

IN THE COURT OF APPEALS OF IOWA

No. 7-666 / 96-2055

000459

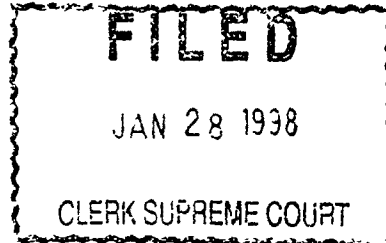
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MAURICE TYRONE MOORE,

Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, Lynne E. Brady, August
F. Honsell, and William L. Thomas, Judges.

Defendant appeals from his conviction for first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant
County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Maurice Moore appeals his conviction for first-degree robbery while armed with a firearm. Moore contends the trial court erred in: (1) refusing to admit deposition testimony into evidence as an exception to the hearsay rule; (2) refusing to order the State to reveal the identity of a confidential informant; (3) refusing to find the second trial violated the Double Jeopardy Clause of the United States Constitution; and (4) refusing to give his requested instruction on the defense of right. We affirm.

The State accused Maurice Moore of robbing Susan Zeiser-Perkins and William Conley Johnson at gunpoint in the apartment of Perkins and Johnson using a sawed-off shotgun. Moore claims he did not commit a robbery because he and Dontay Hoosman, the other defendant charged in this crime, did not have a gun and were only trying to reclaim the money they had given to Johnson in exchange for drugs he never delivered.

This is the second trial in this case. The trial court declared the first trial a mistrial after the State violated the court's ruling ordering both sides to refrain from mentioning the existence of a confidential informant. The State violated the ruling during its opening arguments.

I. FORMER TESTIMONY. Moore contends the trial court erred in refusing to admit the deposition testimony of Michael Crowley into evidence as an

exception to the hearsay rule under Iowa Rule of Evidence 804(b)(1). We generally review admissibility of evidence issues for abuse of discretion. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). We will reverse a district court's determination regarding admissibility of evidence only when we find a clear abuse of discretion. *Id.* We will not find abuse of discretion unless it is shown the trial court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *Hagen v. DeNooy*, 563 N.W.2d 4, 7 (Iowa 1997).

When the declarant is unavailable, former testimony is not excluded by the hearsay rule. Iowa R. Evid. 804(b)(1). Former testimony is:

Testimony given as a witness . . . in a deposition taken in compliance with the law in the course of the same . . . proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Id. Prior to trial, the defendants requested the depositions of their own witnesses under rule 12(2). *See* Iowa R. Crim. P. 12(2). Crowley answered all questions asked by both defendants. When the State, represented by Mr. Vander Sanden, attempted to question Crowley, the defense attorneys, Mr. Meyerdirk and Mr. Hauser, warned Crowley he should seek the advice of an attorney prior to answering.

VANDER SANDEN: Can you tell me when it was that you moved from the Waterloo area to Des Moines?

CROWLEY: . . . I don't want you to feel like you have to harass me. . . . I have nothing to hide, I have truth on my side and, you know, there's -- I have nothing to gain, you know, from coming in here and telling you anything other than the truth.

VANDER SANDEN: Okay, I've got a few more questions, if you'll bear with me.

CROWLEY: Okay.

VANDER SANDEN: Tell me how it was, again, that you decided to come to Cedar Rapids with Dontay Hoosman and Tyrone Moore. Whose idea was it to come to Cedar Rapids back on January 13th?

MEYERDIRK: I'm going to interject an objection right here. If it is Mr. Vander Sanden's position on the record to get into any specifics -- and I'm referring to the specifics of any agreement to come down to Cedar Rapids -- I'm going to instruct this man to not answer the question --.

CROWLEY: Shall I get an attorney?

MEYERDIRK: Let me continue -- until he has counsel here, because I think what is happening is Mr. Vander Sanden may attempt to create a criminal charge against you and I think if he's going to get into specifics and attempt to maybe create a conspiracy of some sort that he has a right to counsel and he has a right to not incriminate himself and I think the questioning should cease and we should resume this questioning when Mr. Crowley has counsel sitting by his side and protecting his rights in this matter. So I would direct you not to answer any more questions if Mr. Vander Sanden is going to get into specifics.

