IN THE COURT OF APPEALS OF IOWA

No. 1-267 / 10-1218
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRADLEY ALLEN BILYEU,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge.

The defendant appeals his convictions for assault with intent to commit serious injury and robbery in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Carlyle D. Dalen, County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DOYLE, J.

Bradley Bilyeu appeals his convictions for assault with intent to commit serious injury and robbery in the first degree. He claims the district court erred in refusing to allow him to impeach a witness's testimony with extrinsic evidence. He additionally claims his trial counsel was ineffective for failing to request a jury instruction asking the jury to determine whether three witnesses were accomplices. We affirm.

I. Background Facts and Proceedings.

A jury could have found the following facts from the evidence presented at trial: Bradley Bilyeu was at a party with his friends, Dallas Collins, Nathan Lee, and Jason Schultz, until the early morning hours of November 15, 2008. While there, Collins was involved in a fight. The friends left the party and went back to the residence they shared. Still excited from the fight, Lee suggested robbing an acquaintance of his, William Schukei, who had a large amount of money and marijuana at his house. Collins and Schultz told Lee it was a bad idea, but Bilyeu "was all for it." Bilyeu got a double barrel shotgun from the basement of the residence, loaded it, and shoved it down his pants.

Bilyeu and Lee set off for Schukei's house. They soon tired of walking and called Bilyeu's girlfriend, Gina, for a ride. She picked them up around 5:00 a.m., thinking she was taking them somewhere to buy marijuana.

Lee gave Gina directions and had her park about a block away from Schukei's house. He and Bilyeu got out and walked the rest of the way. They crawled over a fence in Schukei's backyard and walked up to the door. Bilyeu took the butt of the shotgun and smashed the outside glass door. The wooden

door behind it opened, and Bilyeu walked into the house. Once inside, he encountered Schukei, who was lying in his bed in the front room.

Bilyeu pointed the gun at Schukei and said, "[T]his is a robbery." Schukei put his pants on, walked over to his dresser, and threw two vacuum-packed bags of marijuana at Bilyeu. Schukei's roommate, Susan Button, walked into the room. Bilyeu pointed the gun at her and asked her if she wanted to die too. Schukei grabbed a sword he kept in his room and brought it down on the gun. He pushed Bilyeu out the front door and saw Lee standing next to the side of the house. Schukei shook his head at him and turned to go back inside. Lee yelled, "Shoot him!" Bilyeu shot Schukei in the back. He and Lee ran back to Gina's vehicle and told her to drive to Big Blue Lake.

Either Bilyeu or Lee threw the gun into the water. Gina drove them back to their apartment where Collins and Schultz were waiting. The gun was found in the lake a few days later. Bilyeu and Lee were arrested and charged with attempted murder and first-degree robbery. Lee accepted a plea deal from the State and testified against Bilyeu. Gina and Collins also testified, but Schultz refused to testify, so his police interview and deposition testimony were presented to the jury instead.

The trial court instructed the jury that if it found Lee was an accomplice, his testimony must be corroborated by other evidence. The court did not provide the same instruction for the testimony of Gina, Collins, or Schultz. The jury returned a verdict finding Bilyeu guilty of assault with intent to commit serious injury and robbery in the first degree. Bilyeu appeals.

II. Discussion.

A. Impeachment by Contradiction.

At trial, Collins testified on direct examination by the State that he was at a party before the robbery. The State asked, "And where was the party, or what was going on?" Collins answered, "It was just a party. I ended up in a fight." He testified that after the fight, "everybody was [a] little riled up . . . . And Nate [Lee] presented the idea where he knew where he could rob a guy." On cross-examination, Bilyeu's counsel asked Collins more questions about the fight:

> Q. And who did you get in a fight with? A. I don't know his name.
> Q. Was anybody injured in that fight? A. It was a fight. I mean, I'm sure somebody felt some kind of whack.
> Q. Somebody was cut in that fight? A. Not that I know of.
> . . . .
> Q. Mr. Collins . . . during that fight, did you use a weapon to cut somebody? A. No, I didn't.
> . . . .
> A. The night involved Dylan Anderson.
> Q. Dylan Anderson was involved? A. He was one of the ones I was fighting with.

