IN THE COURT OF APPEALS OF IOWA

No. 9-530 / 08-1224
Filed October 21, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ARON MICHAEL MOSS,
Defendant-Appellant.

Appeal from the Iowa District Court for Boone County, David Danilson, Judge.

Aron Michael Moss appeals his second-degree murder conviction. **AFFIRMED.**

Jesse A. Macro Jr. of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Jim Robbins, County Attorney, and Scott Brown, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ. Danilson, J., takes no part.

DOYLE, J.

Aron Michael Moss appeals following his conviction for second-degree murder. He contends there was insufficient evidence to support the jury's verdict, the district court erred in failing to give a corroboration instruction to the jury, and his trial counsel ineffective was in several respects. Upon our review, we affirm.

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

On May 28, 2007, Shane Hill twice called 911 to report that he accidentally shot himself. He died shortly thereafter. An ensuing investigation revealed that Hill had in fact been gunned down at the farm where he worked.

Jessica Hill, the victim's wife; Daniel Blair, Jessica's lover and Moss's friend and roommate; and Moss were charged with murder in the first degree for the victim's death. Blair was tried first and found guilty of first-degree murder. Thereafter, Blair agreed to testify against Moss in Moss's trial.

Moss's jury trial began on May 28, 2008. There, Blair testified that Moss shot the victim. Moss testified in his own defense and denied Blair's testimony. Moss admitted he drove Blair out to the farm the morning of the victim's murder and testified that he later picked Blair up from the farm. However, Moss testified he was not at the farm when the victim was shot and that Blair shot the victim. Moss further testified that he did not know Blair was going to murder the victim when he dropped Blair off at the farm.

The jury found Moss guilty of second-degree murder, a lesser-included charge. Moss now appeals.

***II. Discussion*.**

On appeal, Moss argues there was insufficient evidence to support the jury's verdict and the district court erred in failing to give a corroboration instruction to the jury. To the extent these claims were not preserved, Moss argues trial counsel was ineffective. Moss additionally claims his trial counsel was ineffective in several other respects.

***A. Preservation of Error*.**

***1. Sufficiency of Evidence to Support Verdict*.**

"To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) (citing *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996)). In this case, trial counsel for Moss moved for a judgment of acquittal at the close of the State's case and again at the close of all the evidence. However, Moss's counsel only argued the evidence failed to support a conviction of murder in the first degree. Because Moss was ultimately convicted of second-degree murder and now challenges sufficiency of the evidence to support his conviction upon that charge, Moss failed to preserve error on this issue.

***2. Jury Instruction*.**

Moss next argues the district court had a duty to give an instruction on the necessity for corroboration of the accomplice testimony, even though Moss did not request the instruction. The State argues that Moss failed to preserve error by failing to request a corroboration instruction.

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:

> 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 the defendant[].

State v. Berney, 378 N.W.2d 915, 918 (Iowa 1985) (citing *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). 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)). Moss asserts and the State concedes that Blair was an accomplice.

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.

---

[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.

> 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.

(Emphasis added.) "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." *State v. Anderson*, 240 Iowa 1090, 1096, 38 N.W.2d 662, 665 (1949) (emphasis added); *see also State v. LaRue*, 478 N.W.2d 880, 883 (Iowa Ct. App. 1991).

Blair, the accomplice, was not the only witness to testify against Moss at trial, and we therefore conclude the district court was not obligated to give the accomplice testimony instruction in the absence of a request. While it is the district court's duty to instruct the jury fully and fairly, even without request,

> "our adversarial system imposes the burden upon counsel to make a proper record to preserve error . . . by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in [the] event they are refused."

State v. Moore, 276 N.W.2d 437, 442 (Iowa 1979) (quoting *State v. Sallis*, 262 N.W.2d 240, 248 (Iowa 1978)). 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.'" *Id*. (quoting *Sallis*, 262 N.W.2d at 248). Moss did not request a corroboration instruction nor voice an exception to its omission. Therefore, we find Moss failed to preserve error on this issue.

