IN THE COURT OF APPEALS OF IOWA

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No. 1999-250 (9-480) / 98-1236
Filed November 10, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RODNEY LEE CORMENY,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, L. Vern Robinson, Judge.

The defendant appeals his conviction and sentence, following a jury trial, on two counts of third-degree burglary and one count of conspiracy. Defendant argues the district court erred in: (1) denying his motion for directed verdict on all three counts because there was insufficient evidence to corroborate the testimony of his accomplice, Brian Shepherd; and (2) denying his motion for new trial. **AFFIRMED.**

Nancy L. Burk, Toledo, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Brent D. Heeren, County Attorney, and Richard R. Vander May, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, J.J., but decided by Sackett, C.J., and Mahan and Miller, J.J. Zimmer, J. takes no part.

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SACKETT, C.J.

Defendant Appellant Rodney Cormeny appeals his conviction following a jury trial of two counts of third degree burglary and one count of conspiracy to commit burglary. Defendant contends that the only evidence convicting him was the testimony of an accomplice and it was not corroborated. Defendant further contends his trial attorney was not effective. We affirm.

Defendant's charges stem from a break-in at the King Tower Cafe in Tama and the Subway Restaurant in Toledo during the early morning hours of July 25, 1997. At about 3:35 that morning Officer Rodney Drummer of the Tama Police Department saw a car pull out of a parking lot of Austin Motors, a car dealership in Toledo, Iowa. The officer decided to do an investigatory stop because it was an unusual time for a car to be in that particular parking lot and he thought that the car was stopped at the entrance of the lot for a long time before pulling out.

On stopping the car Officer Drummer saw there were four passengers, including defendant. The driver was asked what they were doing in the Austin Motors parking lot and responded they had been at Meskwaki Casino, and on their way home stopped at Kwik Star for snacks. The driver said on leaving Kwik Star he had decided to drive through the car lot to look at a used car he had noticed earlier.

The Officer, with the driver's consent, searched the interior of the car and its trunk. He found a crowbar among the miscellaneous tools in the trunk. The crowbar

was grey, two or three feet long, and had some fresh marks or scratches on it that were still shiny and not rusted over. The crowbar was also bent. When questioned about the marks, the driver replied that the crowbar was recently used to straighten out an auto body part. The officer accepted this as an explanation that seemed consistent with the condition of the crowbar. He seized nothing from the car at the time.

Later that morning two burglaries were reported. Between 6:00 and 7:00 a.m. Officer Drummer was dispatched to the King Tower Cafe in Tama to take a burglary report at that business. At 7:50 a.m. the employees of the Subway Restaurant in Toledo discovered that the back door of the restaurant was open when they came to work. Investigations of the crimes concluded that a crowbar or similar tool was used to enter both establishments.

On July 28, 1997 Officer Drummer with other officers sought to retrieve the crowbar from the driver of the car. The driver produced a crowbar that Officer Drummer did not believe to be the same one he saw on July 25th. Officer Drummer testified the crowbar he got from the driver was rusty and had no paint as did the crowbar he saw in the trunk three days before.

In August 1997 one of the passengers, Brian Sheperd, gave a statement to police implicating all four of the men in the car in the two burglaries. All men were charged with two counts of burglary in the third degree and one count of conspiracy

to commit the crime of burglary. Sheperd entered into a plea bargain with the state and testified as a state's witness at trial.

Defendant and the two remaining co-defendants were tried before a jury on May 12 and 13, 1998. At the close of the state's case, defendant moved for a directed verdict on all three counts. In support of defendant's motion, defense stated that "defendant cannot be convicted only by that testimony". At the close of all the evidence defendant renewed his motion. Both motions were overruled. Defendant was found guilty on all three counts.

Defendant filed a Motion for a New Trial claiming the verdict was contrary to law in that no evidence other than the statement of an accomplice directly linked him to the burglaries or showed that he was involved either in the burglaries or a conspiracy to commit these crimes. The court denied this motion and cited *State v. Ellis*, 578 N.W.2d 655 (Iowa 1998 as the basis for its denial.

