

IN THE COURT OF APPEALS OF IOWA

No. 3-1150 / 13-0140
Filed January 23, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLESTON HESTON WALKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek (suppression) and Marlita A. Greve (trial), Judges.

The defendant appeals his convictions for burglary, theft, and operating without the owner's consent. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael J. Walton, County Attorney, and Will Ripley, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

Charleston Heston Walker appeals his convictions for four counts of third-degree burglary, one count of second-degree theft, and one count of operating without the owner's consent. See Iowa Code §§ 713.1, 713.6A (burglary), 714.1, 714.2(2) (theft), 714.7 (operating without consent) (2011). Walker asserts the district court erred by allowing into evidence the "tainted" identifications made by two police officers. Assuming without deciding the officers' identifications were improper, we conclude the admission of the challenged evidence constitutes harmless error.

I. Background Facts and Proceedings

In the early morning hours of September 10, 2012, police in Scott County received reports of four "smash and grab" burglaries at closed convenience stores. The suspect stole cigarette cartons at each location. Around 4:00 a.m., undercover Davenport Police Officers Bryan Butt and Patrick Sievert drove an unmarked car toward the fourth location. They were aware the suspect was dressed in black. A short distance from the store, they saw a green Buick, "the only vehicle in the area," and followed it. Officer Butt noted the Buick was missing the driver's side hub cap and the driver was male, between eighteen and twenty-five years old, with light-complected black skin and a pony tail. When the Buick quickly pulled into the parking lot of a flower shop and turned around, the officers drove past, continued down the street, and then turned around to continue their mobile surveillance.

Just before an interstate bridge overpass, both vehicles stopped side-by-side for the duration of a red light. Due to the street lighting around the interstate ramps, the intersection was well-lit. From about three feet away, Butt observed the driver's profile and the fact he was wearing a white tank top, inconsistent with the evening's cool temperature. Butt could see inside the car and his view at the stop light reinforced his initial observation of the driver.

Sievert was in the passenger seat and farther away from the stopped Buick. He observed the driver to be a light-skinned black male with dark hair in a ponytail and wearing a white tank top. When the light changed, the officers drove straight ahead and called for a marked squad car to stop the Buick.

That marked squad car met and then passed the green Buick and the unmarked car, before making a U-turn in the middle of the street. When the marked squad car turned around, the Buick sped up, quickly changed lanes, pulled into the lot of an apartment complex, and parked. Officers Butt and Sievert followed, blocked the Buick, and activated their lights. Next, the marked squad car pulled in and its video shows the Buick's driver exiting the car and running away.

Officer Sievert was face to face with the driver from a distance of ten feet before the driver exited the Buick. Butts and Sievert gave chase but lost the suspect when he entered a brushy, wooded area. During the chase, Butt noted the driver wore black sweat pants and a white tank top. When Butt returned to the abandoned Buick, he discovered multiple cigarette cartons and clothing

consistent with what surveillance cameras showed the burglar wearing—white socks, a navy bandana and a black sweatshirt.

Butt contacted the car's owner, Maria Monnarez, who told him no one had permission to drive her car. Monnarez kept her car keys on the kitchen table, in her purse, or hanging near the door. Butt described the driver as a light-skinned black male between the ages of eighteen and twenty-five with his dark hair in a ponytail. Monnarez's boyfriend believed the description matched Charleston Heston Walker, who was renting a room from Monnarez. Monnarez testified Walker's rented room did not have a locked door or any other physical barrier from the rest of her home.

Three to four hours after encountering the Buick, Butt retrieved a single photo of Walker and positively identified him as the driver. Four to five hours after the pursuit, Sievert viewed a single photo of Walker and identified him as the driver. Later that morning, the police arrested Walker. His hair was in corn rows, not in a ponytail, and he had tattoos on his body that the officers did not note in their descriptions.

Before trial, Walker filed a motion to suppress. He challenged the officers' identification of him based on a single photograph, arguing the procedure was impermissibly suggestive and unnecessary because another "officer would have been able to put together a photo line-up." Walker asserted "this identification should fail under the Due Process Clause" and sought to exclude the officers' initial identification and "any subsequent identification."

