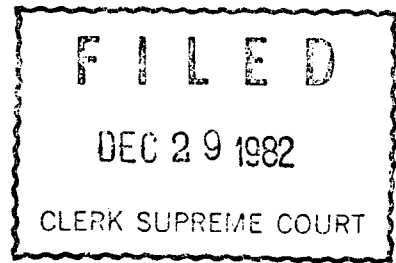


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

RONNIE EDWARD POWER,)

Defendant-Appellant.)

Filed December 29, 1982

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2-251
66739

Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Defendant appeals his convictions for sexual abuse in the third degree in violation of Iowa Code § 709.4(1) and robbery in the second degree in violation of Iowa Code § 71L.3 and his subsequent sentencing as an habitual offender under Iowa Code § 902.8. AFFIRMED.

W. H. Gilliam of Rapp & Gilliam, P.C., Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

DONIELSON, J.

Defendant appeals his convictions for sexual abuse in the third degree in violation of Iowa Code § 709.4(1) and robbery in the second degree in violation of Iowa Code § 711.3 and his subsequent sentencing as an habitual offender under Iowa Code § 902.8. He raises a number of evidentiary and procedural issues with regard to both his convictions and the manner in which he was determined to be an habitual offender. We affirm.

Defendant was charged by trial information on November 21, 1980, with third-degree sexual abuse and second-degree robbery in connection with an incident involving a Cedar Falls teenager in the early morning hours of November 8, 1980. This information also charged defendant with being an habitual offender. A supplemental information was filed the same day which did not mention the latter charge. Defendant filed two motions to suppress; one regarding certain written and oral statements made by him after his arrest and the other concerning identification testimony by the victim based on alleged impermissibly suggestive procedures. These motions were overruled.

After a nonjury trial, the court on February 26, 1980, found defendant guilty of the two offenses as charged in the supplemental information and ordered that a hearing be held to determine if defendant was to be sentenced as an habitual offender under Iowa Code § 902.8. Defendant filed various posttrial motions which were later overruled. After the hearing referred to above, the court on March 20, 1981, found that defendant had been previously convicted of attempting to break and enter, arson and burglary with aggravation and thus came within the definition of habitual offender as set forth in § 902.8. He was subsequently sentenced to a term not to exceed ten years for the sexual abuse conviction and a term not to exceed fifteen years for the robbery conviction as enhanced by § 902.8. This appeal followed.

I.

Defendant first claims that the trial court erred in overruling his motion to suppress the victim's identification testimony based on photographic lineups. On November 10, 1980, two days after the assault, the victim reported the incident to the police and gave them a detailed description of her attacker, including the facts that he was a young black adult, approximately six feet tall, weighed about 170 lbs. and had a silver tooth in his front teeth. She then looked through 15-20 photographs at the police station and picked out two that she thought resembled her attacker, one of which was in fact the defendant. On the next day, November 11, she was shown six photographs and this time positively identified defendant as her attacker.

In determining the admissibility of out-of-court photographic identification against constitutional claims, we must determine whether the procedure used by the police was "impermissibly suggestive" and, if it was, whether, "under the totality of the circumstances, the suggestive procedure allowed for a very substantial likelihood of irreparable misidentification." State v. Mack, 286 N.W.2d 396, 403-04 (Iowa 1979), quoting Manson v. Brathwaite, 432 U.S. 98, 109, 97 S. Ct. 2243, 2250, 53 L. Ed. 2d 140, 151 (1977). In this case we need not consider the second test for defendant has made absolutely no showing that the procedure used here was impermissibly suggestive. His sole argument is that, since the 15-20 photographs from which the victim selected on November 10 were not available at trial, "it must be presumed that the evidence would have damaged the State had it been presented, and, therefore, that the original line-up was suggestive." (Defendant's brief at 17). Of course, we will not make such a presumption without any basis in fact whatsoever. The record shows that on both November 10 and 11, she was handed a group of photographs and was asked if she recognized any of them as her attacker. She was not told that any of the individuals in the

photographs, all young black male adults, were suspects nor was she told any of their names. Under these circumstances, the trial court was correct in overruling defendant's motion to suppress.

