

IN THE COURT OF APPEALS OF IOWA

No. 1-665 / 10-1665
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ASA JASON WINTERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Asa Winters appeals from his conviction of robbery in the first degree.

AFFIRMED.

Richard E. H. Phelps, II, of Phelps Law Office, Mingo, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Eisenhauer, JJ.

SACKETT, C.J.

Asa Winters appeals from his conviction of robbery in the first degree. He contends there was insufficient evidence, the court erred in instructing the jury, and he received ineffective assistance of counsel. We affirm.

I. Background Facts and Proceedings.

On December 23, 2009, three men robbed a liquor store. Two men wearing masks, black stocking caps, black pants, and dark hooded coats or sweatshirts ran into the store. The taller of them had a handgun and ordered the clerk at the cash register to get down on the ground. The shorter man was wearing blue plastic exam gloves. After the clerk opened the cash register, both robbers grabbed money from the cash drawer, then fled. The robbery was caught on several security cameras in the store. When the manager of the store, who was not present during the robbery, viewed the videos of the robbery, he told police he recognized the larger robber from his physique and his eyes as a regular customer, but he didn't know his name. The clerk and another man who was in the store during the robbery both said they did not recognize the robbers.

On a day soon after the robbery, a car came through the liquor store drive-through. The manager saw the men he believed to be the robbers in the car. He wrote down the license plate and called the police, but they were unable to locate the car. On December 31, the manager saw one of the men he believed was one of the robbers in the store. He called the police. When they arrived they detained the man in the store, the defendant, who was outside the store, and another man in a vehicle outside the store. When the police searched the

vehicle, they found a number of items consistent with the robbery: a .38 caliber handgun, a partial box of blue plastic exam gloves, a face mask, a black stocking cap, and a pair of black pants.

The store manager viewed sets of photos and identified the defendant as the man who had the gun during the robbery. Baron Booker, one of the men detained on December 31, pleaded guilty to robbery in the first degree. He testified at the defendant's trial and said he and the defendant were the two who robbed the store on December 23, and the third man, Najuan Decatur, was the lookout that night. Booker identified himself and the defendant on the security video. Decatur appears in security video from earlier on December 23. Booker testified Decatur had entered the store earlier on December 23 to see who was working, because the men knew the manager could identify them. Booker also identified the items police found in the vehicle as the blue gloves and black pants he wore during the robbery, the stocking cap and face mask the defendant wore during the robbery, and the handgun the defendant held during the robbery.

At trial, after the State rested, defense counsel moved for a "directed verdict," stating, "I'd maintain that no reasonable jury could find beyond a reasonable doubt that the State had proven each and every element of the offense." The court overruled the motion, finding the State had generated a jury question.

Defense counsel objected to jury instruction 20 to the extent the court added language to uniform instruction 200.4 on corroboration of accomplice testimony.¹ The court overruled the objection and did not remove the challenged language.

The jury found Winters guilty. The court overruled his subsequent motion to set aside verdict, motion in arrest of judgment, and motion for new trial.

II. Scope and Standards of Review.

Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010). We will uphold a jury's verdict if supported by substantial evidence. *State v. McCullah*, 787 N.W.2d 90, 93 (Iowa 2010). Substantial evidence is evidence that "would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). The evidence is viewed in the light most favorable to the State, including all legitimate inferences

¹ Instruction 20 provided:

An "accomplice" is a person who knowingly and voluntarily cooperates or aids in the commission of a crime.

A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime.

The court finds that Baron Booker is an accomplice, the defendant cannot be convicted only by that testimony. There must be other evidence tending to connect the defendant with the commission of the crime. Such other evidence, if any, is not enough if it just shows a crime was committed. It must be evidence tending to single out the defendant as one of the persons who committed it.

The corroboration of an accomplice's testimony need not be strong, nor must it confirm every material fact testified to by the accomplice. It need only tend to connect an accused with the commission of a given crime.

Corroborative evidence can be either direct or circumstantial. A small amount of corroborative evidence is all that is required.

