Ash*, 244 N.W.2d 812, 814 (Iowa 1976). In considering an undue suggestiveness claim, we employ a two-part analysis. First, we must decide whether the identification procedure was in fact impermissibly suggestive. *State v. Mark*, 286 N.W.2d 396, 403-04 (Iowa 1979). Second, if we find the procedure was impermissibly suggestive, we must then determine whether, under the totality of the circumstances, an identification adhered to by the witness at the time of trial is irreparably tainted. *State v. Webb*, 516 N.W.2d 824, 829 (Iowa 1994). "Short of this, the identification evidence and its shortcomings or credibility are for the jury to weigh." *Id.* (quoting *State v. Neal*, 353 N.W.2d 83, 87 (Iowa 1984)).

At the hearing on Smith's motion to suppress Brown's eyewitness identification testimony, the district court made the following assessment of the challenged photo line-up:

Ms. Brown knew two of the suspects shown in the display quite well and had previously described them as having been involved. Defendant's association in the crime is highly suggested by his photo being placed in the photo array with those two known and previously identified suspects. Viewing Defendant's picture with those of Mr. Botts and Mr. Calaway may have given her a false sense of confidence of Defendant's involvement. The suggestiveness of the display is compounded by the fact that only Defendant's photograph displayed white, chapped lips in light of the suggestion at the interview that one of the suspects had "crusty lips."

The district court's resulting conclusion that the photo line-up was impermissibly suggestive is abundantly supported by the record, and we adopt it as our own.

The remaining question is whether Brown's in-court identification was irreparably tainted by the impermissibly suggestive photo line-up. In making this determination, we consider the following reliability factors:

- (1) the opportunity of the witness to view the criminal at the time of the crime,
- (2) the witness' degree of attention,
- (3) the accuracy of the witness' prior description of the criminal,
- (4) the level of certainty demonstrated by the witness at the confrontation, and
- (5) the length of time between the crime and the confrontation.

Mark, 286 N.W.2d at 405 (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972)).

The controlling record is found in the State's offer of proof made preliminary to the court's ruling admitting Brown's in-court identification. In the State's offer of proof, Brown testified she saw Dawue Stigler, Darrell Smith, Damon Calaway, Tohamed Fowler, Joe Houston, and Babe Botts at Calaway's residence. Specifically, she stated she saw, from her vantage point in the kitchen, Smith come through the front door, walk through the kitchen, and down to the basement. She approximated it took one to two minutes and required him to walk within two or three feet of her. When asked if she was paying attention to what was going on when Smith walked through the kitchen, she replied, "Kind of. If anybody walks in your house you—and if you haven't seen them there before, yeah."

Brown further testified that although she hadn't previously remembered meeting Smith, she recently recalled that she had in fact met him in 1996 in Forest Park, where she smoked a "blunt" with him. When asked if she recalled "anything in particular about the defendant when [she was] smoking the blunt with him," she indicated that he had really chapped lips and that he was really dark complected. Also when asked about the picture of Smith that Officer Rowley presented to her, she stated that she recognized Smith from their encounter at Calaway's residence and believed she would be able to identify him in court even if she had never seen that picture.

We, like the district court, find the State's offer of proof included sufficient indicators of reliability to admit Brown's in-court identification. The nature of her observations, their length, and certainty of recollection all weigh in favor of the district court's ruling. We also note that Brown was vigorously cross-examined concerning any inconsistencies in her testimony. Under these circumstances, the credibility of Brown's in-court identification was properly left to the jury. We affirm on this issue.

IV. Codefendants' Statements.

Smith's challenge to the admission of testimony concerning statements made by Calaway and Botts is limited to a claimed violation of his rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. U.S. Const. Amend. VI. We find it sufficient to note that our supreme court has effectively resolved this issue against Smith in *State v.*

Tangie, ___ N.W.2d ___ (Iowa 2000) (Confrontation Clause is not implicated when statement of a coconspirator admitted under 801(d)(2)(E)).

Lastly, we decline to consider Smith's argument that these statements do not fall within the rule 801(d)(2)(E) exception to the hearsay rule. Smith cites no authority and makes no arguments in his brief concerning any claimed hearsay issues. Our appellate rules require a party's brief to state the issue or issues presented for review. *Mueller v. St. Ansgar State Bank*, 465 N.W.2d 659, 659 (Iowa 1991). When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived. See Iowa R. App. P. 14(a)(3); *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996).

Smith's conviction is accordingly affirmed.

AFFIRMED.