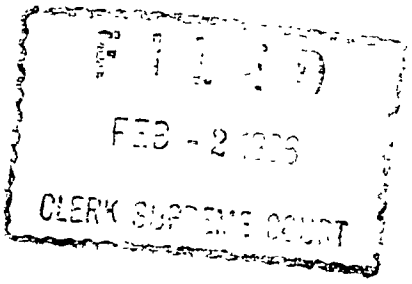
IN THE COURT OF APPEALS OF IOWA



No 5-700 / 94-1466

STATE OF IOWA,

Appellee,

001227

vs.

HUNG MINH TRINH,

Appellant

Appeal from the Iowa District Court for Woodbury County, Robert C Clem, Judge

Defendant appeals judgment and sentences, following jury trial, entered upon his convictions of first-degree robbery and fourth-degree theft **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S Lipman, Assistant State Appellate Defender, for appellant.

Thomas J Miller, Attorney General, Sheryl A Soich, Assistant Attorney General, Thomas S. Mullin, County Attorney, and James J Katcher, Assistant County Attorney, for appellee.

Heard by Habhab, P J., Cady, J , and Perkins, S J *

*Senior judge from the Fifth Judicial District serving on this court by order of the Iowa Supreme Court

PERKINS, S.J.

The defendant, Hung Minh Trinh, appeals from his convictions for first-degree robbery and fourth-degree theft He contends 1) the trial court erred in not submitting the offense of accessory after the fact as a lesser-included offense of robbery, 2) the trial court abused its discretion in refusing to grant his request for a mistrial, and 3) he was denied due process by the admission of deposition testimony of an unavailable witness We affirm

I. LESSER-INCLUDED OFFENSE.

The defendant argues the trial court erred in not submitting the offense of accessory after the fact, Iowa Code section 703 3 (1993), as a lesser-included offense of first-degree robbery Iowa Code §711 1, 2 (1993). We review jury instruction challenges for legal error. *State v. Massick*, 511 N W 2d 384, 86 (Iowa 1994), Iowa R App P 4 A trial court has a duty to instruct on all lesser-included crimes. Iowa R Crim P 6(3), *State v. Hernandez*, 538 N W 2d 884, 888 (Iowa App. 1995) In all but a few instances not applicable to this case, the determination of what constitutes a lesser-included offense is resolved solely by a legal test. *Hernandez*, 538 N W.2d at 888. A lesser offense is included within the greater offense under the legal test if it is not possible to commit the greater crime without also committing the lesser crime. *Id.*

In determining if an offense is a lesser-included offense, we look to the statutory elements of each offense *See State v. Peck*, 539 N.W 2d 170, 175 (Iowa 1995) In order to be a lesser-included offense, the offense must be composed solely of some but

not all of the elements of a greater offense *Id.* In other words, the greater offense must be impossible to commit without committing the lesser offense *Id.*

The Iowa Supreme Court has previously held the offense of accessory after the fact is a separate offense and is not a lesser-included offense of robbery *State v. Sanders*, 280 N W 2d 375 (Iowa 1979) In applying the legal test, the *Sanders* court found the intent required under section 703 3 (intent to prevent apprehension) differs from the intent required under sections 711 1 and 2 (intent to commit theft) *Sanders*, 280 N W 2d at 377

The defendant attempts to distinguish *Sanders* by claiming he, unlike the defendant in *Sanders*, was not charged and tried as a principal Instead, his guilt was submitted upon theories of joint criminal conduct and aiding and abetting based upon his conduct in driving the "getaway" car used in the robbery The defendant contends "the intent element of the nonprincipal actor is to facilitate or participate in the crime in some manner Necessarily included in that intent to participate is the intent to prevent apprehension of any of the parties for the crime " The defendant argues it is inevitable one who aids and abets a robbery will act with the intent to avoid arrest after the commission of the crime.

We reject the defendant's attempt to distinguish *Sanders*. Our supreme court has held the "only intent necessary to render one guilty of violating section 703 3(1) is the 'intent to prevent the apprehension of the accused person.'" *State v. Sanders*, 312 N W 2d 534, 539 (Iowa 1981) Though unlikely to occur often, it is possible to have the intent to commit theft without having the additional intent to avoid apprehension.

