

IN THE COURT OF APPEALS OF IOWA

FILED

APR 20 1988

CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM GILFORD WITTER,
Defendant-Appellant.

Filed April 20, 1988

7-529
86-1339

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Appeal from the Iowa District Court for Polk County (No. CR 30791) -
Richard A. Strickler, Judge.

The defendant appeals his second-degree murder conviction. **REVERSED.**

Patricia M. Hulting of Roehrick, Hulting & Moisan, Des Moines, for
defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney
General; D. William Thomas and Catherine H. Thune, Assistant County Attorneys,
for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

PER CURIAM

Defendant, William Gilford Witter, appeals his second-degree murder conviction. We reverse on the ground there was insufficient evidence to corroborate the testimony of defendant's alleged accomplices that he had participated in the robbery and murder of the victim.

Defendant was charged with first-degree murder. At trial, two of his alleged accomplices testified as to defendant's role in the crime. The State introduced a screwdriver seized from defendant's residence. The State's expert testified the screwdriver

could have produced the markings, the tool markings on the doorways where entry [to victim's house] was gained. However, I felt that there was lacking individual characteristics on the items from the door to allow me to positively identify this screwdriver as having produced those marks.

The screwdriver found at defendant's residence was a three-eighths-inch Stanley tool with a black and red handle.

Two witnesses testified they saw a white man with the accomplices on the night of the incident in question.

Iowa Rule of Criminal Procedure 20(3) provides:

3. Corroboration of accomplice of person solicited. 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.

Corroborating evidence serves two purposes: (1) it tends to connect the accused with the crime charged; and (2) it serves as a counterweight against the dubious credibility of the accomplice whose testimony may be suspect based on the self-interest of focusing blame on the defendant. State v. Berney, 378 N.W.2d 915, 918 (Iowa 1985). Corroborative evidence need not be strong as long as it connects the accused with the crime and supports the credibility of

the accomplice. Id. Any corroborative evidence tending to connect the defendant to the commission of the crime supports the credibility of the accomplice and is sufficient. State v. Doss, 355 N.W.2d 874, 879 (Iowa 1984). Every material fact need not be confirmed nor all the elements of the crime charged need be confirmed by corroborative evidence. Id. The only requirement is that the accomplice's testimony be supported in some material fact tending to connect the defendant to the crime charged. Id.

Viewing the evidence in a light most favorable to the State, State v. Klindt, 389 N.W.2d 670, 676 (Iowa 1986), we find as a matter of law there was not sufficient evidence to corroborate the testimony of the accomplices.

The fact that defendant had a common-type screwdriver at his home and that two witnesses saw a white man with the accomplices, did not support any material fact connecting defendant to the crime. One accomplice testified the screwdriver used in the crime was black and yellow; the screwdriver taken from defendant's home was black and red. The witnesses could not identify defendant as the white person they saw with the accomplices on the night the crime occurred.

We hold the trial court erred in overruling defendant's motions for directed verdict and new trial.

REVERSED.

Oxberger, C.J., concurs; Donielson, J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. I find that the State produced sufficient evidence which "tended to connect" the defendant with the crime. State v. Doss, 355 N.W.2d 874, 879 (Iowa 1984). Corroborative evidence may be circumstantial, and it need not be strong. State v. Brown, 397 N.W.2d 689, 695 (Iowa 1986). The corroborative evidence need not be established beyond a reasonable doubt. See State v. King, 256 N.W.2d 1, 10 (Iowa 1977).

I find there was sufficient evidence to corroborate the testimony of the accomplices. The friendship between accomplice Newman and defendant was corroborated by several people. Newman's testimony regarding the events of the day of the murder was corroborated by a pastor, Dani Rhiner, defendant's mother's "boyfriend," a Kwik Shop employee named Teresa Dixon, who noticed that there were "a couple white guys" and "one or two blacks" with Newman, and Newman's brother, Larry Botts, who testified that on the night of the incident he saw that Newman's car was full with codefendant Mikesell in the front seat and two blacks and one white in the back seat. Newman testified regarding the procurement of the gun from Glenn Davis used in the murder; this testimony was corroborated by Davis's friend, Ted Beveridge. Newman's testimony that wire cutters were used to cut decedent's telephone lines was corroborated when tin snips were recovered from Newman's car. Newman's testimony regarding an unsuccessful attempt of getting into a garage window was corroborated by discovery of a removed storm window. Newman testified a screwdriver was used in obtaining entry to the residence; a screwdriver was found in defendant's home which could have produced the marks made on the decedent's door in order to gain entry. Newman's testimony that the door was kicked down was corroborated by finding shoeprints on the door. In addition, accomplice White's

testimony regarding the specific directions taken to get to decedent's home was corroborated by a police officer.

While I recognize the foregoing recitation of corroborative evidence does not wholly relate to defendant's connection to the crime, the fact Newman's testimony was corroborated on several other key issues I feel is indicative of his credibility as a witness. The credibility of the witnesses remains in the judgment for the factfinder. State v. Schrier, 300 N.W.2d 305, 309 (Iowa 1981). As such, I feel it was for the jury to weigh the evidence regarding the discrepancy of the color of the screwdriver. The fact the corroborating witnesses could not positively identify the defendant goes to the weight of the evidence. See State v. Graham, 291 N.W.2d 345, 350 (Iowa 1980) (complaint that corroborating witnesses could not identify defendant goes to weight of the testimony). The jury was instructed on the standard it was to apply in relying on the accomplice testimony; it was for them to decide the strength of the corroborative evidence. The existence of corroborative evidence is a question of law for the court; the sufficiency of corroborative evidence is a question of fact for the jury. Doss, 355 N.W.2d at 880.

As the court stated in State v. Willman, 244 N.W.2d 314, 315 (Iowa 1976), "[t]here may be a combination of circumstances, singularly unpersuasive but in totality sufficient, to entitle a jury to conclude the accomplice's testimony has been corroborated." I find such is the case here.

Furthermore, even accepting the majority's view there was not sufficient corroborative evidence, in United States v. Runge, 593 F.2d 66, 71 (8th Cir. 1979), cert. denied, 444 U.S. 859, 100 S. Ct. 123, 62 L. Ed. 2d 80, the court stated that an accused may be convicted upon the uncorroborated testimony of an alleged accomplice if the factfinder believes the testimony of the accomplice proves the guilt of the defendant beyond a reasonable doubt. I find that

such is the situation in this case. Accomplice Newman testified extensively and with clarity regarding the sequence of events leading up to the murder, including defendant's involvement.

Viewing the evidence in a light most favorable to the State, Schrier, 300 N.W.2d at 306, I would affirm the conviction.