

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JAMES R. MURPHY,)

Defendant-Appellant.)

Filed September 6, 1984

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83-1354

Appeal from the Iowa District Court for Dubuque County - Roger F. Peterson and T. H. Nelson, Judges.

Defendant appeals from his convictions and consecutive sentences for six counts of false use of a financial instrument in violation of Iowa Code section 715.6 (1983). REVERSED AND REMANDED FOR NEW TRIAL.

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

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

Defendant appeals from his convictions and consecutive sentences for six counts of false use of a financial instrument in violation of Iowa Code section 715.6 (1983). Defendant asserts that his trial counsel rendered ineffective assistance by failing to request an instruction on the necessity of corroboration of accomplice testimony and by mistakenly advising him about the scope of cross-examination he might undergo if he chose to testify. Defendant also contends that he was illegally sentenced on two of the six counts. The State agrees with the last contention and requests that the case be remanded for resentencing.

Our review of criminal appeals is ordinarily on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). When a defendant raises issues involving the violation of basic constitutional rights, we make an independent evaluation of the totality of the circumstances. This is the equivalent of a de novo review. Id. Effective assistance of counsel is a basic constitutional right triggering a de novo type review. Sims v. State, 295 N.W.2d 420, 422-23 (Iowa 1980).

I. Sentencing. On July 29, 1983, defendant was sentenced to determinate two-year sentences on counts II and V for obtaining property valued at more than one hundred dollars. Iowa Code section 715.6 as amended by 1983 Iowa Acts, chapter 183, section 1, effective July 1, 1983, classified false use of a financial instrument to obtain property one hundred dollars or more in value as a class "D" felony. Therefore, defendant should have been sentenced to indeterminate five-year sentences on counts II and V. Iowa Code §§ 902.3, 902.9(4), 4.13 (1983). The State admits that this case should be remanded for resentencing. Defendant argues in addition, however, that he is entitled to a new trial.

II. Corroboration of Accomplice Testimony. Defendant, James Murphy, was charged with aiding and abetting his wife, Anna Murphy, and Michael Rose in six counts of false use of a financial instrument. The evidence at trial showed

that the three individuals drove to Dubuque on August 13, 1982, where they visited six businesses. At each one Anna and Rose entered the store, picked out merchandise, and Rose wrote checks using the name Brian Becker on Becker's credit union account. Rose testified that defendant knew of the illegal activity and participated in it. Rose maintained that defendant told him to write a check at the Cuemaster and to make it for more than the amount of purchase. Rose also stated that defendant vouched for him at Cuemaster when the bartender asked for identification. It was also Rose's testimony that defendant entered both Ace Radio and T.V. and Harold's Radio and T.V. and greeted him with "Hi, Brian." Rose testified against defendant in return for a dismissal of the charges against him.

Iowa Rule of Criminal Procedure 20(3) provides:

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.

Corroborating evidence must be inculpatory, but need not be entirely inconsistent with innocence. State v. Horn, 282 N.W.2d 717, 731 (Iowa 1979). Such evidence need not be strong. All that is necessary is that the accomplice be corroborated in some material fact which tends to connect the defendant with the crime. It is not necessary that the corroborative evidence relate to all of the elements material to defendant's commission of the crime. Id. However, the evidence is insufficient if it merely supports accomplice testimony tending to show defendant's opportunity to commit a crime. State v. Vesey, 241 N.W.2d 888, 891 (Iowa 1976). The evidence must support testimony raising more than a suspicion of defendant's guilt. Id. A defendant may himself furnish the required corroboration. State v. Bizzett, 212 N.W.2d 466, 468 (Iowa 1973).

The existence of corroborative evidence is a legal issue, State v. Dickerson, 313 N.W.2d 526, 529 (Iowa 1981), but the sufficiency of the corroborative evidence is a question of fact for the jury. State v. Harrington, 284 N.W.2d 244, 248 (Iowa 1979); State v. Horn, 282 N.W.2d at 731. If the trial court determines that there is enough evidence to submit the question of corroboration, then the issue should go to the jury under proper instructions for a determination by that body as to its sufficiency. State v. Bizzett, 212 N.W.2d at 468.

A trial court's refusal to give a requested instruction that the defendant cannot be convicted unless an accomplice's testimony is corroborated is reversible error. State v. Upton, 167 N.W.2d 625, 629 (Iowa 1969); State v. Bestmann, 317 N.W.2d 847, 851-52 (Iowa Ct. App. 1982). However, if no instruction is requested, the court has no sua sponte responsibility to instruct on corroboration. State v. Jochims, 241 N.W.2d 25, 28 (Iowa 1976).

In the present case no request was made for an instruction on corroboration of accomplice testimony. Defendant excuses his failure to raise the issue below by asserting that his trial counsel was ineffective.