***B. Ineffective Assistance of Counsel*.**

Moss claims he received ineffective assistance from trial counsel in several respects. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan,* 712 N.W.2d 121, 136 (Iowa 2006). There is "a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). A defendant is not denied effective assistance of counsel by his counsel's failure to raise meritless challenges. *State v. Hoskins*, 711 N.W.2d 720, 730-31 (Iowa 2006).

In order to show prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *DeVoss*, 648 N.W.2d at 64 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome" of defendant's trial. *Id*.

Generally, ineffective assistance claims are preserved to allow full development of the facts surrounding counsel's conduct. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). However, we will resolve such claims on direct appeal "where the record is adequate to determine as a matter of law that the defendant will be unable to establish one or both of the elements of his ineffective-assistance claim." *Id*. Under such circumstances, we affirm the

defendant's conviction without preserving the ineffective-assistance claims. *Id*. Both Moss and the State urge this court to decide his claims on direct appeal. We conclude the record is adequate to do so.

***1. Sufficiency of Evidence to Support Verdict*.**

Moss argues his trial counsel was ineffective for failing to raise a specific sufficiency-of-the-evidence claim during the motion for judgment of acquittal. *See* Iowa R. Crim. P. 2.19(8); *State v. Abbas*, 561 N.W.2d 72, 73, (Iowa 1997). Moss contends the evidence of his participation in the crime came solely from Blair and that Blair was not credible. Moss further argues that even if the jurors found Blair credible, Blair was an accomplice and his testimony was not corroborated by sufficient evidence as required by Iowa Rule of Criminal Procedure 2.21(3).

A jury's guilty verdict will be upheld on appeal unless the record lacks substantial evidence to support the charge. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). Substantial evidence means evidence that could "convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). In reviewing a challenge to the sufficiency of the evidence supporting a guilty verdict, the court considers all the record evidence in the light most favorable to the State and draws all reasonable inferences in the State's favor. *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005). The court does not pass upon the credibility of witnesses or resolve conflicts in the evidence, as "such matters are for the jury." *Id*. (citation omitted). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive."

Liggins, 557 N.W.2d at 269. The existence of evidence which might support a different verdict does not negate the existence of substantial evidence sufficient to support the jury's verdict in the case. *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990).

To establish Moss's guilt on the second-degree murder charge, the State was required to prove that Moss, or someone he aided and abetted, intentionally shot Hill; that Hill died as a result of being intentionally shot by Moss or someone he aided and abetted; and that Moss acted with malice aforethought or he had knowledge that someone he aided and abetted acted with malice aforethought. *See* Iowa Code §§ 703.1, 707.1, 707.3 (2007). A person who aids and abets is charged, tried, and punished as a principal. *State v. Doss*, 355 N.W.2d 874, 877 (Iowa 1984). The jury was thus instructed:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.
>
> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."
>
> The guilt of a person who knowingly aids and abets the commission of the crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.

See also id. at 877-78.

When a defendant is accused of aiding and abetting in the commission of a crime in which intent is an element, as here, there must be substantial

evidence in the record to support a finding that the defendant either participated with the intent himself or with the knowledge that the principal had the required intent. *State v. Salkil*, 441 N.W.2d 386, 387 (Iowa Ct. App. 1989). "The element of intent is rarely capable of direct proof and may be shown by circumstantial evidence." *Id*. A defendant's participation in the crime as an aider and abettor likewise may be proven by circumstantial evidence. *Doss*, 355 N.W.2d at 878. "For purposes of proving guilt beyond a reasonable doubt, circumstantial evidence is as probative as direct evidence." *Id*. Even excluding Blair's testimony accusing Moss of being the shooter, there was considerable evidence, circumstantial and otherwise, in this case from which the jury could have found Moss knowingly approved and agreed to Hill's murder by either actively participating in it, or knowingly advising or encouraging Blair's murder of Hill, knowing Blair had the requisite intent.

