FILED
MAR 22 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,)
vs.)
KERRY PAUL FUGATE,)
Appellant.)

Filed March 22, 1979

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Appeal from Polk District Court - James P. Denato, Judge.

Defendant appeals conviction of robbery alleging improper admission of identification testimony and fingerprint evidence. - AFFIRMED.

Thomas E. McCurnin and Robert A. Wright, Des Moines, for Appellant.

Thomas J. Miller, Attorney General of Iowa and Ann Fitzgibbons, Assistant Attorney General, for Appellee.

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

PER CURIAM

Defendant Kerry Fugate appeals conviction of robbery in violation of section 711.3, The Code 1977. He contends trial court erred by failing to suppress an in-court identification of defendant by witness Pugh, alleging taint by previous, improper photographic displays. He also asserts that fingerprint evidence which was not produced pursuant to his pretrial motion for production should not have been admitted. We affirm.

Mrs. Pugh, the victim of the instant robbery, was asked to identify her assailant from various photographs on at least five occasions. On the day of trial, she was shown two photographs both of which depicted the defendant. This display was unnecessary and impermissibly suggestive. See United States v. Dailey, 524 F.2d 911, 914 (8th Cir. 1975). On this appeal, our concern is whether Mrs. Pugh's in-court identification was reliable. State v. McManus, 263 N.W.2d 556, 558 (Iowa App. 1977). To determine reliability, we consider the following five factors: the opportunity to view, the degree of attention, the accuracy of the description, the witness's level of certainty, and the time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977). Mrs. Pugh first observed defendant in the well lighted hallway of her apartment building. A short while later, defendant came to her door and asked to use the telephone. She permitted him to enter and accompanied him to the kitchen. After completing his call, defendant started to leave the apartment. He suddenly grabbed the witness, pushed her into the bedroom, then bound and gagged her. The entire incident transpired in approximately ten to fifteen minutes. Mrs. Pugh testified she was positive that defendant was the person who robbed her. She further testified that she was capable of identifying defendant solely on her recollection of the incident and independently of the photographs she had seen. Based on the totality of the circumstances recited above, we find the record discloses the requisite degree of reliability. McManus, 263 N.W.2d at 559. Trial court correctly admitted the in-court identification.

At trial, defendant objected to the admission of a fingerprint card on the grounds that the State had failed to disclose the same pursuant to a defense motion

for production of evidence. Trial court offered defendant a continuance which was declined. Rule of Criminal Procedure 13(6)(c) offers trial court a number of options when confronted with a party's failure to comply with discovery. Among other things, it may grant a continuance or prohibit a party from introducing undisclosed evidence. Trial court chose to offer defendant a continuance rather than exclude the fingerprint exhibit. We find no abuse of discretion in this decision.

AFFIRMED.