

FILED

IN THE COURT OF APPEALS OF IOWA NOV 24 1981

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 24, 1981*

vs.

)

CURTIS JON ROBERTS,

)

1-295

65697

Defendant-Appellant.

)

Appeal from Black Hawk District Court - Joseph C. Keefe, Judge.

Defendant appeals from his conviction for burglary in the second degree in violation of section 713.3, The Code, asserting 1) that the evidence was insufficient to either corroborate the testimony of an accomplice or support a finding of guilt, and 2) that he was denied effective assistance of counsel by various acts and omissions of his attorney. **AFFIRMED.**

Charles L. Harrington, State Appellate Defender's Office, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Curtis Jon Roberts, appeals from his conviction for burglary in the second degree in violation of section 713.3, The Code, asserting 1) that the evidence was insufficient to either corroborate the testimony of an accomplice or support a finding of guilt, and 2) that he was denied effective assistance of counsel by various acts and omissions of his attorney. We affirm.

On January 25, 1980, the Black Hawk County Attorney filed a trial information charging defendant with burglary in the second degree, in violation of section 713.3, The Code. This information was subsequently amended and supplemented to allege that defendant was an habitual offender. On May 27, 1980, defendant appeared before the court and waived his right to a trial by jury. Trial to the court commenced on the same date. At the close of the state's case, defendant moved to dismiss the charge on the ground that the state had not presented sufficient evidence to establish the guilt of the defendant beyond a reasonable doubt. Specifically, defendant pointed to the state's failure to corroborate the testimony of defendant's alleged accomplice. Trial court overruled this motion and defendant put on his case. Trial was completed on May 28, 1980. On June 17, 1980, the court entered its ruling in which it found defendant guilty of second degree burglary. On July 28, 1980, defendant entered a plea of guilty to being an habitual offender pursuant to section 902.8, The Code. This appeal followed.

The evidence at trial established that on January 6, 1980, the Cedar Falls home of Agnes Johnson was burglarized sometime between 7:30 p.m. and 9:30 p.m. Randy Lonnie Lee admitted his involvement in the burglary and pled guilty to a charge of second degree burglary. Lee testified at defendant's trial and detailed defendant's involvement in the burglary. Defendant admitted at trial that, at Lee's request, he drove his fiancée's car to a parking lot near the house and helped Lee place two television sets in the back seat of the car. He denied any involvement prior to or during the commission of the crime.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. App. P. 4.

II. Corroboration of Accomplice Testimony. Defendant alleges that the evidence adduced at trial was insufficient to corroborate the accomplice's testimony. Since it is undisputed that the defendant did not participate in the actual breaking and entering of the house, defendant's guilt must be based upon his aiding and abetting an accomplice in commission of this crime. See § 703.1, The Code 1979.

We begin our analysis by reviewing the law governing accomplice's testimony. Iowa law precludes conviction based solely upon uncorroborated testimony of an accomplice; such testimony must be corroborated by other evidence which tends to connect the defendant with the commission of the offense. Iowa R. Crim. P. 20(3); State v. Reese, 301 N.W.2d 693, 696 (Iowa 1981). However, corroborative evidence itself need not be strong. State v. Harrington, 284 N.W.2d 244, 248 (Iowa 1979); State v. Cuevas, 281 N.W.2d 627, 629 (Iowa 1979). "It must be inculpatory but need not be entirely inconsistent with innocence." Cuevas, 281 N.W.2d at 629, quoting State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976). "[The corroboration] need not go to the whole of the accomplice's testimony or every material fact." Cuevas, 281 N.W.2d at 630, quoting Vesey, 241 N.W.2d at 890. The question is whether "it can fairly be said that the accomplice's testimony is corroborated in some material fact tending to connect the defendant with the commission of the crime." State v. Graham, 291 N.W.2d 345, 350 (Iowa 1980), quoting Vesey, 241 N.W.2d at 890.

The underlying concept of aiding and abetting is the requirement that the defendant in some way associate himself with the venture, participate in it as something that he wishes to bring about, and seek by his action to make it succeed. State v. Lott, 255 N.W.2d 105, 108 (Iowa 1977). However, defendant may not be convicted as a principal on the theory of aiding and abetting for conduct which would make him only an accessory after the fact. State v. Barnes, 204 N.W.2d 827, 829 (Iowa 1972). Neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting. Id. at 828. Subsequent conduct is relevant insofar as it tends to prove defendant's prior encouragement or participation. Id. at 828-29.

Turning to the evidence, we find no dispute that defendant received, transported and possessed stolen articles, knowing that the articles were stolen. We also believe the fact that defendant and Lee were together shortly before the burglary was committed, having left together in defendant's fiancée's car, and that they were later together in the same automobile which was carrying stolen goods, lends corroboration to Lee's testimony that the two participated in a common design to carry out a burglary.

Further, the testimony of defendant and his fiancée, Susan Daniels, regarding disposition of the stolen television sets is corroborative of Lee's testimony. Lee testified that defendant assisted in the burglary because defendant needed money for his kids and for his fiancée's trailer payments. Defendant's fiancée, Susan Daniels, testified that she and defendant sold one of the stolen television sets because of a need

for money. Defendant admitted that he lied about the source of the television sets both when he explained his possession to one of Daniels' friends on the night of the burglary, and later when he and Daniels undertook to sell one of the sets. As a final matter, defendant corroborated Lee's account of how he and defendant fled from their Newton residence when police discovered the stolen television sets. On the entire record, we believe that the independent testimony was sufficient to corroborate the accomplice's testimony and fairly connected defendant to the crime as required by Iowa R. Crim. P. 20(3).

III. Sufficiency of the Evidence. Defendant also asserts that there was not substantial evidence to support his conviction. We disagree.

When sufficiency of the evidence is challenged, we view the evidence in the light most favorable to the State, taking into consideration all evidence in the record. State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). On factual issues, the credibility of witnesses and the weight to be given to their testimony is for the trier of fact. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979).

In this case the court, as the trier of fact, chose to accept the accomplice's testimony, not defendant's. Viewing this evidence in a light most favorable to the State, and construing all reasonable inferences to support the conviction, we conclude that trial court's judgment is supported by substantial evidence.

IV. Ineffective Assistance of Counsel. Ineffective assistance issues ordinarily require an evidentiary and adversary hearing. State v. Poyner, 306 N.W.2d 716, 719 (Iowa 1981); State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980). Such a hearing was not held in this case; we thus conclude raising this issue on direct appeal is premature.

Having found no error, we affirm trial court's judgment.

AFFIRMED.