Defendant claims that he was convicted on all three counts on the uncorroborated accomplice testimony of Brian Sheperd. The state contends that defendant failed to preserve error of this issue, but even if preserved, that there was sufficient corroboration of the accomplice's testimony.

Iowa R. App. P. 14(a)(2) provides an appellant must state how the issue was preserved for review, with references to the places in the record where the issue was raised and decided. The state claims that defendant's brief does not contain a

statement as to where error was preserved. It further contends that failure of defendant to state, argue or cite any authority in support of an issue may be deemed waiver, citing *Luke v. State*, 465 N.W.2d 898, 903 (Iowa App. 1990). In *Luke*, no authority was cited for defendant's claim concerning the method for obtaining evidence regarding an ineffective assistance of counsel claim.

Defendant's brief sets forth the means by which the errors were preserved along with references to the record where this occurred. It also sets forth the authority which serves as the basis for his claims. We hold that error was preserved by defendant's Motion for Directed Verdict and by his Motion for a New Trial where the absence of corroboration of accomplice testimony was alleged. The state's argument to the contrary is without merit.

We address defendant's claim the trial court erred by overruling the motion for a directed verdict because the evidence corroborating the accomplice's testimony was not adequate to create a question for the jury.

Under Iowa R. Crim. P. 20(3), which was codified in Iowa Code Section 782.5:

> "a conviction cannot be had upon the testimony of an accomplice. . . 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."

The existence of corroborating evidence is a legal question for the court. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). Once the legal adequacy of the corroborating evidence is established, the sufficiency of the evidence is for the jury. *Id.*, *State v. Brown*, 397 N.W.2d 689, 695 (Iowa 1986). Because defendant challenges the trial court's determination that corroborating evidence existed to warrant submission of this case to the jury, our review is for the correction of errors of law.

In considering a motion for a directed verdict, the general principles are that the evidence is viewed in the light most favorable to the state regardless of whether it is contradicted, and every legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence, *State v. Cuevas*, 281 N.W.2d 627, 629 (Iowa 1979).

Evidence asserted as corroborative of an accomplice's testimony will be sufficient to create a jury question if that evidence corroborates some material aspect of the accomplice's testimony tending to connect defendant to the commission of the crime and thereby supports the credibility of the accomplice. *Brown,* 397 N.W.2d at 694-695. Corroborative evidence may be direct or circumstantial. *State v. Vesey*, 241 N.W.2d 888, 890 (Iowa 1976). It need not go to the whole of the accomplice's testimony or every material fact, *Id.*, nor does it need to be strong or be entirely inconsistent with innocence. *Bugely*, 562 N.W.2d at 176.

Defendant contends that the only corroboration of Sheperd's story is that the defendant and the accomplice were together in Toledo on the night the burglaries happened and that a crowbar not actually linked to the crimes is missing. He argues that the corroborative evidence was insufficient to create a jury question because Shepard's testimony regarding defendant being with him that night only supports the notion that defendant had the opportunity to commit the crime and that his other testimony and the evidence provided to corroborate it raised no more than a suspicion of defendant's guilt. In support of his argument defendant cites *Vesey*, 241 N.W.2d at 891 where it was stated that corroborative evidence is insufficient if it merely supports accomplice testimony tending to show a defendant's opportunity to commit a crime. Defendant also relies on *Vesey* for the proposition that corroborative evidence must support testimony raising more than a suspicion of guilt. *Id.*

Specifically, defendant argues that no employee of the Subway Restaurant had any information that tied him to that burglary. In addition, the officer who investigated the Subway Restaurant burglary could not confirm the type of tool used to pry the door, although he believed it to be either a crowbar or any other bar that has any strength at all. Defendant asserts that nothing in the car stopped by Officer Drummer tied its occupants with the burglaries other than the crowbar that had been used recently.

The state contends that Sheperd's testimony was corroborated by several of the state's witnesses. Sheperd's testimony is as follows: He was with defendant and the other co-defendants on the night of July 24, 1997 and the early morning of July 25, 1997. Sheperd had gone to defendant's home and met defendant and the other co-defendants there. While they were at defendant's house they discussed breaking into the Subway and King Tower Restaurants. Sheperd had suggested that they burglarize these restaurants because he knew the closing procedures and thus, where the money was kept.

