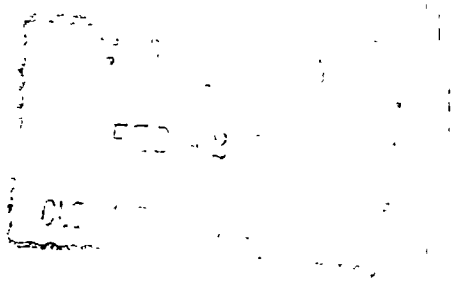
# IN THE COURT OF APPEALS OF IOWA

No 5-534 / 94-1411



**STATE OF IOWA,**

001181

Appellee.

**vs.**

**LAWRENCE MICHAEL RYAN, JR.,**

Appellant.

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Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Defendant appeals his conviction and sentence, following a bench trial, for first-degree robbery. **AFFIRMED.**

Robert E. Weinberg of Wells, Bowman & Smith, Davenport, until his withdrawal, and then Kyle Williamson, Davenport, for appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; William E. Davis, County Attorney; and Hugh Pries, Assistant County Attorney, for appellee.

Heard by Habhab, P.J., Cady, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court

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**McCARTNEY, S.J.**

The defendant, Lawrence Ryan Jr., appeals from the judgment and sentence entered upon his conviction of first-degree robbery. He argues: 1) the trial court abused its discretion in allowing the testimony of a codefendant not timely listed on the State's witness list; 2) the trial court erred in allowing testimony about a shotgun when evidence regarding the seizure of the shotgun had been suppressed; 3) there was not sufficient evidence to corroborate the testimony of the codefendant; and 4) the trial court erred in finding the defendant aided and abetted the commission of the robbery.

We affirm.

Shane O'Leary committed an armed robbery of a gas station on January 25, 1994. At issue was whether the defendant, O'Leary's roommate, aided and abetted O'Leary in the commission of the offense. The defendant had accompanied O'Leary to the gas station but waited in the car while O'Leary committed the actual robbery.

O'Leary was not listed as a witness to be called by the State in the trial. During the course of the trial, the State announced its intention to call O'Leary as a witness, and defense counsel objected on the grounds of timeliness and prejudice. The trial court provided the defendant an opportunity to depose O'Leary and allowed the State to amend and add him as a witness. The defendant repeated his objections

to the admission of O'Leary's testimony when he made his motions for acquittal and mistrial.

Only after the trial was concluded and the defendant filed his motion for a new trial did he assert for the first time that his constitutional right to a jury trial was compromised by the decision of the court to allow the State to amend and add O'Leary as a witness. The defendant had filed a waiver of his right to a jury trial. Pursuant to Iowa Rule of Criminal Procedure 16(1) a defendant may not withdraw a waiver of his right to a jury trial after the commencement of the trial. The defendant appears to argue O'Leary's testimony presented substantial credibility problems and had he known prior to trial O'Leary was going to testify, he would not have waived his right to a jury trial as he would have wanted a jury to assess O'Leary's credibility. The defendant argues his waiver of his right to a jury trial was not voluntary, knowing and intelligent given the subsequent decision of the trial court to allow O'Leary's testimony.

As noted above, the defendant waited until he filed his motion for a new trial to argue his constitutional right to a jury trial was compromised by the decision to allow O'Leary to testify. Objections should be raised at the earliest time at which error becomes apparent in order to properly preserve error. *State v. Steltzer*, 288 N.W.2d 557, 559 (Iowa 1980). A motion for a new trial is ordinarily not sufficient to preserve error when proper objections were not made at trial. *Id.* Error which is

not preserved is waived. *See State v. Heacock*, 521 N.W 2d 707, 710 (Iowa 1994) We find error was not preserved with respect to this issue. The defendant failed to raise this specific objection until after the trial and it was not preserved for appellate review.

To the extent the argument of the defendant on this issue can be read to reiterate his timely raised claims of prejudice, we find no abuse of discretion in the admission of O'Leary's testimony. The trial court gave the defendant an opportunity to depose the witness, Iowa Rule of Civil Procedure 18(3), and defense counsel had in fact interviewed O'Leary prior to trial. The defendant cites no authority for his proposition that a different standard should be applied in bench trials when determining whether to allow the testimony of additional witnesses. Given the facts of this case, we do not find this argument persuasive. There was no abuse of discretion in the decision to admit O'Leary's testimony.

O'Leary used the defendant's shotgun to commit the robbery. The gun was seized from the home of the defendant's father. The trial court suppressed introduction of the gun into evidence.

