IN THE COURT OF APPEALS OF IOWA

No. 1-428 / 00-950
Filed December 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS DESHAWN HOLMES,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer and Jon Fister, Judges.

Thomas Holmes appeals from his convictions and sentences for first-degree kidnapping and first-degree robbery in violation of Iowa Code sections 710.2, 711.1, and 711.2 (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Ray Walton, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Hecht and Vaitheswaran, JJ.

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VAITHESWARAN, J.

Thomas DeShawn Holmes appeals his judgment and sentences for first-degree kidnapping and first-degree robbery. He contends the district court erred in: (1) denying his motion to suppress body samples taken from him following an arrest that was later deemed unlawful and (2) admitting the victim's in-court identification of him and testimony from the State's fingerprint and DNA experts. We conclude the body samples were not tainted by the illegal arrest and the remainder of the challenged evidence was admissible. Accordingly, we affirm.

I. Background Facts and Proceedings

A woman was discovered in a ditch in Waterloo. She reported to police that she was raped, beaten, and robbed of the red car she was driving.

Meanwhile, officers were called to a Waterloo apartment complex in response to a report that a man, later identified as Holmes, was throwing rocks at the window of an apartment. They arrived to find Holmes having a heated discussion with a woman named April, about certain property Holmes contended was missing. At Holmes' insistence, the officers agreed to file a missing property report on his behalf. They did not know at the time that the name Holmes gave them was false.

The officers ran a warrant check on the false name. No warrants were outstanding. They told Holmes to leave the area and Holmes walked away.

April then informed the officers Holmes had driven to her apartment in a red car located in the parking lot but had walked rather than driven away because he had a suspended license. When nothing came back on the license check, the officers inquired about Holmes' true identity. After running a second

check on his actual name, they discovered Holmes' license had indeed been suspended. One of the officers went to look for Holmes, found him in an alley, and arrested him for interference with official acts for providing the officers with a false name.

Holmes was taken to the police station where, during a search incident to his arrest, police discovered a registration paper for the car driven by the assault victim and a single key that fit the door of that car. Holmes made several statements that led police to witnesses who observed Holmes and the victim together the night of the incident.

On the day of Holmes' arrest, police obtained a search warrant for Holmes' hair, blood and other body samples. DNA analysis of the samples revealed the presence of the victim's DNA in Holmes' penile DNA swab and on his underwear. In addition, Holmes' DNA was identified on the victim's underwear.

The State charged Holmes with first-degree kidnapping and first-degree robbery. *See* Iowa Code §§ 710.2(3)(4) and 711.1, 711.2 (1999). Holmes moved to suppress his statements as well as items seized from him following his arrest for interference with official acts. He argued his arrest on that charge was not supported by probable cause, rendering the evidence inadmissible. The district court agreed and suppressed Holmes' post-arrest statements, the registration and key found on his person, and a baggie of marijuana found as Holmes got into the squad car.

The State sought reconsideration of the ruling. Holmes responded with a second motion to suppress and a motion in limine seeking to exclude all other

evidence, including his body samples, as fruit of the unlawful arrest. A different judge upheld the earlier suppression ruling and also granted that portion of the second motion seeking suppression of the witness statements obtained following the custodial interview with Holmes. The court denied Holmes' request to suppress the body samples, independently concluding the contents of the search warrant application after excision of the suppressed evidence was sufficient to support the warrant.

The case proceeded to trial before the court. During a break in the trial, the victim saw Holmes in the hallway and, within earshot of the presiding judge, identified Holmes as her assailant. She confirmed this identification in court and on the record. The State called a fingerprint expert and a DNA expert, among other witnesses at trial.

The court found Holmes guilty of first-degree kidnapping and first-degree robbery and sentenced him to life in prison without parole on the kidnapping charge and up to twenty-five years on the robbery charge. Holmes appeals.

II. Admission of Body Sample Evidence

Holmes contends the district court should have granted his motion to suppress and motion in limine as they pertained to the body sample evidence. As a preliminary matter, we note the State concedes error was preserved.[1] Therefore, we will proceed to the merits of the suppression ruling.

As the motion to suppress raises a constitutionally based challenge, our review is de novo. *State v.* Turner, 630 N.W.2d 601, 606 (Iowa 2000).

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[1] Holmes suggests error may not have been preserved but argues we may review the issue under an ineffective assistance of counsel claim. In light of the State's concession, we need not analyze this claim under an ineffective-assistance-of-counsel rubric.

