IN THE COURT OF APPEALS OF IOWA

No. 9-794 / 08-1737
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SAMUEL MONTEZ WRIGHT,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Samuel Montez Wright appeals his convictions of first-degree murder, first-degree robbery, and first-degree kidnapping. **AFFIRMED.**

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

Samuel Montez Wright, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Patrick Jennings, County Attorney, and Terry Ganzel, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Samuel Montez Wright appeals from the judgment and sentence entered upon jury verdicts finding him guilty of murder in the first degree in violation of Iowa Code section 707.2(1) (2007), robbery in the first degree in violation of sections 711.1 and 711.2, and kidnapping in the first degree in violation of sections 710.1 and 710.2. Wright argues the district court erred (1) in admitting evidence from a cell phone company radio frequency engineer that purported to place Wright's cell phone in the area of the murder during the relevant time period, (2) in denying his request for an accomplice corroboration instruction, and (3) in admitting ammunition seized from his home over three months prior to the occurrence of the charged offenses. For the reasons set forth herein, we conclude Wright's challenges to the evidentiary and instructional rulings of the district court are without merit, and therefore affirm his convictions and sentence.

I. Background Facts and Proceedings

On January 17, 2008, two hunters discovered the frozen, shirtless, dead body of Zachary Cooper lying face down on a dirt road, near Lawton—about ten miles east of Sioux City. Cooper had been shot twice.

Wright was subsequently prosecuted for robbing, kidnapping, and murdering Cooper. The State's evidence showed that on January 15, 2008, Wright, Jeremy Williams, Nick Perez, Ray Dukes, Teddy Case, Matthew Dean, and one other individual named "Wayne" were hanging out in Perez's Sioux City apartment. While sitting around, various individuals in the group decided that they wanted to smoke some marijuana. Therefore, Perez volunteered to contact

his friend Cooper about purchasing a quarter pound of marijuana. Cooper lived in a house about a block away that belonged to David Myers's father.

Dean and Case both testified they heard some discussion in the group about robbing Cooper. They claimed Wright was part of the discussion. Dukes testified that he heard Case and Perez talk about a robbery. Dean testified that Dukes was in on "the talk about robbing" Cooper. Case admitted he had previously testified in deposition that the plan to rob Cooper came from Dukes, among others. However, Dean and Case (as well as "Wayne") left Perez's apartment before any marijuana was delivered.

After Perez visited with Cooper regarding the possibility of buying marijuana, Cooper went to Perez's apartment to make sure the group had enough money to pay for it. According to Myers, who was with Cooper that afternoon, Cooper was nervous about dealing with Perez. However, when Cooper returned from Perez's apartment, he told Myers everything was all right, explaining that just Perez, Wright, and Williams were there, and that he "saw the money."

Perez went to visit Cooper again (this time with Williams) to finalize the deal. According to Perez, during this meeting, Cooper stated that he "wanted to make sure things go straight. If things boil down wrong then he would have to do something to [Williams] and his family." Williams then replied, "Dude, don't threaten my f---ing family." Cooper answered that he wasn't threatening Williams's family. Perez attempted to calm Williams down and eventually they left and walked back to Perez's apartment. On the walk home, Williams was still angry about the threat and stated, "Oh, I got this."

According to Myers, Cooper obtained the marijuana from his source, left for Perez's apartment around 6:30 or 7:00 p.m., and never returned. Perez and Dukes testified at trial as to what happened next, although there were a number of discrepancies between their respective narratives.[1]

Perez testified that once Cooper arrived at the apartment with the marijuana, Wright pulled out a gun. According to Perez, Williams had been outside moving his car (a Mercury Marquis), but he came running in and "punched Zachary Cooper, like three times in the face. And the second and third time he punched, Zach's nose started streaking blood." Perez further testified that Dukes exited the bathroom after Cooper was knocked down and asked, "[W]hat the hell is going on?" After seeing Cooper's bloody face, Dukes said, "Oh s---. I'm staying out of this." Perez testified he too "was all scared," and "was freaking out." He ran into the bathroom and locked the door. After a minute or two, Williams began banging on the bathroom door telling Perez to come out. When Perez left the bathroom, Williams told Perez to go wait out in his car and threatened "you better not screw us over or I'm going to screw your life over." The car doors were locked, so Perez waited next to the vehicle until everyone else came outside. At that point, Wright, wielding the gun, told him to get in the vehicle along with the others.