Regardless of whether one acts as a principal or an aider and abettor, it is possible to commit robbery without the intent to avoid apprehension Applying the "impossibility test" of *State v. McNitt*, 451 N W 2d 824, 825 (Iowa 1990), we find the offense of accessory after the fact was not a lesser-included offense, and the trial court did not err in refusing to submit it to the jury

II. MOTION FOR MISTRIAL.

The defendant sought a mistrial based upon alleged jury misconduct His motion was denied Jury misconduct which tends to prevent a fair and just consideration of the case may be the basis for the grant of a new trial Iowa R Crim P 23(2)(b)(3) In ruling upon a motion for mistrial based on jury misconduct, the trial court has broad discretion. *State v. Wells*, 437 N W.2d 575, 581 (Iowa 1989) We do not find an abuse of discretion on appeal unless the trial court's action was clearly unreasonable under the attendant circumstances *Id.*

Pursuant to Iowa Rule of Criminal Procedure 18(5)(a), the jury in this case was allowed to view the scene of the robbery The court had admonished the jury not to discuss the case while at the scene and to stay together within a specified area. After the jury viewed the scene, the court-appointed officials who accompanied the jury informed the court and the parties of incidents of talking and of jurors allegedly walking beyond the parameters of the area designated by the court.

To obtain a new trial based upon jury misconduct, the misconduct must exceed the tolerable bounds of jury deliberation and must have been calculated to, and with

reasonable probability did, influence the verdict *See State v. Tinnus*, 527 N W 2d 414, 416 (Iowa App 1994) We have reviewed the record and find any juror transgressions while visiting the crime scene were minor and nonprejudicial in nature For example, when the court attendant observed juror discussion at the crime scene, she reminded the jurors of the judge's admonition and the conversation ceased Likewise, there was no evidence the jurors who strayed beyond the designated crime scene area were made aware, by bystanders or otherwise, of any information which would have any bearing on the outcome of the case

Any alleged misconduct in this case did not exceed the tolerable bounds of jury deliberation and it was not of a nature to have influenced the verdict. There was no abuse of discretion in the trial judge's denial of the defendant's motion for mistrial

III. ADMISSION OF DEPOSITION OF UNAVAILABLE WITNESS.

Stephanie Woods had witnessed two people run from the scene of the robbery and jump into a black car which left at a high rate of speed. Ms Woods was deposed prior to trial. Present at her deposition was a representative of the State, counsel for the defendant and counsel for Phuc Xuan Nguyen, a codefendant whose trial was severed from that of the defendant.

Ms Woods died prior to the defendant's trial and the State offered her deposition as evidence The defendant resisted the use of any portion of the deposition testimony developed by Nguyen's counsel. The defendant argues he was denied his right to due process based upon the admission of deposition testimony developed by a codefendant

whose trial had been severed The defendant claims Nguyen's interests had always been adverse to his and requiring him to be bound by evidence developed by this adverse party would violate his right to due process

Since a constitutional right is implicated, we make an independent evaluation of the totality of the relevant circumstances disclosed by the entire record and review the evidence de novo *State v. Dean*, 332 N W 2d 336, 338 (Iowa 1983) The admissibility of the deposition is governed by our rule of evidence addressing hearsay exceptions.

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness (1) *Former testimony.* Testimony given as a witness at another trial or hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination

Iowa R. Evid 804(b)(1)

There is no question the defendant was represented at the deposition and had the opportunity to develop the testimony of Ms Woods by direct, cross, or redirect examination His only argument is that he and Nguyen did not have similar motives in developing the testimony of Ms. Woods, and, therefore, the testimony developed by Nguyen does not fall within the hearsay exception of rule 804(b)(1)

Prior to trial the codefendants had sought to sever their trials as it appeared they were going to proffer incompatible and antagonistic defenses While severance was granted, and may in fact have been warranted, we cannot find the codefendants had dissimilar motives in deposing Ms Woods Both parties questioned what she had

witnessed and questioned the accuracy and specificity of her observations The testimony elicited by both the State and the defendant's counsel was incriminating to the defendant The testimony elicited by Nguyen's counsel was not particularly prejudicial to the defendant's theory of defense

This court has read the entire deposition of Ms Woods and finds no evidence of dissimilar motives or prejudice to the defendant by the admission of those portions of the testimony developed by Nguyen We affirm the trial court's admission of the entire deposition

AFFIRMED.