FILED
AUG 23 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-269 / 88-791

STATE OF IOWA,

Appellee,

785

vs.

CHESTER DONALD ISLEY, JR.,

Appellant.

Appeal from the Iowa District Court for Monroe County, Richard J. Vogel, Judge.

Defendant appeals from his conviction, following a jury trial, for second-degree burglary. **AFFIRMED.**

William L. Wegman, State Public Defender, and James F. Whalen, Assistant State Public Defender, for appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and William S. Owens, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

OXBERGER, C.J.

The defendant Chester Donald Isley (Isley) appeals his conviction by a jury trial of second-degree burglary. Isley contends that the trial court erred in overruling his motion for directed judgment of acquittal; that he was denied effective assistance of counsel; and that the trial court erred in limiting attempts to impeach State's primary witness by eliciting evidence to show bias and self-interests. We affirm.

Our review is for the correction of errors at law except with respect to the constitutional issue of ineffective assistance of counsel where our review is of the totality of the circumstances. State v. Johnson, 395 N.W.2d 661, 663 (Iowa App. 1986).

I. Judgment of Acquittal

Isley claims trial court erred when it overruled his motions for a judgment of acquittal. He argues he was entitled to a judgment of acquittal because the evidence was insufficient to corroborate the testimony of an accomplice, Geraldine Davis.

A. Accomplice Instruction

Defendant claims the jury should not have been allowed to determine the accomplice issue, but should have been instructed as a matter of law that Geraldine was an accomplice whose testimony required sufficient corroboration.

We hold the trial court was correct in submitting the accomplice issue to the jury for its determination. According to Geraldine's testimony, she did not actively participate in the burglary. She did not know that a burglary was going to take place. Initially all Geraldine knew was that she, Isley and her husband, were going for a ride. At some time before they arrived at the house her husband told her that they were going to get a stove. Although she did hold a flashlight while the stove was being disconnected and held the door while it was being moved, it was upon the request of her husband. A couple of days after the incident, Geraldine did go report it to the police. While she did not give full details concerning the burglary, her failure to do so was due to the fear of retaliation by her husband. Geraldine left her home for Indiana one day after her incomplete report to the police.

While there are implications that Geraldine Davis was an accomplice, the jury could have accepted her version and determined to the contrary. We find no merit in defendant's contention.

B. Corroboration

Corroborative evidence need not be strong as long as it fairly connects the accused with the crime and supports the credibility of the accomplice. State v. Berney, 378 N.W.2d 915, 918 (Iowa 1985); see also State v. Aldape, 307 N.W.2d 32, 41 (Iowa 1981). The corroborative evidence can be

either direct or circumstantial. State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976). The existence of corroborative evidence is a legal issue, State v. Dickerson, 313 N.W.2d 526, 529 (Iowa 1981), but the sufficiency of the corroborative evidence is a question of fact for the jury. State v. Harrington, 284 N.W.2d 244, 248 (Iowa 1979); State v. Horn, 282 N.W.2d 717, 731 (Iowa 1979). If the trial court determines that there is enough evidence to submit the question of corroboration, then the issue should go to the jury under proper instructions for a jury determination as to its sufficiency.

Although we seriously doubt that Geraldine was an accomplice, in viewing the record here in the light most favorable to the State we agree with the trial court that there was sufficient evidence corroborating the testimony of Geraldine Davis to submit to the jury. Rose Miletech identified the items seized from the Davis house as those items stolen from her farm house. Isley kept most of his clothes and sometimes slept in the basement where the iron stove was hidden. Isley lived with the Davis' two to three weeks prior to the incident.

We conclude that the trial court properly submitted to the jury both the question of whether Geraldine Davis was an accomplice and the question of whether sufficient corroborative evidence supported her testimony, if the jury so concludes from the evidence that she was an accomplice.

II. Ineffective Assistant of Counsel

Defendant claims ineffective assistance of counsel in failing to request, or to object, to the failure to give, an instruction that Geraldine Davis was an accomplice as a matter of law. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987). However, when the record is sufficient to allow us to consider the issue, we resolve it on direct appeal. State v. Uedding, 400 N.W.2d 550, 553 (Iowa 1987).

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to

be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong of a claim of ineffective assistance of counsel, prejudice, we require the defendant to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

As previously discussed, the trial court twice denied defendant's trial counsel's motion for directed judgment of acquittal. The motion was denied at the close of State's evidence and again at the close of all evidence. Defendant's motions were grounded on the position that there was insufficient evidence to corroborate Geraldine's testimony. The trial court rejected these motions and submitted the issue to the jury.

In addition, at the time the jury instructions were discussed among court and counsel, the trial court denied the State's request for an instruction that Geraldine was not an accomplice as a matter of law. The following conversation occurred between counsel for the parties and the court:

> THE COURT: And do you have any additions, deletions, corrections, objections, or exceptions to any of the proposed instructions?