Dukes testified that after Cooper arrived with the marijuana, Williams started punching him. Dukes testified that Wright also "started swinging on [Cooper] and pulled the gun out." According to Dukes, Wright and Williams

[1] Not only did their trial testimony differ on a number of points, but Wright's counsel was also able to point out that both of them had given prior statements inconsistent in various respects with their trial testimony.

made Cooper take off his shirt to be sure he wasn't wearing a wire.[2] Wright and Williams then led Cooper, bloody and shirtless, out of the apartment and into the car. Wright had his gun trained on Cooper. Wright and Williams also told Dukes to get in the car. Dukes testified he did so "cuz I didn't want to get shot."

Williams drove the car, with Perez in the front passenger seat, and Dukes, Cooper, and Wright from left to right in the rear. Cooper's blood was later found in the middle rear of the car where both Perez and Dukes testified he had been sitting. According to Perez, when Wright entered the vehicle he said to Williams, "you know where to go, just start driving."

Wright forced Cooper to keep his head down. Perez testified that Cooper was praying for his life. Perez also testified that Wright observed a tattoo on Cooper's chest, which he thought was a sign for the Antichrist, and told Cooper he was "going to put the devil in his grave." Dukes testified that Williams commented he was "going to show [Cooper] what to do when you threaten people's family." Perez also recalled Williams saying, "Nobody threatens me and my family and gets away with it."

Williams drove the car into rural Woodbury County. Eventually, Williams stopped the car in a rural farm driveway off of 170th Street near Lawton. Perez testified that Wright told Williams to leave the headlights on because "he was going to do it like a movie on Showtime." Perez remained in the car, but he recalled that Dukes momentarily left the car to smoke a cigarette and go to the bathroom. Perez testified that Wright and Williams had Cooper kneel down in

[2] Dukes admitted he had previously testified in deposition that Perez searched Cooper after his shirt had been removed and found a mace (ball and spiked chain) in his pocket. According to Dukes, Perez pulled out the mace and put it on the table.

front of the car and put his hands on the hood. According to Perez, Wright had to manually load the gun. Wright shot Cooper, and Cooper fell from his view. Wright then handed the gun to Williams, they reloaded the gun, and Williams also shot Cooper.

Dukes testified that when the car stopped near Lawton, he was directed out of the vehicle so Cooper could get out on his side. Dukes recalled that Wright handed his gun to Williams, and told him "to do what he do." Williams then shot Cooper. Dukes testified that when Williams shot Cooper, Wright had his hand on his shoulder telling him he "was going to watch." Williams gave the gun back to Wright. Wright had to reload the gun with a single bullet because it was missing its clip.[3] Wright then stood over Cooper's body and shot him as well.

On the drive home, both Perez and Dukes testified that they were warned to stay quiet. According to Perez, when he commented that it was stupid for Wright and Williams to have shot Cooper, Wright directed Williams to stop the car, put the gun against the back of his head, and said, "If [Perez] want to talk we can take him out right now and do him too." Dukes testified that Wright told him that "he will kill my son" if he (Dukes) told anyone.

When the group returned to Sioux City, Williams stopped at a Kum & Go for gas. Williams and Perez were caught on the surveillance video inside the store. Surveillance photography taken outside the store showed Williams' car

[3] The State's ballistics expert demonstrated how a .380 caliber handgun could be loaded and fired one bullet at a time without a clip.

and four individuals. Although the outside images were dark and fuzzy, at trial, Perez and Dukes identified Wright as one of the individuals.

The foursome then returned to Perez's apartment where Wright and Williams cleaned Cooper's blood off of the wall. According to Perez, Cooper's clothes and the gun were placed into a garbage sack and thrown into the apartment complex dumpster. Perez, Wright, and Williams then went over to "Wayne's" to smoke the marijuana taken from Cooper, while Dukes went to his girlfriend's house.

Around 10:30 or 11:00 p.m., Perez's mother arrived at Perez's apartment to stay the night. She noticed a strong odor of cleaning fluid. Wright and Williams were present, and Williams was "acting really nervous." She also testified that when went to bed, Perez "came over and gave me a big hug and . . . he just said that he was sorry for getting involved with the wrong people and causing problems and that something bad had happened."

