

IN THE COURT OF APPEALS OF IOWA

No. 2-423 / 11-0645
Filed July 11, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY EUGENE WILLIAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas G. Reidel,
Judge.

Timothy Williams appeals his convictions of two counts of delivery of a
controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, and Michael J. Walton, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Timothy Williams appeals his convictions of two counts of delivery of a controlled substance, contending insufficient evidence corroborates an accomplice's testimony and trial counsel was ineffective in several respects. We find substantial evidence was presented to corroborate the accomplice's testimony, and the trial court properly denied the motion for judgment of acquittal. We reject the ineffectiveness claim except one, which we preserve for postconviction proceeding, and therefore affirm.

I. Background Facts and Proceedings.

Much of the evidence in this case stems from two controlled buys and the execution of a search warrant. The State alleged Williams was dealing crack cocaine by using his roommate, Jason Stillman, as the delivery person for the drug transactions.

From the evidence presented at trial, the jury could have found the following facts: Jason Stillman used crack cocaine once or twice a month. In March 2010, defendant Timothy Williams (nickname "Poetic") moved into Stillman's duplex in Davenport after Stillman's former roommate moved out, taking all the roommate's belongings. Williams was able to pay rent in cash, but to Stillman's knowledge, Williams had no discernible employment. In his cell phone, Stillman stored Williams' phone number under the name "Poetic" with telephone number XXX-XXX-0827. Because Williams helped out financially, and because he hoped to receive a portion of the drug in exchange for his services, Stillman would deliver crack cocaine when Williams asked him to.

Sergeant Gil Proehl worked drug cases in the Quad Cities and had worked with a confidential informant (CI) since 2006. Their work together resulted in the prosecution of several state and federal drug cases. The CI was acquainted with Williams, informed Sergeant Proehl he knew of a guy dealing drugs who used another guy to make the deliveries, and showed Sergeant Proehl the phone number on his cell phone. The CI listed Williams' cell phone under "D" "for drug dealer."

On March 13, 2010, Sergeant Proehl was investigating the Stillman and Williams residence and the phone number XXX-0827. Following standard procedures of a controlled purchase,¹ at about 9 p.m., Sergeant Proehl observed the CI place a call to the number XXX-0827 and ask to buy a fifty-dollar "rock" of crack. The CI recognized Williams as the person he spoke to over the phone. Meanwhile, Stillman was in his room reading when Williams asked Stillman to deliver a fifty-dollar rock of crack to a buyer in the alley. Stillman agreed. He took crack from Williams, delivered it to a man in the alley, and returned fifty dollars cash to Williams. Police watched Stillman leave the duplex, approach the CI's car, and return to the house. When the CI again met with Sergeant Proehl, he handed over a rock of crack cocaine² wrapped in the torn-off corner of a plastic bag.

¹ In a controlled purchase, a CI is searched for drugs, money, or contraband, as is the CI's vehicle, if involved. The CI is provided prerecorded money. The CI makes arrangements to purchase drugs, and then law enforcement maintains visual contact with the CI until the purchase is completed. After the purchase, the CI is followed out of the area; the drugs are turned over to law enforcement; and the CI is again searched for any other drugs, money, or contraband.

² A field-test of the rock was positive for the presence of cocaine.

On March 27, the CI arranged another controlled purchase of crack cocaine in Sergeant Proehl's presence. The CI first called XXX-0859 and learned the "main guy wasn't home." The CI then received a call from XXX-0859 saying "the guy's on his way home." Sixteen minutes later, the CI called XXX-0827 and "asked for a 50." Each telephone number had a different voice associated with it. The CI then received a call from the XXX-0859 number and was told "the guy was home and that he'd meet him at 14th and Fillmore to complete the transaction." Stillman noted that on March 27, at 9 or 10 p.m., Williams had asked Stillman to watch a cell phone while Williams was away. Stillman answered a call on that cell phone and told the caller Williams was not home. Stillman called Williams about the call and then relayed to the first caller that Williams was on his way home. Williams arrived home and asked Stillman to deliver the crack for him. Stillman took the drugs from Williams, sold them to a person in the alley, and gave the fifty dollars to Williams. Police watched the CI meet with Stillman in the alley. The CI then returned to Sergeant Proehl and handed over a rock of crack cocaine packaged in the torn-off corner of a plastic bag.

