IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	FILED
Plaintiff-Appellee,	)	DEC 27 1983
vs.	)	CLERK SUPREME COURT
WILLIAM DWAYNE LITTLE,	)	3-331
Defendant-Appellant.	)	69254

Appeal from Warren County District Court - Joel D. Novak, Judge.

Defendant appeals from his conviction for burglary in the second degree and theft in the second degree. AFFIRMED.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Robert M. Benton, Schooler, Stuyvesant & Benton, Carlisle, Iowa, for defendant-appellant.

Heard by Oxberger, C.J., and Snell, and Sackett, JJ.

SACKETT, J.

Defendant appeals from his conviction for burglary in the second degree and theft in the second degree in violation of Iowa Code sections 713.1, 713.3, 714.1 and 714.2(2). We affirm.

William Dwayne Little's conviction arose out of the burglary of the Janet and Edwin Ripperger residence on May 24, 1982. Entry to the Ripperger home was gained by kicking in the rear kitchen door, and a Tappan microwave oven, along with five guns, were stolen. Paul Palmer and Ronald Drake were arrested on May 24, 1982, after becoming involved in a fight. During the fight Drake took a shotgun from the trunk of the car in which he was a passenger. The car was owned by John Dietrich. As they were leaving the scene of the fight, a police officer stopped Palmer and Drake and searched the automobile. The gun was recovered by police and it was determined that it was one of the weapons stolen from the Ripperger residence earlier that day. The microwave oven was recovered the following day at the home of a woman who testified that three men had sold it to her on the 24th. On May 25, 1982, the police also searched William Little's residence and recovered a pair of shoes with sole markings similar to a shoeprint left at the scene of the burglary.

On June 23, 1982, the state filed an Information against Little and Drake accusing them of burglary in the first degree and theft in the second degree. Both were also accused of being habitual offenders. Neither Palmer nor Dietrich were arrested in connection with the burglary.

Little was arraigned on June 29, 1982, and entered a plea of not guilty. Trial began August 17, 1982. Prior to jury selection the Information was amended to charge Little with burglary in the second degree. On August 19, 1982, the jury found Little guilty of burglary in the second degree and theft in the second degree. Little was also found guilty of being a habitual offender. Little waived his right to a pre-sentence investigation and requested immediate sentencing. He

was sentenced to two terms not to exceed fifteen years. The sentences were to run concurrently. This appeal followed.

Little now argues: (1) the trial court erred in not admitting proof of another crime as evidence incriminating one other than himself; and (2) the trial court erred in denying a requested jury instruction on corroboration of an accomplice. We affirm.

I. Proof of Another Crime

At trial Little sought to introduce evidence that John Dietrich and Paul Palmer were convicted of burglary in January of 1981 in Warren County. Little sought to show by such evidence that Dietrich and Palmer were responsible for the Ripperger burglary. The state resisted the introduction of such testimony, arguing that testimony regarding prior felony convictions is proper only to impeach a witness, or where a conspiracy can be shown. The trial court sustained the state's objection to the proffered testimony. Little now argues that the trial court erred in not admitting evidence of the earlier crimes for the purpose of incriminating Dietrich in the Ripperger burglary. We find Little's argument to be unpersuasive.

Evidence tending to incriminate another must be confined to substantive facts and create more than a mere suspicion that such other person committed the offense. State v. Stump, 254 Iowa 1181, 1188, 119 N.W. 2d 210, 214, cert. denied 375 U.S. 853, 84 S. Ct. 113, 11 L.Ed. 2d 80 (1963). Evidence tending to show that Dietrich and Palmer were convicted for a burglary which occurred more than one year prior to the burglary for which Little and Palmer were prosecuted and convicted is not a "substantive fact" for purposes of State v. Stump. Furthermore, such evidence does not "create more than a mere suspicion" that Dietrich, rather than Little, committed the offense. We cannot say that the trial court abused its discretion in excluding evidence of such prior convictions.

II. Corroboration of Accomplice Testimony

Little argues that the trial court erred in denying his request for a jury instruction on corroboration of an accomplice. It is Little's position that Palmer was an accomplice in the burglary and that therefore his testimony should have been corroborated. Little also argues that the issue of whether or not Palmer was an accomplice is a question for the jury.

Iowa Rule of Criminal Procedure 20(3) states:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The Iowa Supreme Court defined accomplice in State v. Jennings, 195 N.W. 2d 351, 356-57 (Iowa 1972) as follows:

> An accomplice is a person who willfully unites in, or is in some way concerned in the commission of a crime. The general rule for determining whether a witness is an accomplice is if he could be charged witn and convicted of the specific offense for which an accused is on trial.
>
> But something more than mere knowledge that a crime is contemplated, or mere personal presence at the time and place where committed, must be shown in order to make one an accomplice. And it must be established by a preponderance of the evidence that a witness was in fact an accomplice.

The question of who are accomplices is one of law for the court when the facts as to the witness's culpability are neither disputed nor susceptible of different inferences. State v. Sallis, 238 N.W. 2d 799, 802 (Iowa 1976). When these facts are disputed or susceptible of different inferences, the question is one of fact for the jury. Id.

After a careful review of the record we find that the facts as to Palmer's culpability are neither disputed nor susceptible of different inferences. Palmer had met Little only shortly before the Ripperger burglary. There was no evidence placing Palmer at the scene of the burglary. Although Palmer did happen to be

with Little and Drake when they delivered the stolen oven, he had no knowledge of where the oven came from or the activities of Drake and Little earlier that day. Palmer didn't know about the weapons in the trunk of Dietrich's car until Drake took the shotgun from the trunk during the fight. Since the facts regarding Palmer's lack of knowledge regarding the burglary were neither disputed nor susceptible of different inferences, the trial court could find, as it did, that Palmer was not an accomplice for purposes of rule 20(3). Because the court correctly found that Palmer was not an accomplice, no jury instruction on corroboration of accomplice testimony was required.

Because defendant's arguments lack merit, we affirm the convictions and sentences imposed by the trial court.

AFFIRMED.