At the November 29, 2012 suppression hearing, both officers testified to their training in identification procedures. Both stated they were “100 percent” certain Walker was the driver upon their separate viewings of the challenged photograph. In the courtroom, the officers identified Walker as the driver. The court denied the motion to suppress.

While in jail awaiting trial, Walker called DeMarcus Swolley (Swolley), his step-brother, and Tanisha Leake-Swolley (Tanisha), Walker’s girlfriend. The State recorded these phone calls and played them for the jury at trial.

In the calls, Walker fervently tried to convince Swolley to admit committing the burglaries so Walker could challenge the officers’ identification of him. Walker expressed his concerns about serving twenty-five years in prison and his belief Swolley would get probation. In one call, Walker told Swolley he held Walker’s fate in his hands when deciding whether to confess in his place to the burglaries: “You really have a gun pointed at me now bro. It’s up to you to save me.” Walker also encouraged Tanisha to convince Swolley to contact Walker’s defense counsel so Swolley’s admission to the crimes would unravel the State’s case against Walker. In one call, Walker shushed Swolley when he mentioned Walker leaving his pants in the trash can.

On December 17, 2012, Swolley tried to plead guilty. The court rejected his plea, stating: “[B]ased on the evidence that the State . . . has to present in this case against Mr. Walker, I in good conscience cannot accept a plea from Mr. Swolley.”

At trial, Butt identified Walker as the person driving the green Buick and explained he was “one hundred percent” certain of his identification based on his training. Butt also testified he was certain Swolley was not the driver due to Swolley’s longer face and thinner build.

Sievert also told the jury he was “one hundred percent” certain Walker was the person driving the Buick, specifically: “When he exited the vehicle, he was looking directly at me, and I got a very good look at the subject. That’s how I made my identification.” Sievert testified Swolley was not the person he saw driving the Buick.

Swolley’s girlfriend, Dre Watson, testified Walker arrived at their residence on September 10 after they had gone to bed and while it was still dark. Walker wanted to use the phone and to talk to Swolley. She also explained Walker left a short time later. During a subsequent search of the Swolley-Watson home, the police found wet clothing in the trash can—specifically white socks and a pair of blue sweat pants covered in burrs and weeds. This clothing was consistent with still photos from the convenience stores’ surveillance cameras showing the burglar wearing white socks on his hands and dark sweat pants.

A review of Walker’s cell phone records showed he missed several calls between 5:00 a.m. and 7:00 a.m. on September 10.

The jury convicted Walker of four counts of third-degree burglary, one count of second-degree theft, and one count of operating without the owner’s

consent.¹ Walker appeals, asserting the admission into evidence of the officers' identification testimony violated his due process rights.

II. Scope and Standards of Review

We review due process issues de novo. See *State v. Folkerts*, 703 N.W.2d 761, 763 (Iowa 2005).

III. Identification Evidence Derived From Single-Photo Viewings

The Due Process Clause protects a defendant “against the admission of evidence deriving from suggestive identification procedures.” *Neil v. Biggers*, 409 U.S. 188, 196 (1972) (performing a totality-of-the-circumstances analysis). But “convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384 (1968) (stating each case must be considered on its own facts). Accordingly, if the totality of the circumstances indicates the identification is reliable, the court need not exclude testimony of an identification derived from a suggestive procedure. *Neil*, 409 U.S. at 199 (identifying a two-

¹ The court sentenced Walker to an indeterminate five-year term on each of the four burglary charges, ordering the sentences to run consecutively. On the second-degree theft conviction, the court ordered an indeterminate five-year term. On the operating without consent conviction, the court imposed an indeterminate two-year term. These sentences were ordered to run concurrently with each other and also concurrently with the burglary sentences.

part analysis² to determine whether the testimony concerning an identification procedure is admissible).

Walker argues that because the officers viewed a single photo of him, the procedure was impermissibly suggestive. As to the reliability element, Walker contends, under the totality of the circumstances, the officers' identification is irreparably tainted due to the "accuracy of the description [being] significantly damaged" by the darkness, the distance, "the detail of the non-existent ponytail," and the officers' failure to describe the suspect as having tattoos. Finally, Walker asserts the "short length of time between the chase and the photo viewing" is not determinative "because of the unique situation in this case where [Walker] resembled his brother, who was willing to take responsibility."