The State first asks us to affirm the district court's partial denial of the motion to suppress/motion in limine on the alternate ground that Holmes' arrest for interference with official acts was valid. *See State v. Howard*, 509 N.W.2d 764, 768 (Iowa 1993) (we may affirm on any ground appearing in the record). We decline this invitation. The district court concluded:

> giving a false name to a police officer does give the officer probable cause to arrest a person for interference but only if the false information hinders, retards, or delays the officer in the performance of an official act or duty.

The court then went on to find that Holmes' misrepresentation did not hinder, retard or delay the police officers' duties. We agree with the court's finding and conclusion. *See State v. Smithson*, 594 N.W.2d 1, 2 (Iowa 1999) (Iowa Code section 719.1 contemplates active interference).

The State next contends the warrant for body samples may be upheld because, after excising the information in the application that resulted from the invalid arrest, there is still "sufficient probable cause from independent sources to support the warrant." We agree with the State.

The independent source doctrine permits admission of evidence obtained by means "wholly independent" of constitutional violations. *Nix v. Williams*, 467 U.S. 431, 442-43, 104 S. Ct. 2501, 2508, 81 L. Ed. 2d 377, 386 (1984); *State v. Naujoks*, ___ N.W.2d ___ (Iowa 2001). The doctrine applies to all evidence acquired "in a fashion untainted by the illegal evidence-gathering activity." *Murray v. U.S.*, 487 U.S. 533, 537, 108 S. Ct. 2529, 2533, 101 L. Ed. 2d 472, 479 (1988). It also applies to evidence "acquired by an untainted search *which is identical to the evidence unlawfully acquired.*" *Id.*, 487 U.S. at 538, 108 S. Ct. at 2534, 101 L. Ed. 2d at 481 (emphasis in original). For example, if police discover

items x and y during an illegal search, but later discover item z during an independent legal search, item z is clearly admissible, but items x and y would also be admissible if rediscovered through an independent source. *Id.; State v. Seager*, 571 N.W.2d 204, 211 (Iowa 1997).

Where a warrant application contains illegally obtained evidence together with other evidence, a court may simply excise the tainted information and then determine whether independent probable cause remains. *See Seager*, 571 N.W.2d at 214 n.5.[2] On review, we "may not consider any other relevant information present in the record which was not presented to the neutral magistrate issuing the warrant." *State v. Thomas,* 540 N.W.2d 658, 662 (Iowa 1995).

The warrant affidavit supporting the application for body samples contains information not obtained from Holmes or as a result of his illegal arrest. According to the affidavit, certain officers were dispatched to a Waterloo

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[2] *Cf. United States v. Markling,* 7 F.3d 1309, 1316 (7th Cir. 1993) (holding focus under independent source doctrine is on information apart from tainted evidence); *United States v. Restrepo,* 966 F.2d 964, 970 (5th Cir. 1992) (holding district court should have considered whether the warrant affidavit, once purged of tainted facts and conclusions, contained sufficient evidence to constitute probable cause for issuance of the warrant); *United States v. Herrold*, 962 F.2d 1131, 1141-2 (3rd Cir. 1992) (stating independent source doctrine permits warrant to stand when probable cause exists independent of information officers observed during initial entry). *But see Murray,* 487 U.S. at 542, 108 S. Ct. at 2536, 101 L. Ed. 2d at 483 (suggesting we must determine whether the tainted evidence "affected" the magistrate's decision to issue the warrant). *See also* 4 Wayne R. LaFave, *Search and Seizure* § 11.4, at 82 (Supp. 1992) (reading *Murray* to require an inquiry into the actual effect of the illegally acquired information upon a particular magistrate).

apartment. While there, they learned from April that Holmes got out of the driver's side of a small red car parked in the lot. April turned over a shirt and a baseball bat belonging to Holmes that she discovered in her own car.

Within eight minutes of the dispatch to the apartment, certain other officers were dispatched to the scene of an assault. The victim told these officers that a man beat her with an object, possibly a bat, raped her, and stole her car. These officers discovered a shoe and a pair of shorts in the vicinity. They took the victim to the hospital.

Meanwhile, back at the apartment, an officer learned that the red car in the lot was the one stolen from the assault victim. An officer later searched the area around the car and discovered a shoe matching the shoe found at the assault site. The officer also found other items, including papers bearing the victim's name.

