

IN THE COURT OF APPEALS OF IOWA

No. 9-263 / 88-487

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

FLOYD VANCE CONNER, JR.,

Appellant.

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Appeal from the Iowa District Court for Polk County,
Glenn E. Pille, Judge.

Defendant appeals from his conviction, following a jury
trial, of first-degree robbery. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del
Gallo, Assistant State Public Defender, for the appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan,
Assistant Attorney General; and Steve Foritano, Assistant
County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab,
JJ.

OXBERGER, C.J.

Defendant Floyd Vance Conner, Jr., appeals from his conviction by a jury, of first-degree robbery. He contends that the trial court erred in three matters: first, by overruling his motion to suppress identification testimony based on an impermissibly suggestive photo array; second, by overruling his relevancy objections to the admission into evidence of a weapon he was carrying at the time of his arrest; and third, by denying his motion for a mistrial based on prosecutorial misconduct. Our scope of review is for the correction of errors at law. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa App. 1982); Iowa R. App. P. 4. We affirm.

Conner was convicted as one of two armed robbers of Chi Chi's Restaurant on August 30, 1987. Employees within the closed restaurant, observed the robbers' features and weapons while complying with the robbers' demands. The two robbers fled with approximately \$1,800 cash.

Conner was arrested on September 1, 1987, on the charge of felon in possession of a firearm. He was one of two men in a car in an area from which the police had received a call complaining of an armed threat. During the arrest the police found handguns on both men.

After Conner's arrest, Chi Chi employees were called in to view photo arrays including a picture of Conner taken during the booking procedure. Four employees identified Conner as a restaurant robber from the photo array and again in court.

Conner first asserts the court erred in overruling the defense motion to suppress an impermissibly suggestive identification of Conner from a photographic array. Conner emphasizes the discrepancies between the Chi Chi employees' description of the robbers to the police just after the robbery, and his appearance in the photo used in the array the next night. Conner also argues that the strategic position of his photo in the array had more to do with the witnesses' selection than their ability to recall his features and pick out his photo.

In order to establish that the pretrial photographic identification procedures were unduly suggestive, warranting suppression of this evidence, Conner must establish that under the totality of the circumstances, the procedures gave rise to a very substantial likelihood of irreparable misidentification. State v. Rawlings, 402 N.W.2d 406, 407-08 (Iowa 1987).

Each of the four Chi Chi employees viewed the photo array separately. The police encouraged each of these witnesses to make his own choice taking all the time necessary. Though Conner's picture appeared on a

television newscast prior to the photo identification, all four witnesses testified that they had not seen the broadcast.

The police made a reasonable effort to harmonize the array. See United States v. Lewis, 547 F.2d 1030, 1035 (8th Cir. 1976). Conner's perception of what to him may be a startling difference in appearance between his picture and the others in the array does not result in a finding of suggestiveness. See State v. Neal, 353 N.W.2d 83, 88 (Iowa 1984). The array included men of similar age and features as Conner. Conner argues that the fact that his photo occupied the same position in the array that the other suspect's photo did in the second array was suggestive. However, the record shows that the witnesses who picked out Conner from one array did not pick out the other suspect from the second array.

In deciding whether identifications of Conner by the witnesses at trial were reliable, the court must consider:

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.

State v. Mark, 286 N.W.2d 396, 405 (Iowa 1979) (quoting Neil v. Biggers, 409 U.S. 188, 200; 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972)).

All four witnesses who identified Conner at trial saw the Chi Chi robber within a distance of fifteen feet and for at least fifteen full seconds, and in two instances much closer and longer than that. They had opportunity to view his appearance. The witnesses were victims of an armed threat, and their attention focused to a high degree on their intimidators and their weapons. The witnesses gave reasonably accurate descriptions to the police on the night of the robbery. See Neil v. Biggers, 409 U.S. at 194, 200, 93 S. Ct. at 379, 382, 34 L. Ed. 2d at 408, 412 (1972).

All four witnesses testified that they were positive that Conner was one of the robbers. Finally, the photo array identifications were made within forty-eight hours of the actual robbery.

Clearly, there was independent support for the reliability of the in court identifications. The identifications were admissible evidence. See State v. Ash, 244 N.W.2d 812, 814 (Iowa 1976). It is not likely that any alleged flaws in the pretrial identification procedure resulted in irreparable misidentification at trial.

Conner secondly contends that the trial court erred by overruling his objection to admitting into evidence the gun taken from him at his arrest. The handgun removed from Conner at the time of his arrest, though not the weapon

used to rob Chi Chi's restaurant, was physical evidence of the circumstances surrounding his lawful arrest. This evidence corroborates the probable cause element of the arrest which led to the positive identification of Conner as one of the robbers of the restaurant. Evidence illustrating the arrest completes the picture for the jury.

An instrumentality in a defendant's possession or available to him, even when not identified as having actually been used in the crime charged, may be received in order to complete the picture of circumstances surrounding the event.

State v. Nowlin, 244 N.W.2d 596, 602 (Iowa 1976) (quoting State v. Schultz, 231 N.W.2d 585, 588 (Iowa 1975)).

Finally, Conner urges that his motion for mistrial based on prosecutorial misconduct should have been granted. The State agreed to honor Conner's pretrial motion in limine requesting the court bar the prosecution from introducing any evidence concerning any incident Conner had with Cindy Parker, the woman who called the police with regard to the armed threat that resulted in Conner's arrest, unless testimony to this event became relevant at trial. The court ruled that the State's case would be limited to the circumstances surrounding the arrest when they introduced testimony regarding Conner's contacts with Cindy Parker.

The State asked an arresting officer, "At the time of the arrest of Bell and Conner, you and Officer Miller drew your weapons. Why did you do that?" Detective Theilman

testified, "Because we held the two people as suspects in the robbery case, No. 1, which was an armed robbery; No. 2, information was provided to us that both of them had been carrying weapons previously; and 3, we considered those pieces of information to lead us to the fact that they were considered dangerous."

At this point, Conner moved for mistrial asserting a violation of the ruling on his motion in limine because that information had been learned from Cindy Parker. The court overruled the motion for mistrial. The State did not lead the trial witness to expound on the details agreed to as taboo at the pretrial hearing on the motion in limine. The assertion that the testimony Conner puts in issue is an example of prosecutorial misconduct is without merit. The trial court did not abuse its discretion by denying the motion for mistrial on this unmeritorious claim.

AFFIRMED.