

IN THE COURT OF APPEALS OF IOWA

No. 0-99 / 89-814

FILED

APR 24 1990

CLERK SUPREME COURT

MELVIN KEITH KELLY,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Dennis Damsgaard, Senior Judge.

Kelly appeals the trial court's denial of his application for postconviction relief challenging his 1985 conviction for first-degree robbery. **AFFIRMED.**

Stephen J. Rapp, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, James M. Metcalf, County Attorney, and Joseph Gunderson, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

The sole issue in this postconviction relief proceeding is whether applicant Melvin Keith Kelly's attorney on direct appeal was ineffective in failing to contend that the evidence at trial was not sufficient to corroborate an accomplice's testimony. We affirm the denial of postconviction relief.

Kelly was charged with the crime of first-degree robbery, a Class B felony, in violation of Iowa Code section 711.2 (1983). He was convicted and appeal was taken. We affirmed his conviction in an unpublished case. State v. Kelly, No. 85-168 (Iowa App. March 31, 1986). Applicant was convicted of robbing the Savage Food Center with James Robinson, the brother of applicant's wife. Robinson was living with applicant and his wife at the time.

Robinson testified at applicant's trial that applicant drove him to Savage Food Center, where Robinson went in alone and committed an armed robbery. Robinson stated that applicant brought him back to applicant's home and instructed him to hide in the attic until all the money was counted. Robinson said he was told the count was \$2,800, and this sum was then split two ways. According to Robinson, it was so cold in the attic that a pistol accidentally discharged in his hand.

Linda Harrington testified she was the bookkeeper at the Savage Food Center on December 30, 1983, and that she gave the gunman approximately \$3,800. Another witness stated he saw a black male running away from the Savage Food Center at approximately 8:00 a.m. on December 30, and the individual was picked up by an automobile determined to belong to the applicant.

Applicant asked his appellate counsel to raise the issue of the State's failure to corroborate Robinson's testimony. Appellate counsel said he would raise the issue on appeal. Iowa Rule of Criminal Procedure 20(3) provides in applicable part:

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.

When appellate counsel filed Kelly's brief, he wrote Kelly a letter, which provided in relevant part:

. . . I have determined . . . that we may not raise the issue on appeal that Robinson's testimony was uncorroborated. I studied all of what the State calls corroborating evidence and was able to explain away all of it except the facts that, one, your car was spotted outside the Savage Food Store on December 30, 1984, and, two, the coin wrapper, shell casings, et cetera, were found at your residence. It is true that the above evidence might be logically explained by the fact that Robinson lived in your house and had access to all of those places. However, these considerations are addressed to the sufficiency of the corroborating evidence which we may not challenge on appeal.

The existence of the corroborative evidence required by Rule 20(3) was disputed by applicant's trial counsel in motions for acquittal. At the postconviction hearing, applicant's appellate counsel testified he told applicant in correspondence the issue would be raised, and only informed applicant that he had decided to omit the issue in a letter that accompanied applicant's copy of the brief that had been already filed.

Applicant must show both that his counsel's performance was deficient and that the deficient performance so prejudiced his defense that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The crucial question is whether applicant would have been successful on the corroboration issue. Applicant claims the testimony was insufficiently corroborated, as a matter of law, to submit the case to the jury. Whether or not corroborating evidence is credible or sufficient to prove a defendant's guilt is a question of fact for the jury. See State v. Gill, 261 Iowa 522, 526, 154 N.W.2d 722, 725 (1967); State v. Trogden, 258 Iowa 574, 579, 139 N.W.2d 393, 395-96 (1966). The corroboration of accomplice testimony rule does not require that the corroborating evidence be strong or that it confirm every material fact of the accomplice's testimony; nor must it support all elements of the crime. Rather, the only requirement is

that it must support some material part of the accomplice's testimony, thereby tending to connect a defendant to commission of the crime. State v. Doss, 355 N.W.2d 874, 879-80 (Iowa 1984); State v. Aldape, 307 N.W.2d 32, 41 (Iowa 1981); State v. King, 256 N.W.2d 1, 10 (Iowa 1977); State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976).

The presence, near the scene of two robberies, of an automobile titled in the name of applicant's father but used by applicant, the presence at applicant's home of coin wrappers similar to those on coins taken from one store, and the presence of a shell casing in the attic of applicant's home, when considered together, are sufficient corroboration.

AFFIRMED.