FILED
FEB 24 1982
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed February 24, 1982
vs.)
JAMES ROGER PLOURD,) 2-24
Defendant-Appellant.) 66629

Appeal from Cerro Gordo District Court - Ray E. Clough, Judge.

Defendant appeals from his conviction for robbery in the first degree in violation of sections 711.1 and 711.2, The Code 1981, asserting that evidence was insufficient to corroborate accomplice testimony linking him to the crime. AFFIRMED ON CONDITION AND REMANDED WITH DIRECTIONS.

Philip L. Garland, Mason City, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant appeals from his conviction for robbery in the first degree in violation of sections 711.1 and 711.2, The Code 1981, asserting that evidence was insufficient to corroborate accomplice testimony linking him to the crime. We affirm on condition and remand with directions.

I.

Defendant was charged by information filed on December 10, 1980. Trial was to the court with no witnesses. Defendant stipulated to the admissibility of the minutes of testimony stating, in part, as follows:

> The defense has agreed in part--or I should say in total with the State in regard to the following items: That at a trial there would be sufficient evidence to establish that David Van Horn, Patricia Johnson and Michael Iserman were all coconspirators to the crime in question.

The minutes indicate that all three would testify that defendant was one of two masked men who robbed a couple in their home at knife-point. Defendant is similar in size to the victim's general description of the robbers. Witness Van Horn was, however, merely present during the planning of the robbery and the getaway and the court expressed some doubt as to whether he should be considered an accomplice. In its findings of fact and conclusions of law the court found defendant guilty, stating that the evidence corroborating the testimony of accomplices Johnson and Iserman was sufficient whether or not Van Horn was an accomplice. Defendant was sentenced to prison for a term not to exceed twenty-five years, to run concurrently with a sentence resulting from an unrelated conviction.

II.

On appeal, defendant asserts that the "sole issue concerns the corroborating evidence in this case and whether it was sufficient as a matter of law or as a

matter of fact to connect the defendant to the crime." We do not agree that this is the "sole issue." The defendant assumes that witness Van Horn is an accomplice due to the stipulation quoted in part I where defendant's attorney labeled Van Horn as a co-conspirator. The trial court in its findings of fact never specifically decided whether or not Van Horn was an accomplice. The evidence in the record is unclear as to how much Van Horn actually participated in the planning of the robbery. Even if he can be considered a co-conspirator, the evidence only shows he was present during the preparations and in the car at the scene of the crime. Mere physical presence at the scene of the crime does not make one an accomplice. State v. True, 190 N.W.2d 405 (Iowa 1971). The general rule for determining whether a witness is an accomplice is if he could be charged with and convicted of the specific offense for which an accused is on trial. State v. Johnson, 237 N.W.2d 814, 822 (Iowa 1976); State v. Jennings, 195 N.W.2d 351, 356 (Iowa 1972). The record on appeal is too vague for us to determine whether Van Horn is an accomplice and requires that the case be remanded to resolve this issue.

Evidence is corroborative if it tends to support some material part of the accomplice's testimony, and the statutory requirement is met if it can fairly be said the testimony is corroborated in a material fact tending to connect the defendant with the commission of the crime. State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976); State v. Bissett, 212 N.W.2d 466, 468 (Iowa 1973). If Van Horn is not an accomplice, we would find that the evidence was sufficient to corroborate the testimony of the other two accomplices and link the defendant to the crime. Van Horn's testimony that defendant wore a blue shirt provides a material fact to corroborate the testimony of the other two accomplices and the victim on this point and thereby links defendant to the scene of the crime. However, if Van

Horn is in fact a third accomplice, then there would be insufficient evidence to link defendant to the crime. The only other corroborating evidence, the fact that defendant was of similar height and weight to one of the robbers, would not be sufficient on its own to corroborate testimony of the other accomplices to the crime.

We therefore affirm the trial court on condition that upon remand a determination be made on the existing record as to whether or not Van Horn is an accomplice. If it is determined that Van Horn was an accomplice, then the defendant's conviction must be reversed. If Van Horn was not an accomplice, defendant's conviction is affirmed.

AFFIRMED ON CONDITION AND REMANDED WITH DIRECTIONS.