The final two paragraphs (italicized) are not in uniform criminal instruction 200.4.

and presumptions that may fairly and reasonably be deduced from the record. *Hennings*, 791 N.W.2d at 832-33. The evidence must raise a fair inference of guilt and do more than raise mere suspicion, speculation, or conjecture. *McCullah*, 787 N.W.2d at 93.

Alleged errors in jury instructions are reviewed for correction of errors at law. *State v. Murray*, 796 N.W.2d 907, 908 (Iowa 2011). An instructional error does not require reversal unless it caused prejudice to the defendant. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009). Errors in jury instructions are presumed prejudicial unless “the record affirmatively establishes there was no prejudice.” *State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010). We do not consider jury instructions in isolation, but look at the jury instructions as a whole. *State v. Fintel*, 689 N.W.2d 95, 104 (Iowa 2004). If a requested instruction correctly states the law, applies to the case, and is not recited elsewhere in the instructions, the court must give the requested instruction. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

Generally, claims of ineffective assistance of counsel are preserved for postconviction relief proceedings. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). This is so an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to the claims. *Id.* However, if we determine the record is adequate, the claim may be resolved on direct appeal. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

To succeed on an ineffective-assistance-of-counsel claim, Winters must prove: (1) his counsel failed to perform 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). To prove trial counsel failed to perform an essential duty, Winters must prove counsel's performance was deficient, meaning trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* We measure trial counsel's performance objectively, by determining whether counsel's assistance was reasonable, under prevailing professional norms, considering all the circumstances. *Id.* at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94; *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010).

To demonstrate prejudice, Winters must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. To establish a reasonable probability the result would have been different, Winters "need only show that the probability of a different result is 'sufficient to undermine confidence in the outcome.'" *State v. Graves*, 668 N.W.2d 860, 882 (Iowa 2003) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

III. Merits.

A. Sufficiency of the Evidence.

Winters contends there was insufficient evidence he was involved in the robbery. He lists the evidence against him as a line-up identification, the

testimony of an accomplice, and an identification by the store manager, who was not present during the robbery. His argument is simple. Without an identification by the store manager, there is no corroboration of Booker's testimony that Winters was one of the robbers. If there is no corroboration, there is insufficient evidence for a conviction.

The store manager reviewed the security videos of the robbery numerous times and said he recognized the larger of the robbers from his physique and his eyes as one of his regular customers. The manager testified Winters came into the store from two to four times a day. He was able to identify the defendant from photos viewed at the police station. The weight and credibility given to the manager's testimony is for the jury. *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005) (stating it is for the jury to judge the credibility of the witnesses and weigh the evidence).

In addition to the manager's identification of Winters, the security videos of the robbery show a shorter robber and a taller robber with a gun. Booker testified he was the shorter robber and Winters was the taller robber. Booker is five feet nine inches tall. Winters is six feet tall.

Several items consistent with the robbery and with Booker's testimony were found in the vehicle seized: a .38 caliber handgun, a partial box of blue plastic exam gloves, a face mask, a black stocking cap, and a pair of black pants.

Corroborative evidence need not be strong, but it must tend to connect the accused with the commission of the crime and support the credibility of the accomplice. *State v. Barnes*, 791 N.W.2d 817, 824 (Iowa 2010). Corroborative

evidence may be direct or circumstantial. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). The evidence need not support each element of the offense, but is considered sufficient if it supports some material part of the accomplice's testimony and tends to connect the accused to the crime. *State v. Yeo*, 659 N.W.2d 544, 548 (Iowa 2003).

We conclude there was sufficient evidence to corroborate Booker's testimony that the defendant was the other robber on the security videos. The store manager, although he was not present during the robbery, reviewed the security videos and said he knew the larger robber because he was a regular customer. He identified the defendant as that person from police photos. Booker identified himself, the defendant, and Decatur as the three persons involved in the robbery. The same three persons were arrested when they returned to the store on December 31 and the manager called the police. The manager had seen all three in the store on numerous occasions. Security videos from December 23 show Decatur checking out the store shortly before the robbery. We affirm on this issue.