Now, if there's questions like what do you do in Des Moines or why did you move or what's your favorite food, I would say you're pretty safe on those questions, but if he's getting into specifics regarding the trip down here and how it came about and conversations, I would advise you, for your protection, to get an attorney, and I can direct you to the clerk's office right now and I can even walk you down there

Crowley decided he did want to speak to an attorney prior to answering the State's questions.

On appeal, the State alleges the defense did not show Crowley was unavailable for trial and the defense did not make a good faith effort to procure Crowley's presence at trial. The State admits it did not raise these issues at trial. However, we will uphold a ruling of the trial court on the admissibility of evidence on any ground

appearing in the record, whether urged below or not. *State v. Rawlings*, 402 N.W.2d 406, 409 (Iowa 1987); *State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980). In its motion to admit the deposition of Crowley, defense counsel produced a copy of the return of service from Barry Brandt. Mr. Brandt attempted to serve a subpoena on Crowley at his Waterloo address on October 8, but Crowley had apparently moved out of the residence he had previously shared with his girlfriend. Defense counsel also had a letter dated October 9, six days prior to the beginning of the trial, he had written to the Polk County Sheriff along with a check, requesting they attempt to serve Crowley at a Polk County address. Counsel claimed the sheriff told him they would call if they served Crowley and he had not heard from the sheriff at the time he was seeking to introduce the deposition. We find it difficult to agree with Moore's contention Crowley was unavailable. See *State v. Zaehring*, 325 N.W.2d 754, 759 (Iowa 1982).

Even assuming arguendo Crowley was unavailable for trial, given the circumstances of the deposition and the deferential standard of review, we cannot say the court acted on grounds clearly untenable or to an extent clearly unreasonable when it refused to allow the admission of the deposition transcript. Moore contends the transcript should have been admitted because the State had ample opportunity to examine Crowley at a later date and the failure to do so was a result of the State's own inaction. The State's inability to cross-examine Crowley was prompted, in large part, by the defense. Further, at the close of the deposition, Mr. Meyerdirk, attorney

for Dontay Hoosman, stated, "Mr. Crowley, you understand for the record it's the intention of this particular attorney on behalf of Dontay Hoosman to have you resubpoenaed when you have an attorney present?" We find, under these circumstances, the State did not have a duty to attempt to reconvene the deposition before it could argue it did not have the opportunity to cross-examine Crowley. We find it difficult to reverse the trial court when the defense played such a large role in causing Crowley's decision to seek the advice of an attorney and when defense counsel specifically stated it would reconvene the deposition. We find the State did not have an opportunity to develop the testimony by cross-examination pursuant to Iowa Rule of Evidence 804(b)(1). We therefore affirm the trial court on this issue.

II. IDENTITY OF CONFIDENTIAL INFORMANT. Moore contends the trial court erred when it refused to order the State to reveal the identity of the confidential informant who told the police of the location of the gun allegedly used to commit the robbery in question. Moore believes this denial violated his constitutional right to due process under the Fifth Amendment of the United States Constitution. Our review of constitutional rights is de novo. *State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995). We must look at the totality of the circumstances as shown by the entire record. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995). The district court's ruling may be upheld on any basis appearing in the record, even though different from the one relied upon by the court. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1993).

The State is ordinarily privileged to withhold the identity of a person who merely gives information about the commission of a crime. *State v. Luter*, 346 N.W.2d 802, 810 (Iowa 1984); *State v. White*, 530 N.W.2d 77, 82 (Iowa App. 1994). This privilege is based on the public policy of maintaining the flow of information leading to the investigation and prosecution of criminals. *White*, 530 N.W.2d at 82-83. To be weighed against this privilege, however, is the defendant's right to prepare and present a meaningful defense. *State v. Robertson*, 494 N.W.2d 718, 723 (Iowa 1993). The defendant bears the burden of showing the necessity for disclosure of the informant's identity. *Id.* It is not sufficient to show that the identity of an informer might be helpful in preparation of the defense. *State v. Todd*, 468 N.W.2d 462, 468 (Iowa 1991).

