



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed April 26, 1979
vs.	)	
JAY MICHAEL HAYEN,	)	<u>34</u>
Defendant-Appellant.	)	62072

Appeal from Johnson District Court - Harold D. Vietor, Judge.

Defendant appeals his conviction for rape in violation of section 698.1, The Code
1977. Affirmed.

J. D. Merris, of Cahill, Johnston, Poula & Goetz, of Iowa City, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney
General, for appellee.

Heard by Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant Jan Michael Hayen appeals his jury conviction of rape in violation of section 698.1, The Code 1977. Defendant contends on appeal that the trial court erred in overruling a portion of his motion to suppress identification by the complaining witness, in allowing the complaining witness to testify about a prior assault upon her by someone other than defendant, in allowing the state to continue an attempt to impeach defendant on cross-examination, and in failing to grant a new trial based on improper statements by the prosecutor during closing arguments. We affirm the trial court.

L. Motion to Suppress. The trial court sustained defendant's motion to suppress as to the complaining witness's identification of defendant as the man who raped her on October 5, 1977. The police allowed the witness to observe defendant through a one-way mirror in the police station on October 19, 1977. The state conceded that this show-up was unnecessarily or impermissibly suggestive, and would not be introduced at trial. See State v. Salazar, 213 N.W.2d 490, 492 (Iowa 1972). Defendant contends that a subsequent photographic "line-up" identification by the complaining witness, and her in-court identification of defendant, were tainted by the previous improper identification and inadmissible.

Under the principles set forth in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); and State v. Ash, 244 N.W.2d 812 (Iowa 1976), we must inquire as to whether, under all the circumstances, the October 19, 1977 improper identification gave rise to a substantial likelihood of irreparable misidentification. Our concern is the reliability of subsequent identifications, including that made in the courtroom, considering the following five factors: the opportunity to view, the degree of attention, the accuracy of the description, the witness's level of certainty, and the time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L.Ed.2d at 154; State v. McManus, 263 N.W.2d 556, 558 (Iowa App. 1977).

The complaining witness first observed defendant in the well-lit laundromat where the assault took place. He was the only other person in the laundromat, and was pacing in such a way as to make the witness uneasy and nervous. He then grabbed the witness, pulling her to the floor, and later forcing her to a lighted restroom at the rear of the

laundromat. The witness had an opportunity to observe her assailant for least 15 minutes and perhaps as long as half an hour. She testified that she had ample time to observe him and had no doubt concerning her identification of defendant, and that it was based on her recollection of the incident in the laundromat. We find the record disclosed the requisite degree of reliability, and the trial court did not err when it overruled the motion to suppress.

II. Evidence of Prior Assault. Defendant next contends that testimony by the complaining witness on redirect examination concerning a prior assault upon her was prejudicial. During trial, defendant objected to the testimony on the grounds of relevancy, and he is therefore limited to that ground on appeal. State v. Pepples, 250 N.W.2d 390, 393 (Iowa 1977). Moreover, we will uphold the trial court's ruling if the specific objection could properly have been overruled on any theory. State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976). The test of relevancy is whether the evidence offered makes the desired inference more probable than it would be without the evidence, State v. Evans, 248 N.W.2d 521, 524 (Iowa 1976), and is largely within the discretion of the trial court. State v. Watts, 244 N.W.2d 586, 589 (Iowa 1976). The evidence of the prior assault was relevant both to the complaining witness's calm behavior which enabled her to identify her assailant, and to explain her apparent lack of resistance to an assault upon her against her will. There was no error in admitting the testimony.

III. Impeachment of Defendant. Defendant's next contention is that the trial court erred when it allowed the state to continue with an attempt to impeach defendant by showing prior inconsistent statements made in connection with a pre-trial polygraph examination. The state had agreed that the results of the polygraph would not be admissible, but attempted to question defendant during trial as to statements he made during the examination that he was playing cards with friends at the time of the assault. Defendant testified at trial that he could not remember where he was at the time the rape occurred, and had never offered the police a possible alibi. The trial court allowed the questioning to continue as long as the fact that defendant had undergone polygraph testing was not raised in the presence of the jury. The state contends and the record discloses that the attempt to impeach defendant was not improper but merely unsuccessful, since he was able to adequately explain his apparent inconsistent

statement. See State v. Gilmore, 259 N.W.2d 846, 853 (Iowa 1977). We find no prejudice to defendant and affirm the trial court's ruling.

IV. Prosecutorial Misconduct. Finally, defendant contends that the trial court should have granted him a new trial on the grounds of improper statements made by the assistant county attorney during closing arguments. Closing arguments were not reported, nor was a record made by a bill of exceptions. See sections 786.5 and 786.6, The Code. However, a record of sorts was made during the hearing on the motion for new trial, when the trial court stated:

I believe--it is my recollection that Mr. Johnston [defense counsel] in making his argument to the jury made a statement to the jury that 'your verdict is important to Jay Hayen.' . . . It's my recollection that he [the assistant county attorney] then stated in argument, 'Your verdict is important to Juanita Deaton [the complaining witness] and to this community.' It is not my recollection that he said it was important to Juanita Deaton and the community that a guilty verdict be returned. . . . I think probably it was improper argument. I do not find it, however, to be so improper and so prejudicial as to in and of itself warrant a new trial.

Considerable discretion is vested in the trial court in determining whether prejudice results from misconduct on the part of the prosecutor. State v. Monroe, 236 N.W.2d 24, 29 (Iowa 1975). In the instant case, when the improper remarks were in response to remarks by defense counsel, see State v. Brewer, 247 N.W.2d 205, 215 (Iowa 1976), we find no abuse of discretion in trial court's refusal to grant a new trial. The defendant's conviction is affirmed.

AFFIRMED.