Sergeant Gill prepared a search warrant for the Williams/Stillman residence, and at about 1:30 a.m. on April 7, police executed a search warrant at the duplex where Williams and Stillman lived. In Williams' room, police found \$268 cash, a digital scale with white residue, a cell phone with a number XXX-0827, a box of plastic sandwich bags, and a plastic bag with a corner torn off. In Stillman's room, they found a bag of items commonly used to smoke crack cocaine. No crack cocaine was found during the search.

Williams and Stillman were both charged with two counts of delivery of a controlled substance. Stillman pleaded guilty to one count, received a deferred judgment, and testified for the State at Williams' trial.

At trial on cross-examination the CI testified, "Jason wouldn't deliver no drugs until he got the okay from [Williams]." The CI also testified he had made additional non-controlled buys from Williams, one of which occurred in Moline where Williams "was staying with some girl . . . off 23rd Avenue."

Teshera Harris testified she lived part time with Williams in the duplex with Stillman. She testified Stillman used drugs (marijuana and crack) and she never saw Williams sell drugs. She also stated that after a rent dispute between Williams and Stillman where Williams did not have sufficient rent, Stillman said "if anything goes down, he was gonna say Tim did it or it was Tim."

Cheryl Babers, the mother of three of Williams' children, testified Williams was with her in Moline on March 13, a date on which he proposed to her, and on March 27, which was her birthday. Rose Babers, Cheryl's mother, testified that on March 27 she took the kids to a movie so Williams and Cheryl could spend time together. When Rose returned after the movie to retrieve the children's sleepwear, she saw Williams in Cheryl's house.

Williams testified in his own defense. He stated he met Stillman "on the streets" "some years back"; that late one night Stillman "was walking, and at that particular time when I met him, I had recognized him and we had a conversation and I kind of threw my problems on him like I didn't really have nowhere to go." After moving in with Stillman, Williams learned of Stillman's "heavy use" of drugs, "but I didn't really have nowhere to go, and he was doing me a favor by letting

me stay there.” Williams acknowledged he smoked marijuana and snorted “powder cocaine.” He testified Stillman supplied him with the drugs.

He had—every night it would be three or four people over there I ain’t never seen each night, like a different group of people, and he would party with them.

Some he would sell to. Some—I think he was selling. I can’t say he was selling, but I don’t know. He kept money—when he lost his job, he kept money going and he would party a lot and he would give me what I would pay, like if I give him \$50, he would give me \$20 worth and that would make me upset. We would get into arguments, so he would get his scale out and he would separate it, my powder, and he would take his and cook his up.

Williams testified the digital scale and cell phone were already in his room when he moved in. He stated the “scale bounced around because it wasn’t just for crack. . . . The scale wasn’t just for selling purposes or whatever what they say or claim.” He denied using crack cocaine. And when asked “did you give [crack] to Mr. Stillman to deliver,” he responded “Had I been a drug dealer, I would have never trusted him with it, because he would have ran off and smoked it. It don’t make sense. If I was dealing drugs, why would I give it to him?” As for the CI, Williams stated “I’ve seen him in and around Quad-Cities. He’s like everywhere.” Williams also stated the CI sold stolen items out of the back of his car, panhandled, and claimed he “never really had too much of a connection” with the CI because the CI was “kind of like weird.”

The jury was instructed the State had to prove that on March 13 and March 27, 2010, “the defendant delivered or aided and abetted another to deliver crack cocaine” and “the defendant knew that the substance he delivered was crack cocaine.” The jury was also instructed:

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.

If you find Jason K. Stillman 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.

