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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed January 24, 1984 143
vs.)
BILLIE LESLIE KIPP,) 3-326 / 68520
Defendant-Appellant.)

Appeal from Dallas District Court - Van Wifvat, Judge.

Defendant appeals his conviction for burglary in the second degree in violation of Iowa Code section 713.3 (1981). AFFIRMED.

Charles Harrington, Appellate Defender, and Faith O'Reilly, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia McCown, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Defendant, Billie Leslie Kipp, appeals his conviction for burglary in the second degree in violation of Iowa Code section 713.3 (1981). Defendant asserts that the evidence of aiding and abetting was insufficient to support his conviction, that the State failed to corroborate the testimony of an accomplice, and that evidence that he threatened and abused his wife was improperly admitted. Defendant also claims that he was denied effective assistance of counsel when his trial counsel elicited testimony concerning prior arrests for intoxication-related offenses and when his trial counsel allowed the State to question witnesses about prior instances of intoxication by the defendant. We affirm.

In the early morning hours of November 19, 1982, members of the police force in Perry, Iowa, responding to a silent alarm, found two men inside the office/cafeteria area of the Perry Sale Barn. The glass door leading to that area had been broken to allow the men to gain entry. Frozen meat and a radio had been removed from their usual places but had not been taken from the office/cafeteria area. The two men who were apprehended inside the sale barn were "Chub" Cannon and Darrell Watts. At the time of the arrest, Watts indicated that a third person was with them and that that person could be found in a car in the parking lot on the west side of the building. Defendant was found in the car and was arrested.

Watts testified at trial that the three of them had spent the day driving around to various small towns in Dallas County drinking whiskey and beer. He testified that the three of them had decided to stop at the Perry Sales Barn to secure some blank counter checks in order to obtain some money. He further testified that he and Cannon went into the sale barn and that the defendant stayed in the car, saying he would "watch" for them. Cannon, the other participant in the burglary, testified that the defendant had been asleep in the car during the trip to Perry while he and Watts were planning the break-in and that they had left the

defendant asleep in the car when they entered the sale barn. Both of defendant's accomplices testified that the reason they had stopped at the Perry Sale Barn was because Cannon, a regular customer at the sale barn, believed it would be unlocked and they could easily obtain the checks.

Our review of this criminal case is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). However, where defendant raises issues involving the violation of basic constitutional guarantees, we make an independent evaluation of the totality of the circumstance. Id.

In order to convict defendant of aiding and abetting, the State must show that he assented to or lent countenance and approval to the criminal act. State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977). The evidence concerning defendant's complicity in the burglary is disputed. One participant, Cannon, testified that the defendant was asleep during the planning and commission of the crime while the other participant, Watts, testified that defendant participated as a lookout. Such inconsistencies are for the jury to resolve. We cannot hold as a matter of law that the testimony of Cannon was more credible than the testimony of Watts. The jury verdict should be upheld if supported by substantial evidence. State v. Freie, 335 N.W.2d 169, 171 (Iowa 1983).

There was substantial evidence that the defendant assented to and furthered the commission of the crime. Watts testified that the defendant was the one who wanted the counter checks and participated in the discussion of how to obtain them. Watts also testified that the defendant agreed to remain in the car and "watch" while the other men went into the building. From this the jury could have concluded that defendant actively participated by serving as a lookout. Another piece of evidence was the testimony of Sergeant Haglund that defendant, when apprehended in the parking lot, asked, "Well, where's my partners?" Furthermore, in weighing the credibility of the two participants, the jury could have considered the testimony of Officer Kline that Cannon maintained after his arrest that the

break-in was planned by Watts and defendant. This assertion by Cannon is inconsistent with his testimony at trial that defendant had no part in planning the burglary.

Defendant contends that he cannot be convicted because there is no evidence that he knew the other two men planned to take anything more valuable than counter checks which are ordinarily given to the public. The jury could have concluded from defendant's proposal to watch for the two men that he knew they intended to engage in illegal activity. Furthermore, we reject defendant's claim that he cannot be convicted because he thought the doors to the sale barn would be unlocked. Whether the doors were locked is irrelevant to the commission of a burglary. State v. Hougland, 197 N.W.2d 364, 365 (Iowa 1972); State v. Perry, 165 Iowa 215, 218, 145 N.W. 56, 58 (1914).

Defendant also asserts in this appeal that the State produced insufficient evidence to corroborate the testimony of Watts. 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.

The evidence which corrobated Watts' testimony was defendant's presence at the scene in a position where he could serve as a lookout without being observed from the roadway. This is sufficient corroboration of the accomplice testimony. See State v. Willman, 244 N.W.2d 314, 315 (Iowa 1976). Defendant's reliance on State v. Vesey, 241 N.W.2d 888 (Iowa 1976), is misplaced. The shortcoming of the State's case in Vesey was not insufficiency of corroboration, but the fact that the accomplice's testimony was not inculpatory of the defendant.

Another issue raised by the defendant is the introduction at trial of evidence of defendant's drinking and threats he made to his wife. Defense counsel objected

to this testimony at trial only on the basis that the State's attorney was leading the witness. The court properly overruled that objection. Since no objection was made to the substance of the testimony, there is no error preserved on this issue for appeal.

Defendant's final argument is that he was denied effective assistance of counsel. We decline to consider this issue at this time. A determination of the adequacy of counsel's performance ordinarily requires an evidentiary adversary hearing. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980). This issue is more properly presented in an application for postconviction relief.

AFFIRMED.

Donielson, P.J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

One cannot be convicted of a crime upon a theory of aiding and abetting unless there is substantial evidence to show he assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission. Guilt may be established by circumstantial evidence. Knowledge is essential, but neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting. State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977); State v. Vesey, 241 N.W.2d 888, 891 (Iowa 1976).

Mr. Louis Hansen, the owner of the Perry Sales Barn, testified that the pen area in the back of the sale barn was not locked because other people needed access to that area. Hansen testified "[m]aybe a man comes along with a load of cattle and he has some down and he would like to unload them and load them back up, so we don't lock it—only on Saturday nights after the sale it's locked." Hansen also testified that the sales pavilion was not locked but that the office/restaurant area was locked.

Both of defendant's accomplices testified that the reason they had stopped at the Perry Sale Barn was because Cannon, a regular customer at the sale barn, believed they could secure counter checks without breaking into the place. Watts, the principle witness relied upon by the State, testified as follows:

> Q. Why did you go to the sale barn?
>
> A. Well, Chub Cannon—Chub thought there might be some checks in there.
>
> Q. How were you going to get these checks?
>
> A. Well, he said usually this place was open. You see, we wouldn't have to break into a place, we would just walk in.

The State contends that the record is clear that defendant actively participated in the burglary. I disagree. The record does engender a jury question on the issue of whether defendant was in fact awake and discussed with Watts and

Canon a plan to obtain counter checks and then "float" some checks for money. There was, however, no evidence presented that the defendant assented to or lent countenance and approval to Watts and Cannon breaking into the office/restaurant area and taking meat and office equipment. At its worst, the evidence taken as a whole shows that the defendant and the other two men planned to write some bad checks.

In the present case, defendant was charged by trial information with aiding and abetting Watts and Cannon in breaking an occupied structure or other place where anything of value is kept with the intent to commit theft and with no right, license, or privilege to do so. See State v. Sangster, 299 N.W.2d 661, 662 (Iowa 1980) (the third alternative of Iowa Code section 713.1 (1981)). After reviewing all the evidence, I would find that there was insufficient evidence that defendant assented to or lent countenance and approval to the acts of Watts and Cannon in breaking and entering the office/restaurant area of the sale barn.