



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	Filed April 8, 1983
Plaintiff-Appellee,	)	
vs.	)	3-06
	)	68169
WILLIAM WAYNE BUMPUS,	)	
	)	
Defendant-Appellant.	)	

Appeal from Polk District Court, Joel D. Novak, Judge.

The derendant appeals his conviction of robbery in the first degree in violation of Iowa Code section 711.1, .2 (1981). **AFFIRMED.**

Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Shirley Ann Steffee, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Johnson, J., takes no part.

OXBERGER, C.J.

The derendant appeals his conviction of robbery in the first degree in violation of Iowa Code sections 711.1, .2 (1981). He claims that the State presented insufficient evidence for the jury to find that he committed the robbery and that the trial court erred in overruling his objections to the instruction regarding personal identity. We affirm.

The defendant's objection to the submission of Instruction 17 relating to eyewitness identification is based upon his conclusion that the instruction constituted an undue comment on the evidence. At trial, his counsel objected to the instruction on the ground that by reading it to the jury, the court was in essence "saying the opinion has validity." He then went on to argue that "[t]he jury should make that determination and not the Court by an Instruction." Similarly, at trial he argued that the instruction was improper because in his opinion, it implied that, "if a victim of a crime can point in court to someone and say that's the perpetrator regardless of the fact they may not even have given a description of that person in the past because that might be difficult to do, that that opinion is a valid one."

The instruction at issue reads as follows:

Personal identity is a matter of opinion or belief, founded on facts which may be and frequently are difficult of explanation or communication to a stranger, and therefore as to such fact the opinion of a witness may be considered, even though such witness is unable to fully detail the various facts seen and observed by him upon which such opinion is founded. On questions of identity, therefore, the value of an opinion expressed by a witness depends upon the knowledge the witness has of the person attempted to be identified, the extent of his acquaintance or lack of it, the opportunity such witness has had for observation, and the circumstances surrounding the transaction in question, whether such is to be likely to

impress upon the witness the appearance and personal characteristics of the party under consideration, or otherwise. When a witness expresses an opinion as to the identification of another the opinion must be the result of the recollection of the person seen and of the facts connected with the seeing, and must not be from information derived from others.

We do not find that this instruction can reasonably be interpreted to yield the inferences to which the defendant objects. As we read the instruction, it simply says, in essence, that a witness's identification of a stranger must be based upon a number of factors, that it must be based upon personal experience and not information derived from others, and that the witness's reliability is not contingent upon his ability to articulate the facts and observations upon which he has based his opinion concerning the individual's identity. We find that this instruction presents a balanced recitation of factors inherent in a witness's identification of another person. We do not find any improper judicial comment on the evidence or any suggestion by the court in this instruction as to the weight to be accorded the identification of the defendant by the witnesses.

Instruction No. 17 was evidently modeled after one that the supreme court discussed in State v. Wright, 274 N.W.2d 307, 312-13 (Iowa 1979). The court there upheld the trial court's refusal to issue the disputed instruction on the ground that it was superfluous, since the matters that were to be covered in it had been covered in other instructions. However, the court did not suggest that it would be inappropriate for a court in another case to issue this instruction or another one like it.

On the contrary, the courts have expressed grave concern about the necessity of properly instructing juries on eyewitness identification. For example, the United States Court of Appeals for the Eighth Circuit has said:

We remain, however, deeply concerned with the inherent fallability of eyewitness identification and the great injustice that can arise from misidentification. [citations] Although we do not specifically adopt the Telfaire Model Instruction today, we will view with grave concern the failure to give specific and detailed instructions on identification in future cases where identification of the defendant is based solely or substantially on eyewitness testimony.

United States v. Dodge, 538 F. 2d 770, 784 (8th Cir. 1976).

The Telfaire instruction was modeled by the United States Court of Appeals for the District of Columbia Circuit in order to meet precisely the problem confronted by the trial court in the instant case. United States v. Telfaire, 469 F. 2d 552, 558-59 (D.C. Cir. 1972). The court there warned that although use of the model instruction was not compulsory, "a failure to use this model, with appropriate adaptations, would constitute a risk in future cases that should not be ignored unless there is strong reason in the particular case." Id. at 557.

In any event, we do not find that this instruction was erroneous. Even if it were, "[a]n accused is only entitled to a fair trial, not a perfect one. State v. Gibb, 303 N.W.2d 673, 686 (Iowa 1981). "An error in instructing the jury does not necessitate reversal unless it is prejudicial." Id. Even if this instruction were erroneous, it is certainly not prejudicial and would not justify a reversal.

Defendant claims that the evidence was insufficient to support the jury's verdict. In reviewing a motion challenging sufficiency of evidence, the court views the evidence in a light most favorable to the State. State v. Epps, 322 N.W.2d 288, 289 (Iowa 1982). We have examined the record and carefully considered the particular points raised by the defendant with regard to the testimony concerning his identity, and we find that the evidence was sufficient. State v. Mulder, 313 N.W.2d 885, 889 (Iowa 1982).

AFFIRMED.