Moss and Daniel Blair were good friends who had known each other since fifth grade. In approximately April 2007, Moss and Blair became roommates after Moss and his wife separated.

Blair was involved in a long-term affair with Jessica Hill, the wife of Shane Hill. Moss knew Blair and Jessica were a "bit more friendly than just friends." Jessica told Blair numerous times that she wished her husband Shane would disappear and that things would be easier if he were not around. Moss knew Jessica had made statements about how it would be easier if her husband was not around.

In April 2007, Moss drove Blair to Blair's parents' home to obtain a rifle. On April 17, 2007, Moss and Blair bought two boxes of .30-.06 ammunition from

a gun shop in Boone. The next day, Moss and Blair sighted the rifle at Blair's grandparents' rural residence, taking turns shooting the rifle. The ammunition was kept in Moss's car, and the rifle was stored in the trunk.

Moss admitted that on the morning of Hill's murder he and Blair went to Wal-Mart where Blair purchased a phone card for Moss to add minutes to Moss's cell phone. Moss testified that after purchasing the phone card, Blair asked if he could drive Moss's car, but that Blair did not say where they were going and Moss did not ask. Moss testified that Blair then drove to the farm where Hill worked. During the approximate fifteen-minute drive from the store to the farm, Moss testified he and Blair rode in silence having no conversation.

Moss testified that after arriving at the farm, Blair took the rifle out of the trunk and took shells from one of the ammunition boxes that were sitting on the back seat. Moss testified that Blair told him he was going to wait there for Hill. Moss testified he then went home, leaving Blair at the farm.

Moss testified he exchanged numerous text messages with Blair from home and in his car on his way back out to the farm. Moss testified he knew Blair had shot Hill when Blair started sending the text messages, despite Moss's other testimony that he and Blair had never discussed killing Hill.

From 10:48 a.m. to 11:09 a.m., Moss and Blair exchanged at least twelve text messages. Moss testified he deleted all but one of the contents of the messages from his phone. Moss testified he received a text message from Blair at 10:48 a.m. asking Moss to come and pick Blair up at the farm. Moss testified that Blair texted him again at 11:00 and 11:03 a.m. asking if he was on his way. Moss testified that at 11:06 a.m., Blair texted him to hurry up. At 11:09 a.m.,

Moss texted back that he was five minutes away. Moss said he arrived back at the farm probably around 11:15 a.m.

The 911 log establishes that Shane Hill first called 911 from the farm at 11:10 a.m. Hill reported that he had accidently shot himself and requested assistance. After the call was disconnected, Hill called 911 a second time at 11:16 a.m. Approximately fifty seconds into the call, Hill reported the gun had fired again and a shot can be heard. The call ended approximately three and a half minutes later. Although by Moss's own testimony he would have been at the farm at the time the second shot was fired, Moss asserted that when he arrived Blair was walking towards him up the farm lane with the rifle in hand. Moss said he saw no one else at the farm. Moss testified he got out of the car and gave Blair his keys. Blair opened the trunk and put the rifle in it. Moss took his keys back and then drove the pair away from the farm. Moss testified as he drove back to town he saw Blair take the three spent shell casings from the pocket of his shirt and throw them out the window. Moss testified he then got rid of the murder weapon, giving the rifle to one of his close friends to hold.

Investigators recovered the rifle, some ammunition, and the bag containing the gun from Moss's friend's brother's home. The rifle was completely disassembled and had been recently cleaned. No fingerprints or DNA were found on the rifle itself, but Moss's DNA was found on the rifle's strap. Moss's palm print was found on the plastic shell holder in the ammunition box.

