**IN THE COURT OF APPEALS OF IOWA**

No. 8-405 / 07-0181
Filed October 15, 2008

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**RAMALE ANTRON HUNT,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Ramale Hunt appeals from his first-degree murder conviction. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Ramale Antron Hunt, pro se.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith and Sue Swan, Assistant County Attorneys, for appellee.

Heard by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

**VAITHESWARAN, J.**

The shooting and death of a man in Waterloo led to the filing of a first-degree murder charge against Ramale Hunt. A jury found Hunt guilty as charged. On appeal, Hunt and his attorney argue he is entitled to reversal based on the following claimed errors: (1) there was insufficient evidence that he acted with malice aforethought or that his acts were willful, deliberate, and premeditated; (2) the district court erred in overruling his "challenge to the State's peremptory strike of the only minority juror remaining on the jury panel"; (3) the district court erred in denying his motion for new trial based on prosecutorial misconduct; (4) the district court erred in denying his request to present the videotaped statement of a witness; (5) the district court erred in excluding certain impeachment evidence; (6) the district court erred in submitting a jury instruction on multiple theories; (7) the district court erred in refusing to grant a mistrial based on a police officer's testimony; (8) the district court erred in admitting deposition testimony of a witness who was deemed unavailable; (9) the district court erred in admitting hearsay testimony concerning the disposal of a gun; and (10) the district court erred in excluding a videotaped interview of a witness.

***I. Sufficiency of Evidence.***

The jury was instructed that the State had to prove the following elements of first-degree murder:

> 1. On or about the 6th day of June, 2004, the defendant shot Rob Robinson.
> 2. Rob Robinson died as a result of being shot.
> 3. The defendant acted with malice aforethought.
> 4. The defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Robinson.

Hunt contends there was insufficient evidence to establish that he acted with malice aforethought or that his actions were willful, deliberate, and premeditated. A finding of guilt is binding if supported by substantial evidence. *State v. Dalton*, 674 N.W.2d 111, 116 (Iowa 2004).

With respect to the malice aforethought element, the jury was instructed that the phrase meant "a fixed purpose or design to do some physical harm to another which exists before the act is committed." The jury was further instructed that malice aforethought did "not have to exist for any particular length of time." Finally, the jury was instructed that malice aforethought could be "inferred from the defendant's use of a dangerous weapon," and a gun was a dangerous weapon.

The jury also received definitions of "willful," "to deliberate," and "premeditate." "Willful" was defined as "intentional or by fixed design or purpose and not accidental." "To deliberate" was defined as "to weigh in one's mind, to consider, to contemplate, or to reflect." "Premeditate" was defined as "to think or ponder upon a matter before acting."

For purposes of this argument, Hunt appears to concede that he shot Robinson, but argues he was "attacked and cut by a blow from Rob Robinson" and the attack "was sufficient provocation to excite in a reasonable person an irresistible passion to retaliate." In his view, the evidence supported a finding of guilt on the lesser included offense of voluntary manslaughter but not on first-degree murder. We are not persuaded by this argument.

The record reveals the following facts. A waitress at a bar in the vicinity of the shooting saw Hunt running outside and noticed that his face was bloody and

there was an object in his hand. Shots were fired from Hunt's direction towards Robinson. Robinson stumbled. At this point, the waitress went inside the bar. When she came out, she saw Robinson face down on the ground. Based on the shots she heard previously, she came to the conclusion that the object in Hunt's hand was a gun. She had no doubt the shooter was Hunt. Although the waitress's version of events at trial differed from versions she had previously given, it was the jury's prerogative to assess this inconsistency. *State v. Frommelt*, 159 N.W.2d 532, 535 (Iowa 1968) ("[T]he jury is entitled to weigh one [statement] against the other to decide if such a fickle witness is worthy of belief.").