At around 2:00 a.m. the men then got into co-defendant Eugene Lester's car and went to the Subway Restaurant. Lester parked the car behind a nearby hotel. The men retrieved a crowbar and screwdriver from the trunk of Lester's car and unscrewed the motion light that was above the restaurant's back door. Sheperd knew that the Subway did not have an alarm. Defendant and Sheperd used a crowbar and screwdriver to pry the door open. After gaining entry Sheperd showed defendant where the cash was kept. Defendant removed a red tackle box containing cash from the refrigerator. They did not check the cash register because Sheperd believed that it was empty. Sheperd and defendant were in the restaurant for about thirty seconds.

After the Subway burglary the men headed out of town on a gravel road where they ditched the box. En route, defendant split the money between the four men. After dividing the money, they decided to break into the King Tower Cafe. Before

doing so Lester drove to the Kwik Star convenience store where some of the men bought snacks.

At approximately 3:30 a.m. the group arrived at King Tower. Defendant got out of the car with a screwdriver in his possession and tried to open the front door. It did not open, so he walked to the back of the cafe. Meanwhile, the other three men waited ten or fifteen minutes for defendant in the car. Defendant returned and they decided to break into a Dairy Queen down the street from King Tower.

On the way to the Dairy Queen they missed the road to go behind it and pulled into the car dealership lot next door. Sheperd saw two police cars, so they decided not to go ahead with breaking into the Dairy Queen. The car was stopped by Officer Drummer shortly thereafter.

Other evidence included testimony of an employee of Subway who was working the night of July 24, 1997, regarding the procedure for closing the store. One of her duties that night was to put cash from the day's receipts in a red tackle box that was kept in the refrigerator. She testified that $100.00 is left in the cash register for the next shift. She also noted that the restaurant is not equipped with a burglar alarm.

Kandi Nickolish, a Subway manager, testified that upon arriving for work on July 25, 1997 she saw that the back door of the restaurant was open. She noticed it had been broken open and the dead bolt and knob lock were broken and the red money box that was kept in the cooler was gone. She looked in the cash register and

the money was still there. She verified that the restaurant had a motion light above the back door.

Wayne Martin, the Toledo police chief, testified that he received a call regarding the Subway burglary. Arriving, he saw two pry marks on the back door. Upon examining these marks, he believed that a crowbar or Stanley flat bar was used to open the door. He also stated that the cash register was left undisturbed.

Officer Drummer testified that he was able to identify defendant as one of the men in Lester's car when he stopped it at about 3:35 a.m. At about 7:00 a.m. he investigated the King Tower burglary. When he arrived there he saw that the door on the northeast side of the cafe had been pried open. Inside the cafe papers were scattered about, a bank bag was missing from the register, and an envelope containing money was missing from beneath the register.

The state's witnesses corroborated Sheperd's testimony about the Subway burglary as to the manner of entry, location and description of the money box, the unscrewing of the motion light above the back door, and the lack of an alarm. The corroboration of Sheperd's testimony concerning the details of the first burglary are sufficient to lend it credibility. Regarding the King Tower burglary, Officer Drummer corroborated Sheperd's testimony as to the manner of entry and placed defendant near the scene of the crime with Sheperd and the two co-defendants shortly after it occurred. Lester's statement to Officer Drummer that the men had been at the Casino

before coming to Tama has no corroboration. These facts give Shepard's testimony credibility. The question is whether they corroborated defendant's participation.

This is a case where the evidence shows defendant had the opportunity to commit the crime. As was stated in *State v. Nepple,* 211 N.W.2d 330, 332 (Iowa 1973), there may be a combination of circumstances which entitles the jury to reach the conclusion that the accomplices' testimony has been corroborated. *Nepple* involved the thefts of pigs from various farms. The stolen pigs were later sold at auction. The jury did not believe defendant's testimony that he had picked up the sale items from his brother's farm. The court held that there was sufficient corroboration of the two accomplices' testimony about defendant's involvement in the thefts in that defendant was found with the accomplices in a red pickup truck forty miles from home, on gravel roads, and in vacant farmyards. Defendant was also identified as being in a vacant farmstead where pigs were kept in the same county from which the pigs were stolen and on the same evening. His excuse for being there to look at trees for sale was not believed because he was not in the tree business.

