IN THE COURT OF APPEALS OF IOWA

No. 5-387 / 94-1226

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CHARLES RIVERS, JR.,

Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, Judge.

Charles Rivers, Jr., appeals the judgment and sentence entered upon his conviction, following a jury trial, of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1993). **AFFIRMED.**

Francis C. Hoyt, Jr., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee..

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

SACKETT, P.J.

Defendant-appellant Charles Rivers, Jr., appeals from the judgment and sentence entered following his conviction after a jury trial of robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2 (1993). Defendant contends (1) the trial court erred in failing to sustain his motion for new trial; (2) there was not substantial evidence to support his conviction; and (3) his trial attorney rendered ineffective assistance of counsel. We affirm.

Two people robbed a convenience store in Waterloo, Iowa, on August 12, 1993. The clerk in the store at the time, David Seres, was shown photo arrays but was not able to identify defendant. At trial, Seres identified defendant as a person involved in the robbery. A bartender at a nearby bar and a former girlfriend of defendant identified him as one of the robbers after seeing a videotape of the robbery. The videotape was played at trial. Defendant presented an alibi defense. Two women testified defendant was at their home during the time the robbery occurred. Defendant testified in his own defense and said he was not involved in the robbery. The jury found defendant guilty of first degree robbery.

Defendant first contends he should have been granted a new trial because the State failed to disclose exculpatory evidence. During the trial, defendant learned for the first time one of the photo arrays shown to Seres had not been produced despite defendant having filed a motion to have the State produce all photographic arrays that were presented to the State's witnesses.

Seres was shown two photographic arrays. It is conceded the first array was not made available to defendant.

The lineup shown to Seres on the day of the robbery did not contain defendant's picture and was not produced. A second lineup containing defendant's picture was produced. Seres thought defendant was in the array but could not positively identify him.

The State concedes due process is violated when the prosecution suppresses exculpatory evidence material to guilt or punishment, irrespective of a prosecutor's good or bad faith. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963).

Defendant contends he was prejudiced by the State's failure, but fails to detail how he alleges he was prejudiced. He also does not advance how the material, if provided, would have been helpful to his defense.

The State advances and we agree defendant bears the burden of showing the undisclosed evidence is material and not merely potentially or inferentially helpful to him. *See State v. Anderson*, 410 N.W.2d 231, 235 (Iowa 1987); *State v. Hall*, 249 N.W.2d 843, 847 (Iowa 1977). We affirm on this issue.

Defendant next contends there is not substantial evidence in the record such as would convince a rational trier of fact he is guilty beyond a reasonable doubt. The State contends this issue was not preserved for review. Without addressing the State's argument the issue was not preserved for review, we find there is substantial evidence

from which a rational trier of fact could find defendant guilty beyond a reasonable doubt. Two witnesses who knew defendant well identified him on the videotape of the robbery. The jury saw defendant and the tape. We affirm on this issue.

Defendant's last issue is his trial counsel was not effective in the manner the photo arrays were treated. Apparently defendant believes, had his trial counsel properly objected, he would have been successful in having the photo arrays suppressed. The State advances, even if the objection had been made, the photo arrays would not have been suppressed. Defendant has failed to detail how he claims he was prejudiced on this issue. Consequently, he fails on his claim of ineffective assistance of counsel.

AFFIRMED.