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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed April 26, 1979
vs.	)	
ORVILLE HUDDLESTON,	)	62 61939
Appellant.	)	

Appeal from Pottawattamie District Court - Paul H. Sulhoff, Judge.

Defendant appeals from his conviction of robbery with aggravation in violation of section 711.1, The Code 1977, alleging that the trial court erred in refusing to admit a deposition containing statements purportedly exculpatory to the defendant. - Affirmed.

Sheldon M. Gallner, of Gallner & Gallner, Council Bluffs, for Appellant.

Thomas J. Miller, Attorney General of Iowa, William R. Armstrong, Assistant Attorney General, and Patrick Carr, Assistant Pottawattamie County Attorney, for Appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from his conviction of robbery with aggravation in violation of section 711.1, The Code (1977). He contends the trial court erred in failing to admit a deposition containing purportedly exculpatory statements made by James Ashcraft. Defendant hoped to show, through Ashcraft's deposition and the testimony of other trial witnesses, that Ashcraft was the armed robber. We affirm the trial court.

A trial court has considerable discretion in ruling on motions for a new trial. State v. Kaufman, 265 N.W.2d 610, 619 (Iowa 1978). Furthermore, the admission of a deposition of a non-party witness is within the trial court's discretion and will be disturbed only upon a showing of an abuse of discretion. See Schmitt v. Jenkins Trucklines, Inc., 170 N.W.2d 632, 652 (Iowa 1969).

The trial court refused to admit the deposition of James Ashcraft when offered into evidence by defendant, ruling that an improper statutory foundation had been laid. The taking of depositions in criminal cases is governed by section 781.10, The Code, which provides:

> A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on notice or commission, in the same manner and with like effect as in civil actions.

In State v. District Court (Delaware County), 253 Iowa 903, 910-911, 114 N.W.2d 317, 321 (1962), the supreme court held that the taking of depositions in criminal cases is not governed by Iowa rules on the taking of depositions in civil cases. The court's decision in District Court was subsequently abandoned in State v. Peterson, 219 N.W.2d 665, 668 (Iowa 1974), where the supreme court said that a defendant in a criminal action has a right to depose a State's witness and is not limited to District Court's narrow holding that a defendant may depose a witness only when a witness might otherwise not be available.

The question here, unlike the questions posed in District Court and Peterson, is not whether a defendant has the right to depose a particular witness, but whether, once a deposition has been taken, that particular deposition is admissible at trial. The validity of the trial court's ruling in this case depends upon which rules govern the admissibility of depositions in criminal trials. The State maintains that, in view of the language of section 781.10 and of the supreme court's ruling in Peterson, the rules

governing the admissibility of depositions in civil cases also govern the admissibility of depositions in criminal cases. Although certain language in the Iowa Rules of Civil Procedure pertaining to the taking and use of depositions in civil actions will not be particularly applicable in criminal actions, see District Court, 253 Iowa at 908-909, 114 N.W.2d at 320-321, we find that Peterson's overruling of District Court's holding, when read in conjunction with section 781.10's language of "[i]n the same manner and with like effect as in civil actions," indicates that the basic rules of civil procedure apply in determining the admissibility of depositions at criminal trials.

Iowa R. Civ. P. 144 governs the use of depositions. At trial, defendant argued that notice, which is one of the requirements of rule 144, had been sent, but he failed to lay foundation showing that the other statutory procedures of rule 144 had been complied with. Without determining whether notice in this case was adequate, we agree with the trial court that sufficient foundation had not been laid to permit the admission of this deposition into evidence. Furthermore, after the court stated that compliance with statutory procedures for the laying of proper foundation had not been shown, defendant failed to make any further record concerning these procedures or to show that the procedures had been followed. The court's ruling was proper.

The trial court's denial of a new trial was, likewise, proper. The defendant contended that he had been denied a fair trial due to the court's refusal to admit Ashcraft's deposition. The court ruled that a new trial on this ground would not be mandated since the deposition of Ashcraft was equivocal and, thus, of little extra benefit to the defendant. Although Ashcraft stated in his deposition that, to the best of his knowledge, defendant was in the back seat of the stationwagon when the Phillips 66 station was robbed, he also stated that he was drunk the afternoon of the robbery, that he could not recall much of what happened that day, and that "supposedly" he went to a gas station with three named acquaintances, one of whom was the defendant, "supposedly" they robbed the station, and "supposedly" he was the one who held the gun. While Ashcraft's deposition is supportive of the defendant, we agree that it was not of such weight as to render defendant's trial unfair, especially in view of the testimony of two trial witnesses which was more definite than Ashcraft's deposition and equally exculpatory to the defendant. See Kalianov v. Darland, 252 N.W.2d 732, 736 (Iowa 1977). The trial court did not abuse its discretion in overruling defendant's motion.

AFFIRMED.