The court in *Nepple* acknowledged that facts from case to case vary so greatly that prior decisions have little value as precedents and that each case must be judged on its own facts. *Nepple,* 211 N.W.2d at 332. However, it is similar enough to the present case to be useful. Here, as in *Nepple,* the accomplices' testimony was corroborated by evidence showing defendant's association with the accomplices,

proximity to the crime scene, and additional suspicious circumstances suggestive of defendant's participation in the offense, such as the presence of Lester's car in an auto dealer's lot at 3:35 in the morning and Officer Drummer's finding of a crowbar with fresh marks on it in the trunk of the car.

Defendant contends that the finding of the crowbar in Lester's car was coincidental and thus, did not tie the occupants of the car with the burglaries. He relies on *State v. Fletcher*, 68 N.W.2d 99 (Iowa 1955) to support his claim. In *Fletcher,* during the burglary of a feed store, metal drawers in a safe which contained cash were forced open by a steel punch. An accomplice testified that on the night of the burglary, a co-defendant had placed the punch and certain other tools in a satchel and brought it, a regular hammer and a sledge hammer to the burglary. The satchel and ordinary hammer were found in defendant's car about three months later. At this time, the sledge hammer was also found in defendant's yard. Other than this evidence, there was nothing that connected defendant to the crime other than the accomplice's testimony that defendant and another man had gone with him to the feed store and that defendant had sat in the car while the other two men broke into the store, opened the unlocked safe, forced the metal drawers open, and took the money from the drawers.

The court found that the accomplice's testimony was not sufficiently corroborated because there was nothing outside of his testimony which tended to

show that defendant participated in the crime. The satchel, regular hammer and sledge were only connected with the burglary through the accomplice's testimony. The court reasoned in holding that these tools were not sufficiently linked to the crime, that although these instruments could have been used in the burglary, they had legitimate uses that were much more numerous. *Fletcher*, 68 N.W.2d at 101. The court added that the accomplice testified that the other defendant had left the sledge hammer on defendant's premises. It was also believed to be significant that defendant was unable to drive and that both the accomplice and the co-defendant had frequently driven defendant's car.

The case at bar is distinguishable from *Fletcher* in that unlike that case, the crowbar with fresh marks on it was seen by Officer Drummer in a co-defendant's car relatively close in time to when the burglaries occurred. Investigators also identified a crowbar as the type of tool that was actually used in the burglary. Defendant's association with the accomplice and the co-defendants was not based on Sheperd's testimony alone, but was corroborated by Officer Drummer who was able to identify him as one of the passengers in Lester's car.

Defendant also asserts that the corroborating evidence of the crowbar is weak because other than the pry marks in the door of the Subway Restaurant, no other evidence was found in this burglary and that the type of tool used to pry the door was unconfirmed.

In *State v. Cuevas*, 281 N.W.2d 627 (Iowa 1979), defendant argued that corroboration evidence was weak under the circumstances because the state was unable to show that the handgun, which one of defendants had when she was arrested, was actually the murder weapon. The court rejected this argument saying that it disagreed with defendant's assessment of the quality of the corroborative evidence, because the jury could have concluded that defendants were in possession of the murder weapon the entire night. The court then found that this evidence was sufficient to corroborate the accomplice's story. In the present case, the jury also could have found that the crowbar found in Lester's trunk was used to pry open the back door of the Subway restaurant.

Similarly, in *Bugely*, 562 N.W.2d at 176, the court held that defendant's possession of a ring taken from a burglarized residence within one-half hour of the crime was corroborative. Even though defendant had an innocent explanation for having the ring, the court said that this went to the sufficiency of the evidence and was thus, a jury question, and as such, did not detract from the existence of corroborating evidence. Accordingly, in the instant case Lester's explanation of the recent use of the crowbar would be for the jury's consideration.

Therefore, we hold that there was adequate evidence to corroborate the accomplice's testimony so that a jury question was created concerning the burglary charges.