As noted, Cooper's frozen, shirtless body was discovered two days later lying face down in the snow. Apparently, Cooper did not die immediately from his wounds, but was able to walk approximately three-quarters of a mile before he collapsed and died. Police immediately began investigating the murder scene, and the following day discovered two .380 caliber shell casings and a .380 caliber bullet. At trial, the State offered evidence that in September 2007, a search of Wright's apartment had uncovered seventeen rounds of .380 caliber ammunition. The State also offered evidence that Wright had offered to sell someone a handgun that was either a .357 or a .380 with no clip in August or September 2007.

Despite the cleaning efforts, Cooper's blood was found on an envelope on the living room bookshelf of Perez's apartment. Cooper's blood was also found on Williams's coat sleeve and left breast pocket.

Wright was interviewed by police on January 20. He claimed he had not left his home at all on the 15th, claimed he did not know Dukes, claimed he did not know where Lawton was, and claimed he had never met Cooper in his life. A recording of this interview was played for the jury at trial.

On January 28, 2008, Wright was charged by trial information with first-degree murder, first-degree kidnapping, and first-degree robbery. Prior to trial, Wright filed a motion in limine to preclude the State from offering evidence of his cell phone and cell tower usage on the evening of the murder. Jim Tidmore was a radio frequency engineering manager employed by Wright's wireless provider, Long Lines Wireless. Tidmore intended to testify that based on the company's records, which showed the vectors and the cell towers that were involved for every call or text message made or received by Wright's cell phone, he could map out the approximate location of that phone whenever there was an incoming or outgoing transmission. In particular, relying on those records, Tidmore intended to testify that Wright's cell phone received an unanswered text message through the east sector of the Lawton cell tower at 7:07 p.m. on January 15, 2008, and another unanswered text message through the west sector of the Lawton cell tower at 7:16 p.m. Before trial, the district court provisionally sustained Wright's motion in limine, agreeing with Wright's argument that the evidence was not sufficiently trustworthy at that point.

Trial commenced on August 13, 2008. Before Tidmore was scheduled to testify, the State called him to the stand for an offer of proof. In the offer of proof, Tidmore testified that as the radio engineering frequency manager, his job was to do all the planning for the new cellular towers. He explained that he was asked to analyze which of the 154 cell towers in the Sioux City area were used by Wright's cell phone number on January 15, 2008. To do this, he collected information off of "call detail records." These automatically generated records show the time, duration, and cell tower utilized by each call or text message sent or received by Wright's cell phone on January 15. The records also show the cell tower vector. Tidmore explained that each cell tower has three separate vectors, representing three different directions (or three 120 degree slices of a full 360 degree pie). Thus, the vector data allow an even closer approximation of the location of the phone when a particular communication was sent or received.

Tidmore testified that using these call detail records, it was possible to trace the approximate location of Wright's cell phone at various times on January 15. He then mapped those on a chart (Exhibit 138). The chart showed that Wright's phone was in one vector of the Lawton cell tower at 7:07 p.m. and in another vector of the same tower at 7:16 p.m.

It does not appear that Tidmore had the original call detail records showing actual cell towers and cell tower vectors in the courtroom with him. He did bring with him spreadsheets he had prepared *from* the call detail records; he had used these in developing the chart (Exhibit 138). Tidmore testified that prior to trial, he was provided the call detail records by Bob Bauer of Long Lines

Wireless, who had received them from Cari Christianson at Long Lines.[4] Tidmore admitted he did not maintain the call detail records, but said he was familiar with them and explained how they were automatically generated from each communication. He also confirmed that the call detail records are "kept for business purposes." In addition, Tidmore acknowledged that his chart (Exhibit 138) did not show each transmission to or from Wright's cell phone that occurred on January 15, only when there was a change in tower and/or vector. Finally, Tidmore acknowledged that the locations on the chart were only "approximate areas" where the cell phone would have been at the times in question.

