

ARKANSAS COURT OF APPEALS

DIVISION III
 No. CR-13-724

FREDERICK RAINEY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 22, 2015

APPEAL FROM THE CLEVELAND
 COUNTY CIRCUIT COURT
 [NO. CR-2012-23-5]

HONORABLE LARRY W.
 CHANDLER, JUDGE

AFFIRMED

BRANDON J. HARRISON, Judge

Frederick Rainey appeals from his conviction on two counts of breaking or entering and two counts of theft of property. He argues that the State failed to sufficiently corroborate the testimony of his alleged accomplice. We affirm.

In May 2012, Rainey was charged with two counts of breaking or entering and two counts of theft of property. At a jury trial, held in May 2013, the State presented the following pertinent evidence. Dr. Richard Scallion testified that in February 2012, there were a number of items stolen from his property in Cleveland County, including a four-wheeler, two weed eaters, a chainsaw, and a number of tools. Willie Livingston testified that he also had several items stolen from his property in Cleveland County in February 2012, including two lawn mowers, a ten-foot trailer, numerous tools, and a 1969 antique Dodge truck. Livingston testified that he placed ads in various newspapers looking for the truck and that, in April 2012, he was contacted by Rainey, who stated that he knew

where Livingston's truck was. Livingston met Rainey the next day, and Rainey led him to a location approximately 100 yards from Rainey's home, where the truck and some other items were stuck in the mud. Livingston ultimately gave Rainey \$300 in reward money.

Rainey's cousin, Evines Rainey, Jr., testified that he had pled guilty to two counts of breaking or entering and two counts of theft of property and that he and Rainey had committed the crimes together. He explained that one evening in February 2012, he and Rainey walked to Livingston's property, which was two or three miles from Rainey's home, where Rainey cut the locks off of the gate and started a blue Dodge truck with a screwdriver. He and Rainey then hooked a trailer to the truck and loaded the truck and trailer with other items, including a riding lawn mower and power tools. Evines stated that they returned to Rainey's property, where Evines got into his vehicle and left, and Rainey continued driving the Dodge truck down a small road into the woods.

Evines testified that he saw Rainey again that same night when Rainey showed up at the home of Ashley Adams, Evines's girlfriend. According to Evines, he and Rainey again left on foot and walked to Scallion's property, where they took a four-wheeler and two weed eaters. Rainey left on the four-wheeler, and Evines walked back to Ashley's house. A few days later, Evines explained, he bought the four-wheeler from Rainey for \$200. Evines also saw the Dodge truck stuck in a creek in the woods behind Rainey's home.

Ricky Broughton, another cousin of Rainey's, testified that in February 2012, Rainey showed him a truck, a trailer, and a lawn mower that were stuck in a creek in the

woods behind Rainey's house. Broughton was hoping to use the trailer, but they could not get it unstuck. Broughton did not ask Rainey where the items had come from.

Ashley Adams confirmed that Rainey showed up at her house one evening in February 2012 and that Rainey and Evines left together. She recalled that she was angry because Evines would not tell her what he and Rainey were doing.

Deputy Chance Dodson, an employee of the Cleveland County Sheriff's Department, testified that he investigated the Livingston and Scallion thefts. He explained that on April 3, 2012, Rainey called the police and told them that he "thought he had found some of the property that had been reported stolen in the Livingston case." According to Dodson, Rainey indicated that he had found the property that morning. Rainey led officers to a wooded location near his home, where they found a 1969 blue Dodge truck, along with other items, stuck in a creek. Dodson also explained that a chainsaw similar to one taken from Livingston had been pawned by Rainey at a nearby pawn shop.

In his motion for directed verdict, Rainey argued that Evines's testimony was not sufficiently corroborated, but the circuit court found that there was "adequate, though very slight, corroborating evidence" such that the motion would be denied. The motion was renewed at the close of all the evidence and again denied. The jury found Rainey guilty on all counts, and he was sentenced to four years' imprisonment on each count, to run consecutively. A timely appeal followed.

On appeal, Rainey argues that the circuit court erred in finding sufficient evidence to corroborate his alleged accomplice's testimony. He argues that none of the other witnesses provided testimony sufficient to establish a connection between him and the thefts. It is true that a conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. Ark. Code Ann. § 16-89-111(e)(1)(A) (Repl. 2013). But a person must first be found to be an accomplice for the requirement of corroborative evidence set out in Ark. Code Ann. § 16-89-111(e)(1)(A) to apply. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006). A defendant must either have the circuit court declare a witness to be an accomplice as a matter of law or submit the issue to the jury for determination, and failure to fulfill this requirement prevents this court from reaching the merits of an appellant's sufficiency argument. See, e.g., *Moore v. State*, 2015 Ark. App. 58; *Brooks v. State*, 2014 Ark. App. 84.

We hold that because no accomplice instruction was submitted to the jury, and because Rainey never requested that the circuit court declare Evines to be an accomplice as a matter of law, accomplice status was never determined, and we are therefore unable to reach the merits of his sufficiency argument.

Affirmed.

GLADWIN, C.J., and ABRAMSON, J., agree.

Vicky B. Cooper, for appellant.

Leslie Rutledge, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.