You are instructed that the Court has found that Jason K. Stillman was an accomplice, and you must consider him an accomplice.

The jury found Williams guilty of both delivery charges. He now appeals contending there was insufficient evidence to corroborate Stillman's testimony and he was denied the effective assistance of counsel in several respects.

II. Discussion.

A. The accomplice's testimony was sufficiently corroborated to sustain convictions. We review challenges to the sufficiency of the evidence for the correction of errors at law and will uphold a jury's verdict if it is supported by substantial evidence. *State v. Soboroff*, 798 N.W.2d 1, 5 (Iowa 2011).

"When the facts and circumstances are undisputed and permit only one inference, whether a witness is an accomplice is a question of law for the court." *State v. Douglas*, 675 N.W.2d 567, 571 (Iowa 2004). Here, the court determined, and the jury was instructed, that Stillman was an accomplice. Consequently, Williams could not be convicted on Stillman's testimony alone. See *id.* at 568 ("It has long been the law in Iowa that one may not be convicted on the testimony of an accomplice alone. See Iowa R. Crim. P. 2.21(3); *State v. Brandt*, 44 N.W.2d 690, 693 (Iowa 1950).").

Two purposes are served by the requirement of accomplice corroboration: first, it connects the accused to the crime charged; and second, 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) (quoting *State v. Berney*, 378 N.W.2d 915, 918 (Iowa 1985), *overruled on other grounds by State v. Bruce*, 795 N.W.2d 1, 3 (Iowa 2011)). “Corroborative evidence need not be strong as long as it can fairly be said that it tends to connect the accused with the commission of the crime and supports the credibility of the accomplice.” *Berney*, 378 N.W.2d at 918.

Viewing the record here in the light most favorable to the verdict, *see id.*, we conclude the testimony of the CI and Proehl and items found during the search sufficiently corroborated the testimony of Stillman to connect Williams to the crimes charged and to support the credibility of Stillman.

The CI testified he spoke with Williams on the phone to arrange the transactions. Sergeant Proehl testified he observed the CI dial Williams’ cell phone number when setting up the controlled buys, and his description of the calls closely matched Stillman’s description. Also, during execution of the search warrant police found Williams in his room with items indicative of drug sales, including cash, the cell phone the CI called to arrange the transactions, a digital scale with white residue, and a box of small plastic bags. Police also found a plastic bag with a corner torn off, much like the torn-off corner wrapping the crack the CI purchased.

We do not find Williams' complaint that there was no corroborating evidence Williams was "physically present" or "in the vicinity" of the transactions persuasive because physical presence is not controlling; what is required is that the defendant facilitated the drug transaction. See *State v. Allen*, 633 N.W.2d 752, 756 (Iowa 2001) ("An agent who facilitates a drug transaction, whether at the behest of a buyer or a seller, may be found guilty of aiding and abetting the transfer of drugs."). Stillman testified to Williams' facilitation of the charged drug deliveries. His testimony was corroborated by the CI, who testified he called Williams to procure drugs on March 13 and 27 and Stillman only delivered at Williams' behest. The items found during the search on April 7 lent support to a finding that Williams arranged the sale of drugs. Credibility issues such as whether the CI recognized Williams' voice and whether the jury believed Williams' alibi evidence or Stillman's testimony were for the jury to reconcile. See *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) ("The function of the jury is to weigh the evidence and place credibility where it belongs." (citation omitted)).

B. Ineffective assistance of counsel claims. Williams contends trial counsel was ineffective in (1) failing to make proper objections, (2) soliciting hearsay evidence, (3) soliciting evidence of other crimes committed by the defendant, and (4) failing to object to the jury instruction on accomplice corroboration.

To succeed on a claim of ineffective assistance of counsel, Williams must show by a preponderance of the evidence: (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Rodriguez*, 804 N.W.2d 844,

848 (Iowa 2011). Failure to prove either element is fatal to the claim. *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011).