When a defendant requests disclosure at trial, the defendant's need is weighed against the State's privilege, in light of the facts and circumstances peculiar to each case, considering (1) the nature of the offense charged, (2) defenses raised, and (3) potential significance of an informer's testimony.

Robertson, 494 N.W.2d at 723. Paramount among the considerations in determining whether disclosure is required to ensure a fair trial is whether the informant was a witness or a participant in the crime for which the defendant is charged. *Id.* Thus, if the informant was present at the scene of the crime, or a participant to it, such person is no longer merely an informant but a witness whose identity must ordinarily be divulged. *White*, 520 N.W.2d at 83. However, a defendant has no right to confront an informant who does not directly or indirectly give any evidence at trial. *Id.*

Moore contends the existence of the weapon and its location in Waterloo were powerful and vital evidence against him and served to support the victims' denial of a drug deal as claimed by Moore. He believes the existence of the weapon in the courtroom greatly impacted the credibility of his statements to the police. Further, Moore believes he should have been able to learn how the weapon came to be in its place of discovery. We find Moore's argument to be without merit.

III. DOUBLE JEOPARDY. Moore contends the county attorney purposely caused a mistrial, and the subsequent retrial on the same charge violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. As explained in division II of this opinion, our review of constitutional rights is *de novo*. *Haviland*, 532 N.W.2d at 768. A mistrial declared at the request of the defense is not a bar to retrial unless it results from prosecutorial impropriety designed to avoid a possible acquittal. *State v. Rademacher*, 433 N.W.2d 754, 757 (Iowa 1988) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 675-76, 102 S. Ct. 2083, 2089-90, 72 L. Ed. 2d 416, 424 (1982)). The same principles apply to the protection afforded by the Iowa Constitution. *Id.* The standard calls for a factual finding of subjective intent to be made initially by the trial court. *Id.*

The trial court concluded the State's violation of the motion in limine was inadvertent and not intentional. At the first trial, after declaring a mistrial, the district court judge stated, "I think this could have been avoided had I been clearer in chambers. I will take responsibility for it." There is no substantial evidence to

support a finding that the State would cause a mistrial to avoid acquittal during opening arguments. We agree with the district court and find the State did not purposely violate the motion in limine. Therefore, we also find no violation of the Double Jeopardy Clause.

IV. CLAIM OF RIGHT. Moore contends the trial court erred when it refused to give his requested instruction on the defense of right. We review jury instructions for an abuse of discretion. *State v. Holtz*, 548 N.W.2d 162, 168 (Iowa App. 1996). The trial court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). To warrant submission of a defense to the jury, however, the defendant must produce substantial evidence from any source to support the theory. *State v. Babers*, 514 N.W.2d 79, 83 (Iowa 1994). As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction. *Foggia v. Des Moines Bowl-O-Matic, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996). We will not grant a reversal on the basis of error in giving or refusing to give a particular instruction unless the action results in prejudice to the defendant. *Id.*

The Iowa Code states:

No person who takes, obtains, disposes of, or otherwise uses or acquires property, is guilty of theft by reason of such act if the person reasonably believes that the person has a right, privilege or license to do so, or if the person does in fact have such right, privilege or license.

Iowa Code § 714.4 (1995). Therefore, Moore believes he could not have committed a robbery because he did not have the underlying intent to commit a theft when he allegedly attempted to gain the return of his money. Assuming *arguendo* that a claim of right is a valid defense to robbery, we find it is not applicable in this situation and no instruction was warranted. *See State v. Gallbreath*, 525 N.W.2d 424, 426 (Iowa 1994) (“Once the money changes hands, both title and possession vest in the contractor.”). Further, even if Moore was entitled to the instruction, the jury found he was armed with a firearm; and we find there is no substantial evidence to support a finding that the jury chose to acquit based on the claim of right when it found he had a gun. Thus, we do not believe Moore could have been prejudiced.

We have carefully reviewed the claims of the defendant and, for the reasons discussed in this opinion, affirm the rulings of the trial court.

AFFIRMED.