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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES ROGER PLOURD,

Defendant-Appellant.

Filed August 30, 1983

3-93
68751

Appeal from Cerro Gordo District Court, Ray E. Clough, Judge.

Defendant appeals from his conviction for robbery in the first degree, a violation of Iowa Code sections 711.1 and 711.2, asserting that the evidence was sufficient to establish that one of the State's witnesses was an accomplice and that under our decision in defendant's previous appeal in this case the evidence was therefore insufficient to support the trial court's verdict of guilty. REVERSED.

Philip L. Garland, Garner, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven M. Foritano, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

PER CURIAM

Defendant, James Roger Plourd, was convicted for robbery in the first degree following trial to the court upon stipulated evidence, including minutes of testimony stating that if called as a witness Van Horn would testify that defendant was one of two masked men who robbed a couple in their home at knife-point. On appeal, this court affirmed on condition and remanded to the trial court with directions to determine whether or not Van Horn was an accomplice. In that opinion we stated that if Van Horn was found, on remand, to be an accomplice the evidence would be insufficient to corroborate his testimony, hence the conviction would have to be reversed. On remand the trial court found that Van Horn was not an accomplice and defendant's conviction was therefore affirmed.

Defendant now appeals from this conviction, asserting that the evidence was sufficient to establish, by a preponderance, that Van Horn was an accomplice and that, in accordance with our previous opinion in this case, the conviction must be reversed. Our review of this case is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

The sole issue on this appeal arises by virtue of Iowa Rule of Criminal Procedure 20(3), which provides that:

> [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.

If Van Horn is considered to be an accomplice within the meaning of this rule, as were the other present during the commission of the offense, a conviction could not be had upon his testimony, since there was no independent corroborative evidence. If, on the other hand, Van Horn was not an accomplice, his testimony would be sufficient to corroborate the testimony of the other accomplices and affirmance of the conviction would be appropriate.

The defendant bears the burden of proving, by a preponderance of the evidence, his claim that the State's witness was an accomplice. State v. Houston, 206 N.W.2d 687, 689 (Iowa 1973). The general rule for determining whether a witness is an accomplice is whether he could be charged with and convicted of the same offense for which the defendant is being tried. State v. Sallis, 238 N.W.2d 799, 802 (Iowa 1976); State v. Jennings, 195 N.W.2d 351, 356 (Iowa 1972). "The question of who are accomplices is one of law for the court when the facts as to the witness's culpability are neither disputed nor susceptible of different inferences; when these facts are disputed or susceptible of different inferences, the question is one of fact for the jury." Sallis, 238 N.W.2d at 802, citing State v. Schreck, 258 Iowa 218, 221-22, 137 N.W.2d 914, 915-16 (1965). A finding of fact is binding upon this court "unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of the evidence." State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Because the facts relevant to Van Horn's culpability were susceptible to different inferences, the question of whether or not he was an accomplice was a fact question for the jury. We therefore must review the record to determine whether substantial evidence supports the court's conclusion on limited remand that Van Horn was not an accomplice. Id.

The trial court found that Van Horn was present when defendant and another accomplice discussed and planned the robbery; that he was present when they prepared masks to use in the robbery; that he accompanied them to the scene and waited in the car while they committed the robbery; that he was present when they discussed the crime as they drove away; and that he and the other two took off their shirts and threw them out the car window. Furthermore, Van Horn was listed as a suspect to the offense. While we agree that mere physical presence at

the scene of the crime does not make one an accomplice, see State v. True, 190 N.W.2d 405, 407 (Iowa 1971), we think these facts demonstrate far more and would be sufficient to charge and convict Van Horn. The facts thus distinguish this case from cases like State v. Sallis, in which the State's witness, who denied participation in the offense and disclaimed any knowledge of criminal activity until after the offense had been committed, was found not to be an accomplice. 238 N.W.2d at 802. We conclude that the trial court erred in finding that Van Horn was not an accomplice and that consequently there was corroborative evidence supporting the testimony of the accomplices. In accordance with Iowa Rule of Criminal Procedure 20(3), the conviction must be reversed.

REVERSED.

All judges concur except Donielson, J., and Oxberger, C.J., who dissent.

DONIELSON, J. (dissenting)

I believe the trial court was justified in holding that Van Horn was not an accomplice. Accordingly, I dissent.

The court's finding of fact that Van Horn was not an accomplice is binding on us if that finding is supported by substantial evidence. Iowa R. App. P. 14(f)(1). The record here shows only that Van Horn was present during the planning and commission of the offense. There is absolutely no evidence that he participated in any way in that planning and commission. As the majority correctly notes, presence alone is insufficient to make one an accomplice. The fact that Van Horn took off his shirt and threw it out the car window proves nothing other than the possibility that it may have been a warm October evening. The court's finding that he was not an accomplice is supported by substantial evidence in the record.

I also feel compelled to note a procedural irony in this case. We initially remanded this case to allow the trial court to make the finding being challenged here. The majority now reverses that finding. It seems to me that we could have reached that decision on the first appeal instead of remanding for what turned out to be a futile gesture on the part of the trial court and thereby wasting the time and resources of this court and the court below.

Oxberger, C.J., joins this dissent.