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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Appellee,	)	Filed May 31, 1978
	)	
v.	)	
	)	
CHARLES JUNIOR SMITH,	)	
	)	515
Appellant.	)	<u>60803</u>
	)	

Appeal from Lucas District Court - Van Wifvat, Judge.

Defendant appeals from judgment and sentence imposed following conviction for breaking and entering. Reversed.

Stephen P. Meyer, of the Meyer Law Firm, of Chariton, for appellant.

Richard C. Turner, Attorney General, Thomas A. Evans, Jr., Assistant Attorney General, and William L. Shelton, Lucas County Attorney, for appellee.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant appeals from judgment and sentence imposed following his conviction for breaking and entering. The appeal presents two issues: (1) whether defendant's motion for directed verdict should have been sustained because of insufficiency of the evidence to corroborate the testimony of two accomplices; and (2) whether the trial court incorrectly applied § 785.16, The Code 1977, as it pertains to the supplemental determination that defendant was an habitual criminal.

I. With respect to the first of the stated issues the State relied heavily at trial upon the testimony of two admitted accomplices. Each testified that defendant participated with them in commission of the crime for which defendant was being tried. Defendant's conviction cannot stand on the testimony of accomplices alone, even if there is testimony by multiple accomplices. Section 782.5, The Code 1977. *State v. Nepple*, 211 N.W.2d 330 (Iowa 1975); *Johnson v. State*, 4G Greene 65 (Iowa 1853).

To sustain the conviction against defendant's timely motions for directed verdict raising the application of § 782.5, The Code, the State relies on two pieces of evidence. The first is the testimony of the proprietor of the service station where the break-in occurred that empty cigarette packages and empty candy bar wrappers found in a residence where defendant resided with seven other people (including the two accomplices) were the same kind of merchandise he handled. Our review of the record convinces us that there is no evidence to tie these empty containers to either the break-in or the defendant other than the testimony of the two accomplices. In this regard the case is not dissimilar from *State v. Fletcher*, 246 Iowa 452, 68 N.W.2d 99 (1955), where it was held that a motion for directed verdict based upon § 782.5 should have been sustained. See also *State v. Vesey*, 241 N.W.2d 888, 891 (Iowa 1976).

The other piece of evidence relied upon by the State to provide the necessary corroboration is the testimony of the service station proprietor that the mother of one of the accomplices offered to make restitution if he would drop criminal charges. The record does not disclose specifically against whom such charges were to have been dropped. Tacit admissions by the accused himself may not be relied upon as corroboration of accomplices testimony. *State v. Williams*, 207 N.W.2d 98, 107 (Iowa 1973). It therefore follows that it is also improper to draw such inferences from the acts of third persons.

We hold that in no respect has the State's evidence corroborated the testimony of the two accomplices in a manner connecting defendant with the commission of the offense. The motion for directed verdict should have been sustained. The remedy for such failure is a remand with direction to dismiss the charge. *State v. Vesey*, supra, at 891.

II. The disposition which we make in the prior division makes it unnecessary to consider the second issue presented. We are constrained to observe, however, that we doubt the procedure set forth in § 785.16, The Code 1977, requires that a defendant affirm or deny the matters therein specified under oath.

Based upon the error discussed in division I, the case is reversed and remanded for entry of judgment dismissing the charge and supplemental charge against the defendant.