IN THE COURT OF APPEALS OF IOWA

No. 6-602 / 95-1655

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RICHARD GILBERT CORTEZ,

Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Richard Cortez appeals from judgment and sentence entered following jury trial for first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher M. Wilson, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Defendant Richard Cortez appeals from judgment and sentence entered following jury trial for first-degree robbery. He was identified at trial as one of three people robbing a convenience store. Defendant contends the trial court erred (1) in failing to instruct the jury additional corroborating evidence was necessary in addition to testimony by two accomplices if the jury determined the witnesses against defendant were accomplices, and (2) in failing to submit a special interrogatory asking the jury whether Gail Jackson was an accomplice. We affirm the trial court.

Defendant was charged with first-degree robbery after three masked people entered the Truck-O-Mat in Council Bluffs, assaulted the store attendant, and stole a safe containing over $12,000 in cash and checks. Defendant was alleged to be one of the three people, and also the person who beat the attendant with a long wooden stick.

The attendant who was assaulted sustained head injuries which affected her memory. She could not identify any of the three people. She said the person who beat her wore a ski mask and latex surgical gloves and had dark eyes and dark complexion, but was not a black man. She further testified the person was a man because his arms were "very hairy."

David Murray testified as a witness for the State. He admitted he was one of the three persons entering the business. He testified to the planning of the crime and

also to the activities of the participants afterwards. The trial court instructed the jury that David Murray was an accomplice.

A second witness for the State was Gail Jackson, who defendant contends was also an accomplice. Jackson testified she was present when the crime was planned and the money was divided. She received some of the stolen money and helped conceal the crime. The trial court instructed the jury they could find she was an accomplice.[1] Defendant asked for, but the trial court did not submit, a special interrogatory asking the jury if Jackson was an accomplice.

The jury returned a guilty verdict and defendant was sentenced to an indeterminate twenty-five year prison term.

I. Jury Instructions. Defendant first asserts the trial court did not make it clear that if the jury found Jackson was an accomplice, her testimony could not be used as evidence to corroborate Murray's testimony to find the defendant guilty. Defendant does not complain that Instruction No. 19 was incorrect. Defendant advances the jury

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[1] The trial court instructed the jury, in Instruction No. 19:

An "accomplice" is a person who knowingly and voluntarily cooperates or aids in the commission of a crime.

A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime. If you find Gail Jackson is an accomplice, the defendant cannot be convicted only by that testimony. There must be other evidence tending to connect the defendant with the commission of the crime. Such other evidence, if any, is not enough if it just shows a crime was committed. It must be evidence tending to single out the defendant as one of the persons who committed it.

could have understood the instruction to mean if there were two accomplices then one accomplice's testimony could act as other evidence to corroborate the testimony of another known accomplice. Trial counsel did not raise this at trial. Defendant asserts error is preserved because the court's failure to instruct was prejudicial error.

Error which is not preserved is waived. *See State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). Where the jury could find the only witness against the defendant was an accomplice, it is prejudicial error for the trial court to fail to instruct, even without a request, on the requirement of corroboration. *State v. Larue*, 478 N.W.2d 880, 883 (Iowa App. 1991). In this case the court gave a proper instruction concerning accomplice testimony.[2] The trial court's refusal to fine tune the instruction by saying there must be other evidence even if two accomplices corroborate each other's testimony has been first raised on appeal. Error has not been preserved and has been waived.

II. Special Interrogatory. Defendant argues the court erred in denying his request for a special interrogatory asking the jury if Jackson was an accomplice. He contends pursuant to Iowa Rule of Criminal Procedure 21(2) the court was required to submit the interrogatory on his request.[3]

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[2] Instruction 19 was exactly worded as Uniform Instruction No. 200.4 of the Iowa Criminal Jury Instructions suggests.

[3] Iowa Rule of Criminal Procedure 20(3) states:

"The trial court's decision on instructions will not be disturbed absent an abuse of the trial court's discretion." *State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* The burden of proving an abuse of discretion lies with a defendant. *Id.*

"It is the duty of the trial court, without request therefor, to fairly present the issues and the law of the case to the jury in order that they may have an intelligent conception of the questions for decision." *State v. Gilroy*, 313 N.W.2d 513, 520 (Iowa 1981). We believe the trial court complied with that duty.

Defendant's interrogatory which asked whether Jackson was an accomplice was properly excluded. Instruction 19 clearly stated their must be *other evidence* than accomplice testimony to convict defendant (emphasis added). If the jury found

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> 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.
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> Iowa Rule of Criminal Procedure 21(2) provides:
>
> > [The jury] must also return with the general verdict answers to special interrogatories submitted by the court upon its own motion, or at the request of the defendant in prosecutions where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required.

Jackson was an accomplice they could not convict defendant based solely on her testimony. Likewise, testimony from one accomplice is not sufficient to corroborate the testimony of any other accomplices. *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa App. 1996).