A Waterloo police officer testified he investigated gunfire at the home of Hunt's girlfriend three days before the shooting of Robinson. At least six or seven bullets struck the girlfriend's vehicle and house. The officer interviewed Hunt, who told him he believed a gang called L-Block was behind the gunfire. Hunt also mentioned the name of Robinson's nephew. Hunt talked generally about his theory of retaliation, stating it should occur within a day or a few days.

On the night of Robinson's shooting, a woman who knew both Hunt and Robinson saw Hunt chasing Robinson around a building. After the men turned the corner of the building, she heard approximately three gunshots, saw the flash from a gun, and smelled gunfire. She stated she saw Hunt shoot Robinson. The defense impeached her with a prior statement in which she said she could not see who was shooting or who was shot but, again, it was the jury's prerogative to determine what weight to give her trial testimony. *Id.*

Another witness testified he saw Robinson two days before the shooting. Robinson told him he was having problems with Hunt and he felt as if something was going to happen to him. The witness watched a fight between Hunt and Robinson three months earlier. He testified there was bad blood between the two.

Many other witnesses also testified to events on the night of the shooting. We find it unnecessary to detail that additional evidence. Suffice it to say that, together with the testimony summarized above, it amounted to substantial evidence in support of the challenged elements of first-degree murder.

### *II. Challenge to Peremptory Strike.*

The State used a peremptory challenge to strike an African-American man from the jury. Hunt, who is also African-American, objected to the strike. At a reported hearing, the prosecutor stated the potential juror was struck because he knew several potential witnesses. She continued:

> And my family being a member of the African-American community, the small, tight-knit community, and everybody basically knows one another or of one another and I guarantee he's going to know a great number of these witnesses . . . .

She added that the State also struck two members of the jury panel because those members knew Hunt.

Hunt's attorney responded that the State's perception of the "close-knit" nature of the African-American community in Waterloo would foreclose any member of that community from serving on a jury involving an African-American defendant or witness. At this point, the prosecutor added reasons for striking the potential juror. She mentioned that the juror said he was "like an adopted

brother" to certain witnesses. She also mentioned that another African-American individual on the panel would have been on the jury had he not been excused for a family emergency. The prosecutor discounted the juror's assertion that he could be fair and impartial.

After considering these assertions and counter-assertions, the court rejected Hunt's objections to the peremptory strike. The court stated:

> The fact that a juror is struck because he knows potential witnesses is not unusual and so I am going to find that the reasons the State has elucidated are sufficiently race neutral to allow the strike. And that's the ruling of the court.

On appeal, Hunt maintains that the "district court erred in accepting the prosecutor's statements as a race neutral reason for exercising a peremptory challenge on the only minority remaining on the jury panel." His challenge implicates *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). There, the Supreme Court held that, under the Equal Protection Clause of the Fifth Amendment to the United States Constitution, a prosecutor may not purposefully discriminate by using peremptory strikes to challenge potential jurors solely on the basis of their race. *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719, 90 L. Ed. 2d at 83. Because the issue is of constitutional magnitude, our review is de novo. *State v. Keys*, 535 N.W.2d 783, 785 (Iowa Ct. App. 1995).

A three-part test is used to establish purposeful discrimination. First, the defendant must establish membership in "a racial group capable of being singled out for differential treatment." *Batson*, 476 U.S. at 94, 106 S. Ct. at 1722, 90 L.

Ed. 2d. at 86.[1] This prima facie showing may be made "by relying solely on the facts concerning [the jury's] selection *in his case.*" *Id.* at 95, 106 S. Ct. at 1722, 90 L. Ed. 2d. at 87. Second, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d. at 88. This second step "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767-768, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d. 834, 838 (1995). If a prosecutor provides a combination of discriminatory and race-neutral reasons for the strike and the district court only relies on the race-neutral reason, we may affirm on the basis of the race-neutral reason. *See Rice v. Collins*, 546 U.S. 333, 341, 126 S. Ct. 969, 975, 113 L. Ed. 2d. 824, 833 (2006) ("The prosecutor provided a number of other permissible and plausible race-neutral reasons, and Collins provides no argument why this portion of the colloquy demonstrates that a reasonable fact finder must conclude the prosecutor . . . struck juror 16 based on her race."). The third step requires the trial court to determine "if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d. at 88-89. "Because the trial judge's finding whether purposeful discrimination exists will largely turn on evaluation of credibility, a reviewing court should give those findings great deference." *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990) (citing *Batson*, 476 U.S. at 98 n. 21, 106 S. Ct. at 1724 n. 21, 90 L. Ed. 2d at 89 n. 21).

