

IN THE COURT OF APPEALS OF IOWA

No. 0-921 / 10-1309
Filed January 20, 2011

**IN THE INTEREST OF J.B.,
Minor Child,**

**J.B., Minor Child,
Appellant.**

Appeal from the Iowa District Court for Polk County, Louise Jacobs,
District Associate Judge.

A juvenile appeals the juvenile court order adjudicating him to be a
delinquent. **AFFIRMED.**

Joey T. Hoover of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, John P. Sarcone, County Attorney, and Christina Gonzalez, Assistant
County Attorney, for appellee State.

Considered by Potterfield, P.J., Doyle, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.**I. Background Facts & Proceedings**

On March 29, 2010, at about 8:30 p.m., Saule Sugg, who was fifty-eight years old, was walking from T.J. Maxx to her apartment in West Des Moines. She testified it was still light out, but getting darker, and there were lights on outside the buildings in her apartment complex, Warren Apartments. Sugg stated that as she was walking through her apartment complex, she noticed a shadow very close to her. She looked back and saw a teenage boy walking three to four feet away. He was wearing a pair of black Nike sneakers, a black short-sleeved tee-shirt, and black athletic pants. She took special notice of his eyes and his gaze.

Sugg continued walking, and she noticed the boy was walking about three or four steps behind her. The boy asked to use her telephone. Sugg replied, "No." She started walking faster and saw the boy was still behind her. Sugg thought that maybe he needed to call his mother to get a ride home, and she started thinking about letting him use her telephone.

The boy suddenly came quickly up to her, grabbed her purse with a lot of strength, and ran away. Sugg testified she "saw the whole body, his clothes, his head." She described the boy as "short, strongly built," "short haircut," and about sixteen or seventeen years old. Sugg shouted and ran after the boy. She heard a door bang in one of the nearby apartment buildings, and did not see the boy any longer. Sugg contacted the police. Her purse was recovered the next day on the other side of the apartment complex. A small sum of money had been taken from the purse.

On March 30, 2010, Sugg went to the police station and worked with an officer to develop a composite picture of the person who took her purse. A composite was developed, but Sugg stated she believed the hair should be shorter, and the lips and the nose should be different than they were in the composite picture. Police officers took a photograph of Joey, who was fifteen years old and lived in the Warren Apartments with his mother. Joey's apartment was about 300 yards away from where the purse was found. On April 1, 2010, an officer showed the photograph of Joey to Sugg, stating that it was okay if this was not the person. Sugg identified the person in the photograph as the person who stole her purse.

The State filed a petition in juvenile court alleging Joey had engaged in the delinquent act of first-degree theft. Sugg testified at the juvenile court hearing that she was ninety-five percent confident the person in the photograph was the person who had stolen her purse. She stated this was based on the person's facial features, haircut, height, build, and age. Defense counsel did not object to the admission of the photograph as an exhibit. Sugg also identified Joey in the courtroom as the person who had taken her purse.

Joey testified he had tattoos on his arms. Sugg had not noticed any tattoos. He also stated that there were other teenagers in the apartment complex. The defense presented the expert testimony of Otto Maclin, a teacher in the psychology department at the University of Northern Iowa. Maclin testified to the problems inherent in eyewitness identification. He stated it would have been the better practice to show Sugg a photographic array instead of an

individual photograph. Maclin concluded by stating it was possible this was an accurate identification.

The juvenile court adjudicated Joey to be a delinquent under Iowa Code section 232.47(8) (2009) by engaging in first-degree theft, as defined in sections 714.1(1) and 714.2(1). From the bench the court noted Sugg was a strong witness, who was very credible. The court also noted Joey was living in the area and Sugg heard the fleeing person go into a nearby building, which showed the person was familiar with the buildings.

Joey filed a motion in arrest of judgment, challenging the identification process. The court denied that motion. In the dispositional order, Joey was placed at the Boy's State Training School. He now appeals the adjudication and dispositional orders.

