IN THE COURT OF APPEALS OF IOWA

FILED
AUG 26 1987
CLERK SUPREME COURT

IN THE INTEREST OF T.R.A.
A Minor

Appellant

Filed August 26, 1987

7-258
87-140

Appeal from the Iowa District Court for Black Hawk County (No. J3936) - Stephen C Clarke, Juvenile Referee, and Robert E Mahan, District Associate Judge

T R A , a minor, appeals from order determining he committed sexual abuse in the second degree **AFFIRMED**

John S Pieters, of Pieters & Pieters, Waterloo, for the appellant juvenile.

Thomas J Miller, Attorney General, Charles K Phillips, Assistant Attorney General, and Janet Pederson, Assistant County Attorney, for the appellee state.

Considered by Donielson, P J , and Schlegel, and Sackett, JJ.

46126

PER CURIAM

T.R.A., a minor child, appeals from an order finding him to have committed a sexual abuse in the second degree. He complains the court should have suppressed a photographic lineup because (1) the photographic lineup was unduly suggestive, and (2) the lineup was conducted without notice to defendant and in absence of his right to counsel. We disagree and affirm the trial court.

To succeed on a claim of an impermissibly suggestive photographic array defendant must establish the 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). Short of this, the identification evidence and its shortcomings or credibility are for the factfinder to weigh. Id.

We determine the identification here was reliable. The victim encountered T.R.A. five times in a lighted area. She identified him from the photographs three or four days after the incident, she picked him out immediately, and she pointed him out at trial.

There is other evidence tying T.R.A. to the crime. He was found in the place of the alleged crime at about the time it was to have occurred. T.R.A. had injuries consistent with what the victim had allegedly done to him.

T.R.A. next contends his constitutional right to counsel had attached at the time of the photo lineup. He contends the absence of his counsel at the lineup and the absence of any notice to him or his counsel of the lineup, requires that identification testimony be excluded. In State v. Dewey, 220 N.W.2d 629, 631 (Iowa 1974), the court stated:

> Defendant-appellant however takes the position that because the photographs were shown to the witnesses after his arraignment and appointment of defense counsel his rights under the Sixth Amendment to the United States Constitution were violated. This issue is resolved

3

against defendant in United States v Ash, 413 U S 300, 93 S.Ct. 2568, 2579, 37 L Ed 2d 619, 633, where the court said

> "* * * the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender * * * "

We determine there is no basis for T R A 's claims

AFFIRMED