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[1] This element has since been modified to clarify that a defendant and the challenged juror need not be of the same race. *Powers v. Ohio*, 499 U.S. 400, 416, 111 S. Ct. 1364, 1373, 113 L. Ed. 2d. 411, 429 (1991) ("[R]ace is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges.").

Here, the district court proceeded directly to step two. This was not fatal to the ruling. *See State v. Veal*, 564 N.W.2d 797, 807 (Iowa 1997) (partially overruled on other grounds by *State v. Hallum*, 585 N.W.2d 249, 254 (Iowa 1998)). In overruling Hunt's objection to the peremptory challenge, the court relied on the prosecutor's assertion that the potential juror knew some of the witnesses. This is a race-neutral reason. *See Knox*, 464 N.W.2d at 448 (rejecting *Batson* challenge where prosecutor said potential juror was struck because she knew defense counsel). While the prosecutor also indicated that she exercised the peremptory challenge because the juror was part of a "close-knit" community, the district court did not rely on this arguably discriminatory reason. *See Congdon v. State*, 424 S.E.2d 630, 631 (Ga. 1993) (rejecting prosecutor's strike of all four black members of venire where State's reason for striking them was their membership in discrete community); *Carroll v. State*, 639 So.2d 574, 576 (Ala. Crim. App. 1993) (rejecting prosecutor's strike of only black member of venire where prosecutor stated, "They come from a small community, the same community, and it's our understanding they are all related to each other by blood or marriage."). For that reason, we affirm the district court's ruling. *See Hernandez v. New York*, 500 U.S. 352, 361, 111 S. Ct. 1859, 1867, 114 L. Ed. 2d 395, 407 (1991) ("While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause.").

***III. Prosecutorial Misconduct.***

The State named Maria Thomas as a witness but declined to call her.[2] Hunt called her instead. At trial, her testimony differed in key respects from an initial videotaped statement she gave to police. She initially told the police that the shooter wore his hair in braids. Testimony from other witnesses established that Hunt did not wear his hair in braids and wore it very short. At the time of trial, Thomas said she thought she was wrong about his hair style. Thomas also told police that the shooter was wearing dark clothes and the person who died was wearing white. Trial testimony established that Hunt was wearing a white jersey on the night of the shooting. When asked about this discrepancy at trial, Thomas said she was "pretty confident" that Hunt "had on dark clothing" but, now, she did not really remember. Thomas was also asked about a diagram she drew during the police interview that identified the location of the shooter. This location was inconsistent with other trial testimony. At trial, Thomas stated she was not certain where the person who shot Robinson was when the shooting took place.

Hunt attributed these inconsistencies to coaching by the State because, a week prior to her trial testimony, Thomas met with a police investigator and the prosecutors in the "sealed" courtroom. At that time, Thomas was shown Robinson's clothing and a photograph of a jersey resembling the one worn by Hunt. The investigator and prosecutors also showed Thomas the videotape of

[2] At trial, the defense stated that the prosecutor subpoenaed Thomas to come to Iowa from her home in Florida but, on realizing her testimony would not assist the State, sent her back to Florida without informing the defense. The district court ordered the State to make Thomas available in Iowa for the defense.

her earlier statement to police. The meeting lasted "a couple hours." Hunt urged that this meeting was improper, amounted to prosecutorial misconduct and entitled him to a new trial.