The existence of corroborative evidence is a question of law for the court, but fact for the jury. *State v. Ware*, 338 N.W.2d 717, 718 (Iowa 1983). Corroborative evidence need not be strong as long as it can fairly be said to connect the defendant with the commission of the crime in some material fact. *State v. Dickerson*, 313 N.W.2d 526, 529 (Iowa 1981). We presume the jury followed the instructions concerning the need for other evidence, if they found Jackson was an accomplice to connect the defendant with the crime. *See State v. Simpson*, 438 N.W.2d 20, 21 (Iowa App. 1989) (generally a jury is presumed to follow its instructions). If the jury did not find Jackson was an accomplice, they must have found other evidence sufficient to corroborate Murray's testimony.

Although the better practice may be for the trial court to give the interrogatory requested, the court did not abuse its discretion in refusing submission. Iowa Rule of Criminal Procedure 21(2) does not make it mandatory for the court to submit a requested interrogatory. It requires the jury to answer special interrogatories submitted by the court or at the request of defendant in three limited situations. *See* Iowa R. Crim. P. 21(2). This rule does not eliminate the discretion of the trial court.

We find no reversible error and find defendant's conviction supported by corroborated substantial evidence.

AFFIRMED.

Vogel, J. concurs; Sackett, P.J. dissents.

SACKETT, P.J. (dissenting)

I dissent.

The trial court erred in denying defendant's request for a special interrogatory pursuant to Iowa Rule of Criminal Procedure 21(2) as to Jackson's status. The State acknowledges error was preserved on this issue.

Iowa Rule of Criminal Procedure 21(2) provides:

> [The jury] must also return with the general verdict answers to special interrogatories submitted by the court upon its own motion, or at the request of the defendant in prosecutions where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required.

Iowa Rule of Criminal Procedure 20(3) states:

> 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.

Under these rules, defendant's requested interrogatory as to Jackson's status should have been given if there was substantial evidence to support a finding she was an accomplice. The State contends there is not.

An accomplice is a person who willfully unites in, or is in some way concerned in the commission of a crime. The general rule for determining whether a witness is an accomplice is if he [or she] could be charged with and convicted of the specific offense for which an accused is on trial. *State v. Johnson*, 318 N.W.2d 417, 439-40 (Iowa 1982), *cert. denied*, 459 U.S. 848 (1982); *State v. Jennings*, 195

N.W.2d 351, 356-57 (Iowa 1972). But something more than mere knowledge that a crime is contemplated, or mere personal presence at the time and place where committed, must be shown in order to make one an accomplice. It must be established by a preponderance of the evidence that a witness was in fact an accomplice. *Id.*; *see State v. Johnson*, 237 N.W.2d 819, 822 (Iowa 1976); *State v. Houston*, 211 N.W.2d 598, 601 (Iowa 1973). "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 [fact finder]." *State v. Sallis*, 238 N.W.2d 799, 802 (Iowa 1976).

The trial court recognized there were facts supporting a finding Jackson was an accomplice. The State admits Jackson was possibly aware of the planning of the crime and she received a small amount of the money from the robbery. Jackson testified on direct examination she was at the home where the robbery was planned but she did not know there was to be a robbery. She admitted on cross-examination she had a good idea there would be a robbery. She admitted she was told to wait with other girls at a motel where the participants came after the robbery and the money was divided and she received money from that robbery and helped conceal the crime.

From Jackson's testimony, contradicted in part on cross-examination, and the circumstantial evidence concerning her presence at the place of planning the crime and dividing the money, the jury could have inferred Jackson helped plan the crime

and was to benefit from it. Her participation may be shown by circumstantial evidence of her conduct. *See State v. Blyth*, 226 N.W.2d 250, 263 (Iowa 1975). The question of her status was a fact question for the fact finder. *See Sallis*, 238 N.W.2d at 802. I agree with the trial court there was evidence from which the jury could find Jackson an accomplice.

The State urges the trial court properly determined the issue was sufficiently addressed by Instruction No. 19, and because there was corroborating evidence in addition to Murray's testimony, defendant suffered no prejudice.

Instruction No. 19 further compounded the problem. In telling the jury Murray was an accomplice and in giving Instruction No. 19, the trial court did not make it clear to the jury that if Jackson were found to be an accomplice it took more than the testimony of the admitted accomplice, Murray, to corroborate Jackson's testimony. If the jury found Jackson to be an accomplice, it could have understood the instruction to mean they could use Murray's testimony to corroborate Jackson's testimony because Instruction No. 19 does not refer specifically to Murray.

Defendant asked for a special interrogatory on Jackson as an accomplice. The court had a duty to submit it. While I agree with the State there was other corroborating evidence, the sufficiency of that evidence is a question of fact for the jury. *State v. Doss*, 355 N.W.2d 874, 880 (Iowa 1984); *State v. Larue*, 478 N.W.2d 880, 883 (Iowa App. 1991).

The jury could have found the only witnesses who testified against defendant were accomplices to the crime. I, therefore, would reverse and remand for a new trial. *See Larue*, 478 N.W.2d at 883.