After the State rested, Bilyeu sought to present the testimony of Anderson. The State objected. In an offer of proof, Anderson testified he saw Collins cut someone named Tavar with a box cutter at the party. The State argued the testimony was inadmissible under Iowa Rules of Evidence 5.608(*b*) and 5.403. The defense responded that it was properly seeking to impeach Collins's credibility under rule 5.607. The district court ruled, "I do agree with the State's argument and am not allowing the testimony that has just been offered."

Bilyeu argues this ruling was in error because rule 5.608(*b*) does not prevent "the ordinary contradiction of a witness's testimony regarding the facts of

the particular case." Changing its tune somewhat on appeal, the State agrees with Bilyeu "that Iowa Rule of Evidence 5.608(*b*) does not govern the admissibility of evidence offered under the theory of impeachment by contradiction." The State asserts impeachment by contradiction is instead governed by rule 5.607, as Bilyeu argued before the district court, but maintains the challenged evidence was nevertheless inadmissible under that rule. We agree. *See State v. Parker*, 747 N.W.2d 196, 208 (Iowa 2008) (noting a court's ruling on the admissibility of evidence may be upheld on any ground appearing in the record).

"The credibility of a witness can be attacked in a variety of ways." *Id.* at 207. One method is referred to as "impeachment by contradiction" and is accomplished by proof through other witnesses that the material facts were not as testified to by the witness. *Id.* at n.3; *see also United States v. Kincaid-Chauncey*, 556 F.3d 923, 932 (9th Cir. 2009). "Impeachment by contradiction 'permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence.'" *Kincaid-Chauncey*, 556 F.3d at 932. This method of impeachment is recognized by the federal courts as "an exception to the collateral fact rule embodied in Federal Rule of Evidence 608(b), which generally prohibits the introduction of extrinsic evidence to attack the credibility of a witness."[1] *Id.*; *see also Brunner v. Brown*, 480 N.W.2d 33, 35 (Iowa 1992) ("[O]ur rules of evidence are patterned after the federal rules, and

[1] Like Federal Rule of Evidence 608(b), Iowa Rule of Evidence 5.608(*b*) provides in relevant part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in rule 5.609, may not be proved by extrinsic evidence."

we give considerable weight to their rationale and the cases interpreting them."). In the federal courts, impeachment by contradiction is authorized by Rule 507 and Rule 403 governs its application.[2] *United States v. Gilmore*, 553 F.3d 266, 271 (3d Cir. 2009); *see also United States v. Castillo*, 181 F.3d 1129, 1133 (9th Cir. 1999) ("Impeachment by contradiction is properly considered under Rule 607, not Rule 608(b).").[3]

Iowa recognizes the method of impeaching a witness by contradiction. *See State v. Roth*, 403 N.W.2d 762, 767 (Iowa 1987), *overruled on other grounds by State v. Campbell*, 714 N.W.2d 622 (Iowa 2006). But the method comes with an important limitation. "In general, a witness may be impeached by contradiction only if 'the statements in issue [have] been volunteered on *direct* examination.'" *Kincaid-Chauncey*, 556 F.3d at 932 (citation omitted). Extrinsic evidence may not be admitted to impeach testimony invited by questions posed during cross-examination. *Id.* This is because

> when the testimony to be contradicted is offered under cross-examination, impeachment by contradiction is far less likely to

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[2] Iowa Rule of Evidence 5.607 is identical to its federal counterpart, Rule 507, and states: "The credibility of a witness may be attacked by any party, including the party calling the witness." Rule 5.403 contains the general balancing test whereby relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[3] *Castillo* observes that "'[c]ounsel and courts sometimes have difficulty distinguishing between Rule 608 impeachment and impeachment by contradiction.'" 181 F.3d at 1132 (quoting 4 Joseph M. McLaughlin, *Weinstein's Federal Evidence*, § 608.12[6][a], at 608-41 (2d ed. 1999)). The court explains the difference as follows:

> Rule 608(b) prohibits the use of extrinsic evidence of conduct to impeach a witness' credibility in terms of his general veracity. In contrast, the concept of impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence.

Id.

> achieve its intended purpose of rooting out perjury because "opposing counsel may manipulate questions to trap an unwary witness into 'volunteering' statements on cross-examination" and because "it is often difficult to determine whether testimony is invited or whether it is volunteered on cross-examination."

