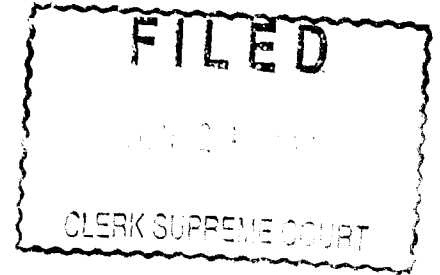


IN THE COURT OF APPEALS OF IOWA

No. 8-274 / 97-928



STATE OF IOWA,
Appellee,

vs.

DAVID ALLEN FREEMAN,
Appellant.

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge.

The defendant appeals his conviction and sentence, following a jury trial, for possession of a firearm as a felon, trafficking in stolen weapons, conspiracy to commit a felony, and possession of burglar's tools. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Patricia A. Reynolds, Assistant State Appellate Defender, and Chris Kragnes, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, Mary E. Richards, County Attorney, and James Scheetz, Assistant County Attorney, for appellee.

Heard by Cady, C.J., Vogel, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

VOGEL, J.

Following a jury trial, David Allen Freeman appeals his conviction and sentence for possession of burglar's tools. As we find sufficient evidence, apart from accomplice testimony, to support his conviction, we affirm his conviction but preserve his claim of ineffective assistance of counsel for post conviction proceedings.

Backgrounds facts. On or about December 24, 1996, seven storage units at Keepers Personal Storage in Boone, Iowa, were burglarized. The padlocks to each unit had been severed with bolt cutters. Among the items stolen from the units were certain firearms and ammunition. Shortly after the burglary, the Ames police received an anonymous tip that people were carrying guns around a trailer court at 516 North Dakota. While investigating this tip, the police arrested Freeman on a prior warrant. The police also questioned Fred Still, who granted them permission to search his car. During the search, they discovered a pair of bolt cutters under the driver's seat. Police later discovered two handguns, a shotgun, and a rifle in a neighboring trailer, whose owner informed police that Freeman and Still had brought the guns there in order to sell them.

Freeman and Still were charged by trial information with felon in possession of a firearm, trafficking in stolen weapons, conspiracy to commit a felony, and possession of burglar's tools. Each were also charged with one count of being a habitual offender. Still ultimately pleaded guilty to one count of conspiracy to commit

a felony and agreed to testify against Freeman as a witness for the State. At trial, the jury found Freeman guilty as charged.

I. Insufficient Evidence. Freeman first contends there was insufficient evidence to support his conviction for possession of burglary tools as the State did not present sufficient corroborative evidence. The State argues this issue was not sufficiently raised in the trial court and should be deemed waived on appeal.

Freeman's motion for judgment of acquittal made no mention that the State failed to corroborate accomplice testimony in regard to the burglar's tools conviction. We therefore find that the issue was not preserved for review, but will address it in the context of Freeman's ineffective assistance of counsel claim. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996).

II. Ineffective Assistance of Counsel. To prevail on a claim of ineffective assistance, the defendant must show (1) his counsel failed to perform an essential duty, and (2) the failure prejudiced applicant. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). If there was substantial evidence to corroborate the accomplice testimony such that the jury could have found Freeman guilty beyond a

reasonable doubt, then Freeman has failed to show that he was prejudiced by counsel's actions. In this context, we next examine the sufficiency of the evidence.

"Evidence is substantial if it could convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. Evidence, whether direct or circumstantial, must however do more than create speculation, suspicion, or conjecture." *State v. Sanborn*, 564 N.W.2d 813, 816 (Iowa 1997) (quoting *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996) (citations omitted)). If a conviction is based on testimony by an accomplice, it is necessary for the prosecution to present evidence that tends to connect the defendant with the commission of the crime. Iowa R. Crim. P. 20(3). This requirement is based upon the assumption that an accomplice's testimony may be unreliable. *State v. Odell*, 456 N.W.2d 910, 912-13 (Iowa 1990).

Freeman contends the State failed to introduce sufficient direct evidence independent of Still's accomplice testimony to show that Freeman had possessed the bolt cutters. However, we also examine the sufficiency of circumstantial evidence to corroborate Still's testimony. Corroborating evidence can be direct or circumstantial, and it need not be entirely consistent with innocence, but it must be corroboration of an inculpatory fact. *State v. William*, 244 N.W.2d 314, 315 (Iowa 1976).

Beyond his unexplained absence during the time of the burglary, Freeman admitted that he saw the bolt cutters in Still's car, and there was independent

testimony from witnesses who saw Freeman in possession of the stolen firearms shortly after the burglary. Perhaps the most persuasive corroborative evidence, however, was David Fleming's testimony that when he asked how Freeman had come to possess the firearms, Freeman stated: "It's easy when you have the master key," and made a gesture indicating the use of a pair of bolt cutters. We find there was sufficient independent testimony to corroborate Still's testimony, and therefore find there was sufficient evidence to support the jury's finding. For this reason, we find trial counsel was not ineffective for failing to preserve the corroboration issue in his motion for judgment of acquittal as no prejudice to Freeman resulted.

III. Other Ineffective Assistance of Counsel Claims. Freeman further contends he was denied effective assistance of counsel because trial counsel failed to object to several instances of hearsay and erred in stipulating to and failing to object to the admission of prior crimes. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *Id.* This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct.

Id. As we find the record on appeal is insufficient to make a determination on these ineffective assistance claims, we preserve the issues for postconviction proceedings.

IV. Cumulative Errors. Finally, Freeman contends the cumulative effect of the trial court's errors was so prejudicial that he was denied a fair trial. However, because Freeman has failed to demonstrate he suffered prejudice from any asserted error during the trial, we do not find he was denied a fair trial. *State v. Pierce*, 287 N.W.2d 570, 575 (Iowa 1980).

Having considered all issues properly before us on appeal, we affirm the district court and uphold Freeman's conviction.

AFFIRMED.