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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed September 29, 1981

vs.)

LARRY MERCER,) 1-140/64633

Defendant-Appellant.)

Appeal from Polk District Court - Thomas S. Bown, Judge.

Defendant appeals from his jury conviction for robbery in the second degree asserting: 1) trial court erred in admitting hearsay testimony of a prior out-of-court identification; 2) the circumstances of the out-of-court identification were such that admission of the testimony into evidence denied defendant due process of law; and 3) there was not substantial evidence to support his conviction. AFFIRMED.

Mark Pennington, Des Moines, for defendant-appellant.

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

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Larry Mercer, appeals from his jury conviction for robbery in the second degree asserting: 1) trial court erred in admitting hearsay testimony of a prior out-of-court identification; 2) the circumstances of the out-of-court identification were such that admission of the testimony into evidence denied defendant due process of law; and 3) there was not substantial evidence to support his conviction. We affirm.

On August 22, 1979, a white male entered the Continental Trailways bus depot at 11th and Locust Streets, Des Moines, Iowa, and told the cashier, Connie Brummett, to open up the cash drawer or he would blow her head off. He had his hand tucked into his shirt, apparently to indicate that he had a gun. When Brummett refused to give the man any money, he left the depot. A police officer on foot patrol in the area heard the police broadcast describing the robber and, momentarily, saw a man who fit the description of the perpetrator. After an identification check, the officer requested the suspect (defendant) to accompany him voluntarily to the depot. Defendant claims his request at that time to be taken to a nearby bar to check his alibi was refused; the officer denied having been so requested. Nevertheless, defendant, in the company of several patrol unit officers, voluntarily returned to the depot where Brummett, looking out of the depot window, identified defendant as the perpetrator. This "show up" took place under street lighting. After Brummett's identification, defendant was arrested.

On direct examination at trial, Brummett testified that the robber was not in the courtroom. Defendant's appearance had changed between the time of his arrest and the day of trial because defendant had cut his "medium frizzy hair" and had grown a beard. The State, in an attempt to prove defendant was the suspect identified at the scene, introduced a photograph of defendant taken two days after his arrest and asked Brummett if she could identify the man in the photograph. She testified that the man in the photograph was the man who attempted to rob her. Later police testimony identified defendant as the man photographed. Defendant was convicted on November 16, 1979. This appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Hearsay Testimony.

A. State's Eye Witness. Defendant argues that Brummett's testimony on direct examination as to her out-of-court identification of the suspect was hearsay and inadmissible. Without deciding that question, we reject defendant's assertion.

At trial, defendant made six objections during the State's direct and redirect examinations of Brummett. Not one was on the ground that a question called for hearsay evidence, nor was an objection made to any answer as being hearsay. Defendant's failure to make his hearsay objection at trial is not without its legal consequences. As stated in State v. Schurman, 205 N.W.2d 732, 735 (Iowa 1973):

> [A] failure to make a sufficient objection to evidence which is incompetent waives any ground of complaint as to the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes a part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof.

This statement was subsequently approved in State v. Johnson, 223 N.W.2d 226, 228 (Iowa 1974). We applied this rule to circumstances involving failure to move to strike evidence in State v. Flesher, 286 N.W.2d 218, 221 (Iowa App. 1979), aff'd. 286 N.W.2d 215 (Iowa 1979). Moreover, as the court stated in State v. Reynolds, 250 N.W.2d 434, 440 (Iowa 1977):

> [T]he defendant failed to preserve for review here any objections to the hearsay nature of the photographic identification. Therefore, although the only link the witness Allen had to the names attached to the photographs may well have been hearsay, the issue is not preserved and we cannot consider it here.

Applying these considerations to the present case, we consider any hearsay objection waived.

We have also considered defendant's arguments with respect to accreditation impeachment, rebuttal, refreshment of recollection, and rehabilitation of witnesses. Finding no objection at trial on any of those theories, we conclude those objections are waived.

B. Testimony of Police Officers. Defendant also contends that the testimony of police officers likewise was inadmissible hearsay. He first challenges the police officers' testimony about the identification of the suspect at the scene. The first objection was made during direct examination of officer William Jones. The question and answer occurred as follows:

> Q. After he was taken to the scene, was there an identification made?
>
> A. Yes, there was.
>
> * * *
>
> Q. Who made this identification?

