

IN THE COURT OF APPEALS OF IOWA

No. 6-555 / 05-1659
Filed October 25, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DIONE LAMAR GRIGGS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,
Judge.

Dione Lamar Griggs appeals his conviction for robbery in the first degree.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Shellie Knipfer, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, William E. Davis, County Attorney, and Kelly G. Cunningham, Assistant
County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Dione Lamar Griggs appeals his conviction, following jury trial, for robbery in the first degree. He contends the trial court erred in concluding an accomplice's testimony was corroborated. He also claims his trial counsel was ineffective for failing to object to certain evidence. We affirm the conviction and preserve Griggs's ineffective assistance claim for a possible postconviction proceeding.

I. BACKGROUND FACTS AND PROCEEDINGS.

Trina Watkins was fired from a Murphy USA gas station in Davenport around September 17, 2004, for alleged theft. Colleen France was the training assistant manager at the station and was present, along with the manager, on the day Watkins was terminated. The defendant, Griggs, was Watkins's boyfriend at the time and was also present with her at the station on the day she was fired. When Griggs realized Watkins was being fired he began accusing France of getting her fired, threatened to get even with France, and stated he was going to pursue legal action against Murphy USA.

On the morning of October 17, 2004, DeShon Collins and his girlfriend Jeanne Sindt were staying at a residence with Griggs and Watkins. Griggs woke Collins up that morning at approximately 9:00 a.m. Collins told Sindt the two of them were leaving but did not tell her where they were going. According to Collins, Griggs woke him up to talk to him about Watkins being fired and wanting to get back at the gas station personnel by robbing the business. Based on information from Watkins, Griggs told Collins that between 10:00 a.m. and noon

France would be taking a large sum of money to deposit at a bank located in a nearby Hy-Vee grocery store. He also knew what type of vehicle France would be driving.

Collins testified that he and Griggs drove Collins's car to the gas station and waited for France to leave with the deposit. He also stated that he and Griggs both took Ecstasy and cocaine, which he had supplied, while they waited for France to leave. When France's relief person arrived France left the station with the deposit. Watkins was familiar with this deposit practice as she had been the relief person until fired. According to Collins, he and Griggs then followed France to the Hy-Vee store. As they arrived France was already getting out of her car, so Griggs told Collins to "hurry up and rob her" and handed him a gun.

Collins tried to rob France in the Hy-Vee store but his attempt was thwarted by several nearby citizens and Hy-Vee employees. He was eventually brought to the ground outside the store. As he was being held down he suffered an asthma attack. He drew the gun and pulled the trigger in an attempt to get the people off him but the gun was not loaded. As Collins was being restrained, Collins's tan car began speeding towards him and the group of people on top of him. Several witnesses identified the driver of the tan car, their description of which matched Collins's car, as a black male. At least one witness described the driver as being older than Collins. Collins testified that he left his cell phone in the car when he went to rob France.

Sometime between noon and 1:00 p.m. Watkins called Sindt asking her for help to retrieve Collins's car. The two found the car at a Taco Bell and Sindt

drove it to an apartment complex. Sindt testified that Griggs was waiting for them at the apartment complex. They left Collins's car at the complex and the three departed together in Watkins's car. After Collins was arrested, he initially told the police Corey Thomas was his accomplice in the robbery but later named Griggs as the accomplice. He stated they did it because Griggs was upset over Watkins being fired and wanted to get even.

On May 3, 2005, the State charged Griggs, by trial information, with robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (2003); assault while participating in a felony, in violation of sections 708.1 and 708.3; and conspiracy, in violation of sections 706.1(1)(a) and 706.3. Collins and Watkins were also charged and both later entered pleas of guilty to lesser charges.¹ As part of a plea agreement Collins pled guilty to theft in the first degree, assault while participating in a felony, and possession of cocaine with intent to deliver. Also as part of the plea agreement Collins was to testify for the State at Griggs's trial.

The case proceeded to jury trial and Collins testified for the State. Griggs moved for judgment of acquittal at both the close of the State's case and at the close of all the evidence. He argued in the initial motion only that the State failed to prove he committed the offenses beyond a reasonable doubt. In the renewed motion he argued that the testimony of Collins, an accomplice, was not corroborated by other evidence tending to connect Griggs with the robbery. The trial court denied the motions. In overruling the renewed motion the court found

¹ Collins was initially charged with two additional counts, felon in possession of a firearm and assault while displaying a weapon.

“there is some testimony from witnesses other than [Collins] which the jury could find credible. . . .”

The jury found Griggs guilty as charged. The court merged the assault and conspiracy convictions with the first-degree robbery conviction and sentenced Griggs to an indeterminate term of imprisonment not to exceed twenty-five years on the robbery conviction.

Griggs appeals contending his counsel was ineffective for failing to object to the admission of Watkins’s cell phone records from Iowa Wireless both for lack of foundation and as hearsay. He further claims the trial court erred in concluding there was independent evidence corroborating Collins’s accomplice testimony.

II. MERITS.

A. Corroboration of Accomplice Testimony.

Griggs contends Collins’s testimony was not independently corroborated as required by Iowa Rule of Criminal Procedure 2.21(3). Rule 2.21(3) provides, in relevant part:

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.

