FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )

Plaintiff-Appellee, ) Filed March 31, 1986

vs. ) 283

TERRY PAUL EUROM, ) 5-695
85-205

Defendant-Appellant. )

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Appeal from the Iowa District Court for Marshall County (No. 6741) Carl E. Peterson, Judge.

Defendant appeals from his conviction for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Valencia Voyd McCown, Assistant Attorney General; and Phillip L. Krejci, County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

**DONIELSON, P.J.**

Defendant, Terry Paul Eurom, appeals from his conviction for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5, asserting that the evidence was insufficient to support a finding either that he had no right, license, or privilege to enter the premises or that he had intent to commit a theft, and that he was denied effective assistance by trial counsel's failure to move for a directed verdict on the ground that the evidence was insufficient to corroborate accomplice testimony.

Defendant was convicted following jury trial on a charge of burglary in the second degree. Trial counsel unsuccessfully moved for a directed verdict of acquittal on grounds that the evidence was insufficient to support a finding either that he had no right, license, or privilege to enter the premises or that he had an intent to commit theft.

A gas station employee testified that she, while talking to a friend, observed someone use a key to enter the station while it was closed and emerge with two packs of cigarettes. She confronted him at the time, and he apparently made a threatening comment to her that she should forget what she saw. Later, she was unable to identify defendant as that person. Her friend was also unable to positively identify defendant, although she picked a photograph of him from a photo lineup as one of two that resembled the suspect.

The station employee further testified that all employees had keys to the building, but were not authorized to enter when it was closed. She stated that she had, however, on one occasion entered the station when it was closed in order to obtain beer, which she paid for the next day. She further testified that on the night in question the person who had entered the station left the scene with Sean Williams.

Williams testified that he, defendant, and two others left a party in order to get cigarettes but that they had no money. Defendant conversed with, and was given keys by, one of the others, who was an employee of the gas station. Williams testified that he accompanied defendant to the area of the station and waited across the street while defendant left in the direction of the station, returned, and conversed with the station employee who had observed someone enter it.

At the time of trial, Williams was on probation following a conviction for second-degree burglary and he had told a different story to police when initially questioned about the incident. The issue of whether he was an accomplice and, if so, whether his testimony was corroborated was submitted to the jury at the request of defense counsel. The unsuccessful motion for directed verdict did not assert the ground of insufficient corroboration.

I.

An appellate court reviewing the sufficiency of the evidence views the evidence in the light most favorable to the State, and all reasonable inferences tending to support the conviction are accepted as established. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Further, all the evidence must be considered in weighing the sufficiency of the evidence. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Burglary is defined in Iowa Code § 713.1 (1983) as:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Defendant's position is that the evidence does not satisfy the elements of having no right, license, or privilege to enter the business and entering with the intent

to commit a theft. We find no merit in defendant's challenges. While defendant claims he had a good faith belief that he could enter the building after hours with a key provided by an employee which could establish consent. The jury apparently found his conduct prior to entering the building indicated defendant knew he was doing something wrong. Williams testified that the defendant and the employee who gave the keys to the defendant were walking with him, looking for cigarettes. Williams then stated that defendant and the employee started walking ahead of him and he tried to keep up with defendant; however, he was told to go elsewhere. Williams stated he had a bad feeling about what was going on between defendant and the employee. After the entry, defendant told Williams he "better not say anything about what happened." This was apparently an attempt to conceal the truth. This evidence was sufficient to lead the jury to conclude defendant's surreptitious conduct indicated he knew he did not have authority to enter the building.

Although the State's case proving defendant had the intent to commit theft did not compel the jury to return a guilty verdict, the jury has spoken and we cannot find error in their determination. While another employee had taken merchandise from the gas station after hours and paid for the goods the next day, the jury was able to find the defendant did not intend to pay for the cigarettes when he took them. The fact the defendant acted suspiciously when planning to take the cigarettes coupled with his comment to the employee who confronted him after he left the store by threatening her by telling her, in essence, to forget she saw the incident was sufficient for the jury to find intent.

II.

While a claim of ineffective assistance of counsel is usually preserved for a postconviction proceeding, this record enables us to adequately adjudicate the matter at this time. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982).

Defendant claims his trial counsel rendered ineffective assistance of counsel by not including in his motion for judgment of acquittal that the prosecution only presented testimony from an uncorroborated accomplice. See Iowa R. Crim. P. 20(3). We cannot find the testimony came from an accomplice nor was it uncorroborated. Thus, counsel did not fail to perform an essential duty under Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Under these facts, Williams would have to be charged with aiding and abetting under Iowa Code § 703.1 (1983). This section provides:

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.

An accomplice has been defined as:

> [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.
>
> But something more than mere knowledge that 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. And it must be established that a witness was in fact an accomplice.

State v. Doss, 355 N.W.2d 874, 879 (Iowa 1984) (quoting State v. Johnson, 318 N.W.2d 417, 440 (Iowa), cert. denied, 459 U.S. 848, 103 S. Ct. 106, 74 L. Ed. 2d 95 (1982) (citations omitted)).

Even though Williams was present with defendant after they left the party, Williams parted company with defendant before he obtained the keys to the building. Moreover, Williams did not have knowledge of the scheme to take cigarettes from the gas station. The mere presence of Williams being across

the street from the scene of the crime did not rise to the level of making him an accomplice.

In addition, Williams' identification of the defendant was corroborated by a witness who identified defendant from a photographic array. While the witness's identification was subject to challenge, there was sufficient evidence to corroborate Williams' testimony. See State v. Doss, 355 N.W.2d at 880; State v. Vesey, 241 N.W.2d 888, 891 (Iowa 1976).

Therefore, we affirm the trial court's decision in all respects.

**AFFIRMED.**