Generally, we preserve these claims for postconviction relief proceedings. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We do this 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 defendant's claims. *Id.* However, if we determine the record is adequate, we may resolve the claims on direct appeal. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

1. *Phone record objection.* Williams contends trial counsel failed to object to Exhibit 1 "on the basis the exhibit was a police report and illegal hearsay that violated Williams' federal and state right to confrontation." Specifically, he challenges the reference in the exhibit to item "#15 Poetic (Memory: phone) Mobile: XXXXXX0827." The State responds that Williams has failed to prove prejudice as it was cumulative to other proof of the same fact, including Stillman's testimony that he recognized the number as belonging to Williams and the police officers' testimony that the 528-0827 cell phone was found with Williams in his room during the April 7 search warrant. We conclude Williams has failed to prove prejudice as the evidence was cumulative.³ See *State v. Newell*, 710 N.W.2d 6, 25-26 (Iowa 2006) (finding no prejudice from admission of evidence in

³ We note too that in *State v. Reynolds*, 746 N.W.2d 837, 843 (Iowa 2008), our supreme court acknowledged records created through a fully automated and reliable process involving no human declarant are "arguably not hearsay at all, as they would not have been made by a human declarant."

violation of hearsay rule and Confrontation Clause where same evidence was in the record).

2. *Officer Proehl's testimony of Detective Morel's observations during surveillance of controlled buys.* Williams next contends trial counsel should have objected on hearsay grounds to Sergeant Proehl's testimony that fellow officer, Detective Morel, observed a white male exit the front door at 1421 Washington (Stillman's address), approach the CI, then return to 1421 Washington. Even assuming a hearsay objection could have been lodged, Stillman and the CI also testified to essentially the same facts, which do not appear to be in dispute. See *id.* Williams has failed to prove any prejudice arising from the claimed error. See *id.*

3. *Improperly soliciting evidence of other crimes committed by defendant.* Williams contends trial counsel was ineffective in soliciting testimony from the CI that he bought drugs from Williams on occasions other than the controlled buys. He acknowledges "counsel may have been trying to question [the CI's] credibility."

We presume counsel is competent and a "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." See *State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006) (citation omitted). Where, as here, trial counsel was left with a defense that hinged on whether Williams was a mere user of illegal substances, rather than a seller, we cannot determine on this record that these questions amounted to ineffective assistance of counsel. See *id.* at 786 ("Because '[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do

not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." (citation omitted)). We preserve this issue for possible postconviction proceedings.

4. *Accomplice corroboration instruction.* Finally, Williams argues trial counsel was ineffective in failing to object to the jury instruction regarding corroboration of accomplice testimony because it contained confusing statements ("If you find . . . Stillman was an accomplice" and "You are instructed that the Court has found . . . Stillman was an accomplice"). On appeal, Williams argues Stillman was an accomplice as a matter of law and the instruction allowed the jury to disregard the need for corroborating evidence. However, we are not convinced the instruction misguided or confused the jury as Williams suggests.

Jury instruction No. 19 consists of only four paragraphs of which the first three paragraphs echo Iowa Criminal Jury Instruction 200.4. We are reluctant to disapprove uniform instructions. *State v. Johnson*, 534 N.W.2d 118, 127 (Iowa Ct. App. 1995). The fourth paragraph simply informed the jury that the court deemed Stillman an accomplice and jury should as well. Thus the jury was not required to go through the mechanics of deciding if Stillman was an accomplice. Any apparent contradiction was minimal, and there is no proof, only Williams' speculation, that instruction No. 19 caused any confusion to or misguided the jury.

We therefore find counsel did not breach an essential duty by failing to object to the instruction as an incorrect statement of the law. See *State v. Wills*, 696 N.W.2d 20, 25 (Iowa 2005) (finding trial counsel was not ineffective for failing

to raise unmeritorious issue). And, as we have found, there was corroborating independent evidence verifying Stillman's testimony and linking Williams to the drug transactions. Thus, Williams has failed to prove prejudice, and his ineffectiveness claim fails.

AFFIRMED.