IN THE COURT OF APPEALS OF IOWA

FILED
DEC 26 1984
CLERK SUPREME COURT

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 26, 1984
vs.	)	
PERCY BRADY,	)	4-403 / 83-949
Defendant-Appellant.	)	

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Appeal from the Iowa District Court for Wright County - Albert Habhab and Paul W. Riffel, Judges.

Defendant appeals his conviction of second degree burglary asserting that the trial court erred in failing to declare a witness an accomplice as a matter of law and that he was denied effective assistance of counsel when his trial counsel did not request a change in the jury instruction for a lesser included offense. AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

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

Heard by Snell, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Defendant, Percy Brady, appeals his conviction of second degree burglary. He asserts: (1) the trial court erred in failing to declare a witness an accomplice as a matter of law, and (2) he was denied effective assistance of counsel when his trial counsel did not request a change in the jury instruction for a lesser included offense. We affirm.

I. Accomplice Testimony. At trial, Terry Steig testified that at Brady's suggestion the two of them broke into the Smoke Shop tavern and stole liquor, cigarettes, and cash. Steig testified that they then returned to the home of Rodney Frye, who disapproved of the crime and locked the stolen liquor in the basement so that Brady and Steig could not drink it. The next morning Frye reported the burglary to the police. Brady and Steig were then arrested.

Frye also testified at Brady's trial. His testimony substantially corroborated Steig's testimony. Brady, however, denied any involvement in the crime.

Iowa Rule of Criminal Procedure 20(3) provides in part:

> A conviction cannot be had upon the testimony of an accomplice . . . unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense . . . .

Brady argues that both Steig and Frye were accomplices as a matter of law, and, therefore, that their testimony cannot be considered corroboration upon which a conviction can be based. He further argues that the other evidence presented by the prosecution was insufficient to connect Brady to the commission of the crime.

Brady's argument that Frye was an accomplice as a matter of law and that his testimony could not corroborate Steig's testimony is without merit.

> The question whether a particular witness is an accomplice is a matter of law for the court when the facts are not disputed or susceptible to different inferences; when the facts are disputed, the question is one of fact for the jury.

State v. Doss, 355 N.W.2d 874, 879 (Iowa 1984) (emphasis added). Since the facts were disputed, the trial court properly submitted the issue whether Frye was an accomplice to the jury.

II. Ineffective Assistance of Counsel. Brady's ineffective assistance of counsel claim is also meritless. He has failed to show that he was prejudiced by his attorney's alleged omission. See State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984). The jury instruction for the lesser included offense of criminal tresspass that Brady contends was prejudicial was, in fact, perfectly proper.

Brady contends that it was improper for the instruction to include theft as the only "public offense" element of the lesser charge. He claims that the use of "theft" confused the jury and made the distinction between the two offenses indistinguishable. His argument fails because there was no evidence that Brady entered the tavern with the intent to commit any crime other than theft. See State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982). Thus, the instruction on the lesser included offense of criminal trespass was proper only if it was limited to the public offense of theft. See id. The instruction was so limited and was proper. Brady was not prejudiced by a failure to request that a proper jury instruction be changed.

AFFIRMED.