B. Jury Instructions.

Winters contends the district court erred in refusing to delete language the court added to the uniform instruction on corroboration of accomplice testimony.

Winters objected to the last two paragraphs of Instruction 20, contending they conflicted with the language in other instructions that told the jury if the State had to prove something, it had to be by evidence beyond a reasonable doubt. The instruction as given, provides:

An “accomplice” is a person who knowingly and voluntarily cooperates or aids in the commission of a crime.

A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime.

The court finds that Baron Booker is an accomplice, the defendant cannot be convicted only by that testimony. There must be other evidence tending to connect the defendant with the commission of the crime. Such other evidence, if any, is not enough if it just shows a crime was committed. It must be evidence tending to single out the defendant as one of the persons who committed it.

The corroboration of an accomplice’s testimony need not be strong, nor must it confirm every material fact testified to by the accomplice. It need only tend to connect an accused with the commission of a given crime.

Corroborative evidence can be either direct or circumstantial. A small amount of corroborative evidence is all that is required.

All but the last two paragraphs are from the uniform criminal instruction 200.4.

The only change the court made to the uniform instruction was to paragraph three, by finding Baron Booker was an accomplice, instead of leaving that finding to the jury.

Concerning the added language that is paragraph four, the language is a direct quote from *State v. King*, 256 N.W.2d 1, 10 (Iowa 1977). The appellant there made a similar argument, that the “need not be strong” language conflicts with the jury instruction the State must prove each element of the offense by evidence beyond a reasonable doubt. *King*, 256 N.W.2d at 10. The court determined “the isolated ‘beyond a reasonable doubt’ standard he here invites us to apply is misconceived” and the jury instructions “viewed in their entirety, sufficed to place upon the State the requisite burden of proof.” *Id.* at 10-11.

Citing to *King*, our court has held “[t]he State need not establish corroborative evidence beyond a reasonable doubt.” *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996).

Concerning the final paragraph of the instruction, that language also comes directly from case law. See *Shortridge*, 589 N.W.2d at 80 (“Corroborative evidence may be direct or circumstantial. . . . [A] small amount of corroborative evidence is all that is required.”).

Even though the language from the cases cited above has not been added to the uniform instructions, it is a correct statement of the law, it is applicable to the circumstances of this case, and it is not stated elsewhere in the instructions. See *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000) (providing for an instruction “when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions”). Although the uniform instructions are generally preferred, see *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987), the district court is not bound by them. See *State v. Harrington*, 284 N.W.2d 244, 250 (Iowa 1979). We find no error in the challenged instruction and affirm on this issue.

C. Ineffective Assistance.

Winters contends trial counsel was ineffective in not moving in limine or objecting to Booker’s testimony he pleaded guilty to robbery in the first degree or in not requesting a limiting instruction on accomplice testimony. He argues Booker’s testimony that Winters participated in the robbery to which Booker pleaded guilty, would be used improperly by the jury as substantive evidence of

Winters' guilt of the same crime. The State contends trial counsel did not breach any duty and Winters was not prejudiced.

In *State v. Johnson*, 534 N.W.2d 118, 126 (Iowa Ct. App. 1995), we addressed a claim trial counsel was ineffective in *not* offering evidence of a codefendant's guilty plea. At trial the State objected to the evidence and the court ruled it was irrelevant. *Id.* We concluded the evidence would not have been admitted, even if counsel had made a timely offer of proof, citing *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985), for the principle that evidence of a guilty plea of an accomplice is not admissible to prove the guilt of the defendant. *Id.* However, such evidence may be admissible for other purposes "such as to impeach, to reflect on the witness's credibility, or to show the witness's acknowledgment of participation in the offense." *State v. Hendrickson*, 444 N.W.2d 468, 471 (Iowa 1989) (citation omitted).

