IN THE COURT OF APPEALS OF IOWA

No. 0-929 / 09-1210
Filed March 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PATRICK DARNELL ELLIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge.

Defendant appeals his conviction for robbery in the second degree and simple assault. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Stephan Japuntich, Assistant State Appellate Defender, and Keith Duffy, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Stephen Holmes, County Attorney, and Brendan Greiner and Travis Johnson, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

SACKETT, C.J.

The defendant, Patrick Darnell Ellis, appeals from his conviction and sentence for robbery in the second degree in violation of Iowa Code sections 711.1, 711.3, 703.1 and 703.2 (2007) and simple assault pursuant to sections 708.1 and 702.2(6). He contends the district court erred in overruling his motion for judgment of acquittal as there was insufficient evidence to sustain the convictions. Specifically, he claims there was insufficient corroboration of the statements of coconspirators to show the defendant's participation in the crimes as a principal or an aider/abettor. In addition, Ellis claims the district court erred in excluding the exculpatory testimony of one coconspirator. We affirm.

I. BACKGROUND AND PROCEEDINGS. In the early morning hours of October 21, 2007, fifteen-year-old, TM, was spending the night at a party at her friend's house. Also at the party that night was twenty-year-old, Joey Yeazel. Yeazel and TM decided leave the party to go to TM's uncle's apartment so Yeazel could retrieve some CDs he had left there. TM drove Yeazel's car because Yeazel had been drinking that night. After arriving at TM's uncle's apartment, Yeazel ran upstairs to retrieve the CDs while TM waited in the car with the engine running.

While she was waiting for Yeazel to return, TM spotted a black man she believed looked suspicious wandering around the parking lot of the apartment complex. Within two or three minutes, TM saw Yeazel return to the parking lot and he was surrounded by three black men. One of the men, the tallest of the group, was holding Yeazel's arms behind him while the others held a gun on his

stomach and punched him. The men were asking Yeazel what he had in his possession and were going through Yeazel's pockets. While this was occurring, TM testified another black male approached her car to ask how she was doing. She asked this man what was going on with Yeazel and if she and Yeazel would be able to leave safely. The man told her yes.

Shortly after, the three men let Yeazel go and came over to the car. TM described the man with the gun entering the passenger side of her vehicle, pointing the gun at her head and ordering his friends to "Get this b*tch out of the car." TM exited the car and the men started going through her pockets. TM testified one of the men, the short one with braids, slipped his hand down the back of her pants and touched her anus. TM's phone was taken from her. The man with the gun drove away with Yeazel's car. Three men were left with TM and Yeazel in the parking lot.

When a second car drove up, TM stated the shortest man with the braids and the tallest man, the one that had held Yeazel during the earlier assault, ran to the car telling the third man to watch over her. This third man was the same individual who had approached her earlier to ask how she was doing. This man then slipped his hand down her pants. She hopped away and the man ran to catch up with the other two men who were heading toward the car. The men got into the car and it drove away.

TM and Yeazel reentered the apartment building and returned to TM's uncle's apartment. The two occupants, Nick Haltom and Nathanial Hansen, let them inside. Haltom and Hansen had seen the assault from their third floor

apartment and had called 911. TM and Yeazel reported the assault and carjacking to the police.

On the way to the scene, Officer Hauge spotted a vehicle matching the description of the stolen car. He pursued the vehicle and it eventually crashed. The driver of the car got out and fled the scene. Based on evidence left in the car and at the scene, police were able to determine the person driving the stolen vehicle was Isaiah Duncan.

During the investigation into the assault and carjacking, Detective Jerry Spencer received information that led him to believe the second car was owned or operated by Tara Quade. When Detective Spencer interviewed Quade, she stated she was at the scene of the robbery and Ralph Ellis, Terrance Jenkins, Bernard Martin, and the defendant, Patrick Ellis, were with her. She also identified Isaiah Duncan as one who stole Yeazel's car.