II.

Next, defendant claims that the trial court erred in admitting evidence that was allegedly not included in the minutes of testimony. Specifically, he complains about the admission of the victim's photographic identification of defendant on November 11 and testimony concerning a 1975 conviction in the habitual offender hearing. Assuming without deciding that this evidence was not included in the minutes of testimony, we conclude that defendant has shown no prejudice resulting therefrom; in fact, defendant does not even claim prejudice. The November 11 identification was fully discussed in the January 23 hearing on defendant's motion to suppress; defendant, therefore, cannot claim surprise when that evidence was introduced at trial. With regard to the evidence of the 1975 conviction, the trial court stated in its ruling that it did not consider the testimony allegedly not covered by the minutes.¹ We will not reverse absent a showing of prejudice. State v. Buford, 308 N.W.2d 31, 34 (Iowa 1981). None has been shown here.

III.

Defendant claims that his motion to dismiss the habitual offender proceeding should have been sustained because it was not held at the same time as his trial on the sexual abuse and robbery charges. He focuses on Iowa R. Crim. P. 6(5):

Allegations of prior convictions. If the offense charged is one for which the defendant, if

¹ For this same reason, we reject defendant's claim of reversible error in the trial court's failure to grant his motion to strike the State's additional minutes of testimony due to the State's failure to make a motion to amend the information.

convicted, will be subject by reason of the Code, to an increased penalty because of prior convictions, the allegation of such convictions, if any, shall be contained in the indictment. A supplemental indictment shall be prepared for the purpose of trial of the facts of the current offense only, and shall satisfy all pertinent requirements of the Code, except that it shall make no mention, directly or indirectly, of the allegation of the prior convictions, and shall be the only indictment read or otherwise presented to the jury prior to conviction of the current offense. The effect of this subdivision shall be to alter the procedure for trying, in one criminal proceeding, the offenses appropriate to its provisions, and not to alter in any manner the basic elements of an offense as provided by law.

(emphasis added). We do not agree that Rule 6(5) requires the habitual offender determination to be made in the trial on the current charge or charges. It is clear that Iowa Code § 902.8, the habitual offender statute, is only a sentencing statute; it does not define a separate crime. State v. Popes, 290 N.W.2d 926, 927 (Iowa 1980). It is only after a defendant is found guilty on the current charge or charges that the enhanced penalty proceedings are triggered. See State v. Biggles, 235 N.W.2d 112 (Iowa 1975). This issue is without merit.

IV.

Defendant contends that the court erred in admitting prejudicial hearsay evidence connected with a telephone call made to the victim's home in the afternoon after the incident of November 8. The victim testified that it was defendant who called and related what he told her. In response to defendant's hearsay objection, the court ruled: "I'm not going to accept it for the truth of what was said, simply that somebody called . . . only for the purpose that a call was received."

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979) (emphasis added). Here, the trial court made it clear that it would consider this evidence only to prove

that the victim in fact received a telephone call; it would not consider what was said in the phone conversation. In fact, it is questionable whether the court gave any consideration to this evidence, for the court did not mention it at all in its findings and conclusions. In any event, given the purpose for which the court admitted this evidence, defendant's hearsay objection was properly rejected.

V.

Finally, defendant complains about the admission of statements made by him to the police. These statements tended to support defendant's not guilty plea and were to the effect that he did talk to the victim on the morning in question but did not commit the offenses as charged. Defendant makes two claims: 1) his prior statements are inadmissible hearsay, and 2) the burden was shifted to him to come forward with evidence. This latter, somewhat cryptic, claim was not raised below. Therefore, we need not consider it here for the first time. State v. Moritz, 293 N.W.2d 235, 244 (Iowa 1980). Even on the merits, this claim is wholly without any basis. The trial court clearly stated that the State had the burden of proving all essential elements of the crimes charged. Regarding the former claim, defendant has failed to provide any indication that the introduction of his statements, assuming for argument's sake they are hearsay, has prejudiced him in any way.

Finding no reversible error in this record, we affirm defendant's conviction and sentence.

AFFIRMED.