

IN THE COURT OF APPEALS OF IOWA

No. 8-278 / 97-1039

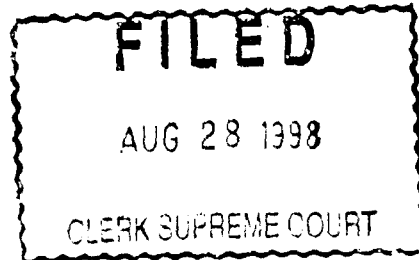
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JOHNNY LEDELL PIPPINS,

Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, James E. Kelly, Judge.

Defendant appeals the judgment and sentence entered upon his convictions of first-degree robbery and criminal gang participation in violation of Iowa Code sections 711.2 and 723A.2 (1995). **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, William E. Davis, County Attorney, and Michael Walton, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

SACKETT, P.J.

Defendant-appellant Johnny Ledell Pippins was convicted of robbery in the first degree and criminal gang participation following a robbery at a home where he and Darlene Graves went to purchase drugs. The robbery was conducted by three masked men later identified as Demetrius Carr, Ryan Logan, and Bruce Sims. At trial, Carr and Logan testified defendant planned the robbery. Defendant appeals contending: (1) his motion for judgment of acquittal should have been sustained because there was no evidence corroborating the testimony of the accomplices to the crime; and (2) the trial court should have made further inquiry as to the alleged conflict of his trial attorney. We affirm.

The robbery occurred at the home of Frank and Cheryl Hillman. Graves testified at defendant's request she contacted the Hillmans to purchase marijuana. Frank Hillman testified he let Graves in the kitchen door and she had a man with her, who Frank Hillman identified as looking like defendant. Frank Hillman testified after letting the two in his home, he locked the back door. He went to the bedroom to get the marijuana when three people, masked and carrying guns, came out of the kitchen and threw Frank Hillman across the living room and demanded marijuana and money.

Graves testified defendant asked her to make arrangements to buy marijuana, and defendant went with her to buy the marijuana. Graves further testified she and defendant sat in the kitchen while Frank Hillman went to the bedroom. She said the back door was kicked in and they were told to get on the floor. Graves said she and

defendant were on the floor under the kitchen table. She identified the three masked men as her nephews.

Carr and Logan testified defendant planned the robbery and planned that the three masked men were to enter the Hillman house thirty seconds after defendant and Graves. Carr testified defendant purchased bandannas and gave them to the three to use as masks. Logan testified marijuana and money were taken from the Hillman house and the marijuana and money were split among Carr, Sims, and defendant following the robbery.

Defendant contends Logan, Carr, and Graves were accomplices. Defendant has the burden to establish by a preponderance of the evidence they were accomplices. *See State v. Jennings*, 195 N.W.2d 351, 357 (Iowa 1972). It was agreed Logan and Carr were accomplices. The trial court submitted a special interrogatory to determine Graves' status. The jury found she was not an accomplice.

Corroborating evidence serves a two-fold purpose: it tends to connect the accused with the crime charged, and it serves as a counterweight against the dubious credibility of an accomplice whose motivation to testify is suspect because the person would have a natural self-interest in focusing the blame on the defendant. *State v. Cuevas*, 281 N.W.2d 627, 629 (Iowa 1979); *State v. Johnson*, 237 N.W.2d 819, 822 (Iowa 1976). Iowa Rule of Criminal Procedure 20(3) provides:

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.

Iowa R. Crim. P. 20(3).

An accomplice is a person who willfully unites in, or is in some way concerned in the commission of a crime. 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. Yet, something more than mere knowledge a crime is contemplated, or mere personal presence at the time and place where committed, must be shown in order to make one an accomplice. It must be established by a preponderance of the evidence that a witness was in fact an accomplice. *See State v. Johnson*, 318 N.W.2d 417, 440 (Iowa), *cert. denied*, 459 U.S. 848 (1982); *Jennings*, 195 N.W.2d at 357.

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). It need not be strong. *Id.* Any corroborative evidence which tends to connect the accused with the commission of the crime and thereby supports the credibility of the accomplice is sufficient. *Id.* Such evidence may be direct or circumstantial. *Id.* It must be inculpatory but need not be entirely inconsistent with innocence. *Id.* Each case must be judged on its own facts. *Id.*

Whether evidence is corroborative depends on whether it supports some material part of the accomplice's testimony. *Cuevas*, 281 N.W.2d at 629; *State v.*

Aldape, 307 N.W.2d 32, 41 (Iowa 1981). It need not go to the whole of the accomplice's testimony or every material fact. *Cuevas*, 281 N.W.2d at 630. The statutory requirement is met if it can fairly be said the accomplice is corroborated in some material fact tending to connect the defendant with the commission of the crime. *Id.*

Corroborative evidence need not be strong as long as it can fairly be said it tends to connect the accused with the commission of the crime and supports the credibility of the accomplice. *State v. Berney*, 378 N.W.2d 915, 918 (Iowa 1985); *State v. Ware*, 338 N.W.2d 717, 718 (Iowa 1983); *Vesey*, 241 N.W.2d at 890.

Whether a particular witness is an accomplice is a question of law where the facts are not disputed or susceptible to different inferences; however, where the facts are susceptible to different inferences, the question is one of fact for the jury. *State v. Doss*, 355 N.W.2d 874, 879 (Iowa 1984); *State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984); *State v. Sallis*, 238 N.W.2d 799, 802 (Iowa 1976).

