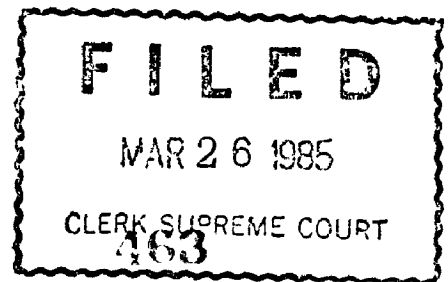


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed March 26, 1985

vs.

)

BRIAN ROELS,

)

5-51

84-839

Defendant-Appellant.

)

Appeal from the Iowa District Court for Jackson County - J. L. Burns and
J. Hobart Darbyshire, Judges.

Defendant appeals from his conviction of robbery in the first degree in
violation of Iowa Code sections 711.1 and 711.2. AFFIRMED.

Charles L. Harrington, Appellate Defender, and Patrick R. Grady, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mickey W. Greene, Assistant
Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

DONIELSON, P.J.

Defendant appeals from his conviction of robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2. He asserts that the trial court erred in failing to suppress 1) evidence of witnesses' identifications and 2) incriminating statements which were allegedly obtained following a request for an attorney. We affirm.

On December 16, 1983, two men robbed a convenience store. Testimony reflects that one of the men held a knife to the throat of the cashier; the other man, who was masked, emptied a cash register. Acting upon a description of the men, police stopped a car containing defendant Brian Roels and two other persons. The individuals were subsequently arrested.

At trial, the State presented evidence indicating that Brian Roels was the unmasked man in possession of the knife. Witness identifications and incriminating statements made by the defendant were allowed into evidence over defense counsel's objections. Roels was ultimately convicted of first-degree robbery and has appealed from this result.

The defendant's first assignment of error is that the trial court erred in failing to suppress evidence of the witness identifications. He argues that the pre-trial identification procedure was "impermissibly suggestive" and thus violated his due process rights.

In analyzing the defendant's claim, we consider two questions: 1) whether the procedure was, in fact, impermissibly suggestive and 2) if it was, whether under the totality of the circumstances, the suggestive procedure gave rise to "a very substantial likelihood of irreparable misidentification." State v. Mark, 286 N.W.2d 396, 403-04 (Iowa 1980).

Upon reviewing the record, we conclude that the procedure was not impermissably suggestive.

The record reflects that subsequent to defendant's arrest, three witnesses were called, informed that suspects were in custody, and asked to identify the perpetrators. The three suspects were individually brought before one witness at a time wearing different combinations of clothing, some of which belonged to the suspects and some of which did not.

The store cashier first viewed defendant when he matched the description of the masked robber who emptied the cash register. When he pulled the mask down at her request, she identified him as the unmasked robber who had wielded the knife. She again identified him as the knife-wielding robber when he was brought before her later wearing other clothing. Another store employee stated that the defendant was not the masked robber who emptied the cash register when he was brought before her in that guise. Later she identified him as the robber with the knife. The third witness failed to identify defendant.

The supreme court has stated that one-on-one confrontations are inherently suggestive. State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973). Yet, in the case before this court the confrontation was a series of viewings of three suspects dressed in various combinations of clothing. We agree with the State's assertion that this procedure is far less suggestive than one witness viewing one suspect. Thus, while the identification procedure could be characterized as suggestive, we cannot say that it was "impermissibly" suggestive.

Even assuming the procedure was impermissibly suggestive, we do not believe there was "a very substantial likelihood of the irreparable misidentification." In making this determination we consider the factors set forth in Neil v. Biggers, 409 U.S. 188, 193, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972). They include:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the

confrontation, and the length of time between the crime and the confrontation.

The record reflects that both witnesses who identified the defendant had several minutes to observe the assailants during the actual commission of the crime. They both described the man wielding the knife with particularity. One witness, Kris Miller, stated that the robber was wearing wire-rimmed sunglasses, a grayish ski mask, a C.P.O. jacket, and blue jeans. She also said he had light brown hair and was about five feet nine inches tall. Witness Cindy Ehlinger's description of the man with the knife was similar to that of Kris Miller's. Furthermore, the time span between the crime and the identification procedure was only five and one-half hours; the incident was likely still fresh in the witnesses' minds. Finally, both witnesses positively identified the defendant. Kris Miller was certain of her identification of the defendant in two viewings. Cindy Ehlinger specifically eliminated the defendant as the one wearing the ski mask who took the money from the cash register. She later identified him as the one with the knife.

Under the totality of the circumstances, it is apparent that the identifications were reliable. We hold that the defendant was not denied due process by the admission in evidence of the witness identifications.

The defendant also argues that the trial court erred in failing to suppress evidence of incriminating statements that he made to police after his arrest. He claims that he requested an attorney and that the request was denied, thereby depriving him of his constitutional rights.

It is well established that once an accused has requested counsel, he is not subject to further interrogation by authorities until counsel has been made available. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378, 386 (1981). Subsequent statements made by the accused are only admissible when it is the accused who initiates further communication. Id. However, in reviewing the record before this court, it is unclear whether the

defendant in this action actually requested a lawyer prior to interrogation.

Defendant was given Miranda warnings both upon arrest and prior to questioning which elicited inculpatory statements later admitted at trial. The arresting officer testified that he overheard defendant request to speak to a relative who was an attorney, but could not recall when the request was made or who was present at that time. The officer who questioned defendant testified that, when asked whether he wanted a lawyer, defendant stated that he didn't need one and hadn't done anything wrong. After making the inculpatory statement, he refused to sign it stating that his uncle was a lawyer who had told him never to sign anything given to him by police. Defendant testified that he had on two occasions asked to speak to his uncle and, when asked why, had replied that it was because his uncle was a lawyer.

In a situation such as this where there is conflicting testimony, the factual issue can only be resolved by examining the credibility of the witnesses. As in all cases on appeal, the record reveals very little in this respect and, consequently, we defer to the trial court's judgment.

Finding no error, we affirm in all respects.

AFFIRMED.