At the conclusion of the offer of proof, Wright's counsel objected that the call detail records had not been provided in discovery, that Tidmore "can't provide sufficient foundation for any of the prepared documents," that he "can't provide foundation for the billing record," that "[a]ll we have is the alleged analysis of the witness and not actual source documents from which any of this information has been created." Wright's counsel also renewed his objection based on lack of reliability. The district court overruled these objections, allowed Tidmore to testify, and admitted Exhibit 138 into evidence.

Wright subsequently took the stand in his own defense. He denied robbing, kidnapping, or murdering Cooper. He denied that he was the fourth person shown on the Kum & Go surveillance photographs. He testified that he was at Perez's apartment early on the evening of January 15. However, he claimed that he left by foot to go to his old apartment prior to Cooper's arrival at

[4] Christianson and Bauer were both listed as potential witnesses in the State's minutes of testimony, and Christianson was specifically listed as a foundational witness for the Long Lines' records relating to Wright's cell phone, but neither was called at trial.

Perez's place and never even saw Cooper that evening. Wright testified that after he left Perez's apartment, he walked down the street where he met a friend "Troy" and decided to help him move. Wright did not provide Troy's last name. Troy did not testify.

To explain how his cell phone might have been in Lawton when and where Cooper was murdered, Wright testified that he had inadvertently left that phone behind and that he recovered it from Williams's car later that night. To explain why Perez's mother saw him late at night at Perez's apartment, Wright testified that after helping Troy move, he needed to be picked up by his girlfriend. According to Wright, he walked the six blocks from Troy's apartment to Perez's apartment in order to save his girlfriend six blocks of driving. To account for why Perez's mother smelled a strong odor of cleaning fluid when she returned to Perez's apartment late on the evening of January 15 (and saw Wright), Wright claimed that he told Perez that day to clean up his apartment "for your momma" and "spray some smell good."

To try to establish an alibi, Wright also offered the testimony of his girlfriend that she had encountered Wright alone between 6:00 and 6:30 p.m., and again around 9:30 p.m. on the 15th when she picked him up outside Perez's apartment.

The State played the DVD of Wright's original police interview where he made a number of statements that were inconsistent with Wright's trial testimony, including that he had not left his place at all on the 15th.

Both parties had previously proposed that versions of Iowa's accomplice corroboration instruction be given to the jury.[5] However, at the conclusion of the evidence, the district court declined to give such an instruction, stating that it "just doesn't find anything in the record of significance and far less than what would be necessary to make these two fellows [Perez and Dukes] an accomplice." Wright objected to the court's failure to give the accomplice instruction.

The case was submitted to the jury, and Wright was found guilty on all three counts. Wright was sentenced to incarceration for life on the murder and kidnapping convictions, and to an indeterminate term of twenty-five years for his robbery conviction. Wright appeals.

On appeal, Wright argues that the district court erred (1) in admitting the evidence concerning the location of his cell phone on January 15, 2008, (2) in refusing to give an accomplice instruction, and (3) in admitting evidence of .380 caliber ammunition found in Wright's apartment in September 2007. For the reasons discussed herein, we overrule Wright's claims of error.

II. Cell Phone Evidence

Wright asserts that Tidmore's chart and testimony tracking the movement of Wright's cell phone on January 15, 2008, amounted to inadmissible hearsay, because the underlying "call detail records" used to create the chart lacked the

[5] This instruction provides, among other things, that a person cannot be convicted "only by the testimony of an accomplice," and that there "must be other evidence tending to connect the defendant with the commission of the crime." *See* Iowa Crim. Jury Instruction 200.4. Both the prosecution and the defense version of this instruction would have instructed the jury that if they found Dukes or Perez to be an accomplice, they could not convict Wright only by that testimony.

The district court later observed that the State submitted its accomplice instruction before any evidence had been received. It noted that Williams went to trial before Wright and, as part of his defense, had testified that Dukes had been a shooter.

requisite foundation to be admissible under the business records exception of Iowa Rule of Evidence 5.803(6). The State responds that Tidmore's testimony provided as much foundation as was needed, noting further that the call detail records were "computer-generated" through a fully automated and reliable process involving no human declarant. The State further characterizes the chart as a valid summary under Iowa Rule of Evidence 5.1006.