Id. at 932-33 (citation omitted).

In light of the foregoing, we conclude the district court correctly excluded Anderson's testimony because the challenged statements were elicited by defense counsel during Collins's cross-examination. We additionally find any error in excluding Anderson's testimony was harmless. *See Parker*, 747 N.W.2d at 209 ("[E]rror in an evidentiary ruling that is harmless may not be a basis for relief on appeal."); *see also* Iowa R. Evid. 5.103(*a*) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .").

A variety of circumstances are considered in determining the existence of harmless error, *see Parker*, 747 N.W.2d at 209, including whether substantially similar evidence is in the record without objection. *State v. Gilmore*, 259 N.W.2d 846, 858 (Iowa 1977); *see also State v. Wixom*, 599 N.W.2d 481, 484 (Iowa Ct. App. 1999) ("When evidence is merely cumulative, it cannot be said to injuriously affect the complaining party's rights.").

Both Lee and Bilyeu testified Collins cut someone during the fight before the robbery. Lee was asked by defense counsel on cross-examination, "Did somebody get cut at that fight?" Lee responded,

> I did not see anything, but in my paperwork it said that Tavar got cut and had to get stitches for it so I guess when they were rolling around on the ground he had gotten cut.
>
> Q. Wrestling around with who? A. Tavar and Dallas [Collins] were wrestling around.

In response to questions from his counsel, Bilyeu similarly testified,

> I seen Dallas pull out—I didn't think it was a box cutter. I thought it was a steak knife which he had actually took and brought with him from the house earlier that night. He always carried knives on him. . . . I witnessed him pull the knife and it had a blade on it. . . . But I seen him pull the blade back and thrust towards Tavar and Tavar got sliced after that.

Anderson's proposed testimony that he saw Collins cut someone with a box cutter at the party was cumulative to the above testimony. We therefore find any error in excluding the evidence was harmless.

B. Accomplice Instruction

Bilyeu next claims his trial counsel was ineffective under the federal constitution for failing to request a jury instruction asking the jury to determine whether Gina, Collins, and Schultz were accomplices. To prevail on this claim, Bilyeu must show that counsel (1) breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The claim may be resolved on either ground if the record is adequate to do so on direct appeal. *See State v. Barnes*, 791 N.W.2d 817, 822-24 (Iowa 2010). Our review is de novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010).

We begin and end with the prejudice prong.[4] For purposes of this analysis, we will assume without deciding that Gina, Collins, and Schultz were

[4] In *Barnes*, the court noted there was no need to preserve a similar ineffective-assistance claim for further development of the record, "as the determination of prejudice for this particular claim is made based on a review of the evidence introduced at trial. Therefore, the necessary record is before us." 791 N.W.2d at 824 n.2.

accomplices.[5] *See State v. Douglas*, 675 N.W.2d 567, 571 (Iowa 2004) (stating an accomplice is a person who could be charged with and convicted of the specific offense for which an accused is on trial). The only question then is whether there was sufficient independent evidence to corroborate their stories. *See Barnes*, 791 N.W.2d at 824.

"It has long been the law in Iowa that one may not be convicted on the testimony of an accomplice alone." *Douglas*, 675 N.W.2d at 568; *see also* Iowa R. Crim. P. 2.21(3). Thus, when the State relies upon accomplice testimony, "corroborating evidence independently linking the defendant to the offense is required." *Douglas*, 675 N.W.2d at 569. Corroborative evidence may be direct or circumstantial. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). It need not be strong or confirm each material fact of the accomplice's testimony. *State v. Brown*, 397 N.W.2d 689, 695 (Iowa 1986). Evidence asserted as corroborative of an accomplice's testimony will be sufficient if that evidence "'tends to connect the accused with the commission of the crime and supports the credibility of the accomplice.'" *Barnes*, 791 N.W.2d at 824 (citation omitted). A small amount of evidence is all that is required. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). However, the "testimony of one accomplice may not corroborate the testimony of another accomplice." *Douglas*, 675 N.W.2d at 572.