The trial court found the question extremely close, but ultimately determined evidence of Frank Hillman that he locked the back door and after the robbery he could not see that the lock was broken, together with Graves' testimony, was sufficient corroborating evidence.

The State contends the testimony of the victims as to how the robbery occurred is corroborative. Yet, what this argument misses is these facts in no way support defendant's implication or tend to connect defendant to the crime other than to show

defendant was at the place of the robbery. As did the trial court, we find this is insufficient. *See Cuevas*, 281 N.W.2d at 630; *Vesey*, 241 N.W.2d at 891.

The trial court recognized any corroborating evidence "may be just barely sufficient." The State's brief does not focus on the back door evidence relied on by the trial court. The back door evidence allegedly supports the accomplices' testimony defendant let them in rather than the door was kicked in as Graves testified. In defendant's brief, he attacks this evidence, advancing there is no evidence defendant unlocked the door. Defendant further alleges the fact the lock on the door was not broken does not mean the lock would hold the door shut on a kick. The question was asked of Frank Hillman if the lock was broken that night, and he answered not that he could see. There is no other evidence in the record concerning the condition of the door after the break-in.

Defendant further alleges if the facts rely on the testimony defendant and Graves were the only people in the kitchen or unlocked or opened the door to allow entry, then Graves should have been held to be an accomplice as a matter of law. Graves did not testify defendant opened the back door. Her testimony did not connect defendant with the robbery other than to state he was the one who instigated the trip to buy marijuana. We agree with the trial court there is sufficient corroborating evidence. We affirm the trial court on this issue.

Defendant's second complaint is just prior to trial defendant's trial counsel reasserted a former application for substitute counsel. The attorney stated he filed a

motion to withdraw because he had represented Cheryl Hillman, one of the victims of the crime, three years earlier. The original informal application had been denied because the attorney was unable to articulate anything he knew about Cheryl Hillman that would affect his representation or that he could use to defendant's advantage.

Defendant contends the evidence in this trial showed Cheryl Hillman was robbed, grabbed by the hair, and held with a crowbar braced against her head, and her children were present while this all happened. He contends under these circumstances prejudice is presumed whether or not it is independently shown.

Defendant contends the issue should not have been ruled on without a full disclosure of the facts. He challenges the fact he was not present at the first informal hearing.

The right to counsel guaranteed by the Sixth Amendment is a fundamental right. *Argersinger v. Hamlin*, 407 U.S. 25, 29-33, 92 S. Ct. 2006, 2008-011, 32 L. Ed. 2d 530, 533-36 (1972). The Sixth Amendment prevents the states from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance. *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 344 (1980). The Sixth Amendment right to counsel includes the right to effective assistance free of conflicts of interest. *United States v. Mooney*, 769 F.2d 496, 499 (8th Cir. 1985) (citing *United States v. Ramsey*, 661 F.2d 1013, 1017 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982)).

In order to establish a violation of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate an actual conflict of interest adversely affected his lawyer's performance. *Cuyler*, 446 U.S. at 349, 100 S. Ct. at 1710, 64 L. Ed. 2d at 347. Defendant must show there is a substantial possibility of a conflict of interest that affected the lawyer's representation. *Nichol v. State*, 309 N.W.2d 468, 470 (Iowa 1981); *Jackson v. Auger*, 239 N.W.2d 180, 183 (Iowa 1976). Yet, the conflict itself demonstrates a denial of the "right to have the effective assistance of counsel." Thus, a defendant who shows a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. *Nichol*, 309 N.W.2d at 470; *Jackson*, 239 N.W.2d at 183. But, until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *Nichol*, 309 N.W.2d at 470; *Jackson*, 239 N.W.2d at 183; *see also United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir.), *cert. denied*, 464 U.S. 991 (1983).

It is conceded Cheryl Hillman was a witness and defendant's trial counsel represented her in an earlier undefined proceeding. Because defendant has established his attorney had an attorney-client relationship with an adverse witness, he need only show a substantial possibility of a conflict of interest to claim a denial of effective assistance of counsel. *See Cosgrove v. State*, 304 N.W.2d 184, 187 (Iowa 1981) (McCormick, J., dissenting).

We are dealing with an issue of dual not joint representation. In a case of dual representation, not joint representation, the danger of conflict is not as great, hence judicial scrutiny need not be as deep. *Theodore v. State*, 614 F.2d 817, 822 (1st Cir. 1980); *United States v. DiCarlo*, 575 F.2d 952, 957 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978).

Defense counsel has an ethical obligation to avoid conflicting representations and to immediately advise the trial court if the possibility of one should occur. *See Cuyler*, 446 U.S. at 346, 100 S. Ct. at 1718, 64 L. Ed. 2d at 345. Defendant's attorney made no effort to disclose the privileged information to the court in camera to enable the court to consider its relevance. *See discussion United States v. Jeffers*, 520 F.2d 1256, 1262 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). Consequently, on this record, we are unable to assess whether the attorney-client relationship between the attorney and the witness would have effected the representation of defendant.

The State argues defendant waived the conflict. Because this comes to us upon direct appeal, the record does not address the issue of whether defendant may have been aware and waived the conflict. If a defendant knowingly, intelligently, and voluntarily wishes to waive this protection, the constitution does not prevent him from doing so. *See United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975). To make a valid waiver, it must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (1970).

The record here is insufficient for us to address defendant's claim his trial counsel had a conflict. We affirm defendant's conviction. We reserve his right to raise the issue in a postconviction proceeding.

AFFIRMED.