Charges were filed against everyone involved including the defendant. On the day of the defendant's trial, an amended and substituted trial information was filed charging the defendant with two counts of robbery in the second degree and one count of burglary in the second degree. Defendant's trial began on June 24, 2009. By the time of the defendant's trial, Bernard Martin, Isaiah Duncan, Ralph Ellis, and Tara Quade had accepted plea deals and the charges against Terrance Jenkins had been dismissed.

Quade was initially charged with four counts of being an accessory to a felony. She pled guilty to one count in exchange for her testimony. Quade testified she, Ralph Ellis, Terrance Jenkins, Bernard Martin, and the defendant

were at an after-hours party in the same apartment complex where TM's uncle lived. Jenkins left the party first, but hung around outside because Quade was his ride home. Soon after, Quade left the apartment with Ralph Ellis, Bernard Martin, Isaiah Duncan, and the defendant. Upon exiting the apartment, Quade saw Yeazel in the hallway and recognized him because she went to school with Yeazel's sister. On her way down the stairs, she was stopped by someone and the rest of the group proceeded outside. When she made it outside, she saw Martin holding Yeazel in a choke hold up against Yeazel's car. She saw Ralph Ellis next to Martin and the defendant was two or three arms length away. Quade continued to walk toward her vehicle, which was located in another parking lot. On her way past Yeazel's car, Quade saw TM in the driver's seat. TM asked Quade what was going on and Quade responded she did not know and she did not want any involvement.

Once Quade made it to her car, Jenkins jumped in the back seat and ducked down. She decided to leave the area and drove the car to a nearby parking lot with Jenkins. After a few minutes, Quade and Jenkins decided to return to the apartment parking lot. Upon her return, she saw Martin, Ralph Ellis, and the defendant running toward her car. Yeazel's car was gone and Duncan was no longer present. Ralph Ellis got in the front seat of Quade's car, Martin got in the back passenger's side seat, and the defendant got in the back driver's side seat. Jenkins remained in the middle of the back seat between Martin and the defendant. Quade then drove away. While they were fleeing the scene, Quade testified the defendant told Ralph Ellis to throw the items taken from

Yeazel and TM out the window. Quade did not know who threw what out the window, but did remember all the windows were down.

Martin testified for the State at the defendant's trial. He stated Ralph Ellis had a gun that night and pointed it at Yeazel during the assault. He said the defendant went through Yeazel's front pockets removing some marijuana and giving it to Ralph Ellis. Martin saw Ralph Ellis remove a pipe from Yeazel's front pocket as well. Martin stated Jenkins went into Yeazel's back pockets, but did not retrieve anything. Martin then saw Jenkins walking towards Quade's car. According to Martin, Isaiah Duncan took the gun from Ralph Ellis, used it to get TM out of the car and drove away in Yeazel's car.

When Quade and Jenkins returned to the parking lot, Martin headed toward the car. He turned back to see the defendant with his hands in TM's pants. He told the defendant and Ralph Ellis to come on. All three got into Quade's car. Martin confirmed Quade's testimony as to where each person was sitting in the Quade vehicle: Ralph in the front passenger seat, the defendant in back of the driver, Martin in back behind Ralph, and Jenkins in the middle. Martin claims he told everyone to throw what they had taken out the window, but did not see anyone throw anything. Martin testified he and Duncan were the tallest people in the group and Ralph Ellis was the shortest with cornrow braids in his hair. He stated the defendant's height was between himself and Ralph. In addition, he stated Jenkins was a little taller than Ralph Ellis but shorter than the defendant.

Terrance Jenkins also testified for the State at the defendant's trial. He stated he was ready to leave the after-hours party, but the rest of the group was not willing to go. So he went outside and sat in the parking lot. He described a group of his friends exiting the apartment building and assaulting a white guy that had previously asked him for some marijuana. Jenkins asserted Martin, Duncan, the defendant, and another guy by the name of Two-Four assaulted and robbed the victim. Jenkins did not see Ralph Ellis in the group and thought Ralph was still upstairs. Jenkins estimated he was seventy-five to one hundred feet away from the assault. While Jenkins saw a girl sitting in the driver's seat of the car, he did not see anything happen to her. However, he did hear Duncan say, "b*tch, get out of the car."

