IN THE COURT OF APPEALS OF IOWA

No. 2-700 / 11-0477
Filed September 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VINCENT BRADLEY CONNORS,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

Vincent Connors appeals from his conviction for robbery in the first degree. **AFFIRMED.**

Webb L. Wassmer of Simmons Perrine Moyer and Bergman PLC, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Jason A. Burns, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

Vincent Connors appeals from his conviction and sentence for first degree robbery following a jury trial. *See* Iowa Code §§ 711.1(1), .2, 703.1 (2009). He argues the district court erred in failing to give an instruction on corroboration of accomplice testimony, requesting this court adopt the plain error rule to sidestep error preservation issues. In the alternative, he raises the instruction issue under the ineffective-assistance-of-counsel rubic. Upon our review, we affirm Connors's conviction.

***I. Background Facts and Proceedings*.**

From the evidence presented at trial, the jury could reasonably have found the following facts. During the evening hours of January 2 and early morning hours of January 3, 2010, Ethen Ayers and three of his friends, Vincent Connors, Chris Curley, and Trae Finn, were "hanging out, partying, having fun" at Ayers' house in Cedar Rapids. Ayers, Connors, and Curley were drinking and intoxicated. Ayers received a telephone call from his sister, Edlena, who asked him to come pick her up and bring her home. The four left the house to get Edlena. After picking her up, the five headed back to the house. While Curley was driving, Ayers and Connors were playing with two knives in the back seat of the car; Ayers had a butterfly knife and Connors had a "Rambo" type knife. It was about 2:30 in the morning when they came upon a man walking down the street. Connors told Curley to stop the car. Connors said he was going to rob the man.

Curley stopped the car, and Connors got out and approached the man, Matt Dostal. Dostal was walking home after working a long shift. Connors had a

six-to-eight inch knife in his left hand. Connors demanded money from Dostal. Dostal refused, raised his right hand armed with a small pocket knife, and feigned towards Connors hoping to scare him away. Not deterred, Connors kicked the lunch box from Dostal's left hand. At this point, the other three men got out of the car and ran up to help Connors. The four men started beating Dostal. Dostal was punched in the head, knocked to the ground, kicked repeatedly, and stabbed twice during the altercation. By this time, Edlena had gotten out of the car and yelled she was calling the police. The porch light of a neighboring house came on, and a couple came out. They yelled, "Stop, stop." The woman said she was going to call the police. Ayers, Connors, Curley, and Finn then took off running. They regrouped at Ayers' house where Connors had the two knives. He later threw them into some woods.

Ayers, Connors, Curley, and Finn were charged by trial information with robbery in the first degree. Curley and Finn pled guilty to lesser charges and testified as State's witnesses against Connors and Ayers, who were tried jointly to a jury. The jury found Connors guilty of robbery in the first degree, and he was sentenced to twenty-five years.

Connors appeals. His sole issue on appeal concerns the absence of an instruction regarding corroboration of accomplice testimony.

II. Error Preservation.

It is undisputed that Connors's trial counsel did not request an instruction on corroboration of accomplice testimony nor voice an exception to its omission. A defendant's "failure to make known to the trial court before the instructions were given to the jury his wish to so instruct deprives him of a basis for

successful appeal in this court for such failure to instruct," *State v*. *Sallis*, 262 N.W.2d 240, 248 (Iowa 1978), and Connors concedes error was not preserved.

In order to hurdle this obstruction, Connors asks us to adopt a plain error exception to our error preservation rules. *See* Fed. R. Crim. P. 52 (allowing claim that error affected "substantial rights" to be asserted for the first time on appeal); *see also United States v*. *Delgado*, 653 F.3d 729, 735 (8th Cir. 2011) ("To establish plain error, [a defendant] must show the district court committed an error that is plain, *i*.*e*., clear under current law, that he was prejudiced by the error, and that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."). As our supreme court has explained: "We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point." *State v*. *Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). We are bound by our supreme court's pronouncements. *See State v*. *Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent."); *State v*. *Hughes*, 457 N.W.2d 25, 28 (Iowa Ct. App. 1990) (citing *State v*. *Eichler*, 83 N.W.2d 576, 578 (1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.")). We decline to adopt the plain error rule.

III. Ineffective Assistance of Counsel.

We next turn to Connors's ineffective-assistance-of-counsel argument, which is excepted from the traditional error-preservation rules. *State v*. *Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). We review claims of ineffective assistance of counsel de novo. *State v*. *Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Although we generally preserve such claims for postconviction relief, where the record is

sufficient to address the issues, we may resolve the claims on direct appeal. *Id.* We find the record here is adequate to address Connors's claims.