This evidence is also sufficiently corroborative of the accomplice's testimony to generate a jury question regarding the conspiracy charge. Although this evidence alone would not be enough to convict, it is such that it lends credibility to the testimony. The jurors would then be free to believe the accomplice's testimony concerning discussions at defendant's house about doing the burglaries and the actions of defendant in carrying out their plan.

In light of the above, we hold that the district court did not err in denying defendant's motion for directed verdict.

Defendant next contends the trial erred in denying his motion for a new trial in that finding him guilty of two counts of burglary and conspiracy to commit burglary were contrary to the evidence presented at trial.

Iowa R. Crim. P. 23(2)(b)(6) provides that the court may grant a new trial when the verdict is contrary to law or the evidence. In *State v. Ellis,* 578 N.W.2d 655, 659 (Iowa 1998), it was held that "contrary to ... the evidence" in the rule means "contrary to the weight of the evidence." *Id.* "Contrary to the weight of the evidence" refers to a determination by the trier of fact that "a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* at 658. The court made it clear that the contrary to the weight of the evidence standard was not the same as the sufficiency of the evidence standard as had been previously held.

In applying the weight of the evidence standard, the court said that if the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. *Id.* at 658-659.

The court stated further that:

> "The motion for new trial is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." *Id.* at 659.

The present case is not one of those cases in which the weight of the evidence heavily goes against the verdict convicting defendant of burglary. The total evidence presented against defendant was not against the verdict which found defendant to be guilty of committing the burglaries of the Subway and King Tower restaurants. The testimony of the accomplice, Brian Sheperd, which was corroborated by testimony of state's witnesses concerning specific details of these crimes, along with Officer Drummer's identification of defendant in a co-defendant's car near the location and within minutes of when the second burglary occurred and his observation of a crowbar with fresh marks on it, which could have been used in one of the burglaries, was not outweighed by any other evidence in the record consistent with defendant's innocence.

Defendant argues, citing *State v. Simms*, 239 N.W.2d 550 (Iowa 1976), that if the evidence relied upon by the prosecution to corroborate the accomplice's testimony is circumstantial, the court must find whether the evidence is sufficient for the jury to find those circumstances entirely consistent with defendant's guilt. This was a case which was decided under the old sufficiency of the evidence standard and is thus not applicable here.

Defendant contends that the verdict finding him guilty of conspiracy to commit burglary was contrary to the evidence because no evidence of a conspiracy was presented to the jury other than Sheperd's accomplice testimony. Defendant argues specifically that there was no evidence of an agreement by defendant or anyone else to commit the two burglaries.

The element of agreement is defined in Iowa Code section 706.1:

> 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 ...*
>
> b. *Agrees to aid another in the planning or commission of the crime ...*

A conspiracy involves concert action; the gist of the crime is an unlawful agreement with the intent to do the thing charged in the indictment. *State v. Paden*, 202 N.W.2d 105, 106 (Iowa 1925).

An agreement may be shown by circumstantial evidence such as conduct of the alleged participants or evidence of a scheme. *State v. Larue*, 478 N.W.2d 880, 882 (Iowa App. 1991). Direct evidence is not required. *State v. Ross*, 573 N.W.2d 906, 914 (Iowa 1998). An agreement may also be inferred from the surrounding circumstances. All legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict. *State v. Mapp*, 585 N.W.2d 746, 748 (Iowa 1998). If it is proved that the defendants, with a view to the attainment of the same purpose, pursued such purposes by their acts -- often by the same means, each performing some part thereof - -the jury will be justified in concluding that they were engaged in a conspiracy to effect a common object. *State v. Schreck*, 1 N.W.2d 690, 693-694 (Iowa 1942).

Here, it can be inferred from the circumstances that defendant agreed with Sherperd and the other to either commit the burglaries or assist in doing so. Sheperd testified that defendant and the other men talked about doing the burglaries for at least an hour. They went to Tama/Toledo for the purpose to get money. When they got to the Subway Restaurant they all got out of Lester's car, took a crowbar and screwdriver out of the trunk and walked up to the building. The other two men waited in the car while defendant and Sheperd went inside and took the cash box. Then they went together to the outskirts of town, ditched the box and came back. They divided up the money on the way back to town. They drove around for awhile to try to figure

out someplace else to burglarize. It was decided to break into the KingTower Cafe while they were driving around. At King Tower defendant went to the building while the other men waited in the car.