Jenkins said he waited for Quade to come across the field to the car the group had arrived in. He got in the car with Quade and told her to drive away. He saw Ralph Ellis, Martin, and the defendant again when he and Quade returned to the parking lot. He also confirmed Ralph Ellis got in the front passenger seat, and Martin and the defendant jumped in the back seat with him. Jenkins did see Martin and the defendant handing items to each other to throw out the car window while they were fleeing the scene. Specifically, Jenkins saw the defendant with a marijuana pipe and a scale and Martin had a cell phone. Jenkins also confirmed Ralph Ellis was the shortest person in the group and was the only person who had cornrows in his hair. He believed the tallest members were Duncan and Martin and the defendant's height was between himself and Duncan.

Yeazel did testify at trial, but he was not able to offer any identifying information on his attackers. He stated he was surrounded by four black men, struck several times and robbed at gun point. He saw TM get pulled from the car by the guy holding the gun while he was being held by the trunk of his car. He was hit one last time and then saw his car drive away.

The two witnesses, who observed the assault from TM's uncle's third floor apartment, could not provide any identification testimony. They both testified they saw four black men assaulting Yeazel and going through his pockets.

While the defendant did not testify at trial, the State did enter into evidence the police interview between the defendant and detectives Spencer and Konopa. In that interview, the defendant asserted he was at the after-hours party with Quade, Martin, Jenkins, Ralph Ellis and Duncan. However, the defendant stated he left the party with Quade, Martin, Jenkins and Ralph Ellis before anything happened. The defendant maintained he and the rest of the group left Duncan at the party and Duncan must have committed the robbery after they left. He stated he had nothing to do with the robbery and he and the rest of the group were not present when Duncan committed the crime.

Isaiah Duncan testified at trial for the defense. He confirmed Ralph Ellis, Jenkins, Quade and the defendant were at that party, but he asserted he never saw Martin that night. Duncan stated he and Two-Four committed the robbery alone. He believed Quade and Jenkins were by Quade's car and Ralph Ellis and the defendant were still inside the apartment building at the time of the incident. Duncan testified Two-Four initially had the gun on Yeazel while the two of them

went through his pockets. Duncan testified he took the gun from Two-Four and ordered TM out of the car, taking her phone in the process. He sped off with the car and did not see what happened to either TM or Yeazel after he left. Duncan stated he was intoxicated at the time and could not recall many details, but he is sure the defendant had nothing to do with the incident.

The defendant attempted to call Ralph Ellis to testify, but Ralph Ellis indicated through counsel his intention to invoke his Fifth Amendment rights. Ralph Ellis had previously pled guilty to two counts of theft in the first degree arising out of this incident, but had not yet been sentenced at the time of the defendant's trial. Based on his counsel's advice, he was willing to testify to the details surrounding the two counts of theft, but intended to invoke the Fifth Amendment on any question that dealt with the other counts, which had not yet been dismissed. The State refused to grant immunity to Ralph Ellis and because he planned to take the Fifth Amendment, the court granted the State's motion to strike him as a witness. Defendant made an offer of proof as to Ralph Ellis's testimony submitting his deposition transcript.

At the close of the State's case-in-chief and at the close of all evidence, defense counsel moved for judgment of acquittal asserting the State had failed to present sufficient evidence of accomplice corroboration and failed to present evidence of joint criminal conduct or aiding and abetting. The court overruled the motion on both occasions finding sufficient evidence to submit the case to the jury. On June 26, 2009, the jury reached a verdict of guilty to count one, robbery in the second degree with respect to Yeazel, and guilty on count two of the lesser

included offense of simple assault with respect to TM. They found the defendant not guilty of the third count of burglary in the second degree.