The State insists the district court properly overruled Walker's motion because the identification procedure was not impermissibly suggestive. The State points out the witnesses were not lay people, but experienced peace officers who focused their full attention on viewing Walker in the Buick. See *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977) (distinguishing between casual observers and trained police officers).

Assuming without deciding the identifications were improperly suggestive and irreparably tainted, we affirm Walker's convictions because we conclude the

² First, a court determines whether the identification procedure was, in fact, impermissibly suggestive. *Folkerts*, 703 N.W.2d at 764. If the procedure was impermissibly suggestive, the court then considers whether, under the totality of the circumstances, an identification made by a witness at trial is irreparably tainted—an analysis focusing on the reliability of the initial identification. *Id.* (listing five factors relevant to the initial identification's reliability—viewing opportunity, degree of attention, accuracy of prior description, the level of certainty of the witness, and the length of time between the crime and confrontation).

admission of the challenged evidence was harmless. See *Chapman v. California*, 386 U.S. 18, 22 (1967) (recognizing some constitutional errors may be harmless, “not requiring the automatic reversal of the conviction”).

To establish harmless error in the context of a violation of Walker’s constitutional rights, the State must prove beyond a reasonable doubt the “error complained of did not contribute to the verdict obtained.” See *State v. Cox*, 781 N.W.2d 757, 771 (Iowa 2010). Using a two-step analysis, we first consider “what evidence the jury actually considered in reaching its verdict.” See *State v. Walls*, 761 N.W.2d 683, 686 (Iowa 2009). In the second step, we weigh “the probative force of the untainted evidence the jury actually considered against the probative force of the erroneously admitted evidence” standing alone. *Id.* at 688. In the weighing process, the key question is “whether we can conclude the [challenged] statements are so unimportant in relation to everything else the jury considered that there *is no reasonable possibility* they contributed to [Walker’s] conviction.” *State v. Peterson*, 663 N.W.2d 417, 434 (Iowa 2003); see *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (stating the inquiry is “whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error”).

We turn to the evidence actually considered by the jury. Besides the officers’ identifications, the jury viewed surveillance videos from three of the four convenience stores. The State’s exhibits included still photos from the videos. The photos show a young black male carrying a red duffle bag and dressed in dark sweat pants and a hooded sweatshirt, with a dark-patterned bandana on his face and white socks on his hands.

The evidence also established Walker arrived at his step-brother's house on September 10 while it was still dark. Walker wanted to use the phone and speak with his step-brother. When the police searched the step-brother's home, they found wet clothing in the trash can, including white socks and a pair of blue sweat pants covered in burrs and weeds. This clothing is consistent with the still photos and the suspect entering the woods to elude the officers. Walker's cell phone records showed multiple missed calls during the early morning of September 10. These calls are consistent with Walker's need to use his step-brother's phone because he did not have his phone with him while he was committing the burglaries.

The jury also learned Maria Monnarez owned the green Buick. Walker had been living in Monnarez's home and had access to her car keys. On September 10 Walker did not have her permission to drive her car. The State offered photographs of the inside of Monnarez's car at the time it was abandoned by the driver. A red duffle bag containing cigarette cartons and a navy blue-patterned bandana appear on the passenger seat. A black sweatshirt and car keys rest on the driver's seat. This clothing matches what the burglar is wearing in the still photos, and Monnarez identified the car keys as hers.

The recorded phone calls Walker made to Swolley and Tanisha while in jail also proved to be damaging evidence against him. Specifically, Walker shushing Swolley's remarks about Walker leaving his sweat pants in Swolley's trash can shows Walker's recognition of the strength of the State's case.

In light of this overwhelming evidence, we conclude the jury's finding of guilt beyond a reasonable doubt would surely not have been different absent the challenged identification evidence. See *Sullivan*, 508 U.S. at 280. Accordingly, we affirm.

AFFIRMED.