Although evidentiary rulings are normally reviewed for abuse of discretion, hearsay rulings are reviewed for correction of errors at law. *State v. Reynolds*, 746 N.W.2d 837, 841 (Iowa 2008). This includes rulings where the issue is whether adequate foundation has been laid for admissibility under the business records exception. *GE Money Bank v. Morales*, 773 N.W.2d 533, 536 (Iowa 2009).

We begin with the State's contention that the chart is a summary. We agree with that contention, as far as it goes. For the summary to be admissible, the underlying records on which the summary is based have to be both available and admissible. In *State v. Fingert*, 298 N.W.2d 249, 255 (Iowa 1980), our supreme court articulated the relevant legal standards:

> From our prior cases and these interpretations of Fed.R.Evid. 1006, we glean what we conclude to be the requisites for admissibility of evidence summarizing voluminous records: *either* the underlying records have been properly admitted, *or* (1) the underlying records are available for examination and use by the opposing party and (2) a foundation has been laid which would render such records admissible should they be offered into evidence.

(Emphasis in original.) In *Fingert*, the supreme court reversed the defendant's conviction for tax evasion, because among other things, the summary evidence presented by the State's witness should not have been admitted. The court

reasoned that "the underlying records were either improperly admitted or were not offered in evidence or otherwise made available." *Id*. at 255-56.

Here we had two levels of summarization. Tidmore testified that he prepared the map or chart from certain spreadsheets. In turn, Tidmore prepared the spreadsheets from "call detail records." He testified that he received the original call detail records for Wright's cell phone from Bob Bauer, who had obtained them from Cari Christianson. Tidmore testified that the call detail records were regular business records of the company, that his company's systems automatically create a call detail record for each call (and how that occurs), and that those records are stored on the company's billing server. We now turn to the two issues of availability and admissibility.

Our appellate record includes the spreadsheets but apparently not the call detail records themselves. However, at oral argument, Wright's appellate counsel conceded the call detail records had been made available to trial counsel at some point during the discovery process. Wright's appellate brief reinforces this concession. It contains about five pages of briefing on the cell phone issue, but does *not* claim the call detail records were unavailable.

This brings us to the question of admissibility. Wright argues that "[t]he State needed to offer the underlying records themselves and the supporting testimony of Bauer and [Christianson] to attempt to establish they met the business records exception." However, *Fingert* does not quite say that. It states only that a sufficient foundation must be laid "which would render such records admissible *should* they be offered into evidence." 298 N.W.2d at 255 (emphasis added).

We agree with the district court that the State met this burden. Tidmore demonstrated personal knowledge of call detail records and how they are automatically generated. He explained that he received these particular records from other personnel in the company, that they were the call detail records for Wright's cell phone number, and that they had been "kept for business purposes."[6]

Wright contends that testimony from Bauer and Christianson was also needed, since Tidmore did not retrieve the call detail records himself. How do we know that these are genuine call detail records? Perhaps Tidmore was relying on Bauer's (or Christianson's) out-of-court statements that these were the actual call detail records for Wright's cell phone.

The problem with Wright's argument, however, is that it reads more into this record than is there. During the offer of proof that occurred outside the presence of the jury, Wright's trial counsel never asked Tidmore *how* he was able to identify the call detail records. Was it only because Bauer told him what they

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[6] The foundational elements of the business records exception are:

> (1) That it is a business record; (2) That it was made at or near the time of an act; (3) That it was made by, or from information transmitted by, a person with knowledge; (4) That it was kept in the course of a regularly conducted business activity; [and] (5) That is was the regular practice of that business activity to make such a business record.

Reynolds, 746 N.W.2d at 841. We believe Tidmore's testimony established the required foundational elements. Tidmore explained that the call detail records were business records that were automatically created every time a transaction was made. He further testified that he had personal knowledge of the process by which the call detail records were generated. According to Tidmore, when a call is made, the cell phone automatically searches for its best server location on which to make the call. After finding the best server tower, the call is placed into a switch which triggers a call detail record entry. These entries are then stored on the billing server. Tidmore also testified that the records were regularly kept for billing purposes, and that it was regular practice to make these records for billing purposes and to ensure the performance and optimization of their tower network. Accordingly, the foundation necessary for the business records exception would be established.

were, or was Tidmore able to rely on his own personal knowledge and familiarity with his company's records and systems? From Tidmore's answers, in the absence of further clarification, we think the trial judge was entitled to draw the latter conclusion.