The test of whether a defendant has been denied his constitutional right to the effective assistance of counsel is whether "under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). When a claim of ineffective assistance is based upon a specific act or omission of counsel at trial, it must be shown that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." Id. "Prejudice cannot be found unless the error constitutes a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). Failure of defense counsel to take proper steps regarding instructions may or may not rise to the level of ineffective assistance of counsel depending upon the circumstances of the case. State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983).

In State v. Blackford, 335 N.W.2d 173, 178 (Iowa 1983), the supreme court held that counsel did not render ineffective assistance by failing to request that the element of criminal intent be placed in the marshalling instruction on a third-degree sexual abuse charge. The court noted first that the jury was instructed on general criminal intent in a separate instruction. Id. at 177. Moreover, the court stated that the act of sexual abuse is rarely done unintentionally and unknowingly. Therefore, intent was not the "fighting issue" in the case. Id. at 178.

Shortly after Blackford the court held that an accused was deprived of effective representation where the jury was not instructed on the specific intent necessary for second-degree kidnapping. State v. Goff, 342 N.W.2d at 836-38. The court in Goff, distinguishing Blackford, pointed out that there was no specific intent instruction anywhere in this case and that the issue of specific intent was vital to the defense. Id. at 837-38.

Finally, in State v. Miles, 344 N.W.2d at 235, it was held that defendant did not show the requisite prejudice from counsel's failure to object to the omission of the element of malice aforethought from the felony murder marshalling instruction. The court observed that, as in Blackford, the jury was correctly informed of the missing element in a separate instruction. Furthermore, the court found that malice aforethought was not a fighting issue in that case since no one questioned that the victim had been murdered. Id.

We find that the present case is closer to Goff than to Blackford and Miles. Nowhere in the instructions was the jury informed that it must find sufficient corroboration of Rose's testimony in order to convict the defendant. Furthermore, corroboration was a fighting issue in this case. In order to convict the defendant of aiding and abetting the false use of a financial instrument, the State had to show that he assented to or lent approval to the criminal act either by active participation in it or by encouraging it prior to or at the time of its commission. State v. Vesey, 241 N.W.2d at 891. Neither the defendant's

knowledge of the crime nor his mere proximity to the scene of the crime is in itself sufficient to prove aiding and abetting. Id. Defendant admitted that he drove his wife and Rose to various places in Dubuque. However, he denied knowing that they were purchasing the items with stolen checks. Rose's testimony was crucial to establishing defendant's knowing participation in the illegal act. Defense counsel attacked Rose's credibility by presenting testimony from the bartender at Cuemaster that defendant did not vouch for Rose as Rose had testified. Furthermore, on cross-examination, Rose admitted that he had lied when he testified that he knew nothing of the Becker share drafts until August 13. He admitted that he had used the share drafts on August 11.

The State argues that defendant was not prejudiced by the omission of the instruction because there was ample corroboration of Rose's testimony. Since the State must prove more than defendant's mere proximity to the scene of the crime, Rose's testimony that defendant sat in the car while he and Anna Murphy purchased merchandise is not inculpatory. It is consistent with defendant's innocence. Therefore, defendant's admission of proximity to the crime is not corroboration of a material fact tending to connect him with the crime. State v. Vesey, 241 N.W.2d at 891. The only corroboration of Rose's claim that defendant knew of the crime came from the owner of Ace Radio and T.V. who testified that defendant entered the store and greeted Rose with "Hi, Brian." On cross-examination, however, the witness admitted that he could not remember whether defendant had used the name "Brian," but that since it was in his statement to the police, he assumed it was correct.

We conclude that there was some corroboration raising a jury question as to its sufficiency. Considering the inconsistencies in the accomplice testimony and the uncertainty in the corroborative testimony, we decline to say as a matter of law that no reasonable juror could find the corroboration insufficient. Since the accomplice testimony was essential to the State's case and defendant could not be

convicted absent sufficient corroboration of that testimony, we hold that the failure to allow the jury to determine the sufficiency of that evidence denied defendant effective representation.

Although we usually reserve questions of ineffective assistance of counsel raised on direct appeal to allow a more complete record to be made regarding counsel's actions, State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981), we do not see the need for further proceedings in this case. We see no way to attribute counsel's failure to request an instruction on the necessity of corroboration of accomplice testimony to "mere improvident trial strategy, miscalculated tactics or mistaken judgment." State v. Goff, 342 N.W.2d at 838 (quoting State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983)).

In reaching our decision, we note that courts in other jurisdictions have decided that counsel's failure to request a jury instruction regarding the necessity of corroboration of accomplice testimony denied a criminal defendant effective assistance of counsel and necessitated the reversal of the conviction. See Grooms v. State, 320 N.W.2d 149, 151-52 (S.D. 1982); People v. Butler, 23 Ill. App.3d 108, 112, 318 N.E.2d 680, 683 (1974).

Our decision on this issue makes it unnecessary to consider defendant's final allegation that counsel was ineffective for misadvising him of the consequences of his decision to testify.

REVERSED AND REMANDED FOR NEW TRIAL.