On July 24, 2009, the defendant made a motion in arrest of judgment and in the alternative a motion for a new trial asserting he was denied a fair trial. He claimed the verdict was contrary to the law regarding corroboration of accomplice testimony and the court misdirected the jury by giving a jury instruction on joint criminal conduct, which was not supported by the evidence. The district court overruled defendant's motion on July 28, 2009, holding the issues were either raised and ruled on at trial or waived. The defendant was sentenced on August 3, 2009, to a term not to exceed ten years on count one and a term not to exceed thirty days on count two. The sentences were to run consecutively with the defendant given credit for time already served. In addition, he was required to serve seventy percent of his sentence on count one pursuant to Iowa Code section 902.12(5).

Defendant filed his notice of appeal on August 5, 2009. He claims there was insufficient evidence to sustain the convictions because there was insufficient corroboration of the statements of coconspirators to show his participation in the crimes as a principal or an aider or abettor. In addition, Ellis claims the district court erred in excluding the exculpatory testimony of Ralph Ellis, which violated his rights under the Sixth and Fourteenth Amendments of the U.S. Constitution and article I, sections 9 and 10 of the Iowa Constitution.

II. SCOPE OF REVIEW. The scope of review for claims of insufficient evidence of corroboration is for correction of errors at law. Iowa R. App. P.

6.907; *State v. Jones*, 511 N.W.2d 400, 404 (Iowa Ct. App. 1993). This court will consider the evidence in the light most favorable to the State and make every legitimate inference that can be fairly and reasonably deduced. *Jones*, 511 N.W.2d at 404. Defendant's constitutional claims are reviewed de novo and we will evaluate the totality of the circumstances from the record as a whole. *State v. Peterson*, 532 N.W.2d 813, 816 (Iowa Ct. App. 1995).

III. INSUFFICIENT EVIDENCE. Iowa Rule of Criminal Procedure 2.21(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.

Requiring corroborating evidence serves two purposes: (1) "it tends to connect the accused with the crime charged" and (2) "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 defendants." *State v. Barnes*, 791 N.W.2d 817, 823–24 (Iowa 2010). The existence of corroborative evidence is a question of law for the court, but the sufficiency of that evidence is ordinarily a question of fact for the jury. *State v. Brown*, 397 N.W.2d 689, 694–95 (Iowa 1986). The corroborative evidence does not need to be strong and does not need to confirm each material fact of the accomplice's testimony. *Id*. But the corroborative evidence must be inculpatory and must connect the defendant with the commission of the crime. *State v. Vesey*, 241 N.W.2d 888, 890 (Iowa 1976). The corroborative evidence is

insufficient if it "merely supports accomplice testimony tending to show a defendant's opportunity to commit a crime." *Id.* at 891. Finally, testimony of one accomplice may not corroborate the testimony of another accomplice. *State v. Douglas*, 675 N.W.2d 567, 572 (Iowa 2004).

> An accomplice has been defined as
>
> > a person who willfully unites in, or is in some way concerned in the commission of a crime. In general, a person is an accomplice if he or she could be charged and convicted of the same offense for which the defendant is on trial.

Barnes, 791 N.W.2d at 823 (citations omitted). Where the facts are not in dispute or susceptible to different inferences, the question of whether a witness is an accomplice is a question of law for the court. *Id.* However if there is a dispute, the question is one of fact for the jury. *Id.*

The district court submitted to the Jury Instruction No. 16, which defined accomplice as "a person who knowingly and voluntarily cooperates or aids in the commission of a crime." The instruction correctly informed the jury a person cannot be convicted only by the testimony of an accomplice, but the accomplice testimony needed to be corroborated by other evidence tending to connect the defendant with the crime. The court asked the jury to consider whether Quade, Jenkins, Duncan, and Martin were accomplices. The court instructed the jury if it found any of these individuals were accomplices, they could not convict the defendant on the basis of that accomplice's testimony alone. However, unfortunately the district court did not on its own motion give the jury special interrogatories provided for under Iowa Rule of Criminal Procedure 2.22(2). Such interrogatories can be given on the court's own motion or at the request of

the defendant where, as here, "it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required." Iowa R. Crim. P. 2.22(2). While these special interrogatories would have assisted this court in its appellate review, we nonetheless find sufficient corroboration of the other State's witnesses' testimony in the defendant's police interview and the testimony of the two victims.

