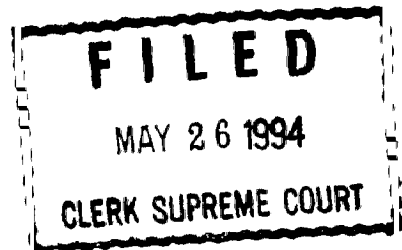


IN THE COURT OF APPEALS OF IOWA

No. 4-109 / 93-0578



STATE OF IOWA,

Plaintiff-Appellee,

vs.

ERICK LACEY,

Defendant-Appellant.

Appeal from the Iowa District Court for Linn County,
Lynne E. Brady and Thomas L. Koehler, Judges.

Defendant appeals from judgment and sentence, following
jury trial, entered upon his conviction of delivery of a
controlled substance. **AFFIRMED.**

James A. Benzoni, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Mary Tabor,
Assistant Attorney General, Denver D. Dillard, County
Attorney, and Todd D. Tripp, Assistant County Attorney, for
appellee.

Heard by Donielson, C.J., and Cady and Huitink, JJ.

CADY, J.

Erick Lacey appeals his conviction for possession of a controlled substance with intent to deliver in violation of Iowa Code section 204.101(1) (1991). He claims the district court improperly admitted identification evidence. He also challenges the sufficiency of the evidence supporting his conviction.

A paid confidential informant, Karna Tillman, purchased crack from a man whom she knew as Fontaine. Police officers associated that name with Erick Lacey. Several weeks after the buy, an officer showed Tillman a picture labeled Erick Lacey. The officer believed the picture was of Lacey. Tillman stated the individual pictured was not the person from whom she had obtained the cocaine. Several weeks later, the officer showed Tillman another single picture believed to be of Lacey. Tillman identified the individual pictured as the man who sold her cocaine.

Erick Lacey was tried on a charge of delivery of a controlled substance. Tillman testified she received \$100 from the police for each successful drug buy. Officers testified about Tillman's actions before and after the buy. No officer saw Lacey at the scene of the buy.

Lacey was convicted of delivery of a controlled substance. He was sentenced to a term of imprisonment not to exceed ten years. The sentence carried a mandatory one-third minimum to be served.

Lacey now appeals.

I. Admissibility of Photograph Identification

Lacey contends Tillman's out-of-court identification based on a single picture was impermissibly suggestive and should have been excluded. He claims this resulted in a the denial of a fair trial.

When a defendant is alleging error involving a constitutional right, such as here, our review is de novo. State v. Neal, 353 N.W.2d 83, 87 (Iowa 1984).

To analyze challenges to out-of-court identifications, we employ a two-step analysis. State v. Taft, 506 N.W.2d 757, 762 (Iowa 1993). First, a defendant must establish that the procedure used for the identification was impermissibly suggestive. Id.; see also Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). If we determine the identification procedure was impermissibly suggestive, then we must evaluate whether "under the totality of [the] circumstances the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." Taft, 506 N.W.2d at 762, (quoting State v. Whetstone, 315 N.W.2d 758, 764 (Iowa 1982)). The key question then becomes whether the identification was reliable.

On the question of reliability, five factors are considered: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of

certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Taft, 506 N.W.2d at 763.

While we do not conclude the identification procedure employed here was actually impermissibly suggestive, we evaluate the reliability of the procedure used. In so doing, we conclude, under the totality of the circumstances, the identification was reliable.

Tillman viewed Lacey outside the apartment and during the drug transaction. She was in his presence for several minutes and watched him remove cocaine from his jacket pocket. She stood close enough to him to exchange money for the cocaine. The transaction took place during the daytime. We conclude Tillman had ample opportunity to view Lacey at the time of the crime.

