

**IN THE COURT OF APPEALS OF IOWA**

No. 9-219 / 08-0519  
Filed May 6, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**WAYNE SAMUEL BARNES,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Calhoun County, Joel E. Swanson,  
Judge.

Appeal from convictions and sentences for burglary in the third degree  
and theft in the second degree, both as a habitual offender. **REVERSED AND  
REMANDED.**

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

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney  
General, and Cynthia Voorde, County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ.

**SACKETT, C.J.**

The defendant appeals from his convictions and sentences for burglary in the third degree as a habitual offender and theft in the second degree as a habitual offender. He contends his trial counsel did not provide effective assistance by, among other things, failing to request an instruction that accomplice testimony must be corroborated. We reverse and remand.

**Scope and Standards of Review.** We review ineffective-assistance claims de novo. *State v. Bearnse*, 748 N.W.2d 211, 214 (Iowa 2008). A defendant must demonstrate by a preponderance of the evidence "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We normally preserve such claims for postconviction relief proceedings; however, direct appeal is appropriate when the record is adequate to determine as a matter of law a defendant will be unable to establish one or both of the elements of the claim. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003).

**Background Facts.** From the evidence introduced at trial, the jury could find the following facts. In March of 2006, the defendant bought some pigs to raise and sell. His sister and brother-in-law (Bellcocks) allowed him to keep the pigs on property they owned in rural Calhoun County. In return for using their property, defendant agreed to give the Bellcocks one pig when he was ready to sell them. Around May of 2006, the defendant moved to Kansas and stopped caring for the pigs. The Bellcocks did not know where the defendant had gone

and he did not contact them. After caring for the pigs for about a month, the Bellcocks, tired of the effort and expense, sold them in June of 2006.

While in Kansas, the defendant met Brandi Rex. The defendant returned to Iowa in March of 2007, accompanied by Rex. They moved in with Brian Sayer and his mother. On April 6, 2007, the Bellcocks found that a riding lawn mower they stored on their property was missing and the part of the metal siding on the back side of the shed where it was stored had been removed. A tire and rim for a pickup truck parked outside the shed also were missing.

The defendant offered to trade a friend a mower for some truck parts. He said he was getting the mower from his sister because she owed him money for hogs he owned that she had sold. The defendant's sister testified she never talked to the defendant about trading the lawn mower for the money she and her husband had received when they sold the pigs.

Rex testified the defendant sometimes talked about his sister and said "[n]ot very good things." The defendant told Rex he had spent \$1600 to raise and fatten some hogs that his sister sold while he was in Kansas. The defendant also made comments to Rex about wanting to burn down his sister's house. Rex further testified she was with the defendant and Sayer when they took a lawn mower to Ames and pawned it. She recalled that the defendant had picked up the lawn mower the night before. There was no key in the mower but they were able to get a key. At the pawn shop, Rex signed the paperwork because she was the only one with valid identification. The defendant stood by her while she handled the sale. After Rex and defendant had pawned the lawn mower,

defendant told Rex he had stolen the mower from his sister. She recalled that the defendant told her he knocked a couple of boards out of the back wall of the shed and took the mower out that way.

Sayer testified the defendant asked for help stealing a lawn mower. Sayer refused. The next morning, Sayer drove the defendant and Rex to where the defendant had parked his truck. The mower was in the back of defendant's truck covered with a blue tarp. They bought a key for the mower, then drove to Ames and pawned the mower.

About two months after the disappearance of the mower, a Calhoun County deputy sheriff received information that led him to a pawn shop in Ames, Iowa. The deputy asked the manager whether Brandi Rex, Brian Sayer, or the defendant had pawned any items. Store records showed Brandi Rex pawned a riding lawn mower in early April. James Bellcock later positively identified the mower as the one stolen from him. The pawn shop worker could not positively identify the defendant, but said Rex was accompanied by a man ten to fifteen years older than she was. Rex is twenty-eight years old; the defendant is thirty-nine. Sayer was seventeen at the time the mower was pawned.

The jury found the defendant guilty of burglary in the third degree and theft in the second degree. The jury also found the defendant had two prior felony convictions. The court denied the defendant's motion for new trial, noting,

the instructions contained directions for the jury concerning the weight of the evidence, which included any circumstantial evidence, direct evidence, the jury considered that obviously in their decision, also the instructions contained a request by the court for the jury to find the value of any property they believed to be taken, which they did do.

The court believes that the instructions were followed by the jury, they returned the verdict accordingly, the court finds that there was sufficient evidence for a conviction as set forth in the verdict for of the jury, accordingly, the motion for new trial will be denied.

The court sentenced the defendant to imprisonment not to exceed fifteen years on each conviction, to be served consecutively.

**Ineffective assistance.** The defendant contends he received ineffective assistance because trial counsel failed to request a jury instruction on corroboration of accomplice testimony. He asserts that both Rex and Sayer were accomplices and the jury should have been instructed that their testimony must be independently corroborated.

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.

Corroborating evidence serves a two-fold purpose: it 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 defendants. *State v. Berney*, 378 N.W.2d 915, 918 (Iowa 1985); *see also State v. Cuevas*, 281 N.W.2d 627, 629 (Iowa 1979); *State v. Johnson*, 237 N.W.2d 819, 822 (Iowa 1976).