The State maintains the call detail records are not hearsay because they were produced by "a fully automated and reliable process, not involving any statements by a declarant." *See Morales*, 773 N.W.2d at 537 (suggesting that such documents are not hearsay); *Reynolds*, 746 N.W.2d at 843 (same). Nonetheless, a foundation was needed to show that the records Tidmore relied upon emerged from that "process." We agree with the district court that Tidmore laid that foundation.

Wright analogizes the call detail records to the Federal Reserve error reports in *Reynolds*. 746 N.W.2d at 842-43. There the supreme court held that a bank employee had not provided adequate foundation for admission of those reports. Although the employee testified that the error reports were *maintained* by her bank in the ordinary course of business, she could not and did not testify how they were *produced*, since they came from a different entity—namely, the Federal Reserve. Here, however, Tidmore had that additional knowledge and imparted it. He testified as to how his company, Long Lines Wireless, generated the call detail records.

Wright argues in the alternative that Tidmore's chart and testimony should have been excluded as unreliable and unduly prejudicial. He points out that each of the locations on the chart was merely "a hypothetical point" and not the actual

cell phone location. Also, Tidmore acknowledged an error in his exhibit when he was deposed before trial.

We review the trial court's decision to admit the evidence as against Wright's reliability and undue prejudice challenge for an abuse of discretion. *State v. Parker,* 747 N.W.2d 196, 203 (Iowa 2008). We find no abuse of discretion here. The typographical error was discovered before trial. Wright's counsel had the opportunity to cross-examine Tidmore about it. Tidmore also conceded on cross-examination that the locations on the chart were "a hypothetical within the best server boundaries," not the precise locations for Wright's cell phone. Thus, the jury was told about the limitations of Tidmore's chart and testimony. These limitations did not deprive it of its essential value.[7]

Several courts have approved the use of cell phone and cell tower usage records in criminal cases as circumstantial evidence of the defendant's approximate location. *See, e.g., United States v. Sanchez,* 586 F.3d 918, 928-29 (11th Cir. 2009) (admitting records and maps showing defendants' locations based on cell phone communications); *Perez v. State*, 980 So.2d 1126, 1131-32 (Fla. Ct. App. 2008) (upholding admission of call records in attempted murder case to show approximate location of cell phones used by defendant and his confederates at particular times); *Francis v. State*, 729 N.W.2d 584, 591 (Minn. 2007) (allowing call records that showed a fifteen-minute gap when shooting took place, and placed defendant in area); *State v. Tran*, 712 N.W.2d 540, 543-545

[7] We cannot help making the observation that Wright ultimately asserted a defense that *accepted* the reliability of the cell phone tower evidence, but asked the jury to believe he had mistakenly left his cell phone behind, with the result that it ended up in the vehicle used to transport Cooper to the murder scene.

(Minn. 2006) (admitting records indicating that defendant was in victim's neighborhood on afternoon of murder); *State v. Robinson*, 724 N.W.2d 35, 64-69 (Neb. 2006) (upholding use of call records in a murder case under the business records exception to show the defendant and the victim's whereabouts at relevant time periods). Our view is no different. With a proper foundation, these records can be relevant and probative. The district court did not err in admitting Tidmore's chart and testimony.

III. Accomplice Corroboration Instruction

Wright next contends the trial court erred in determining as a matter of law that Perez and Dukes were not accomplices, and thus in denying his request for an instruction informing the jury that accomplice testimony must be corroborated. *See* Iowa R. Crim. P. 2.21(3) ("A conviction cannot be had upon the testimony of an accomplice . . . unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense. . . ."); *see also* Iowa Crim. Jury Instruction 200.4 (standard instruction providing that "[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."). We review alleged errors in jury instructions for errors at law. *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992).

> An accomplice is a person who willfully unites in, or is in some way concerned in the commission of a crime. The general rule for determining whether a witness is an accomplice is if he could be charged with and convicted of the specific offense for which an accused is on trial.

