

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

WILLIAM STRINGER,

Defendant-Appellant.

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8-14
87-473

FILED

AUG 24 1988

CLERK SUPREME COURT

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Appeal from the Iowa District Court for Polk County
(No. 33680), A. M. Critelli, Judge.

Defendant appeals from a conviction for murder in the
first degree, in violation of Iowa Code sections 707.1 and
707.2, after a jury trial in district court. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Linda
Del Gallo, Assistant Appellate Defender, for defendant-
appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden,
Assistant Attorney General; and James W. Ramey III,
Assistant County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J.

The defendant appeals from the judgment and sentence entered upon his conviction for murder in the first degree in violation of Iowa Code sections 707.1 and 707.2 (1987) after a jury trial in district court. The defendant claims the trial court (1) erred in denying his motion to suppress the identification of him as the perpetrator by two witnesses; and (2) abused its discretion in denying his mistrial motions based on prosecutorial misconduct. We affirm.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

The defendant forced his way into a house in which Lyn Ballard, Kevin Colburn, and Jim Clay lived. He held a gun to Ballard's head and announced it was a robbery. The three fled the house and the defendant fatally shot Clay. The defendant was staying with Gary Dean Lewis. Lewis testified that the defendant borrowed some dark clothes and left with a sawed-off shotgun. He was also wearing makeup when he left. When the defendant returned, he told Lewis he had killed someone. Lewis informed the police and they arrested the defendant.

I. Motion To Suppress

The defendant claims the trial court erred in denying defendant's motion to suppress any identification of the defendant by witnesses Lyn Ballard and Kevin Colburn. The

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defendant says the identification procedure was impermissibly suggestive in that the witnesses came to the hearing expecting to see the person the police had arrested for the offense. Also, the defendant was the only black person in the room and clearly was identified as the person the police were accusing of the offense.

In State v. Mark, 286 N.W.2d 396, 402 (Iowa 1979), the court established a five-factor test regarding witness identification.

1. Opportunity to view. The defendant held Lyn Ballard at gunpoint for approximately five minutes during which time she closely observed his features. Kevin Colburn, a senior medical student, estimated he observed defendant's features for five to ten seconds from a distance of 20 feet in good lighting conditions. The witnesses' opportunity to view the defendant was sufficient to ensure the reliability of their identification.

2. Degree of attention. Both witnesses were being threatened. They realized their victimization and appreciated a need to scrutinize the defendant's face. Their need to be concerned with their personal safety does not justify our finding that this need would so distract them that as a matter of law they lacked sufficient degree of attention to form a valued opinion of identification.

3. Accuracy of description. Ms. Ballard testified defendant had a knit cap with makeup on his face. Mr. Colburn testified that the defendant had a nylon stocking over his face. These discrepancies are for the jury to resolve. We do not find they are of sufficient nature to hold as a matter of law that the identification is totally untrustworthy.

4. Level of certainty. The defendant says the witnesses' action in going to the initial appearance to see the person the police arrested demonstrated strong bias. The defendant also claims that the conduct of the prosecutor in telling the witnesses that the defendant was a suspect in other crimes improperly biased them and solidified their identification. Defendant further claims that Colburn's mistaken statement regarding time sequence in which he saw defendant's picture in the newspaper adds to the untrustworthiness of his expression of certainty. We find such matters are considerations for the jury and do not rise to a level that the court should rule as a matter of law.

5. Time span. We hold that the seventeen-hour period from the robbery to the witnesses' observation at the initial appearance is not sufficient length to hold as a matter of law the identification is unworthy.

After viewing the factors cited above by the defendant, we conclude that the trial court properly overruled defendant's motion to suppress the witnesses' identification of the defendant.

II. Prosecutorial Misconduct

Defendant submits that he was denied a fair trial by conduct of the prosecutor. Specifically, defendant objects to the following question directed to the Lyn Ballard by the prosecutor: "As a matter of fact, Lyn, I told you he had been identified in those other shootings, hadn't he?" Defendant's motion for mistrial was overruled. The question was not answered. The trial judge struck the question from the record and advised the jury to disregard it.

Defense counsel was the first to raise before the jury the fact the prosecutor suspected the defendant in other shootings. Counsel was attempting to show the jury that this information could have influenced the witnesses' identification of the defendant. The prosecutor claims that his question is justified because the defendant had opened the door concerning other crimes. The prosecutor's question was designed to show that the defendant was not only a suspect but that, in fact, he had been identified in other shootings. We do not determine whether this question was proper. We hold that even if it is improper, the defendant was not unduly prejudiced since the question was stricken from the record and the jury advised to disregard it. See State v. Williams, 35 N.W.2d 45, 56 (Iowa 1982).

The defendant also contends the prosecutor was guilty of misconduct for implying to the jury that defendant had previously been convicted of felony crimes. Defendant claims the trial court erred in denying his motion for mistrial based on this misconduct. The prosecutor James Ramey questioned Gary Lewis concerning involvement with criminals and therefore whether he should be around the defendant. The State contends that since the defendant had just informed Lewis that he had killed a person, that Lewis should not associate with a criminal. Defendant contends this question was designed to elicit information that defendant had previously been convicted of a crime. We do not speculate as to the prosecutor's ultimate purpose. We conclude that the trial court did not abuse its discretion in denying defendant's motion for mistrial. The question was not answered and the defendant refused the trial court's offer to admonish the jury.

We affirm the defendant's conviction.

AFFIRMED.