FILED
SEP 27 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed September 27, 1983
vs.)
JERRY DEAN ASHBURN,) 3-210 / 68562
Defendant-Appellant.)

Appeal from Dallas District Court - Van Wifvat, Judge.

Defendant appeals from his conviction of robbery in the first degree in violation of Iowa Code §§ 711.1 and 711.2. AFFIRMED.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

DONIELSON, J.

Defendant appeals from his conviction of robbery in the first degree in violation of Iowa Code §§ 711.1 and 711.2. He claims that: 1) there was insufficient foundation for certain testimony regarding the purpose of hollow-point bullets; 2) the trial court erred in overruling his motion to suppress the victim's photo array, lineup, and in-court identifications of defendant; 3) the court erred in overruling his motion for directed verdict of acquittal based on the State's alleged failure to corroborate an accomplice's testimony; and 4) the court should have given his proposed jury instruction on the reliability of eyewitness identification. We affirm.

On November 23, 1979, at approximately 2:30 a.m., a truck driver was the victim of an armed robbery at the Waukee rest area located off Interstate 80 near West Des Moines. Three men were involved in the robbery. One of the robbers, Max Meyers, identified the defendant as a participant. About a week after the robbery the Dallas County authorities showed the victim a photo array from which the defendant's photo was quickly and positively identified. About three months later and at the request of defendant's attorney, the Dallas County authorities asked the victim to view a lineup; before the lineup, he was again shown the photo array. The victim identified the defendant from the lineup.

Defendant was tried to a jury on March 23 and 24, 1982. The State's case depended heavily on testimony by defendant's accomplice, Max Meyers. Meyers was asked what the purpose was of the hollow-point bullets contained in the firearm used in the robbery. He responded, after some difficulty understanding the question, that they were: "To create more damage." Upon being asked: "To whom?", defendant objected that there had been no foundation qualifying Meyers as an expert about ammunition. The court overruled the objection and the witness then agreed with the prosecutor's suggestion that the "damage" referred to was

damage "to whomever it strikes . . . ." At the close of the State's case, defendant moved for acquittal on grounds there was not evidence corroborating Meyer's testimony. The motion was overruled. At the close of evidence the defendant asked that the following jury instruction be given:

> In passing on the reliability of the witness' identification testimony, in addition to the factors considered in Instruction No. 5 you may and should consider the opportunity to view the criminal at the time of the crime, their degree of attention at the time of the crime, the accuracy of the witness' prior description, the level of certainty demonstrated by the witness at the confrontation, and the lack of time between the crime and the confrontation.

The court overruled defendant's request and instead gave the uniform instruction on the credibility of witnesses. Defendant was convicted of robbery in the first degree and sentenced to a prison term of up to twenty-five years. This appeal followed.

I.

Defendant first claims that the trial court erred in overruling his objection to the testimony of Max Meyers regarding the purpose of hollow-point bullets. This claim is based upon the following exchange between the prosecutor and Meyers:

> Q. Do you know why or what a hollow point is used for?
> A. To create more damage.
>
> Q. To whom?
>
> MR. JENNINGS: Your Honor, I object. There has been no foundation showing Mr. Meyers has any expertise in the nature of ammunition.
>
> THE COURT: Overruled.
>
> Q. (By Mr. Powell): To cause to whomever it strikes?
> A. Yes.

As is apparent, defendant did not make a motion to strike the challenged answer, did not apply to have his objection precede the answer or offer an excuse for his delay in objecting until after the answer was in. Therefore, error has not been preserved on this issue. State v. Steltzer, 288 N.W.2d 557, 558 (Iowa 1980).

Even if error was preserved, defendant's argument has no merit. Meyers' testimony cannot be considered as "expert testimony"; his statement regarding the effect of hollow-point bullets is not of a subject "so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman." McCormick on Evidence § 13 at 29 (2d ed. 1972). Instead, Meyers was merely recounting his reason for using hollow-point bullets; i.e. "to create more damage." A different result might inhere if, for example, the State sought to elicit ballistics information regarding these bullets. In this case, however, defendant's foundation objection was properly rejected by the trial court.

II.

Defendant next challenges the trial court's refusal to suppress the victim's identification of defendant as one of the robbers. He alleges that the photographic array from which the victim first identified defendant was invalid and thereby tainted later identifications through a lineup and in-court observation.

The resolution of a constitutional challenge to identification procedures involves a two-step analysis: we first determine whether the procedure employed was impermissibly suggestive; if it was, then we must determine if, under the totality of the circumstances, the suggestive procedure gave rise to a "very substantial likelihood of irreparable misidentification." State v. Mark, 286 N.W.2d 396, 403-04 (Iowa 1979) (citations omitted). Only if both steps are satisfied will the identification evidence be suppressed.