In *Hendrickson*, the State introduced testimony of a codefendant's guilty plea, and the defendant claimed the court erred in not giving a limiting instruction to the jury. *Id.* at 469-70. The supreme court concluded the district court did not abuse its discretion in giving only a general jury instruction on witness credibility instead of the defendant's requested instruction. *Id.* at 473. In its analysis, the court applied factors from *United States v. Black*, 685 F.2d 132, 135 (5th Cir. 1982), in determining Hendrickson was not unfairly prejudiced by the guilty plea testimony. *Id.* at 471.

These factors included the presence or absence of a limiting instruction, but the court also included other factors. These include whether there was a proper purpose in introducing the fact that a guilty plea was entered, whether the plea was improperly

emphasized by the government, whether the plea was used as substantive evidence of the defendant's guilt, and whether the introduction of the plea was invited by defense counsel.

Id.

In the case before us, in contrast to *Hendrickson*, even though trial counsel did not request a limiting instruction, the court gave a specific limiting instruction. Although it does not mention Booker by name, he was the only witness it applied to. Instruction 19 provided:

You have heard evidence claiming that a witness was convicted of crimes.

You may use that evidence only to help you decide whether to believe the witness and how much weight to give their testimony.

Winters claims that was not enough, because the State emphasized the guilty plea in closing arguments and encouraged the jury to use it as substantive proof of Winters's guilt of the same offense. The following are excerpts of the prosecutor's remarks:

[Booker] plead guilty to robbery in the first degree. Not robbery in the second degree, not some lesser offense of a theft. He pled guilty to the very crime the defendant is charged with, robbery in the first degree.

A little later he argued:

Baron Booker pled guilty. Baron Booker, long before he pled guilty, admitted to his involvement in the crime on the 23rd. He admitted to his involvement in the crime on the 29th. And he admitted to his involvement in the crime on the 31st. He pled guilty to those. He's implicated the defendant for the 23rd.

Still later, the prosecutor said:

Instruction No. 17 talks about aiding and abetting and I think this is important when we're looking at Mr. Booker. Mr. Booker's charged with robbery in the first degree. Did he have a gun? No. How does he get to robbery in the first degree? Because people who aid and abet in a crime are treated the same way, whether

they're the guy who had the gun, the guy, Mr. Decatur, standing out front, just casing the place, they're all treated the same way, charged with robbery in the first degree.

They can be aiding and abetting simply by actively participating in it, by encouraging an act in some way, such as the lookout, such as the guy who goes in as an additional body in there. They're all charged with robbery in the first degree.

Again, you'll find they aided and abetted, they're guilty of the crime charged. That's where we have Booker. That's how we have Mr. Decatur all charged.

Winters compares these remarks to the circumstances in *State v. Vargas*, 2010 WL 3463405 (Minn. Ct. App. 2010), an unpublished opinion from Minnesota, where the court ruled:

Here, the prosecutor clearly invited the jury to consider the accomplice's plea of guilty rather than just the facts of the accomplice's involvement in deciding two essential elements of the burglary charge. [The accomplice's] plea of guilty permeated the prosecutor's arguments and became a central focus in those arguments. Having failed to show a legitimate purpose for the introduction and repeated references to the accomplice's plea of guilty, the prosecutor was bound by the clear general rule of inadmissibility. His failure to follow the rule was prosecutorial misconduct and plain error.

Vargas, 2010 WL 3463405 at *5.

We conclude Booker's testimony he pleaded guilty to the robbery was admissible for such purposes as impeachment, to reflect on the Booker's credibility, or to show the his acknowledgment of participation in the offense. *See Hendrickson*, 444 N.W.2d at 471. We note defense counsel cross-examined Booker concerning his criminal record, suggesting the lack of an objection to his testimony was trial strategy to impeach Booker. We cannot say counsel failed in an essential duty. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Therefore, the claim counsel was ineffective must fail.

IV. Conclusion.

Having carefully reviewed the record and the claims and arguments raised on appeal, we conclude there was sufficient corroboration of the accomplice's testimony, the court properly instructed the jury, and defense counsel was not ineffective. Accordingly, we affirm Asa Winters's conviction of robbery in the first degree.

AFFIRMED.