IN THE COURT OF APPEALS OF IOWA

No. 0-565 / 89-1789

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

EDWARD J. PHILPOTT, JR.,

Appellant.

Appeal from the Iowa District Court for Montgomery County, Keith E. Burgett, Judge.

Defendant appeals from the judgement and sentence entered following his conviction for delivery of a schedule II controlled substance. **REVERSED and REMANDED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Thomas S. Tauber, Assistant Attorney General; and Mark D. Swanson, County Attorney, for appellee.

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

PER CURIAM

Two undercover officers and a confidential informant arranged a drug purchase in a bar. The defendant, Edward Philpott and his live-in girlfriend, Marie Murphy, were both present in the bar. Marie Murphy actually transferred the drugs to the officers and received the payment. Murphy claimed she received the drugs from Philpott and had sold them at his request. Other than Murphy's testimony, Philpott's presence in the bar, and the fact the confidential informant had spoken to Philpott in the bar, there was little evidence connecting Philpott directly to the sale. (The marked money used in the transaction was never found. The informant, Pamela Barnes, could not testify about the substance of her conversation with Philpott because she died before trial, and the conversation was not heard by anyone else. Philpott claimed the conversation was innocent.)

As a result of these events, Philpott was charged with delivery of methamphetamine. A jury found him guilty of that charge, and he has appealed from the resulting conviction.

Philpott notes that much of the evidence against him consisted of the testimony of an alleged accomplice, Marie Murphy. He contends the remaining evidence was insufficient to corroborate this accomplice testimony, as required by Iowa Rule of Criminal Procedure 20(3). This rule provides that:

> A conviction cannot be had upon 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 requirement of corroborative evidence serves two purposes. First, it independently tends to connect defendant to the crime. Second, it supports the credibility of an accomplice whose motives are clearly suspect because of the accomplice's self-interest in focusing blame on the defendant. State v. Berney, 378 N.W.2d 915, 918 (Iowa 1985); State v. Cuevas, 281 N.W.2d 627, 629 (Iowa 1979).

The existence of corroborative evidence is a question of law; the sufficiency of that evidence ordinarily is a question of fact. State v. Doss, 355 N.W.2d 874, 880 (Iowa 1984); State v. Ware, 338 N.W.2d 707, 710 (Iowa 1983). 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. State v. Berney, 378 N.W.2d at 918; State v. Hutchison, 341 N.W.2d 33, 37 (Iowa 1983). Such evidence may be direct or circumstantial, State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976), and need not be strong or confirm each material fact of the accomplice's testimony. State v. Hutchison, 341 N.W.2d at

37. While corroborative evidence must tend to connect defendant to the crime and thus must be inculpatory, it need not be entirely inconsistent with innocence. State v. Vesey, 241 N.W.2d at 890-891.

Murphy testified she saw the defendant have two conversations with Barnes. She further testified that she did not have any substantial conversation with Barnes. In addition, the undercover officers corroborated this testimony stating they also saw the defendant speak to the informant Barnes. But this is the only evidence which is corroborated.

Murphy also testified that the defendant handed her the brown wallet and asked her to take it to the bathroom to make the deal with Barnes and special agent Johnson. While this may be true, neither of the special agents saw the defendant hand the wallet to Barnes and the wallet as well as the marked money were never found. In addition, the agents stated they could not be positive that the informant did not have any type of conversation with Murphy. While they testified they did not believe any substantial conversation occurred between the two they were not positive that no conversation occurred.

The State argues that sufficient evidence was corroborated because it was logical to assume Murphy learned of the informant's desire to purchase drugs from the defendant since the accomplice's testimony was corroborated in that Philpott did have a conversation with

Barnes. We do not believe this is sufficient corroboration. The State failed to show any connection between the defendant and the drugs other than his conversation with the informant. Evidence which merely raises a suspicion that the accused is guilty of the charged crime is not sufficiently corroborative to warrant a conviction. State v. Aldape, 307 N.W.2d 32, 41 (Iowa 1981).

The record is void of any corroboration of Murphy's testimony that 1) she received the pouch containing methamphetamine from the defendant, 2) that she went to the restroom at the defendant's direction, or 3) that she handed the pouch or money received to him after returning from the restroom. We do not find the requisite corroborative evidence and reverse.

The trial court erred in overruling defendant's motion for directed verdict. We reverse and remand for entry of judgment dismissing the charge against the defendant.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Donielson and Habhab, JJ., concur; Oxberger, C.J., specially concurs.

OXBERGER, C.J. (specially concurring)

I concur in the result only.