IN THE COURT OF APPEALS OF IOWA

No. 1-306 / 90-1578

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ROBERT D. HAHN,

Appellant.

Appeal from the Iowa District Court for Muscatine County, R.K. Stohr, Judge.

Hahn appeals from his conviction, following a jury trial, for the crime of conspiracy to commit second-degree burglary or second-degree theft. **REVERSED AND REMANDED.**

Jeffrey M. Johnson, Muscatine, for appellant.

Bonnie J. Campbell, Attorney General, Mark Joel Zbieroski, Assistant Attorney General, and Stephen J. Petersen, County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

Robert Hahn and Larry LaRue operated a legitimate auto repair business. The State alleges they also operated a "fencing" business, purchasing stolen property from burglars and thieves.

Hahn was convicted of the crime of conspiracy to commit second-degree theft or second-degree burglary. At his jury trial, the State presented testimony from three persons who had committed thefts or burglaries and had then sold the stolen property to Hahn. Hahn has appealed from the resulting conviction.

Hahn contends there was insufficient evidence to corroborate the testimony of accomplices, as required by Iowa Rule of Criminal Procedure 20(3). He argues that other than the testimony of the burglars, who sold stolen property to him, there was no evidence connecting him to any of the crimes. He alleges that he had done legitimate auto repair work on two occasions for them, thus providing an innocent explanation for evidence that he knew those individuals.

Hahn asserts the trial court erred in not directing a verdict of acquittal in favor of the defendant. He further contends the district court erred in declining to instruct the jury that accomplice testimony could not support a conviction unless corroborated. The State responds that Hahn failed to preserve the issue of whether the court erred in not directing a verdict of acquittal because no motion

for directed verdict of acquittal was made. Further, Hahn was not prejudiced by any instructional error because corroboration is not required for accomplice testimony to be admissible and that, in any event, Iowa R. Crim. P. 20(3) does not demand corroboration of each and every accomplice. The State further argues that even if coconspirators are considered accomplices, Hahn conviction should be upheld on the strength of the corroborative evidence.

Jury Instruction: We consider whether the trial court erred in refusing to instruct the jury regarding corroboration of accomplice testimony. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. W. T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord Borough v. Minneapolis & St. L. R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. See Borough, 191 Iowa at 1223, 184 N.W. at 323; see also Miller, 246 N.W.2d at 301.

A corollary to these rules is that the trial court has a duty to ensure the jury understands the issues it must decide. Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d

232, 234 (Iowa 1983); McDivitt v. Des Moines City R. Co., 141 Iowa 689, 697-98, 118 N.W. 459, 463 (1909).

In fulfilling these duties, the trial court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Clinton Land Co., 340 N.W.2d at 234. "The sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party urging submission." Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 858 (Iowa 1972); Campbell v. Martin, 257 Iowa 1247, 1251, 136 N.W.2d 508, 511 (1965).

A second corollary is that the trial court has a duty to ensure the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we must read all of the instructions together, not piecemeal or in artificial isolation. Id.; Clinton Land Co., 340 N.W.2d at 234. We must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law. Sanders, 421 N.W.2d at 522 (citing Adam v. T.I.P. Rural Elec. Co-op, 271 N.W.2d 896, 900-01 (Iowa 1978)).

Hahn argues, that the testimony of burglars, Bruce and Newberry should be considered "accomplice testimony" as contemplated within Iowa R. Crim. P. 20(3). That rule states in part:

> 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...(emphasis added).

Hahn requested the testimony of the coconspirators be stricken in its entirety and the jury be instructed to disregard the testimony. He asserts the admission of this testimony without proper jury instruction regarding the corroboration of accomplice testimony prejudiced Mr. Hahn's trial. We agree.

To resolve this matter, we consider whether the accomplice rule and the requirement of corroboration under Iowa R. Crim. P. 20(3) applies to the testimony of coconspirators in a conspiracy trial. At the onset, we note there was no formal determination by the court that the witnesses were or were not accomplices or coconspirators. Iowa Code section 706.1 provides in relevant part:

> 1. A person commits conspiracy with another if, with the intent to promote or facilitate the commission of a crime which is an aggravated misdemeanor or felony, the person does either of the following:
>
> a. Agrees with another that they or one or more of them will engage in conduct constituting the crime or an attempt or solicitation to commit the crime.
>
> b. Agrees to aid another in the planning or commission of the crime or of an attempt or solicitation to commit the crime.

An accomplice is a person who willfully unites in, or is in some way concerned in the commission of a crime.

State v. Jennings, 195 N.W.2d 351,356 (1972). The general rule for determining whether a witness is an accomplice is if he could be charged with and convicted of the specific offense for which an accused is on trial. Id. at 356.

It has been held that the declarations of a coconspirator or codefendant can have no greater force than the testimony of an accomplice or codefendant, and hence evidence of statements of a coconspirator or codefendant tending to inculpate accused is not, in the absence of corroboration evidence sufficient for a conviction. State v. Theodore, 150 N.W.2d 612, 613 (Iowa 1967). We find the burglars who testified in this case could have been charged with the crime of conspiracy and as such were accomplices whose testimony was subject to rule 20(3).

The State argues that even if this court accepts that the coconspirators were accomplices, Hahn's claim that the testimony should have been excluded is without merit. In support of this contention, the State urges that corroboration, while required to support a conviction, is not required for accomplice testimony to be admissible.

Iowa R. Crim. P. 20(3) is not a rule of admission of evidence. The rule is direct to the sufficiency of evidence. The existence of corroborative evidence is a question of law while the sufficiency of that evidence ordinarily is a question of fact for the jury. State v. Doss, 355 N.W.2d 874, 880 (Iowa 1984); State v. Ware, 338

N.W.2d 707, 710 (Iowa 1983); State v. Harrington, 284 N.W.2d 244, 248 (Iowa 1979).

It is prejudicial error to fail to instruct even without request on the requirement of corroboration where the jury could find the only witness against the defendant was an accomplice. State v. Anderson, 38 N.W.2d 662, 665 (Iowa 1949).

We find the jury could have found that the only witnesses who testified against Robert Hahn were accomplices to the crime for which he was on trial. The refusal to submit an instruction to the jury regarding their responsibility to determine if the evidence at trial sufficiently corroborated the testimony of the burglars was prejudicial error.

We find no merit in the State's argument that under rule 20(3), the testimony of one coconspirator provides the necessary corroboration for the testimony of the others. To the contrary, we adhere to the long-established rule that the testimony of one accomplice cannot be corroborated by that of another. Johnson v. State, 4 G.Greene 65 (Iowa 1853). At any rate, the matter of sufficiency of the evidence to corroborate testimony to support a conviction was the providence of the jury. We reverse and remand for a new trial.

REVERSED AND REMANDED.