In *Jones* this court recognized "evidence defendant was seen in the company of perpetrators of a crime shortly before the event may be used to corroborate testimony." *Jones*, 511 N.W.2d at 405 (emphasis added). In this case, the defendant stated in his police interview he was at the after-hours party before the incident occurred. He identified Quade, Martin, Jenkins, Ralph Ellis, and Duncan as being at the party with him. He also confirmed he left the party with Quade, Martin, Jenkins, and Ralph Ellis, and that Duncan was not along when the group left. Quade, Martin, and Jenkins all testified they were at the after-hours party with the defendant and all testified the defendant left the party with them in Quade's car. The defendant's statements placing himself in the company of perpetrators of the crime both immediately before and after the crime occurred is sufficient to corroborate the accomplice's testimony and provides sufficient evidence to sustain the defendant's convictions. *See Douglas*, 675 N.W.2d at 572 (finding an accomplice's testimony can be corroborated by a defendant's confession).

Additionally, the victims provided corroboration for the accomplice testimony. Each of them testified that four individuals were involved in the crimes

committed against them and gave descriptions of those individuals that were consistent with their being Martin, Duncan, Ralph Ellis, and the defendant. While the victims could not identify the perpetrators, the group of perpetrators had to have been larger than the defendant claimed it was. Although the defendant denied he was one of the perpetrators, the defendant admitted he was in their company shortly before the crimes were committed.

The defendant also asserts there was insufficient evidence of his aiding and abetting to sustain the conviction. He relies on the same lack of corroboration argument as above asserting the only evidence regarding his aiding and abetting the crime came through the uncorroborated testimony of accomplices. As we state above, the defendant's statement in the police interview placing himself in the company of the perpetrators of the crime both immediately before and after the crime occurred, as well as the victims' testimony, is sufficient to corroborate the accomplice testimony that the defendant was not only present, but actively participated in the crime. Based on this corroboration, we find there was sufficient evidence to sustain the defendant's conviction as an aider or abettor or as a principal.

IV. EXCLUDING TESTIMONY OF COCONSPIRATOR. The defendant also claims that the district court erred by excluding the testimony of Ralph Ellis. Specifically, he asserts the district court should have directed the State to refrain from asking questions on cross examination that would have required Ralph Ellis to invoke his privilege against self-incrimination. Alternatively, the defendant asserts the district court should have granted his request to award Ralph Ellis

immunity so Ralph Ellis could testify without the need to invoke his Fifth Amendment rights.

The defendant sought to call Ralph Ellis as a witness during his case-in-chief. At the time of the defendant's trial, Ralph Ellis had pled guilty to two counts against him arising from this incident, but he had not yet been sentenced. Ralph Ellis made it clear during the pre-trial deposition he intended to invoke his Fifth Amendment rights on any question that implicated the charges to which he had not pled guilty and Ralph Ellis did invoke this privilege a multitude of times during the deposition. It was Ralph Ellis's position that until he was sentenced, the State could back out of the plea agreement he had been given.

The State moved to strike the testimony of Ralph Ellis based on *State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987). In *Bedwell*, the Iowa Supreme Court held the district court properly refused to permit the defendant to call a witness who had indicated an intent to claim his Fifth Amendment privilege against self-incrimination. 417 N.W.2d at 69. The court held the "jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense." *Id*. Thus, the court ruled the restriction against calling a witness who has indicated an intention to invoke his Fifth Amendment privileges applies equally to the State and the defendant. *Id.*

In response to the State's motion to strike Ralph Ellis, the defendant asked the district court to order the parties to limit the scope of the direct and cross-examination of Ralph Ellis to only those charges to which he had pled

guilty; thus, in theory alleviating Ralph Ellis's need to invoke the Fifth Amendment. The district court refused to limit the scope of the examination finding the State was entitled to a full cross-examination of the witness. We find no error in the district court refusing to restrict the direct and cross-examination testimony of Ralph Ellis. Pursuant to *State v. Parker*, 747 N.W.2d 196, 207 (Iowa 2008), "[t]he nature and scope of cross-examination is governed by the sound discretion of the trial court."

