IN THE COURT OF APPEALS OF IOWA

No. 3-305 / 92-1185

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

CHAD COCKING,

Appellant.

Appeal from the Iowa District Court for Story County, Mark A. Cady, Judge.

Cocking appeals from being found guilty of burglary in the second degree following a jury trial. **AFFIRMED.**

William J. Talbot of Parker Law Firm, Nevada, for appellant.

Bonnie J. Campbell, Attorney General; Robert P. Ewald, Assistant Attorney General; Mary E. Richards, County Attorney; and Michael Houchins, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

000748

DONIELSON, P.J.

Chad Cocking, Greg Cory, and Ben Snyder, three juveniles, discussed how they might take part in Cory's plan to burglarize the Casey's store in Slater. Cory was a former employee and knew how to deactivate the burglar alarm and where the combination to the safe was kept. His girl friend, Stacy Langstraat, was a current employee and had a key to the store. The plan was to steal the key, enter the store, turn off the alarm, take the money, reactivate the alarm, exit, and throw a brick through the front door to make it appear as if forced entry had been gained.

A few days later, Cocking told Rusty Reese that he and Cory were planning to burglarize the convenience store.

On Saturday, September 7, 1991, Cory's girl friend gave him a ride home and the next day discovered her key to Casey's was missing. Around midnight on September 8, Cory, Cocking, and Snyder met to discuss final plans for the burglary. Snyder, however, decided not to participate and went home.

On Monday morning, it was discovered Casey's had been burglarized. The alarm had not gone off, although the window in the front door had been smashed with a brick. About $5000 had been taken from the safe.

At school, Snyder heard about the burglary and at lunch time went to Cory's house where he met Cory and Cocking. He saw a large amount of cash in a paper sack and his friends told him they had committed the burglary. Snyder

000749

saw Cocking receive some of the money and put it in his wallet.

The next Saturday, Cocking, Cory, Snyder, and another juvenile checked into the Des Moines Marriott. Cocking signed for the room. He also signed the receipt for a limousine the boys hired to drive them around. On September 16, Cocking purchased almost $300 worth of car stereo equipment.

A few weeks later, Cory and Cocking told Cocking's girl friend, Elisa Herrera, and Heather Swanson that they had burglarized Casey's.

The State charged Cory and Cocking with second-degree burglary. After a hearing, a juvenile court referee sustained the State's motion to waive jurisdiction in juvenile court. The court also granted a motion to sever trials.

The State filed a pretrial motion to adjudicate law points. The State conceded Snyder was an accomplice or solicited person and requested a ruling on whether there was sufficient evidence to corroborate his testimony. See Iowa R. Crim. P. 20(3). After a hearing, the court as a matter of law ruled that there was sufficient evidence to support a trial, holding a defendant's own statements may furnish corroboration for the testimony of an accomplice.

After the close of evidence, Cocking objected to the uniform instruction on circumstantial evidence. He prevailed in adding language that:

000750

> [w]here circumstantial evidence alone is relied upon, the circumstantial evidence must be entirely inconsistent with any rational hypothesis of Defendant's innocence and so convincing as to exclude a reasonable doubt that the Defendant is guilty.

Instruction No. 7. Cocking assured the court that the modified instruction was "entirely acceptable."

The jury found Cocking guilty of burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5 (1991) and the court sentenced him accordingly. Cocking appeals.

Defendant (appellant) raises three issues on appeal: first, that the court should have instructed the jury that the State presented only circumstantial evidence at trial; second, that the court should have directed a verdict of acquittal based on the sufficiency of the evidence; and third, that the court should not have instructed the jury on guilt by aiding and abetting. We address each issue in turn.

I. Circumstantial evidence.

We review actions of the trial court for correction of errors at law. Iowa R. App. P. 4. The trial court's decisions on jury instructions will not be upset absent an abuse of the court's discretion. State v. Cunningham, 463 N.W.2d 887, 889 (Iowa App. 1990) (citing State v.

000751

Christensen, 323 N.W.2d 219, 222 (Iowa 1982)). Such abuse will only be found if the discretion is exercised "on grounds or for reasons clearly untenable." Id.

Appellant contends that all the evidence presented at trial was circumstantial and that the court, therefore, should have instructed the jury accordingly. We have carefully reviewed the record on appeal. It contains both direct and circumstantial evidence. The trial court did modify Instruction 7 substantially according to the defendant's request. The modification emphasized and clarified the weight the jury was to give to circumstantial evidence. Defendant stated the instruction as modified was "entirely satisfactory." Since the court could find direct evidence in the record, it properly refused to instruct the jury that the State presented only circumstantial evidence. The court also exercised appropriate discretion in modifying Instruction 7 at defendant's request. We find no error in the court's instruction to the jury.

II. Sufficiency of the evidence.

Appellant next claims that the court failed to direct a verdict of acquittal based on the evidence being insufficient to support a jury verdict. We disagree. In examining the evidence and reviewing motions for directed verdict or motions for a new trial, we view evidence in the light most favorable to the State. State v. Klindt, 389

000752

N.W.2d 670, 676 (Iowa 1986); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

The testimony of an accomplice or a solicited person must be corroborated. Iowa R. Crim. P. 20(3). The corroboration need not be strong, but must "be supported in some material fact that tends to connect the defendant with the crime charged." State v. Aldape, 307 N.W.2d 32, 41 (Iowa 1981); State v. Origer, 418 N.W.2d 368, 370-71 (Iowa App. 1987). "The existence of corroborative evidence is a question of law for the court, but its sufficiency is ordinarily a question of fact for the jury." State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976).

The State conceded before trial that Ben Snyder was a "person solicited as an accomplice." Therefore his testimony must be corroborated. We find ample corroboration in defendant's statements to Heather Swanson and Elisa Herrera to support Snyder's testimony. These statements detailing various aspects of the burglary were correctly understood by the court as statements or admissions, not confessions.

One possible exception is defendant's statement to Elisa Herrera that he and Greg Cory "were responsible for the burglary." But even apart from this testimony, the court properly determined that corroboration existed and the question, therefore, was for the jury. Even if this statement is considered a confession, ample corroboration exists from defendant's other statements to corroborate

000753

this testimony. The court properly refused to direct a verdict of acquittal for appellant.

III. Aiding and Abetting.

Iowa Code section 703.1 states in part, "All persons concerned in the commission of a public offense, whether they directly commit the act . . . or aid and abet its commission, shall be charged, tried, and punished as principals." The statutory distinction between principals and aiders and abettors has been abolished. State v. Garrett, 173 N.W.2d 87, 90 (Iowa 1969); see State v. Wedelstedt 263 N.W.2d 894, 899-900 (Iowa 1978). To charge defendant as an aider and abettor would have been surplusage under section 703.1 We find no error in the court instructing the jury on aiding and abetting.

For the foregoing reasons, we find no cause to disturb the judgment of the trial court. Accordingly, it is affirmed in all respects.

AFFIRMED.