Although we are troubled by the fact that the warrant application does not specify who learned what when, we are able to glean from the application that at least two sets of officers discovered evidence bearing on the application before Holmes was arrested for interference with official acts. This information was sufficient to establish probable cause for issuance of the warrant independent of the evidence tainted by Holmes' unlawful arrest. *See Naujoks*, ___ N.W.2d at ___. Accordingly, the body samples and the results of tests taken on those samples were admissible, and we uphold the district court's disposition on the suppression motion and motion in limine.

III. Admission of Other Evidence

A. In-Court Identification

Holmes contends the victim's in-court identification of him was "tainted and unreliable." In support of this contention, he notes that the victim was able to identify him only after officers told her "they had the guy" and he would be at the courthouse, and only after she saw him both inside and outside the courtroom. He also points out that the victim was not able to identify Holmes from a photo line-up presented to her shortly after the incident.

Our courts have employed a two-part test to determine whether a pre-trial identification is unduly suggestive. *See State v. Webb*, 516 N.W.2d 824, 829 (Iowa 1994). First, we must determine whether the identification procedure was in fact impermissibly suggestive. *Id.* Second, if we determine it was, we must decide whether, under the totality of the circumstances, the trial identification was irreparably tainted. *Id.* We are faced here with two possible pre-trial identifications: (1) a photo array police presented to the victim shortly after the incident; and (2) the victim's hallway encounter with Holmes shortly before she testified.

Holmes does not appear to contend that the photo line-up was unduly suggestive. Indeed, it was defense counsel who introduced the photo array to point out that the victim was unable to identify Holmes from the array and to cast doubt on her unequivocal trial identification. Accordingly, if he is now contending the photo identification tainted the victim's in-court identification, that claimed error has been waived. *See State v. Holderness*, 301 N.W.2d 733, 737-8 (Iowa 1981). Additionally, even if we were to consider a claim that the photo array

tainted the victim's in-court identification, the fact that the victim could not positively identify Holmes among the pictures negates this claim. *See State v. Emery*, 230 N.W.2d 521, 524 (Iowa 1975).

Holmes' primary focus is on the hallway encounter. Prior to the encounter, the prosecution and defense discussed having a live line-up in the courtroom to see if the victim could identify Holmes. However, in the interim, the victim, who was waiting in the hall with the prosecutor, saw Holmes exit the courtroom and stated, "that's him." Holmes was wearing street clothing rather than prison garb and was not shackled or handcuffed, but he was escorted by a deputy.

Holmes appears to argue these circumstances are impermissibly suggestive. We disagree, because the victim identified Holmes in the hallway spontaneously and without any prompting. *Cf. United States v. Boykins*, 966 F.2d 1240, 1242-3 (8th Cir. 1992) (holding witness identification of codefendant outside courtroom was not impermissibly suggestive because it was made without any suggestion from the government); *United States v. Wade*, 740 F.2d 625, 628 (8th Cir. 1984) (holding witness identification of defendant at State's request while she was outside the courtroom looking in was not unduly suggestive); *United States v. Davis*, 487 F.2d 112, 122 (5th Cir. 1973) (finding "insubstantial" the defendants' argument that victim's in-court identification was tainted because witness observed accused in custody outside courtroom).[3]

[3] *Contrast United States v. Emanuele*, 51 F.3d 1123, 1130 (3rd Cir. 1995) (concluding witness identification of defendant as marshals escorted him from courtroom in manacles was unduly suggestive); *United States v. Johnson*, 461 F.2d 1165, 1168-69 (5th Cir. 1972) (witness identification of defendant outside courtroom where witness had been previously unable to identify defendant in lineup and where defendant was bound to man who had been positively identified tainted in-court identification).

Even assuming the hallway identification was suggestive, we find from the totality of the circumstances that the in-court identification was not irreparably tainted by the hallway encounter. *See State v. Hicks*, 277 N.W.2d 889, 892 (Iowa 1979) (identifying reliability factors to consider).[4] That encounter was brief and accidental. Additionally, at the time of the encounter, defense counsel was also in the hallway, saw the entire episode, and made a detailed record for the court's consideration. *Cf. United States v. Wade*, 388 U.S. 218, 233, 87 S. Ct. 1926, 1936-7, 18 L. Ed. 2d 1149, 1160-61 (1967) (holding right to counsel attaches at pre-trial lineup stage). Defense counsel also elicited damaging admissions on cross-examination of the victim, admissions that the court as fact-finder could have used in assessing the credibility of the victim's in-court identification. *See Wade*, 740 F.2d at 628. Despite these admissions, the court found the victim's identification of Holmes "firm, unwavering, absolute" and "credible." Given this finding and our review of the circumstances surrounding the hallway encounter, we conclude the encounter did not irreparably taint the in-court identification.

