FILED
MAR 23 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 23, 1982

vs.) 2-20 535
66445

LEE L. BESTMANN,)

Defendant-Appellant.)

Appeal from Woodbury District Court, James P. Kelley, Judge.

Defendant appeals from his conviction for burglary in the second degree in violation of section 713.1 and 713.3, The Code, theft in the first degree in violation of 714.1(1) and 714.2(1), The Code, and operating a motor vehicle without the owner's consent in violation of section 714.7, The Code. REVERSED AND REMANDED.

Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Defendant appeals from his conviction for burglary in the second degree in violation of section 713.1 and 713.3, The Code, theft in the first degree in violation of 714.1(1) and 714.2(1), The Code, and operating a motor vehicle without the owner's consent in violation of section 714.7, The Code. We reverse and remand for a new trial.

Defendant alleges that he was denied due process by the prosecutor's failure to correct a witness's allegedly misleading testimony regarding favorable treatment to be received in exchange for testimony, and that the court should have permitted questioning of an alleged accomplice concerning other crimes which he admitted but for which he received limited immunity in exchange for testimony. He asserts the State violated Iowa R. Crim. P. 5(6) and 13(1) by taking the statements of two witnesses without providing defense counsel the opportunity to be present and cross-examine them. He also asserts that the court should have instructed the jury that the purchaser of the goods stolen by defendant was an accomplice and that the two witnesses for the State were either accomplices or solicited persons whose testimony was not adequately corroborated.

The Farmers Cereal Cooperative in Sloan, Iowa, was burglarized sometime between April 17 and April 18, 1979, and forty-six cases of Sencor herbicide, valued at over $10,000, were taken. A truck was also stolen, and it was used to transport the stolen chemicals. The truck was later abandoned.

On June 14, 1979, defendant, Lee L. Bestmann, was charged by county attorney's information with burglary in the second degree, theft in the first degree, and theft in the second degree. Trial was begun December 18, 1980, and the jury returned guilty verdicts on burglary in the second degree, theft in the first degree, and operating a motor vehicle without the owner's consent.

On January 15, 1981, the trial court overruled defendant's motion for new trial and motion in arrest of judgment, entered judgment and sentenced Bestmann. Defendant has appealed.

I. Prosecutor's Failure to Correct Misleading Testimony.

Defendant alleges he was denied due process when the prosecutor failed to correct Ronald Kallsen's testimony when the prosecutor knew it was not true. Kallsen, the farmer who purchased the stolen chemicals from Bestmann, was one of the State's leading witnesses.

In chambers before Kallsen was cross-examined, defense attorney Cullison pointed out that the prosecutor would probably have to correct Kallsen's testimony regarding the deals that had been made in exchange for his testimony, since Kallsen had denied any deal in previous testimony. In anticipation of this problem, the prosecutor left the court's chambers and questioned Kallsen about his knowledge of any agreement or understanding that had been reached. The prosecutor reported back to the court and Cullison that Kallsen knew the Plymouth county charge was still pending, that although it would probably be dismissed, it had not been dismissed yet, that he did not know why, and that his knowledge came from what his attorneys told him.

After the discussion in chambers, defense counsel asked Kallsen, "Did you have any agreement or understanding concerning consideration that you will receive in return for your testimony in this case?" Kallsen answered, "I do not personally. It is through my attorney." This answer was consistent with what the prosecutor reported Kallsen would testify and with what defense counsel said he was told by the Plymouth county attorney.

The next answer contains the alleged falsehood. Defense counsel asked Kallsen, "Is it a fact that the Plymouth county attorney has agreed to withhold prosecution of your case until after you testify in this one?" Kallsen answered, "I don't know if that's the reason nothing has been done on it or not, but nothing has

been done. I don't know why something hasn't been done with it." This answer is consistent with what the prosecutor said Kallsen would say. Kallsen did not have personal knowledge of why nothing had been done on his case. Defense counsel did not follow up with a question of what Kallsen had been told by his lawyers. Apparently defense counsel had been convinced by prior testimony that Kallsen would deny any deal in Plymouth county, so he failed to pursue this line of questioning far enough. The record as made by defense counsel does not establish that Kallsen lied about the Plymouth county charge agreement.

II. Limitation of Cross-examination of Kallsen.

Defendant contends the trial court committed reversible error in sustaining the state's motion in limine which prohibited the defense from questioning Kallsen about other crimes he allegedly committed.