We begin with the testimony of the alleged accomplices. Gina testified she picked Bilyeu and Lee up around 5:00 a.m. and drove them to Schukei's house. She stated Bilyeu and Lee got out of her vehicle and walked across someone's yard. A short time later, she heard a loud noise, but she did not think

[5] The State in fact concedes Collins and Schultz were most likely accomplices.

it was a gunshot. Bilyeu and Lee came running back to the car, and Lee told her to "shut the F up and drive" to Big Blue Lake. Once there, Bilyeu and Lee got out of the car and walked out onto the dock where Lee threw some clothes into the water. Gina's testimony was corroborated in most respects by Bilyeu's testimony. *See State v. Taylor*, 557 N.W.2d 523, 528 (Iowa 1996) (noting a defendant may supply necessary corroboration of an accomplice's testimony). Bilyeu testified he called Gina to pick him and Lee up on the way to Schukei's house, where they were going to buy some marijuana. He stated that he waited for Lee outside of Schukei's house. He heard a loud crash and then saw Lee come running towards him. They got back to Gina's car, and Lee told her to "get the F out of here. Drive now. . . . [G]o to Big Blue."

We turn next to Collins's testimony. He testified that he heard Bilyeu and Lee talking about a gun before they left for Schukei's house. Although he didn't see them leave with a gun, he testified there was a 12-gauge shotgun at their residence. He described it as an "older shutgun, side-by-side, double barrel." Collins stated that when Bilyeu and Lee returned home after the robbery, he heard Bilyeu say he threw the gun into Big Blue Lake. Schultz likewise testified that either Bilyeu or Lee told him they threw the gun into the lake after the robbery. As mentioned earlier, a few days after the robbery, investigators dredged Big Blue Lake and found a 12-gauge, double barrel shotgun with one discharged round and one live round left in it. Spent ammunition from a 12-gauge shotgun, referred to by police as a shotgun "wad," was discovered outside Schukei's front door. Schukei and Button described the gun used in the robbery

as a double barrel shotgun. Schukei testified the gun recovered from the lake was like the one used by the shooter.

The victims' description of the robbers' clothing also matches Schultz's description of what Bilyeu and Lee were wearing when they left for Schukei's house. Schultz testified that Bilyeu was wearing a long black coat that reached his knees, while Lee was wearing a shorter black coat with a black bandana around his face. Schukei and his roommate, Susan Button, testified the man that was in their house with the shotgun was wearing a long black trench coat. Schukei stated that man was tall and slender, whereas the second man he saw outside the house was stocky and heavy-set. Bilyeu is over six feet tall. Lee is less than six feet tall and weighs about 260 pounds. Schukei remembered the shooter was wearing glasses. Bilyeu testified he always wears glasses because he cannot see without them. Both Schukei and Button believed Bilyeu was the shooter, though they could not be sure.

Bilyeu challenges the sufficiency of this corroborative evidence, pointing out discrepancies in the testimony of Schukei and Button. However, the State "need not establish corroborative evidence beyond a reasonable doubt." *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996). Inconsistencies in corroborative testimony are for the jury to resolve. *See State v. Cuevas*, 281 N.W.2d 627, 631 (Iowa 1979) (rejecting argument that "corroboration testimony was weak and suspect" because "we do not purport to assess the credibility of the witnesses; that is for the jury"). Moreover, as stated earlier, corroborative testimony does not need to corroborate "the whole of the accomplice's testimony or every material fact." *Id.* at 630. Rather, whether "evidence is corroborative

depends on whether it supports some material part of the accomplice's testimony." *Id.* at 629.

Finally, we "may also consider as corroborating evidence the fact that when defendant was interrogated by the police he gave false and misleading evidence concerning his whereabouts." *State v. Harris*, 589 N.W.2d 239, 242 (Iowa 1999). Bilyeu initially denied attending a party with his friends the night of the robbery. He told the police he was home all night. Bilyeu changed his story at trial, admitting that statement was false and stating he had in fact been at a party with Collins, Lee, and Schultz.

For the foregoing reasons, we find Bilyeu failed to establish that, had the jury been instructed Gina, Collins, and Schultz were accomplices, there was a reasonable probability the jury would have come to a different conclusion regarding his guilt. *See Barnes*, 791 N.W.2d at 825. We therefore deny his ineffective-assistance claim.

III. Conclusions.

Finding no prejudice resulted from either of the claimed errors on appeal, we affirm Bilyeu's convictions for assault with intent to commit serious injury and robbery in the first degree.

AFFIRMED.