MR. PIAZZA: Objection, your Honor. Hearsay.

THE COURT: Overruled. The defendant was present.

A. I don't know the person that made the identification.

Assuming the question called for inadmissible hearsay testimony, we believe, in light of the response, that trial court's error, if any, was harmless. Since the question could not be answered by the witness, the response placed no testimony into evidence which could be characterized as hearsay and was thus rendered harmless by the negative answer. See State v. Love, 203 N.W.2d 115, 120 (Iowa 1981).

The second objection to the hearsay nature of a police officer's testimony as to identification occurred as follows:

> Q. When you arrived there, did you do anything concerning the defendant?
>
> A. Yes, sir. We asked him to step out of the car. Detective Edwards and the victim were standing inside the Trailways looking out through the window. They did take a look at the defendant, did identify him.
>
> MR. PIAZZA: Object, your Honor. Any indication which may have been made at this point is hearsay as to this witness.
>
> THE COURT: Well, he can tell what happened, what he observed.

Assuming the witness's testimony contained hearsay evidence, we nonetheless conclude there is no ground for reversal on this point. As the supreme court said in State v. Gilmore, 259 N.W.2d 846, 858 (Iowa 1977):

> This court has announced that the erroneous admission of evidence that may be justification for reversal is not prejudicial where substantially the same evidence is in the record without objection. See State v. Jurgenson, 225 N.W.2d 310, 312 (Iowa 1975), and authorities cited.

We find this rule applies in the instant case where evidence of the fact that the identification was made, and that the victim identified the suspect as the perpetrator, was introduced into the record without objection when the victim herself testified.

C. Description of the Suspect. Defendant further argues that certain police testimony as to the description of the suspect was improperly introduced into the record over his objections that they were inadmissible hearsay statements.

Again, we note that substantially the same evidence was placed in the record without objection during the State's direct examination of officer James M. O'Donald. Moreover, defense counsel, himself, on cross-examination of officer William Jones, questioned the witness about the description he was given. We thus conclude that, applying the aforementioned rule in Gilmore, there is no justification for reversal.

III. Admission of the Suspect's Photograph. Defendant next asserts that trial court erred in admitting into evidence a photograph of the defendant taken two days after his arrest. He argues that the photograph was inadmissible on the grounds of hearsay, irrelevancy, and immateriality. We note first that no objection on the ground of hearsay was made at trial and will thus not be considered by this court. Reynolds, 250 N.W.2d at 440.

"The test of relevancy is whether the evidence offered would render the desired inference more probable than it would be without such evidence. Irrelevant evidence is that which has no logical tendency to establish any material proposition." State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979), quoting State v. Ball, 262 N.W.2d 278, 279 (Iowa 1978); State v. Sheffey, 250 N.W.2d 51, 55 (Iowa 1977); State v. Sparks, 238 N.W.2d 777, 779 (Iowa 1976). Immateriality relates to evidence which is offered to prove a proposition not in issue. Mark, 286 N.W.2d at 412. "A determination as to the relevancy and materiality of evidence rests largely with the trial court's discretion [citations]." Id.

The photograph in this case was obviously material. It was introduced to prove the identity of the perpetrator, a fact which was encumbant upon the State to prove as an element of the offense. The appearance of the defendant had changed so substantially by the time of trial that Brummett could not identify him as the same man arrested the night of the crime. The photograph tended to show that the man she identified as the perpetrator was the defendant. We thus conclude that, notwithstanding any other evidentiary infirmity it may have had, the photograph was certainly material and relevant. Defendant failed to preserve any other possible evidentiary error.

IV. Jailer's Testimony. Defendant's argument that the jailer's testimony was inadmissible hearsay is deemed waived for failure to object at trial on that ground.

V. Due Process. Defendant argues that the testimony based on the identification was inadmissible because the "show up" based on the totality of the circumstances, was unconstitutionally suggestive. Again, having failed to object to this at trial, defendant has waived any error.

VI. Remaining Assignments of Error. Defendant has cited no authority in support of his remaining assignments of error. Failure to cite authority in support of an issue may be deemed a waiver of that issue. Iowa R. App. P. 14(4). We therefore consider these issues waived and affirm trial court's judgment.

AFFIRMED.