Kallsen was granted immunity in Woodbury County for the charges filed against Bestmann in this case. The defendant was allowed to cross-examine Kallsen about the charges pending against him which resulted from his having bought the Sencor from Bestmann. However, the defendant wished to question Kallsen about his dealings with stolen cattle and other farm chemical buys. Defendant argues that Kallsen's other illegal activities are within the scope of cross-examination because the prosecutor had agreed that the sworn statement in which Kallsen detailed his other illegal activities would not be used against Kallsen to prosecute him in either Woodbury county or anywhere else, and thus the State had a powerful sword over Kallsen's head, and his motivations went beyond the potential charges for which Bestmann was on trial.

The State argues that this agreement did not promise Kallsen that he would not be prosecuted for these activities, but rather that any prosecutions could not be based on the evidence in Kallsen's own statement.

Because the defendant was denied the right to cross-examine Kallsen on other crimes, we do not know whether he understood the subtle distinctions. The

question is not one of legal immunity, but the state of mind of the witness that is important in determining whether the testimony is admitted. The status of potential charges against a witness must be explored with great latitude, since it reflects on that witness's motivation for testifying. State v. Donelson, 302 N.W.2d 125 (Iowa 1981). The defendant should have been permitted to cross-examine Kallsen to explore his belief as to whether there would be prosecution of the charges.

III. Iowa R. Crim. P. 5(6) and 13(1).

The defendant argues that he was denied the right to cross-examine Kallsen and Becker when they were questioned by the county attorney. Iowa R. Crim. P. 5(6) and 13(1) provide that if after complaint, indictment, or information, a county attorney subpoenas a witness to his office, the defendant has the right to be present and cross-examine the witness. Defendant essentially asks us to hold that this rule applies whenever a witness is compelled to make statements, whether or not a subpoena is issued. He argues that in the present case, both Kallsen and Becker were compelled to talk to the county attorney in order to avoid criminal prosecutions against themselves. As we decided in State v. Bestmann, No. 64864 (Filed January 26, 1982), we decline to hold that rule 13(1) applies in the absence of a subpoena under rule 5(6).

IV. Accomplice Instruction.

Defendant's request that the trial court instruct the jury that Kallsen was an accomplice as a matter of law was refused. Instead the court gave a general accomplice instruction. Defendant assigns the court's refusal to give the requested instruction as error.

The rule for determining whether a witness is an accomplice is if he could be charged with and convicted of the specific offense for which the accused is on trial. State v. Stufflebeam, 260 N.W.2d 409, 411 (Iowa 1977).

There is no testimony that Kallsen was present with the defendant during

the actual theft of the farm chemicals. Kallsen's commitment to buy stolen chemicals was made a year prior to the actual theft. Although recent possession of stolen property creates an inference that the possessor stole the property, State v. Everett, 157 N.W.2d 144 (Iowa 1968), these facts do not establish Kallsen's guilt of the crime of theft sufficiently to hold that he was an accomplice as a matter of law.

V. Corroboration.

Defendant argues that both Kallsen and Becker were accomplices and, as such, there was not sufficient evidence to corroborate their testimony. Evidence is corroborative if it tends to support some material part of the accomplice's testimony, particularly a material fact tending to connect the defendant to the commission of the crime. State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976); State v. Bizzett, 212 N.W.2d 466, 468 (Iowa 1973). Whether such evidence exists is a matter for the court, and whether it is sufficient is a matter for the jury. State v. Jennings, 195 N.W.2d 351, 357 (Iowa 1972).

The State conceded that Becker was an accomplice. Therefore, his testimony needed to be corroborated. The question of whether Kallsen was an accomplice was a question for the jury. If Kallsen were not an accomplice, he could offer corroboration. Becker described the theft and hiding of the property in detail. The physical evidence and the testimony of other witnesses corroborated him fully. Both Becker and Kallsen testified to unloading the Sencor at Kallsen's farm. Kallsen's testimony about having paid for the chemicals by check was corroborated by the existence of the checks themselves. The lot numbers on the cases of Sencor from Kallsen's shed matched the numbers of the Sencor stolen from the cooperative in Sloan.

Since the jury was properly instructed on the issue of corroboration as necessary to convict a defendant by Becker's accomplice testimony, and since it was a question for the jury whether Kallsen was an accomplice and therefore whether his testimony could be used to corroborate Becker's testimony, we find no merit in this assignment of error.

REVERSED AND REMANDED FOR A NEW TRIAL.