Moss was interviewed by investigators on June 1, 2007. Moss told the interviewers he had borrowed Blair's cell phone the morning of May 28. Moss stated he went to a friend's house at 9:00 a.m. until around noon that day. He

stated he then went back home, picked up Blair, and then went to a bar. Moss denied knowing or having involvement in Hill's murder. Moss denied knowing where the farm was located. Moss testified at trial that he lied to the investigators when he told the investigator that he had Blair's cell phone on the morning of the murder. *See State v. Lasage*, 523 N.W.2d 617, 621 (Iowa Ct. App. 1994) ("An intentional untruth can be an indication of consciousness of guilt."); *see also State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982) ("A false story told by a defendant to explain a material fact against him is by itself an indication of guilt."). Moss testified that he was untruthful when he denied knowing anything about Hill's murder.

Moss testified he wrote his wife two letters from jail, one stating that he knew when he got Blair's text message that Blair had killed Hill. Moss testified that no one saw him that day and that he had no alibi. Moss's close friend Jesse Hunter testified that Moss told him "he probably wouldn't be seeing him anymore" because "he was probably going to prison for a while."

We conclude substantial evidence supports the jury's verdict of murder in the second degree. Accordingly, Moss suffered no prejudice from trial counsel's failure to challenge the sufficiency of the evidence at trial concerning the second-degree murder charge because substantial evidence supports the jury's verdict. Accordingly, his ineffective-assistance-of-counsel claim must fail.

***2. Jury Instruction*.**

Moss next contends his trial counsel was ineffective for failing to request the court give an instruction on corroboration. 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).

Moss argues that Blair is the only witness who claims Moss was the shooter and the only witness who offered inculpatory evidence against Moss relating to the shooting and its planning. However, for the reasons stated above, we disagree. Moss's own testimony, the letter to his wife, and Hunter's testimony implicates him in the shooting and planning of Hill's murder. Because Blair was not the only witness to testify against Moss at trial, we conclude the accomplice testimony instruction was not required.[2] Counsel thus did not breach an essential duty in failing to request this instruction. Moreover, even if an accomplice instruction were required, Moss was not 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). "[A] defendant's own testimony may furnish the necessary corroboration." *State v. Jochims*, 241 N.W.2d 25, 27 (Iowa 1976) (citing *State v. Bizzett*, 212 N.W.2d 466, 468 (Iowa 1973)). There is no reason to believe the jury would have acquitted Moss had the instruction been given. The corroboration evidence previously discussed supports some material parts of Blair's testimony and tends to connect Moss with

[2] We do note that 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).

the crime. *Bugely*, 562 N.W.2d at 176. We conclude Moss 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.

***3. Jessica Hill's Testimony*.**

Moss next asserts his trial counsel was ineffective for failing to make hearsay and Confrontation Clause objections to the following testimony given by Blair on his direct examination by the State:

> Q. [T]owards the date of May 28, 2007, did you and Jessica [Hill] have any conversations concerning Shane Hill? A. On occasion, yes.
>
> Q. Okay. Tell the jury about those conversations you and Jessica had. A. Well, she had always wished that it would be much easier without him around.
>
> Q. Did she ever suggest to you that Shane Hill should disappear? A. She wished that he would disappear, yes.

Moss argues Blair's testimony was very damaging evidence and supplied the jury with a motive for Hill being murdered. Moss asserts that without the hearsay statements being admitted, there was no direct evidence as to why the shooting took place. Moss argues the statements were prejudicial and not harmless error, and therefore a new trial should be granted. We disagree.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI; *see also Ohio v. Roberts*, 448 U.S. 56, 62-63, 100 S. Ct. 2531, 2537, 65 L. Ed. 2d 597, 605 (1980); Iowa Const. art. 1, § 10. The clause is designed to implement the policies of a preference for face-to-face confrontation and cross-examination of

witnesses against a defendant at trial. *State v. Newell*, 710 N.W.2d 6, 24 (Iowa 2006).

> Although this constitutional provision generally protects the same values as the hearsay rule, "the Confrontation Clause bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." [*State v. Castaneda*, 621 N.W.2d 435, 444 (Iowa 2001)]. On the other hand, the Confrontation Clause, like the hearsay rule, does not prevent "the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59 n. 9, 124 S. Ct. 1354, 1369 n. 9, 158 L. Ed. 2d 177, 198 n. 9 (2004).