In applying the first prong of this test, we have carefully examined the photo array from which defendant was identified and conclude that it is not suggestive and is certainly not impermissibly so. Although three of the seven men appear to be somewhat older than defendant, the other four (including defendant) are approximately the same age and appear to have similar facial characteristics. Even if we assume without deciding that the photo and lineup procedures were

impermissibly suggestive, we conclude that, in any event, such procedures did not give rise to a very substantial likelihood of irreparable misidentification.

Under this second prong of the test, we determine whether the identification was reliable under all the circumstances; if so, both the pre-trial and in-court identifications are admissible as evidence. Mark, 286 N.W.2d at 405. We consider the following reliability factors:

> . . . the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id.

1. Opportunity to View. The victim testified that he was able to observe defendant at least three different times during the commission of the crime with a total viewing time of a couple of minutes. These events took place in the middle of the night, but the rest area was illuminated by street lights.

2. Victim's Degree of Attention. Although the victim may have been tired after driving many hours on the road, he testified that he became very frightened when he saw the gun, a .357 revolver, and was threatened. His attention was surely heightened by the fact that Meyers placed the gun near the victim's derriere and warned him to keep his face forward or else Meyers would "blow [his] ___ing ass away."

3. Accuracy of Prior Description. Although the victim's prior description of his two assailants as white males in their early twenties with one being heavier set was not of the greatest detail, it was accurate as far as it went. Such a relatively vague description does not detract from the reliability of the identification. See, e.g., Chavis v. Henderson, 638 F.2d 534, 537 (2d Cir. 1980) cert. den. 454 U.S. 842, 102 S. Ct. 152, 70 L. Ed. 2d 125.

4. Level of Certainty. At all times during all identification proceedings

and during trial as well, the victim positively and unhesitatingly identified defendant as one of the robbers. We reject defendant's claim that this certainty is suspect in light of the alleged impermissibly suggestive nature of the photo array. The victim's testimony indicates both the nonsuggestiveness of the array and his certainty as to defendant's involvement: "[t]here is three of them [the photographs] that come close to the description of the man. I picked out the one that I was sure that was there, the man I saw that night."

5. Time Span. The photo identification took place about one week after the robbery, while the lineup and in-court identifications occurred approximately four months and two years, respectively, after the robbery.

Upon consideration of these factors, we conclude that the identification procedures were not suggestive, and there was no substantial likelihood of irreparable misidentification. The victim's identification testimony was therefore admissible and the trial court did not err in overruling defendant's motion to suppress.

III.

Defendant next contends that the trial court erred in overruling his motion for directed verdict of acquittal based on the alleged absence of corroborating evidence of the testimony of the accomplice Meyers. Defendant, of course, is correct in stating that an accomplice's testimony alone will not sustain a conviction absent corroborating evidence tending to connect defendant with the crime. Iowa R. Crim. P. 20(3). Defendant premises this issue on his claim that the victim's identification testimony was inadmissible. We have found to the contrary on that issue, however, as indicated in division II of this opinion. The victim's identifications of defendant as one of the robbers certainly corroborates Meyers' testimony of defendant's involvement for purposes of Rule 20(3). In fact, the testimony of Meyers and the victim regarding the sequence of events was nearly identical. The trial court did not err in overruling the motion for acquittal.

IV.

Finally, defendant claims that he was entitled to a jury instruction regarding the reliability of eyewitness identification testimony; this proposed instruction listed the five reliability factors from State v. Mark, 286 N.W.2d at 405, as discussed above in division II. The trial court rejected defendant's request and instead instructed the jury on this matter as follows:

> You are the sole judges of the weight of the evidence, the credibility of the witnesses, and the conclusions to be drawn from the facts and circumstances proved.
>
> If the testimony or any part thereof is conflicting, you will reconcile it if you can, so that it may all have weight and effect, but if you cannot, you will then give credit to that testimony and to those witnesses that to you as fair-minded men and women seem most entitled thereto.
>
> In passing on the credibility of the witnesses and weighing their testimony, you may and should consider their appearance and conduct on the witness stand, their age, intelligence, strength of memory, and means of knowledge of matters of which they testify, their interest or lack of interest in the result of the trial, the motives, if any, actuating them as witnesses, their candor, fairness, bias or prejudice, the reasonableness and probability of their statements or the want thereof, whether their testimony is corroborated or contradicted by other witnesses or facts proven, and from all of these and all other facts and circumstances proven upon the trial, determine where to give credit and where to withhold the same, and give to the testimony of each witness the weight to which you believe it is fairly entitled.

We are satisfied that the trial court properly refused the requested instruction. We note that the instruction actually given by the court is nearly identical to that approved by the supreme court in State v. Wright, 274 N.W.2d 307 (Iowa 1979). The only difference is that the Wright instruction indicated that the jury could consider the lapse of time between the occurrence and the identification whereas the instruction in this case did not refer to that specific factor. This omission, however, is not fatal. The instruction in this case includes a consideration of the victim's "strength of memory." We believe this statement substantially covers the point sought to be raised by the time lapse factor.

Having considered all of defendant's arguments and finding no reversible error, we affirm his conviction and sentence.

AFFIRMED.