This testimony was corroborated by Officer Drummer's testimony that he had found defendant in Lester's car with the other men near the scene of the second burglary close in time after the time Sheperd said that burglary was committed, and the presence of the recently used crowbar in the trunk.

There was no evidence that was contrary to the implication that defendant was involved in a conspiracy. Consequently, under the weight of the evidence analysis, the verdict must stand.

Therefore, we hold that the trial court properly exercised its discretion by denying defendant's motion for a new trial and that the verdict was not contrary to the evidence.

Defendant next contends his defense counsel was ineffective in protecting his rights and providing him with an adequate defense.

Ineffective assistance of counsel claims are generally based on the Sixth and Fourteenth Amendments of the United States Constitution, and article 1 section 10 of the Iowa Constitution, which guarantee criminal defendants effective assistance of counsel. *Collins v. State,* 588 N.W.2d 399, 401 (Iowa 1998). Our standard of review on this constitutional issue is de novo, *State v. Havernann,* 516 N.W.2d 26, 28 (Iowa

App. 1994). Ordinarily, we preserve such claims for post conviction relief proceedings. When the record is adequate to decide the issue, however, we will resolve ineffectiveness of counsel claims on direct appeal. *State v. Arne,* 579 N.W.2d 326, 329 (Iowa 1998).

We determine that the record before us is sufficient to allow us to address defendant's claims on direct appeal.

Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. In doing so, he must overcome the strong presumption that counsel performed competently, *Collins,* 588 N.W.2d at 402. The ultimate test is whether under the entire record and totality of circumstances, counsel's performance was within the normal range of competency. *Id.* In evaluating this, the question is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *State v. Risdal,* 404 N.W.2d 130, 131 (Iowa 1987).

To establish prejudice defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Collins,* 588 N.W.2d at 402.

First, defendant alleges that counsel should have either filed a motion in limine before trial or made an objection at trial to prevent admission of references to possible

types of burglary tools used to commit the burglaries. He argues that this evidence was not relevant because there was no direct connection made between the crowbar observed in Lester's trunk and the burglaries. Defendant believes that this evidence was more prejudicial than probative in weight because the crowbar referred to by the state's witnesses was never produced at trial and its connection to the burglaries was only speculative.

The test for relevancy is whether evidence offered would render the desired inference more probable than it would be without such evidence. *State v. Harris*, 589 N.W.2d 239, 243 (Iowa 1999). Here, the discussion about possible types of burglary tools was relevant in order for the jury to be able to consider whether the crowbar found in Lester's trunk could have been used in the burglary. The crowbar did not have to be specifically tied to the defendant for this purpose. Consequently, if counsel had brought a motion in limine or objected to the admission of this evidence, it would have been overruled. As such, the absence of counsel bringing the motion or making the objection would not have changed the outcome of the trial. Accordingly, we hold that counsel did not fail to perform an essential duty in this regard and that defendant was not prejudiced as a result.

Second, defendant believes that counsel should have investigated and found witnesses who could have substantiated defendant's alibi that the four men had been at the Meskwaki Casino earlier in the evening hours on the night of the burglaries.

However, defendant did not claim that there actually were any such witnesses. In light of this, there was a good chance that no alibi witnesses would be found, so that even if counsel had done an investigation, there was a reasonable probability that the outcome of the trial would not have been different. Again, we hold that counsel did not fail to perform a basic duty and there was no resulting prejudice.

Third, defendant asserts that counsel should have filed a motion to sever because the simultaneous presentation of the state's cases against all three co-defendants could have easily lead the jury to apply the testimony and evidence presented to all three men. Specifically, defendant claims that if the trial had been severed, he would have been able to challenge the admissibility as well as the relevancy of the admission of the crowbar as it relates to him. However, defendant would have been able to make these objections despite whether or not the trial was severed. In addition, the crowbar was as relevant to the defendant as well as the other co-defendants because they were all in the car in which the crowbar was found, near the scene of the burglary within minutes after it occurred. We hold that counsel was not obligated to move for severance, and that the lack of such motion was not prejudicial.

AFFIRMED.