“The existence of corroborating evidence is a legal question for the court.” *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). Once the legal adequacy of the corroborating evidence is established, the question of the sufficiency of the evidence is for the jury to determine. *Id.* Because Griggs challenges the trial

court's determination that corroborating evidence existed to warrant submission of the case to the jury, our review of this issue is for correction of errors at law.

Id.; Iowa R. App. P. 6.4.

Evidence asserted as corroborative of an accomplice's testimony will be sufficient to create a jury question if that evidence corroborates some material aspect of the accomplice's testimony tending to connect defendant to the commission of the crime and thereby supports the credibility of the accomplice.

State v. Brown, 397 N.W.2d 689, 694-95 (Iowa 1986). Corroborative evidence may be direct or circumstantial. *Bugely*, 562 N.W.2d at 176. Corroborative evidence need not be strong and need not be entirely inconsistent with innocence. *Id.* A small amount of corroborative evidence is all that is required. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). A combination of circumstances, singularly unpersuasive, may be sufficient to entitle a jury to conclude the accomplice's testimony has been corroborated. *State v. Willman*, 244 N.W.2d 314, 315 (Iowa 1976). The State need not establish corroborative evidence beyond a reasonable doubt. *State v. King*, 256 N.W.2d 1, 10 (Iowa 1977).

Colleen France testified at trial that Griggs blamed her for getting Watkins fired from the gas station and threatened he would get even with her. She also stated that Watkins would know the procedure for making deposits and know about the relief person who would come and stay at the station while she went and made the deposit because Watkins was that relief person before Watkins was terminated. Finally, France testified that only employees would have first-hand knowledge of this procedure.

Jeanne Sindt also testified at trial. She stated she was staying with Collins in the same duplex as Griggs and Watkins on the morning of October 17, 2004. Sindt testified that Griggs came and woke Collins up and Collins told her he was leaving with Griggs. Witnesses from the Hy-Vee store testified that a car meeting the description of Collins's car sped away as Collins was being held down and the driver was a black male who looked older than Collins.² See *State v. Palmer*, 569 N.W.2d 614, 616 (Iowa Ct. App. 1997) (stating independent testimony the defendant was seen in the company of the accomplice shortly before the crime corroborated the accomplice's inculpatory testimony); see also *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996) (stating testimony of an independent witness that certain accomplices were together in the defendant's residence where plans were made to commit a later crime corroborated testimony of accomplices).

Sindt further testified she got a phone call from Watkins between 12:00 and 1:00 p.m. that same day and Watkins told her they had to go pick up Collins's car. Watkins came and picked up Sindt, they went to Taco Bell to get Collins's car, and Sindt then drove Collins's car to an apartment complex where Griggs was waiting for them. They left Collins's car at the apartment complex and all three left in Watkins's car.

Finally, it appears the robbery occurred around noon both because France testified she left the gas station to make the deposit around 11:45 and because the 911-emergency call reporting it came into the Davenport Police Station at

² According to the presentence investigation report in this case, Collins was approximately twenty-five years of age and Griggs thirty-three years of age at the time of the robbery.

12:04 p.m. Records from Watkins's cell phone, which were admitted at trial, showed that starting at 12:06 p.m. on October 17, 2004, a series of phone calls between Collins's cell phone and Watkins's cell phone began. Officer Mike Martin of the Davenport Police Department testified at trial that Collins was "absolutely" already being detained by the group of people outside Hy-Vee, if not in custody, by 12:08 p.m. and "wasn't in any kind of position" to be making any calls after that time. Watkins received a call from Collins's cell phone at 12:14 p.m. and over the course of the next two plus hours Watkins received six more calls from that phone, several additional attempts were made to contact Watkins from that phone, and Watkins called that phone two times. During this time period Collins was being arrested, taken to the hospital for his asthma attack, and then taken to the Davenport police station.

Accordingly, the testimony of France, Sindt, Martin, and others who witnessed the crime dovetails with and corroborates Collins's testimony. More specifically, the testimony set forth above corroborates Griggs's accompaniment of Collins; Griggs's motive for the crime; how Griggs would have the knowledge necessary to commit the crime; Griggs's opportunity to commit the crime; and Griggs's presence in the car used in, and at the scene of, the crime. We conclude the trial court did not err in determining the record contained evidence independent of Collins's accomplice testimony sufficient for submission of the case to the jury.

B. Ineffective Assistance.

When there is an alleged denial of constitutional rights, such as an allegation of ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). To prove trial counsel was ineffective the defendant must show that counsel failed to perform an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999).

Griggs claims his trial counsel breached an essential duty to his prejudice by not objecting to the admission of State's exhibit five, the Iowa Wireless cellular telephone records of Trina Watkins. More specifically, he argues trial counsel should have objected to the records for lack of foundation and as hearsay. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

No record has yet been made before the trial court on this issue, trial counsel has not been given an opportunity to explain his actions, and the trial court has not ruled on this claim. Under these circumstances, we pass the issue in this direct appeal and preserve it for a possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

III. CONCLUSION.

We conclude the trial court did not err in determining there was independent evidence sufficient to corroborate Collins's accomplice testimony and denying Griggs's motion for judgment of acquittal. Griggs's claim of ineffective assistance of counsel is preserved for a possible postconviction proceeding.

AFFIRMED.