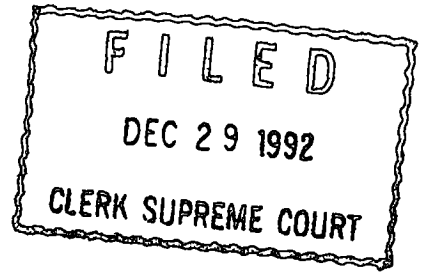
IN THE COURT OF APPEALS OF IOWA

No. 2-440 / 91-908



STATE OF IOWA,

Appellee,

vs.

ED SHAKER NASSIF,

Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

The defendant appeals his first-degree murder conviction. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Thomas S. Tauber, Assistant Attorney General; Denver D. Dillard, County Attorney; and Harold Denton, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ. Schlegel, J., takes no part.

HABHAB, J.

This is an appeal by the defendant from judgment and sentence entered following his conviction by a jury of first-degree murder. We affirm.

The defendant, Ed Shaker Nassif, is the son of Shaker Nassif, a convicted drug dealer. In September 1990, the defendant, Rebecca Griffith, and Sheila Strom were planning to meet Rolando Ballew for the purpose of purchasing drugs. As the defendant, Griffith, and Strom were cruising, they observed Ballew walking through a parking lot. They stopped the car, and Ballew entered the car. While they were driving around, the defendant purchased some marijuana from Ballew. Later, Ballew and the defendant left the car and walked away for a short distance. The defendant ran back to the car and told Griffith to be ready to go. The defendant then went back toward Ballew. As Ballew was reaching down to scratch his leg, Griffith saw a flash and heard a pop. Ballew fell to the ground, and the defendant ran back to the car. The defendant entered the car and told Griffith to drive away.

After returning to the defendant's home, the defendant, Griffith, and Strom went to meet with Jessie Wright. Wright bought some cocaine, and the four individuals went back to the defendant's house to use the drug. After taking Wright home, the defendant, Griffith, and Strom returned to the defendant's house. Later that night, some men broke into the defendant's house yelling that the

defendant had killed Ballew. Before the police arrived, the men left. That night, the defendant and Strom hid in a crawl space under a trap door in one of the bedrooms.

Shortly after 11:00 p.m. Ballew's body was discovered in the middle of 42nd Street Southeast in Cedar Rapids. In investigating the scene, the police found a packet of cocaine under Ballew's watchband. There were also other drugs and money in Ballew's pockets. The doctor who performed the autopsy testified that Ballew died of a gunshot wound to the back of the neck. The bullet went through the neck and out through the mouth.

The day after the murder, Griffith agreed to give testimony to the police in exchange for not being charged in the case. After Griffith gave her statement, the police executed a search warrant on the defendant's house. During the search, they found a gun, a gun case, ammunition, an extra magazine, and an instruction pamphlet for the gun. The gun, ammunition, and spare magazine were found in the crawl space in one of the bedrooms. The defendant's fingerprints were found on the box of ammunition and on the spare magazine.

Several days later, one of the officers found a shell casing in a ditch near a culvert where Ballew's body was found. The State's ballistic expert tested the shell casing found in the ditch and the gun seized at the defendant's house and concluded the bullet was fired from the seized weapon.

Several days after the murder, the defendant and Strom fled from Iowa. They were arrested in North Carolina pursuant to Iowa warrants. Strom gave an unsworn statement to North Carolina police officers after receiving Miranda warnings and signing a waiver of rights. Strom admitted she had been with the defendant and Ballew on the night of the murder. However, she did not mention any actual involvement in the murder.

After being returned to Iowa for the defendant's trial, Strom was deposed. She refused to answer questions about her activities on the night of the murder, invoking her fifth amendment privilege to remain silent.

The defendant filed a motion to compel Strom to answer the deposition questions and a motion to change venue. The district court overruled these motions. The court held that Strom had validly asserted her fifth amendment privilege.

At trial, the defendant sought to introduce Strom's North Carolina statement in lieu of her testimony. The defendant argued Strom's statement should be admissible under Iowa Rule of Evidence 804(b)(5), the residual hearsay exception. The district court ruled the statement was not admissible. The jury then convicted the defendant of first-degree murder.

We are unable to conclude the district court abused its discretion in overruling the defendant's motion to compel Strom to answer questions in deposition. Iowa courts have

accepted the rule that a witness who makes incriminating disclosures at an early stage of a prosecution without claiming the fifth amendment privilege does not thereby waive the right to claim the privilege at trial. State v. Kellogg, 385 N.W.2d 558, 560 (Iowa 1986); Duckworth v. District Court, 220 Iowa 1350, 1363-64, 264 N.W. 715, 721-23 (1936). As the supreme court stated in State v. Kellogg,

> The general rule is that a waiver of a fifth amendment privilege is limited to the particular proceeding in which the waiver occurs. See Duckworth v. District Court, 220 Iowa 1350, 1363, 264 N.W. 715, 721 (1936); VIII Wigmore, Evidence § 2276(4), at 470 (McNaughton rev. 1961); Annot., 42 A.L.R.Fed. 793, 795 (1979). Duckworth held that a person who had waived a fifth amendment privilege in a grand jury proceeding was not prevented from asserting it at a subsequent trial.

Kellogg, 385 N.W.2d at 560.

We find Strom's waiver of her rights in the interview with North Carolina police officers did not constitute waiver for purposes of later stages of the prosecution. Strom validly invoked her fifth amendment privilege in refusing to answer deposition questions. Therefore, because Strom did not waive her fifth amendment privilege, the defendant was not entitled to compel her deposition answers or testimony. We affirm the district court on this issue.

We also conclude the district court did not abuse its discretion in refusing to admit Strom's statement into evidence in lieu of her testimony under Iowa Rule of

Evidence 804(b)(5). We agree Strom's statement lacks the necessary circumstantial guarantees of trustworthiness. We also note the following cautionary words of the Iowa Supreme Court:

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions.

State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983)(citing 28 U.S.C.A. Rule 803, Historical Note at 583; United States v. Cain, 587 F.2d 678, 681 (5th Cir. 1979); United States v. Bailey, 581 F.2d 341, 346 (3d Cir. 1978)). See also State v. Turner, 345 N.W.2d 552, 557 (Iowa App. 1983). We affirm the district court on this issue.

Finally, we are unable to conclude the district court abused its discretion in overruling the defendant's motion for change of venue. The record reveals the prospective jurors had been exposed to pretrial publicity which was somewhat inflammatory and inaccurate. However, the mere exposure to this material is not enough to sustain a claim of presumptive prejudice. The fact that seven months elapsed between the last of the objectionable publicity and the beginning of the defendant's trial and that a thorough voir dire was conducted were enough to dispel any presumption of prejudice which might have arisen from the

existence of unfavorable pretrial publicity. We affirm the district court on this issue.

After considering all issues presented, we affirm the defendant's first-degree murder conviction and sentence.

Cost of this appeal are taxed to the appellant.

AFFIRMED.