Alternatively, the defendant argues the district court erred in refusing to grant use immunity to Ralph Ellis so he could testify without the need to invoke his privilege against self-incrimination. The defendant asserts preventing him from calling Ralph Ellis to testify violated his right to present a defense, which is rooted in the Sixth and Fourteenth Amendments. In addition, he asserts the State engaged in prosecutorial misconduct by seeking to distort the record when the State resisted his request for immunity for Ralph Ellis.

Use immunity is a court order compelling a witness to give self-incriminating testimony and prohibiting the State from using the testimony in a subsequent prosecution of the witness. *State v. Fox*, 491 N.W.2d 527, 533 (Iowa 1992). The Iowa Supreme Court has not yet recognized whether the district courts in this state have the inherent power to grant use immunity, but it has found the district courts have no statutory authority to grant immunity on its own motion. *Id.*

Several policy reasons weigh against allowing the court to grant use immunity including the risk the judicial branch will encroach on the decisions

traditionally made by the executive branch; the risk of significantly impairing the State's ability to prosecute immunized witnesses and increasing the State's burden of proof; and the risk of abuse by codefendants by undermining the administration of justice through cooperative perjury. *Id.* Although the court in *Fox* found it did not need to decide whether the district court had the inherent power to grant use immunity, it did state "use immunity—if available at all—should be considered only in circumstances in which the prosecution has improperly prevented a defense witness from giving essential exculpatory evidence." *Id*. at 533–34.

If Ralph Ellis was granted immunity, the defendant asserts he would offer the following exculpatory evidence:

> 1) The defendant was doing nothing when Yeazel was assaulted and was standing far behind the rest group leaning back on a wall.
> 2) When the group walked out of the building with Yeazel after the assault, the defendant was roughly nine feet behind.
> 3) The defendant was still a long distance away behind Ralph Ellis when the gun was pulled on Yeazel.
> 4) The defendant was standing four cars away when TM was pulled out of the car and when Ralph Ellis took TM's cell phone.
> 5) The defendant did not say anything during the assault on Yeazel in the building or when the group walked out into the parking lot.

Even if we were to find the district court had the inherent power to grant use immunity, we find the defendant has failed to demonstrate the prosecution improperly prevented Ralph Ellis from giving essential exculpatory evidence. Ralph Ellis's testimony was not essential and was not clearly exculpatory. In fact, Ralph Ellis's testimony contradicted both Duncan's testimony and the defendant's statements in the police interview that the defendant was not around

when Duncan committed the crime. In the police interview, the defendant asserted he had left the party prior to the assault and Duncan asserted in his trial testimony the defendant was still inside the apartment building with Ralph Ellis when the assault occurred. In contravention to this testimony, Ralph Ellis asserted in his deposition the defendant was around and observing the assault, though he did not take part or say anything. Ralph Ellis also invoked the Fifth Amendment when asked whether the defendant put his hand down T.M.'s pants. Ralph Ellis's testimony falls short of being essential or exculpatory.

V. CONCLUSION. It would have been helpful to this court for the district court to submit special interrogatories to the jury on the issue of which witnesses they found to be an accomplice. However, sufficient corroboration of all of the witnesses' testimony was found from the defendant's own statements in the police interview, which established the defendant was with the perpetrators both immediately before and after the crime. In addition, we find the district court did not err when it refused to grant use immunity to Ralph Ellis as the defendant failed to demonstrate Ralph Ellis's testimony was essential and exculpatory.

AFFIRMED.