State v. Berney, 378 N.W.2d 915, 917 (Iowa 1985). Mere knowledge that a crime was planned or mere presence when the crime was committed is

insufficient standing alone to make the person an accomplice. *State v. Douglas*, 675 N.W.2d 567, 571 (Iowa 2004). In order for a witness to be considered an accomplice, the facts must establish by a preponderance of the evidence that the witness was involved in some way in the commission of the crime. *Id*.

> Only if the facts are not disputed and not susceptible of different inferences may the question of whether a witness is an accomplice be determined as a matter of law. If the facts are susceptible to different inferences, the question is one of fact for the jury.

State v. Harris, 589 N.W.2d 239, 241 (Iowa 1999).

Any evidence to the effect that Perez and Dukes were accomplices was marginal at best. There is no indication they were involved in kidnapping or murdering Cooper. At most, testimony was given that Perez and Dukes were part of the discussions about robbing Cooper, although no one testified that those discussions concerned use of a gun (i.e., first-degree robbery). Additionally, Dukes admitted on the stand to having testified in deposition that Perez removed a mace from Cooper's person. Wright characterizes this as an attempt to disarm Cooper, although at this point Cooper had already been beaten and robbed by Wright and Williams. We agree with the district court that "there are absolutely no acts that can be attributed to either of these fellows, these fellows being Dukes and Perez, after they left the apartment."

Nonetheless, we will assume, without deciding, that the evidence would have been sufficient to warrant the giving of an accomplice corroboration jury instruction. Regardless, we find any resulting error was harmless. *See State v. Anderson*, 240 Iowa 1090, 1096-98, 38 N.W.2d 662, 665-66 (1949) (indicating that a harmless error analysis can apply to failure to give an accomplice

instruction). Other jurisdictions more recently applying a harmless error analysis to this issue include: *People v. Richardson*, 183 P.3d 1146, 1189 (Cal. 2008); *State v. Holt*, 772 N.W.2d 470, 483-84 (Minn. 2009); *State v. Jackson*, 726 N.W.2d 454, 461 (Minn. 2007); and *State v. Gaede*, 736 N.W.2d 418, 421-23 (N.D. 2007). This is part and parcel of the general rule in Iowa that we will not reverse a conviction based on an instructional error unless the error was prejudicial to the defendant. *State v. Hartsfield*, 681 N.W.2d 626, 633 (Iowa 2004). "Prejudice exists when the rights of the defendant 'have been injuriously affected' or the defendant 'has suffered a miscarriage of justice.'" *Id*. (quoting *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998)). For the reasons discussed below, we believe that the trial court's refusal to give the accomplice corroboration jury instruction could not have been prejudicial.

If the instruction had been given, for it to benefit Wright, the jury would have first had to find by a preponderance of evidence that Perez and Dukes were his accomplices. *Douglas*, 675 N.W.2d at 571. This burden of proof rests on the defendant. *State v. Houston*, 206 N.W.2d 687, 689 (Iowa 1973). As we have pointed out, Wright presented no evidence to show that Perez and Dukes were accomplices in the kidnapping and murder of Cooper. And any evidence linking them to the robbery was minimal. Thus, it is highly unlikely, in our view, that the jury would have crossed the first threshold and found *both* of them to be accomplices.[8]

[8] Obviously, if only one were an accomplice, then the other's testimony could serve as the required corroboration.

Even if a jury concluded that both Dukes and Perez were accomplices, the record shows considerable evidence corroborating their testimony. The evidence corroborating an accomplice's testimony need not be strong, nor must it confirm every material fact testified to by the accomplice. *State v. Aldape*, 307 N.W.2d 32, 41 (Iowa 1981). All that is required is that the accomplice's testimony be supported in some material fact that tends to connect the defendant with the crime charged, and therefore, supports the credibility of the accomplice's testimony. *Id*. We cannot see that a jury, having been instructed on this law, would have had any difficulty finding corroboration in the record.

Despite Wright's denials that he even saw Cooper that evening, and his claim that he never left Sioux City, his cell phone was receiving signals at the murder scene at the time of the murder. Cooper's blood was found in the middle of the backseat of the Mercury Marquis, indicating there were four others in the vehicle, i.e., one other person besides Williams, Perez, and Dukes. Moreover, surveillance photographs taken outside the Kum & Go gas station show a fourth individual standing outside Williams's car shortly after Cooper's murder. Additionally, Myers testified that after Cooper returned from his first visit to Perez's apartment he stated, "Everything's all right. There's only three guys there. It's just Nick Perez, Jeremy Williams, and Black Boy [Wright]."