Detective Hodges had investigated the robbery. The defendant told Hodges a 12-gauge, pump-action, Remington model shotgun was used to commit the robbery. The sales clerk who was robbed was able to provide testimony as to what the gun looked like which was used to commit the robbery.

The defendant argues the trial court erred in allowing the detective to testify as to what a Remington pump-action shotgun would look like. The detective was not testifying about the particular gun which was seized but was merely giving a general description of a type of shotgun. This testimony was clearly relevant inasmuch as the defendant had described to the detective the type of gun used and the description was consistent with the testimony given by the store clerk.

The defendant also objected to the detective testifying about what the defendant told him about how he had acquired the gun. This testimony did not relate to the subsequent seizure of the gun and was admissible. We have reviewed all of the testimony in question and find none of it violated the suppression ruling of the trial court.

The defendant argues the testimony of O'Leary was not corroborated. Our standard of review is on errors of law. *State v. Jones*, 511 N.W.2d 400, 404 (Iowa App. 1993).

Iowa Rule of Criminal Procedure 20(3) provides:

> **Corroboration of accomplice or person solicited.** 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 requirement of corroborative evidence has been recognized as serving two purposes. "First, it independently tends to connect the defendant to the crime."

*State v. Larsen*, 512 N.W 2d 803, 806 (Iowa App. 1993). "Secondly, it serves as a counterweight against the dubious credibility of an accomplice, whose motivation to testify is suspect because the person would have a natural self-interest in focusing the blame on the defendant." *Id.*

To be sufficient, corroborative evidence must corroborate a material aspect of the testimony of the accomplice connecting the defendant with the commission of the crime charged. *State v. Gillespie*, 503 N.W.2d 612, 617 (Iowa App. 1993). Each case must be governed by its own circumstances, and evidence which merely raises a suspicion the accused is the guilty party is not sufficiently corroborative of the testimony of an accomplice to warrant a conviction. *Id.*

Corroborative evidence need not be strong nor entirely inconsistent with innocence. *Id.* It need not confirm every material fact of the accomplice's testimony; nor need it confirm all the elements of the crimes charged. *Jones*, 511 N.W.2d at 404. Corroborative evidence may be direct or circumstantial. *Id.* at 405. The State need not establish corroborative evidence beyond a reasonable doubt. *State v. King*, 256 N.W.2d 1, 10 (Iowa 1977).

There was sufficient evidence to corroborate O'Leary's testimony. The defendant's statements to Detective Hodges implicated him in the planning of the robbery and detailed his involvement. A defendant's admissions may be considered corroboration for the testimony of an accomplice. *See State v. Jochims*, 241 N.W.2d

25, 27 (Iowa 1976); *Jones*, 511 N.W 2d at 405. O'Leary's testimony regarding the defendant's knowledge of the plan to rob the gas station, the defendant's ownership of the gun, and the defendant's role in counting and keeping some of the robbery proceeds was corroborated by statements made by the defendant to the police. There was sufficient evidence to corroborate the testimony of O'Leary.

The defendant argues the trial court erred in finding he aided and abetted the commission of the robbery. Those who aid and abet in the commission of an offense may be punished as principals. Iowa Code § 703.1 (1993). To convict one of a crime on the theory of aiding and abetting, the State must produce substantial evidence that the accused "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. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) (quoting *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977)).

The State must prove the accused knew of the crime at or before its commission and can prove such knowledge by direct or circumstantial evidence. *Lewis*, 514 N.W.2d at 66. "Although such knowledge is essential, neither knowledge nor proximity to the scene is--standing alone--enough to prove aiding and abetting." *Id.* However, such factors in combination with circumstantial evidence such as presence, companionship, and conduct before and after the offense is committed may be enough from which to infer a defendant's participation in a crime. *Id.*

There was evidence the defendant was aware O'Leary had robbed the gas station before and intended to do so again. In his statement to detective Hodges, the defendant indicated he and O'Leary had a conversation planning the robbery prior to driving to the gas station. The defendant knew O'Leary had placed the defendant's shotgun and a ski mask in the car belonging to the defendant's girlfriend. The defendant knew O'Leary intended to use the proceeds from the robbery to pay their utility bills. The defendant allowed O'Leary to use his gun to commit the offense. After the completion of the robbery, the defendant helped O'Leary count the stolen money and the defendant kept a portion of it. Given these facts, there was sufficient evidence from which the trial court could find the defendant assented or lent countenance to and encouraged the commission of the crime.

**AFFIRMED.**