Tillman was not a casual or passing observer, but vitally concerned with the events taking place. See, e.g., Brathwaite, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154; State v. Newman, 326 N.W.2d 788, 794 (Iowa 1982). She was an experienced, paid informant who had expressed interest in assisting law enforcement in arresting drug dealers after she began recovering from her own addiction problems. We conclude Tillman had a sufficient degree of attention during the transaction.

Tillman previously described the perpetrator as an African-American male, approximately six-foot to six-foot two-inches tall with a medium build. These characteristics were accurate.

Tillman clearly identified Lacey in the second photograph presented to her. In fact, she had initially been given a photograph with the defendant's name on it, yet had insisted the person depicted was not the person from whom she had purchased drugs. When she was shown the accurate photograph of Lacey, she promptly and positively identified him. She further identified Lacey as the person from whom she had purchased drugs during her in-court testimony. We find Tillman identified Lacey spontaneously and without hesitation.

Tillman gave the police an accurate physical description of Lacey immediately following the drug transaction. She rejected an incorrect photograph several weeks after the transaction and positively identified Lacey in a photograph several weeks later.

The reliability of in-court identifications have been upheld involving significantly longer time lapses than that present in this case. See, e.g., United States v. Jacobowitz, 877 F.2d 162, 168 (2d Cir. 1989) (ten-month time lapse not a dispositive factor); United States v. Rundell, 858 F.2d 425, 427 (8th Cir. 1988) (permitting eight-month delay); United States v. Robinson, 782 N.W.2d 131-32 (8th Cir. 1986) (permitting five-month delay); United States v. Samalot Perez, 767 F.2d 1, 3 (1st Cir. 1985) (permitting four-year delay). The length of time between the incident and the identification may, of course, be considered by the jury in assessing reliability. See,

e.g., Rundell, 858 F.2d at 427. In this case, defense counsel cross-examined the State's witnesses on the issue of the passage of time.

Finally, while Lacey contends the delayed identification was rendered unreliable by Tillman's previous acquaintance with him, we find no support for his claim. In State v. Birch, 479 N.W.2d 284, 287 (Iowa 1991), the court expressly stated "the circumstances of familiarity will in most cases tend to strengthen an identification rather than weaken it."

We conclude no substantial likelihood of irreparable misidentification occurred in this case. The identification was reliable when viewed under the totality of the circumstances.

II. Sufficiency of the Evidence

Lacey challenges the sufficiency of the evidence to support his conviction. He contends Tillman's uncorroborated testimony is the only evidence linking him to the offense charged. He speculates the promise of police payment motivated Tillman to lie about Lacey's participation in the drug transaction.

Our scope of review is on assigned error only. Iowa R. App. P. 4 The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the

record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984); State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Bass, 349 N.W.2d at 500; Hall, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); Hall, 371 N.W.2d at 188.

Questions of credibility and reliability of witnesses are committed to the jury. State v. Walton, 424 N.W.2d 444, 448 (Iowa 1988). The jury is free to believe or disbelieve the testimony of a witness. State v. Garr, 461 N.W.2d 171, 174 (Iowa 1990).

Tillman's testimony supports Lacey's conviction for delivery of a controlled substance. Tillman submitted to rigorous police procedures, including a strip search, before and after the undercover drug purchase to ensure reliability of the evidence collected. She was dropped off near the location of the transaction and was only out of police sight for a very short time. She immediately identified Lacey, by his nickname, to police. Police were aware that Lacey went by this nickname. Tillman did not identify the first photograph shown to her as the person from whom she purchased drugs. She unequivocally identified an accurate photograph of Lacey a few weeks later. At trial, Tillman again identified Lacey as the person from whom she purchased drugs. In addition, defense counsel cross-examined Tillman's financial interest in making successful drug transactions. The jury was free to weigh her credibility and to believe or disbelieve her.

We conclude the testimony of Tillman, the police officer, and the deputy sheriff presented substantial evidence from which a reasonable fact finder could conclude Lacey was guilty. We affirm Lacey's conviction.

AFFIRMED.