There was also substantial evidence corroborating Perez's and Dukes's testimony that Wright had possession of the murder weapon. A non-accomplice witness testified that Wright attempted to sell him a .357 or .380 handgun with no clip in August or September 2007. This testimony corroborated Dukes's testimony that Wright used a handgun with no clip to murder Cooper (and

Perez's testimony that the gun had to be loaded manually one bullet at a time). Also, the .380 caliber ammunition seized from Wright's apartment prior to the offense was of the same type and caliber used in the murder of Cooper.

Further corroborating evidence is found in the fact that Wright gave several false and misleading statements when interrogated by the police on January 20. *See Harris*, 589 N.W.2d at 242; *see also State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) ("A false story told by a defendant to explain a material fact against him is by itself indication of guilt."). During his interview, Wright claimed to have never left his home on January 15, claimed not to know who Dukes was, and claimed to have no idea where Lawton was. However, at trial, Wright contradicted each of his earlier statements. Wright admitted he was at Perez's apartment twice that evening, and on the first occasion Dukes was also present. Wright also testified that he had previously gone to Lawton on at least one occasion.[9]

Additionally, a jury could have treated Wright's far-fetched trial testimony as further evidence of his guilt. For example, to explain the apparent presence of his cell phone at the murder scene, Wright claimed he had conveniently left it behind and found it later that evening in Williams's car. To explain the testimony from Perez's mother that she saw Wright and smelled a strong odor of cleaning

[9] The State presented evidence that Wright was bailed out of jail in December 2007 by a friend Christopher Graves. The State established that Graves lives on 170th Street near Lawton, just down the road from the murder scene. At trial, Wright tried to deflect this evidence by testifying that after Graves visited him, he got Williams to help give Graves a ride home, and he rode along. Wright also testified that he and Williams may have also gone out to Graves's residence for New Year's Eve. Regardless of Wright's explanation, this evidence tends to corroborate Perez's testimony that when Wright entered Williams's car on the night of the murder he told Williams, "you know where to go, just drive," implying that Wright and Williams had mutual knowledge of the eventual murder scene.

fluid upon returning to Perez's apartment late the evening of January 15, Wright claimed he told Perez that day to clean up his apartment "for your momma" and "spray some smell good." To explain the .380 caliber ammunition that was seized from his efficiency apartment in September 2007 and that matched the type of bullets used to kill Cooper, Wright told the jury that the ammunition actually belonged to a roommate who had been sleeping on his couch and who ran out when the police arrived to execute the search warrant. Wright offered this explanation even though some of the ammunition was found on Wright's dresser and there appeared to be no other occupant of the apartment.

Given the slender evidence that Dukes and Perez were accomplices, and the volume of corroborating evidence, we conclude that any error in failing to give an accomplice corroboration instruction did not prejudice Wright.

IV. Ammunition Evidence

Wright contends the trial court erred in admitting into evidence seventeen rounds of .380 caliber ammunition seized from his apartment on September 25, 2007. Wright argues that the ammunition was irrelevant. It was discovered over three months prior to Cooper's murder, .380 caliber ammunition is relatively common, and nothing about the ammunition other than its caliber tied it to the murder. In the alternative, Wright argues the ammunition should have been excluded as unfairly prejudicial. These evidentiary determinations are reviewed for an abuse of discretion. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003).

We believe the district court did not abuse its discretion in admitting this evidence. The gun used to murder Cooper was never found, but both Perez and

Dukes testified that it was Wright's. According to Dukes, the gun had no clip. Perez confirmed that it had to be manually loaded one bullet at a time. The bullets found in Cooper's body and the shell casings found at the murder scene were .380 caliber. A witness testified that Wright tried to sell him a .357 or .380 handgun with no clip in September 2007. Thus, evidence that .380 caliber ammunition had been seized from Wright's apartment helped piece together the other evidence. Wright's arguments go to weight, not admissibility.

V. Conclusion

For the foregoing reasons, we affirm Samuel Wright's convictions and sentence.

AFFIRMED.