In order to establish a claim for ineffective assistance of counsel, Connors must demonstrate his trial counsel (1) failed to perform an essential duty and (2) prejudice resulted. *Anfinson v*. *State*, 758 N.W.2d 496, 499 (Iowa 2008). If either element is not met, his claim will fail. *Id.* There is a strong presumption counsel's representation fell within the wide range of reasonable professional assistance, and Connors is not denied effective assistance by counsel's failure to raise a meritless issue. *State v*. *Graves*, 668 N.W.2d 860, 881 (Iowa 2003). To demonstrate prejudice, Connors must show that "but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Anfinson*, 758 N.W.2d at 499.

On appeal, we determine whether the instructions correctly state the law. *State v*. *Predka*, 555 N.W.2d 202, 204 (Iowa 1996). Any error in jury instructions must be prejudicial to warrant reversal. *State v*. *Holtz*, 548 N.W.2d 162, 164 (Iowa Ct. App. 1996). A jury instruction error is presumed prejudicial unless upon a review of the entire case, we find the error resulted in no prejudice. *State v*. *Bone*, 429 N.W.2d 123, 127 (Iowa 1988).

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.

This rule has been a part of the body of Iowa law since 1851.[1] The purpose of requiring corroborating evidence is two-fold: "[I]t tends to connect the accused with the crime charged, and 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 defendant[]." *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).

An accomplice is a person who willfully participates in, or is in some way concerned in the commission of a crime. *State v*. *Johnson*, 318 N.W.2d 417, 440 (Iowa 1982). Participation may be inferred by presence, companionship, and conduct before and after the offense is committed. *State v*. *Jones*, 247 N.W.2d 733, 735 (Iowa 1976) (citing *State v*. *Marsan*, 221 N.W.2d 278, 280 (Iowa 1974)). Additionally, Iowa Criminal Jury Instruction 200.4 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.
>
> If you find (name of witness) 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.

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[1] Iowa Code section 2998 (1851) states:

> A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof.

"It is prejudicial error to fail to instruct even without request on the requirement of corroboration where the jury could find the only witness against the defendant was an accomplice." *See State v*. *LaRue*, 478 N.W.2d 880, 883 (Iowa Ct. App. 1991) (citing *State v*. *Anderson*, 38 N.W.2d 662, 665 (Iowa 1949)).

Both Curley and Finn, the accomplices, testified Connors asked Curley to stop the car. Curley testified Connors said he was going to rob Dostal. Both testified they heard Connors demand money from Dostal. Both testified Connors was involved in punching and kicking Dostal. Curley testified when everyone regrouped at Ayers' house after the altercation, Connors said he had the two knives. Curley testified Connors threw the knives in some woods. Finn testified he observed Connors throw away something wrapped in a towel.

Curley and Finn were not the only witnesses to testify against Connors at trial. Edlena testified Connors asked Curley to stop the car. She testified Connors said he was going to rob the man walking on the street. She observed Connors get out of the car and approach Dostal. Dostal testified it was Connors who first approached him with a six-to-eight inch knife. He testified it was Connors who demanded money. He testified all four men beat him.[2]

Was Connors's counsel ineffective in failing to request the instruction? We think not. With sufficient other evidence tending to connect Connors with the crime charged, the accomplice testimony instruction, while recommended, was

[2] Connors naturally dwells on inconsistencies in the non-accomplice testimony. In reviewing the record we are mindful of the conflicting testimony and statements. But, as the State notes, "it is a rare trial without divergent testimony." It is the function of the jury to sort this out. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The jury was instructed to consider each witnesses' interest in the trial, their motive, candor, bias, prejudice, and prior inconsistent statements.

not required.[3] Connors's counsel, thus, did not breach an essential duty in failing to request the instruction.

Moreover, even if his attorney was required to request an accomplice instruction or except to its omission, Connors cannot establish he was prejudiced by the failure to give the instruction. "Corroborative evidence may be direct or circumstantial. It 'need not be strong and need not be entirely inconsistent with innocence.'" *State v*. *Bugely*, 562 N.W.2d 173, 176 (Iowa 1997) (citations omitted). There is no reason to believe the jury would have acquitted Connors had the instruction been given. The corroboration evidence previously discussed supports some material parts of the accomplices' testimony and tends to connect Connors with the crime. *See id.* We conclude Connors suffered no prejudice from trial counsel's failure to request that the court give an instruction on corroboration. Therefore, his ineffective-assistance-of-counsel claim must fail.

***IV*. *Conclusion*.**

For the reasons stated above, we affirm Connors's conviction for first-degree robbery.

AFFIRMED.

[3] It is good practice to give such an instruction as a matter of routine. *State v. Jochims*, 241 N.W.2d 25, 28 (Iowa 1976). We note the State did include such an instruction in its proposed statement of the issues and jury instructions, but it apparently fell through the cracks and was not included in the court's final instructions to the jury.