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). 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. *Id.* But something more than mere knowledge that a crime is contemplated, or mere personal presence at the time and place where committed, must be shown in order to make one an accomplice. And it must be established by a preponderance of the evidence that a witness was in fact an accomplice. *Id.* The question of whether a particular witness is an accomplice is a question of law where the facts are not disputed or susceptible to different inferences; however, where the facts are susceptible to different inferences the question is one of fact for the jury. *Berney*, 378 N.W.2d at 917; *State v. Doss*, 355 N.W.2d 847, 879 (Iowa 1984); *State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984); *State v. Sallis*, 238 N.W.2d 799, 802 (Iowa 1976).

There are facts and inferences that would support by a preponderance of evidence a finding that both Rex and Sayer meet the definition of an accomplice. The supreme court has affirmed the rule that “the testimony of one accomplice may not corroborate the testimony of another accomplice. *State v. Douglas*, 675 N.W.2d 567, 572 (Iowa 2004). The existence of corroborative evidence is a question of law for the court, but its sufficiency is ordinarily a question of fact for the jury. *State v. Ware*, 338 N.W.2d 717, 718 (Iowa 1983); *State v. Bizzett*, 212 N.W.2d 466, 469 (Iowa 1973). Corroborative evidence need not be strong as long as it can fairly be said to connect defendant with the commission of the crime in some material fact. *State v. Dickerson*, 313 N.W.2d 526, 529 (Iowa 1981).

Corroborative evidence existed. See *Ware*, 338 N.W.2d at 718; *State v. Vesey*, 241 N.W.2d 888, 890 (Iowa 1976). The existence of the corroborative evidence triggered the requirement that the jury decide the sufficiency of the corroboration, after being properly instructed. *Bizzett*, 212 N.W.2d at 468. The jury may be required to answer a special interrogatory about the sufficiency of corroboration. Iowa R. Crim. P. 2.22(2). We do not agree with the State that the existence of corroborative evidence demonstrates an absence of prejudice to Barnes, since the existence of corroboration is the threshold requirement for the accomplice instruction.

The jury could draw different inferences as to whether Rex and Sayer were so concerned or cooperated with defendant in the commission of the crime so as to be subject to conviction of that offense, and if they were, whether their testimony was sufficiently corroborated. Defendant was prejudiced by the district court's failure to give the instruction. We reverse and remand for a new trial. Having so determined, we need not address the other issues raised by defendant.

**REVERSED AND REMANDED.**

Potterfield, J., concurs; Mansfield, J. dissents.

**MANSFIELD, J. (dissenting)**

I respectfully dissent. Given the strong evidence of Barnes's guilt, I do not believe he was prejudiced by his trial counsel's failure to request the accomplice corroboration instruction.

Putting aside for now the testimony of Barnes's putative accomplices, the record shows the following: In March 2006, Barnes had been given some pigs and had nowhere to keep them. He brought them to his sister and brother-in-law (the Bellcocks) and asked to keep them on their property while he (Barnes) took care of them. In that same area of the acreage, the Bellcocks had a new \$1500 riding lawn mower. Two months later, Barnes moved to Kansas and stopped caring for the pigs. The Bellcocks got tired of the effort and expense of taking care of the pigs, and did not know how to reach Barnes, so they sold them.

Doug Geibe, an acquaintance of Barnes, testified that sometime during the spring/summer of 2007, he spoke with Barnes (who was now back in Iowa). Geibe told Barnes that his mower was broken down and he needed a new mower. Barnes said he had "access" to a mower and was going to be picking up a mower from his sister's. As Geibe testified, Barnes said "[s]omething about he'd had some hogs or something and she'd taken them, sold them, she apparently owed him some money over that particular deal and she had a lawn mower and was going to give it to him in exchange for the debt that she owed him."

On April 6, 2007, the Bellcocks' riding lawn mower was reported stolen. It turned out that the stolen mower had been brought to a pawn shop in Ames on



April 4, 2007. The pawn shop paperwork contained the signature and fingerprint of Brandi Rex.

With this trial evidence as backdrop, we now consider the testimony of Brandi Rex and Brian Sayer. Rex testified that that Barnes was her boyfriend in Kansas and they moved from Kansas to Iowa in March 2007. She testified that Barnes was “real mad” at his sister. Specifically, Barnes told Rex that he had had some hogs that had cost him \$1600 to raise and fatten. While Barnes was in Kansas, his sister had taken the hogs and sold them.

Rex further testified that on April 4, 2007, she, Brian Sayer, and Barnes went out to Barnes’s truck. The mower in question was already in the back of the truck, covered by a tarp. Barnes told her at that time he had obtained the mower in a trade. They delivered the mower to the pawn shop, where Rex signed the paperwork. Barnes later admitted to her that he had stolen the mower from the Bellcocks.

Sayer testified that on the night before the trip to the pawn shop, Barnes, himself, and others were sitting around drinking beer. Barnes asked the members of the group to help him steal a mower. Sayer declined, but another individual in the group agreed. They left. About an hour and a half later Barnes returned and said they got the mower. Barnes then asked Sayer if he would go to Ames with him and help him pawn the mower. Sayer agreed. The next day, Sayer went with Barnes and Rex to retrieve Barnes’s parked truck, which had the mower. They stopped at a hardware store while Sayer purchased a key for the

mower. Then they went to Ames to pawn the mower. Rex filled out the paperwork, and the mower was pawned.

The State contends that Rex and Sayer were not even accomplices, so no accomplice corroboration instruction was warranted. I think the State has a valid point as to Rex. She did not know the mower was stolen when they went to the pawn shop.

Regardless, I do not believe an accomplice instruction would have made a difference. Otherwise stated, I see no a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). Because of my views on this issue, and because I believe that the other grounds raised by Barnes are also insufficient to merit reversal, I would affirm Barnes's convictions and sentence.