Id.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801; *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006). In other words, "a statement that would ordinarily be deemed hearsay is admissible if it is offered for a non-hearsay purpose that does not depend upon the truth of the facts presented." *McElroy v. State*, 637 N.W.2d 488, 501 (Iowa 2001). For example, a statement might be offered to show the declarant's state of mind, the effect of the statement on the listener, or to show notice, motive, knowledge, reasonableness of behavior, good faith, or anxiety. *Id*.; *Roberts v. Newville*, 554 N.W.2d 298, 300 (Iowa Ct. App. 1996).

In this case, Blair's testimony relating what Jessica Hill stated to him consisted of out-of-court statements. However, the statements were not offered to prove the truth of the matter asserted. Rather, the statements were offered to show the motive for Hill's murder. Because Jessica Hill's statements as testified to by Blair were not hearsay, their admission did not violate the Confrontation Clause. Consequently, we conclude Moss suffered no prejudice from trial

counsel's failure to object to the testimony and his ineffective-assistance-of-counsel claim must therefore fail.

***4. The State's Use of "Truthfulness" in its Closing Argument*.**

Moss finally argues he was denied effective assistance of counsel by his trial counsel's failure to object to remarks made by the prosecutor during closing arguments. He contends the challenged statements constituted prosecutorial misconduct and violated his constitutional right to due process of law as set forth in *State v. Graves*, 668 N.W.2d 860 (Iowa 2003). More specifically, he contends the prosecutor stated at least four times in his closing argument that Moss was untruthful.

In closing arguments, the State made the following statements:

> Well, what do we know happens in that 911 call? 40 seconds into that 911 call, Shane Hill is shot again. You can hear it on the tape. You can hear Shane Hill die from that gunshot wound and the other gunshot wounds. That would put him there during the second shot, but that's not what he tells us. So what does that mean? It means that Aron Moss has not been truthful not only with the police, but with you. That's what it means.
>
> . . . .
>
> How about this one? Moss—Aron Moss is untruthful with the police. 34 times he denies his involvement. 34 times. So what would be a motive to be untruthful to the police? He claims it's because he's just out to help his buddy, Dan Blair. Well, you know what? He's untruthful with the police. Tries to save his own skin to try to avoid a charge and try to avoid providing the police evidence against him. That is a clear motive in this case to be untruthful with the police.
>
> . . . .
>
> Why would he do that unless he is involved in the murder of Shane Hill? He is trying to get out from underneath a very large rock. That's what he's trying to do. That's why he was being untruthful.
>
> . . . .
>
> We've already talked a bit about this. The tally, as told by Aron Moss here, is really simply unbelievable. He's not truthful with the police. There's no reason to think he would be truthful with his wife. He's inconsistent with the jail letter. He admits to statements

> with Jesse Hunter. The testimony on the stand, really the timeline, does not work for him.

The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct. *Graves*, 668 N.W.2d at 869. It is "improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *Id*. at 876. However, "a prosecutor is still free to craft an argument that includes reasonable inferences based on the evidence and . . . when a case turns on which of two conflicting stores is true, [to argue that] certain testimony is not believable." *Id*. (internal quotation and citation omitted). It is not misconduct to argue that a defendant has lied, provided the evidence in the record sufficiently supports such a characterization. *See State v. Carey*, 709 N.W.2d 547, 556 (Iowa 2006).

The following questions must be answered to determine whether the prosecutor's remarks were proper:

> (1) Could one legitimately infer from the evidence that the defendant lied? (2) Were the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? and (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

Graves, 668 N.W.2d at 874-75.

