

IN THE COURT OF APPEALS OF IOWA

No. 0-95 / 89-745

FILED

MAY 24 1990

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

309

vs.

WILLIAM CARROLL MILLER,

Appellant.

Appeal from the Iowa District Court for Polk County,
Rodney J. Ryan, Judge.

The defendant appeals his conviction, after a jury trial, for second-degree robbery. He challenges an evidentiary ruling. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; James Smith, County Attorney; and D. William Thomas, Assistant County Attorney; for appellee.

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

HABHAB, J.

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The defendant, William Miller, appeals his conviction, after a jury trial, of robbery in the second degree. He challenges the admission of the testimony of two police officers. We affirm.

An African-American male wearing a curly afro wig and a cap robbed a convenience store at 2:30 a.m. on December 9, 1988. The store clerk triggered a hidden camera which took several photographs of the robber.

Police responded to the robbery within minutes and found the defendant, William Miller, walking about a block and a half from the store, in the direction the robber had taken. Miller was an African-American male but did not otherwise match the description of the robber; in particular, he had no Afro haircut and no cap. The officers took Miller to the store where the store clerk told police that Miller was not the robber, and Miller was thereupon released. However, the next day an afro wig and a cap like the robber's were found outside the store. Suspicion again focused on Miller, who was arrested and charged with robbery.

At Miller's jury trial he was required to don the wig and cap found outside the store. Thus attired, he was identified by the store clerk as the robber. In addition, two police officers testified that they believed the person shown in the hidden camera's photographs was Miller. The jury found Miller guilty of second-degree robbery. He has appealed the resulting conviction.

Miller contends the district court abused its discretion by permitting the two police officers to testify that Miller was the person shown in the hidden camera's photographs. Miller contends this testimony invaded the province of the jury because it concerned "the ultimate fact of guilt."

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

The only question presented for our review is whether the trial court abused its discretion in permitting police officers to express their opinion that the defendant was the person photographed by the security camera at the scene of the crime. Rule 701, Iowa Rule of Evidence, permits the admission of opinion evidence. The prosecuting attorney posed his question to one of the officers as follows:

Q. Officer Resch, do you have an opinion from looking at the photographs today in court, State's Exhibits 1, 5, and 6, and compared to your opportunity to observe the person you stopped that night as to the identity of the person in the photographs? A. Yes, I do.

Q. And what is your opinion?

* * *

A. In my opinion, the person that I had taken down to the store and the person I see in these photos are one and the same.

We find no error in the manner in which the question was asked and the answer given. The officers apprehended the defendant near the scene of the crime. The circumstances were such that he was able to view the person

of the defendant. The officers' testimony was merely that the person in the photographs was the same person that they had apprehended on the night of the robbery. The admission of such testimony was well within the discretion of the trial court.

AFFIRMED.

Oxberger, C.J., concurs; Schlegel, J., dissents.

I respectfully dissent.

I would hold that the testimony of the officers was inadmissible and its admission prejudiced the defendant. Allowing police officers to corroborate a shaky eyewitness by testifying that the man in the photograph is the defendant clearly invaded the province of the jury. The jury could easily look at the photograph and look at the defendant and make its own determination as to whether they were the same individual. I would reverse and remand for a new trial.