IN THE COURT OF APPEALS OF IOWA

No. 8-273 / 97-871

STATE OF IOWA,

Appellee,

vs.

THOMAS LEO PERRY,

Appellant.

FILED
JUL 31 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

Thomas Leo Perry appeals from judgment and sentence entered for attempted murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Streit, and Vogel, JJ.

900327

CADY, C.J.

Thomas Perry appeals from the judgment and sentence for his conviction of attempted murder. He claims an aiding and abetting instruction was improperly submitted to the jury, insufficient evidence existed to support the conviction, and his attorney was ineffective. We affirm the district court.

The events giving rise to this case stem from a dispute between the Crips and the Gangster Disciples, rival gangs in Cedar Rapids. On August 28, 1996, Marcus Thurmon was home when he noticed a group of Gangster Disciples approaching his apartment. Afraid they were going to attack him, he called Telly Savalas Henderson for assistance. Odell Henderson, Telly Savalas Henderson, Wallace Maxwell, and Thomas Perry subsequently came to Thurmon's apartment. Deea Maxwell, Odell Henderson's fiance, drove the group to Thurmon's apartment. After reaching Thurmon's apartment, the group decided to leave. Thurmon took a .22 caliber pistol with him.

Deea drove the group from the apartment. Perry got out of the car first, then Thurmon, and finally the others. Perry and Thurmon approached a group of Gangster Disciples in a nearby alley. The other members of the group subsequently followed to the alley. Deea waited on a porch near the alley.

A series of shots were fired in the alley. Rico Thigpen was shot in the chest but survived. Thurmon testified he witnessed Perry fire the shots. Odell Henderson testified only Perry or Thurmon could have fired the shots. Telly Savalas Henderson

testified there were two individuals in the alley when he heard the gunshots. Deea testified Perry had shown the group a 9mm black pistol earlier in the day. She also stated Perry was dressed in dark clothing with a baseball cap. Other individuals in the neighborhood heard the shots and observed a man at the scene matching Perry's description. At the scene, police collected ten 9mm shell casings and one .22 caliber revolver.

The State charged Perry, Thurmon, Odell Henderson, and Telly Savalas Henderson with attempted murder. The jury found Perry guilty of attempted murder. The district court sentenced Perry to an indeterminate term not to exceed twenty-five years.

On appeal Perry claims: (1) the trial court erred by submitting an aiding and abetting instruction; (2) insufficient evidence existed to support the conviction; and (3) he received ineffective assistance of counsel.

I. Aiding and Abetting

Our review of the submission of a jury instruction is for corrections of errors of law. Iowa R. App. P. 4; *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Instructions submitted to the jury must be supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). Substantial evidence means evidence exists in the record which could convince a reasonable jury the defendant is guilty beyond a reasonable doubt. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). Even if the trial court did err in submitting an instruction, we will reverse only when the

error has caused prejudice. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 148 (Iowa 1992).

We must assess whether substantial evidence supporting the instruction existed. A person cannot aid and abet himself in the commission of a crime. *State v. Mays*, 204 N.W.2d 862, 864 (Iowa 1973). To convict a person on an aiding and abetting theory, the State must produce substantial evidence the individual "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa App. 1995).[1] Knowledge of the criminal act at or before its commission is essential. *Id.* Knowledge can be inferred. *Id.* Knowledge of the crime and proximity to the scene, circumstantial evidence such

---

[1] The trial court submitted the following instruction to the jury:

All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated the same way.

"Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the Defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."

The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of other person(s) guilt.

If you find the State has proved the Defendant directly committed the crime, or knowingly "aided and abetted" another person in the commission of the crime, then the Defendant is guilty of the crime charged.

as companionship, combined with conduct before and after the crime is committed, are sufficient to infer a defendant's participation. *Id.*

Perry claims the evidence introduced by the State at trial portrayed him as the shooter and did not portray him as an aider and abetter to the shooting. He points out the State presented no evidence anyone else had a 9mm weapon and the wound Thigpen suffered was consistent with a bullet from a 9mm weapon. He further emphasizes that while evidence existed to support the theory others aided and abetted him in the shooting, no evidence existed to support the conclusion he aided and abetted anyone else.

Substantial evidence exists in the record to support the submission of the aiding and abetting instruction. While much of the evidence shows Perry was the shooter, other conflicting evidence supports a theory he aided and abetted the shooting. Odell Henderson testified he did not know who fired the shots. Telly Savalas Henderson initially identified Perry as the shooter, but at trial testified he did not see Perry do anything. Further, Thigpen identified the person who shot him as Odell Henderson. Other testimony placed both Perry and Thurmon at the scene of the shooting together. Both had weapons and the opportunity to shoot Thigpen. Finally, the group shared a common goal, stating in the car "we can take them together." When taken as a whole, the evidence supported an aiding and abetting theory.

II. Sufficiency of Evidence

Our standard of review for claims of insufficient evidence is well established. We review such claims for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless no substantial evidence in the record exists to support it, or it is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981); *State v. Forsyth*, 547 N.W.2d 833, 834 (Iowa App. 1996). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Schrier*, 300 N.W.2d at 306; *see also State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994).

In determining the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980); *State v. Zahner*, 545 N.W.2d 337, 339 (Iowa App. 1996). All evidence is considered, not merely the evidence supporting the verdict. *Robinson*, 288 N.W.2d at 340; *see also State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). We give the State the benefit of all legitimate inferences and presumptions which can fairly and reasonably be deduced from the evidence. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crimes. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). Additionally, discrepancies in testimony do not, in and of themselves, preclude proof beyond a reasonable doubt. *See generally State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (jury could adopt evidence it

found credible); *Forsyth*, 547 N.W.2d at 836 (jury's function to determine credibility and resolve conflicts in evidence).

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.

Independent evidence a defendant was seen in the company of other perpetrators shortly before the crime corroborates accomplice testimony. *State v. Palmer*, 569 N.W.2d 614, 616 (Iowa App. 1997).

Perry asserts the State presented insufficient evidence to support his conviction of attempted murder. He also maintains the only evidence placing him in the alley came from the testimony of accomplices.

We first conclude reliable non-accomplice testimony exists corroborating the evidence provided by the accomplices and supporting Perry's conviction. The record indicates Deea was not an accomplice to this crime. Her testimony placed Perry at the scene of the crime, provided a description of his weapon, and provided a description of his clothing. Rosella Halstead, a neighbor, also observed the shooter and described the shooter's clothing as consistent with clothing worn by Perry. Jason Rife provided further testimony placing Perry at the scene.

In addition to the non-accomplice testimony supporting Perry's conviction, the accomplices to the crime provided substantial evidence supporting his conviction. Thurmon testified he witnessed Perry fire the shots. Odell and Telly Savalas Henderson testified only two individuals were in the alley when the shots were fired. Moreover, evidence of 9mm shell casings were found in the alley.

We therefore conclude substantial evidence exists from which the jury could conclude Perry attempted to murder Thigpen.

III. Ineffective Assistance

Perry's ineffective assistance of counsel claim involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997).

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Perry must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). Perry

must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

Perry claims he received ineffective assistance of trial counsel by counsel's failure to seek a designation of three witnesses as accomplices. He further asserts counsel should have requested an instruction informing the jury of the inherent unreliability of accomplice testimony and requiring corroboration of such testimony.

We conclude Perry was not prejudiced by defense counsel's failure to request further instructions regarding accomplice testimony because much of their testimony was corroborated and the State had a strong case even without the accomplice testimony. Accordingly, we affirm the district court.

We have considered all of Perry's claims and affirm the district court.

AFFIRMED.