> The obvious threat addressed by *Graves* and other of our cases is the possibility that a jury might convict the defendant for reasons other than those found in the evidence. Thus, misconduct does not reside in the fact that the prosecution attempts to tarnish defendant's credibility or boost that of the State's witnesses; such tactics are not only proper, but part of the prosecutor's duty. Instead, misconduct occurs when the prosecutor seeks this end

> through unnecessary and overinflammatory means that go outside the record or threaten to improperly incite the passions of the jury.

Carey, 709 N.W.2d at 556 (citation omitted). Applying the Graves factors set forth above, we conclude the prosecutor's comments do not rise to the level of misconduct.

The prosecutor's closing argument here commented on the lie Moss initially told police. As set forth above, Moss initially told the investigator that he had Blair's cell phone on the morning of the murder. Moss also initially told the investigator that he did not know anything about Hill's murder. Moss testified at his criminal trial that he lied to the investigator. Due to his changed story, by necessity he also admitted, both on direct examination and cross-examination, that he had lied to police. Thus, there was not just a legitimate inference from the evidence that Moss had lied, there was direct evidence based on Moss's own testimony that he had lied.

We conclude it was not misconduct for the prosecutor to state during closing argument that Moss had lied because one could clearly find from the evidence that he had lied, the prosecutor's statements were related to specific evidence that tended to show Moss had been untruthful, and the statements were made in a professional manner that did not unfairly disparage Moss. *See Graves*, 668 N.W.2d at 874-75. As set forth above, misconduct does not reside in the fact that the prosecution attempted to tarnish Moss's credibility; such tactics are not only proper, but part of the prosecutor's duty, especially when the dispute rests upon two or more different versions of events in question. *See Carey*, 709 N.W.2d at 556.

Because we have determined the prosecutor's comments did not rise to the level of misconduct, we conclude Moss's trial counsel did not breach an essential duty by not objecting to the statements. *See State v. Atwood*, 342 N.W.2d 474, 477 (Iowa 1984) (finding counsel not ineffective for failing to make questionable objection). Nor is there a reasonable probability the outcome of the trial would have been different if his trial counsel had objected. Moss has not met his burden to prove his trial counsel was ineffective for not making these objections.

***III. Conclusion*.**

For all the foregoing reasons, we affirm Moss's conviction for second-degree murder.

AFFIRMED.

Eisenhauer, J., concurs; Sackett, C.J., dissents.

SACKET, C.J. (dissenting)

I believe, as the defendant argues, that his trial counsel was ineffective in two respects. The first was in failing to make an adequate motion for judgment of acquittal in that he failed to specify the elements of the offenses that allegedly lack sufficient evidentiary support. I would not reverse on this ground as I do not believe the defendant can show prejudice. The second was the failure to request a corroboration instruction. Because I find the defendant was clearly prejudiced by this failure, I would reverse and remand.

Blair testified against the defendant. The jury clearly could find Blair to be an accomplice. An accomplice is defined as a person who could be charged with, and convicted of, the specific offense for which the accused is on trial. *State v. Berney*, 378 N.W.2d 915, 917 (Iowa 1985). It must be established that the person was involved in some way in the commission of the crime. *Id.* When a witness is an accomplice, a conviction cannot be had upon his or her testimony alone, but must be corroborated by other evidence that tends to connect the defendant with the commission of the offense. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof; it must support some material part of the accomplice's testimony and tend to connect the accused to the crime. *Id.*

The existence of corroborative evidence is a question of law for the court. *State v. Dickerson*, 313 N.W.2d 526, 529 (Iowa 1981); *State v. Larue*, 478 N.W.2d 880, 883 (Iowa Ct. App. 1991). I believe that corroborative evidence exists. However, the inquiry does not end there. Once the legal adequacy of the

corroborating evidence is established, the sufficiency of the evidence is for the jury. *State v. Brown*, 397 N.W.2d 689, 694-95 (Iowa 1986). The failure of defendant's trial counsel to request the instruction deprived the defendant of his right to have the jury determine if the corroborating evidence was sufficient. He was prejudiced.