Finally, we believe there is a source independent of the hallway encounter that would support the victim's in-court identification. *See State v. Wisniewski*, 171 N.W.2d 882, 885 (Iowa 1969). The victim spent a good portion of the

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[4] *Cf. State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993) (holding victims' observation of defendant at police station through one-way glass was impermissibly suggestive but finding identification reliable); *State v. Mark*, 286 N.W.2d 396, 407 (1979) (not deciding whether single photograph display was unduly suggestive but concluding identification was reliable); *State v. Hicks*, 277 N.W.2d at 892 (assuming identification procedures suggestive but finding identification reliable); *State v. Washington*, 257 N.W.2d 890, 894 (Iowa 1977) (noting one-on-one confrontation at police station was suggestive but concluding identification was reliable).

evening prior to the assault in Holmes' presence. Therefore, she had the opportunity to see him at close range for an extended period of time. We recognize the victim had been drinking heavily at the time, was unable to identify Holmes in a photo array, and provided an initial physical description of her assailant that did not exactly match Holmes' actual physique. Nevertheless, her description of the events on the day of the assault was detailed and ultimately proved reliable. For this reason, we conclude the in-court identification was admissible, notwithstanding the hallway encounter.

B. Admission of Fingerprint Testimony

Holmes next contends the district court should not have admitted what he characterizes as "inadequate testimony" concerning a match between his fingerprints and a latent print found on a document outside the red car. He maintains Officer Keith Smith who made the match failed to explain how he reached his conclusion.

As a preliminary matter, Holmes and the State agree Holmes did not preserve error on this assertion but further agree this omission does not preclude review, as the issue is raised in the context of an ineffective assistance of counsel claim. *See State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). To establish this claim, the defendant must prove counsel failed to perform an essential duty and prejudice resulted. *Id.* We are not persuaded Holmes made this showing.

Officer Smith testified he had worked on "literally thousands" of latent fingerprint cases in his twenty years at the crime lab. Before he made the comparison, he determined the latent print in question was one that could be

matched. In making this determination, he stated he used an "accepted method of analyzing items for fingerprints." Although he could not recall how many points of similarity he found, he testified there were enough to make a positive match. We believe this testimony adequately supports his conclusion that the latent print matched Holmes' print. *See State v. Hall*, 297 N.W.2d 80, 86 (Iowa 1980) (noting "the foundation evidence of reliability and the inherent understandability of the evidence itself provided sufficient bases for its admission").

Because there was sufficient support for Officer Keith's conclusion, Holmes' trial attorney did not breach an essential duty by failing to object to the admissibility of this evidence. Accordingly, Holmes' ineffective assistance of counsel claim must fail.

C. Admission of DNA Testimony

Holmes finally argues that the district court should not have admitted the testimony of DNA expert Marie Sides because: (1) it was not accompanied by statistical probabilities relating to the frequency of a random match; (2) it was based on data not developed by Sides; and (3) the techniques used in this case were new. To obtain reversal, Holmes must establish that the court abused its discretion in admitting the evidence, and prejudice resulted. *State v. Belken*, 633 N.W.2d 786 (Iowa 2001). We are not convinced he made this showing.

First, contrary to Holmes' assertion, Sides did testify to random match probabilities, stating that "fewer than one out of one hundred billion individuals" would be expected to have the same profile. Second, it is accepted that experts will use DNA databases in their analysis, rather than individually testing the entire population. *See Belken*, 633 N.W.2d at 799. Third, although the technique used

by Sides had only recently been implemented at her laboratory and Holmes' case was one of the first three cases on which it was used, Sides cited a number of validation studies that had been performed on the technique. *See Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 533 (Iowa 1999) (court may in its discretion consider whether technique has been tested or has been subjected to peer review or publication). Holmes did not call his own expert to refute these studies or the reliability of the underlying technique. In the absence of such evidence, we conclude the district court acted well within its discretion in admitting the evidence. *See State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998) (stating DNA testing is sufficiently reliable to be admitted into evidence).

IV. Disposition

We affirm Holmes' judgment and sentences.

AFFIRMED.