MR. OWENS [the prosecutor]: The only item I would like to address to the Court is in the way of an objection to Instruction No. 13 dealing with accomplice. It's my interpretation from reading the entire instruction and the gender usage that's used in the instruction that it's to apply to Geraldine Davis. I do not think there is sufficient evidence, if any evidence, for a jury question to even be raised as to whether or not she is an accomplice.

Part of that definition indicates that it has to be someone who knowingly and voluntarily cooperates and aids in the commission of a criminal offense, specifically the one the defendant is charged with. There has been no evidence presented to this jury to indicate that she was involved in any way other than unwittingly in this matter, and we would ask that Instruction No. 13 be deleted as it would only serve to confuse the jury.

THE COURT: Do you wish to respond?

MR. PETERSEN [defense counsel]: Yes, your Honor. There was testimony by Mrs. Davis that she realized when she arrived at the residence that what they were doing was wrong, and she did not take any action to stop what was going on. And from that circumstance, I believe it can be implied that she was an accomplice.

THE COURT: It will be the ruling of the Court that sufficient evidence was generated to submit Instruction 13 to the jury.

Attorney Petersen's action in not requesting an instruction that Geraldine was an accomplice as a matter of law was reasonable in light of these events and the court's previous comments in rejecting defense counsel's motions for directed judgment of acquittal. The court had made its position clear that the facts were susceptible to different inferences and the issue was properly left to the jury. Under the entire record and the totality of the circumstances, attorney Petersen's performance was within the range of normal competency.

Defendant further claims attorney Petersen's failure to object to the accomplice instruction constituted ineffective assistance of counsel. We find considering the record as a whole this claim is insufficient to establish that the result of the trial court would have been different. "Rarely do we find failure to preserve error to be sufficiently egregious to deny defendant his right to effective assistance of counsel under the sixth amendment of the United States Constitution." State v. Halstead, 362 N.W.2d 504, 508-09 (Iowa 1985) (citations omitted). Counsel's failure to object in this case does not rise to a sufficiently egregious level.

III. Trial Court Discretion in Limiting Impeachment

Finally, Isley contends that the trial court abused its discretion by erroneously restricting his right to present evidence bearing on Geraldine's bias and interests in testifying. Isley sought to cross-examine Geraldine Davis regarding the January 22, 1988 domestic incident. Isley contends that he was attempting to show that Geraldine was hostile to her husband, John Davis, and thus, by association, to the defendant, because of a contemplated custody battle over their son.

At trial Isley failed to make an offer of proof for the record. Offers of proof are necessary to preserve error on appeal concerning the exclusion of testimony. State v.

Harrington, 349 N.W.2d 758, 760 (Iowa 1984). However, where it is apparent from the whole record what is sought to be proven then no offer of proof is necessary. Id.

On review we find we are able to determine what the contents of the offer of proof would have been. Isley's motion for new trial and supporting brief explained that the purpose and theory of the excluded testimony was to show bias and self-interest on the part of State's witness. We therefore treat this as the missing offer of proof.

The extent and scope of cross-examination lies within the sound discretion of the trial court. State v. Ruble, 372 N.W.2d 216, 219 (Iowa 1985). The trial court's discretion will be disturbed only when such discretion has been obviously abused. State v. Clark, 325 N.W.2d 381, 383 (Iowa 1982).

At trial Isley presented evidence, through testimony by John Davis, that Mr. Davis bought the end table, that his daughter brought the chair with her when she moved back into the house, that one of the flat irons had been in the house for some time, and that Geraldine bought the dresser and wood-burning stove. Isley also presented evidence that three other individuals were responsible for breaking into the Miletech farm house. Isley now asserts that Geraldine Davis procured stolen property to falsely accuse him and her husband. As noted, Isley sought to cross-examine

Geraldine regarding the domestic incidents on January 22, 1988. At trial the court sustained State's objections to such cross-examination based on relevancy grounds. We do not believe it was reversible error in this case to sustain the objections made by the State.

During defense counsel's direct examination of Isley as a witness on his own behalf, Isley testified at length in regard to the January 22 incident.

The exclusion of evidence tending to show a certain fact in question is not reversible error where the claimed fact in question is fully established by other admitted evidence. State v. Hicks, 245 N.W.2d 319, 321 (Iowa 1976). Since the factual information was already in evidence, it was not error to exclude it here.

Also, it is clear from both John's and Geraldine's testimony they were having domestic troubles. The trial court was acting within its level of discretion when it limited the details of the domestic conflict in this criminal trial. The defense was allowed to show possible bias on Geraldine's part due to this conflict. It was not necessary to have all the details.

We conclude that the trial court's cross-examination limitation was not an abuse of discretion and was harmless beyond a reasonable doubt. See Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674, 683 (1986).

We find no error in the trial court for overruling defendant's motions for directed judgment of acquittal. Further, we find no grounds for a claim of ineffective counsel or for abuse of discretion in the trial court for limiting cross-examination.

AFFIRMED.