II. Standard of Review

Our review in delinquency cases is *de novo*. *In re S.C.S.*, 454 N.W.2d 810, 814 (Iowa 1990). We give weight to the factual findings of the juvenile court, especially when considering the credibility of witnesses, but are not bound by those findings. *In re J.D.F.*, 553 N.W.2d 585, 587 (Iowa 1996).

III. Merits

A. Joey contends the identification process used in this case was so suggestive it violated his due process rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 9 of the Iowa Constitution. He asserts Sugg should have been shown a photographic array, not a single photograph. He also asserts it was suggestive to take the

photograph in front of his apartment building, near where the crime occurred and in an area known to Sugg.

We employ a two-part analysis to determine whether an eyewitness identification is so problematic that it violates due process. *State v. Folkerts*, 703 N.W.2d 761, 764 (Iowa 2005). First, we consider whether the procedure used for the identification was impermissibly suggestive. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). If it was impermissibly suggestive, then we determine whether under the totality of the circumstances there was a very substantial likelihood of irreparable misidentification. *Id.* “The critical question under the second step is whether the identification was reliable.” *State v. Zahner*, 545 N.W.2d 337, 339 (Iowa Ct. App. 1996).

On the question of reliability, we consider the following factors: (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. Due process is not violated where the identification has sufficient aspects of reliability. *State v. Webb*, 516 N.W.2d 824, 830 (Iowa 1994).

Assuming, without deciding, the procedure of showing Sugg a single photograph instead of a photograph array was impermissibly suggestive, we turn to the second question of whether Sugg’s identification was reliable using these five factors. We note Sugg had the opportunity to observe the perpetrator for a period of time before her purse was taken. She first noticed him walking behind her, then she talked to him when he asked to use her telephone. Her attention

was on the perpetrator during their interaction. She stated she felt some fear about the situation, and so would have been paying attention to the perpetrator before her purse was taken. Her description of the perpetrator to officers immediately after the crime matched a description of Joey. She took an active part in putting together a composite sketch, even to the point of stating some disagreement over the hair, nose, and lips in said sketch. The record does not indicate Sugg's level of certainty when shown the photograph; however, at the hearing she stated she was ninety-five percent certain Joey was the perpetrator. Additionally, Sugg was shown the photograph two days after the incident. See *Taft*, 506 N.W.2d at 763 (noting a one-day period between an assault and an identification was short).

After considering the totality of the circumstances, we agree with the juvenile court's conclusion that Sugg's identification was reliable. We do not believe that there was "a very substantial likelihood of irreparable misidentification." See *Webb*, 516 N.W.2d at 829 (citation omitted). We conclude there was not a due process violation in this case.

B. (1) Joey claims that if we find the eyewitness identification evidence is inadmissible, then there is not sufficient other evidence in the record to support a finding of delinquency. If a delinquency charge is based on a public offense, the State has the burden to prove the delinquent act beyond a reasonable doubt. *S.C.S.*, 454 N.W.2d at 814. "[I]f in our de novo review admissible evidence satisfies the reasonable doubt standard we need not reverse." *In re Thompson*, 241 N.W.2d 2, 4 (Iowa 1976).

We find there is sufficient evidence in the record to support the decision of the juvenile court. We have determined the eyewitness identification evidence was admissible. Because Joey has not shown a due process violation, this evidence was for the fact-finder to weigh. See *Webb*, 516 N.W.2d at 829. Furthermore, Joey lived in the same apartment complex where the incident took place, Sugg heard the perpetrator run into one of the nearby apartment buildings, and the purse was found just 300 yards from Joey's apartment.

(2) Joey also claims the juvenile court's decision was contrary to the weight of the evidence. A court may grant a new trial if the verdict is contrary to the weight of the evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The court should weigh the evidence and consider the credibility of witnesses. *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004).

On our de novo review, we conclude the juvenile court's decision is not contrary to the weight of the evidence. The juvenile court found Sugg was "a good, strong witness," and found her testimony to be credible. We agree, after considering the detail and consistency in Sugg's testimony. Although Maclin raised doubts about the procedure used in this case regarding the photographic identification, he admitted that he could not say Sugg's identification was in error.

We affirm the decision of the juvenile court.

AFFIRMED.