The district court denied the new trial motion. The court stated that the prosecutors committed no misconduct by allowing Thomas into the courtroom to view the items described above because, notwithstanding a sign on the door indicating that the courtroom was sealed, attorneys and witnesses could enter. The court also noted that Thomas was subject to examination and cross-examination and "anything untoward that occurred prior to that . . . was cured by what happened afterwards."

On appeal, Hunt takes issue with the court's ruling. He contends the prosecutor's actions were "overreaching and coercive" and severely impaired Thomas's ability to present meaningful, exculpatory evidence.

Prosecutorial misconduct warrants a new trial when it is "so prejudicial as to deprive the defendant of a fair trial." *State v. Lyons*, 210 N.W.2d 543, 549 (Iowa 1973). The following factors should be considered in assessing whether the defendant received a fair trial:

> (1) the severity and pervasiveness of misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; (5) the extent to which the defense invited the misconduct.

*State v. Boggs*, 741 N.W.2d 492, 508-509 (Iowa 2007) (citation omitted). "The most important factor is the strength of the State's case against the defendant." *Id.* As a firsthand observer of both the claimed misconduct and any reaction by the jury, the trial court is better equipped than an appellate court to determine the

presence of prejudice. *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa Ct. App. 1997). Consequently, we will reverse a district court ruling only upon a finding of an abuse of discretion. *Id.*

We conclude the district court did not abuse its discretion in denying Hunt's motion for new trial, based on prosecutorial misconduct. Coaching of a witness by an attorney is not per se improper. *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002) ("If by 'coaching,' DeVoss means the prosecutor went over Maggio's testimony with her, the claim simply has no merit. Attorneys certainly have the right to prepare their witnesses. It would be foolhardy not to."). Notably, Hunt's attorneys also met with Thomas in their offices and had her again view the videotape of her earlier statement in their presence.

There is also no indication that the prosecutors told Thomas to perjure herself. *Id.* ("If by 'coaching,' DeVoss means the prosecutor told Maggio to commit perjury, that certainly is prosecutorial misconduct."). While Thomas conceded she became unsure of the events only after she met with the police investigator and the prosecutors, she did not state that she was told to testify untruthfully. For these reasons, we affirm the district court's rejection of the prosecutorial misconduct claim.

***IV. Admissibility of Maria Thomas's Videotaped Statement.***

As noted, Thomas gave a videotaped statement to police. The State initially offered the statement when it filed its notice of intent to use hearsay. Hunt responded that Thomas was not unavailable, he did not have the opportunity to confront her, and her statements were untrustworthy. The court excluded the videotape, citing Thomas's limited personal knowledge, the two

weeks that elapsed between the shooting and the interview, her hesitancy in answering the questions, the lack of detail in her answers, and the fact that the videotape did not include information not generally known. Later, Hunt attempted to introduce the videotape. The court stated, "[B]ased on my previous ruling, the witness had very little personal knowledge, that she was hesitant and that the nature of the questioning was such that it makes the statement in the court's view unreliable."

Hunt contends the district court erred in excluding the videotape. He relies on an exception to the hearsay rule for recorded recollections. *See* Iowa R. Evid. 803(5). That rule states:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The rule contains several requirements. A witness must be shown to have had an incomplete recollection. *State v. Thompson*, 397 N.W.2d 679, 682 (Iowa 1986). Thomas was asked "So you're not confident about anything that you saw that evening, is that what you're saying?" Her response was, "Yes. I cannot remember." The rule also requires a showing that the witness's recollection of events at the time of the recording was "fresh." *Id. at* 683. The videotape was taken less than three weeks after the shooting. In *Thompson*, the court found the freshness requirement satisfied where there was a thirty-one day gap between the incident and the deposition. Finally, the rule requires a satisfactory showing

of "the accuracy of the process utilized to record that recollection." With respect to this requirement,

> The jury should hear the witness state under oath that the prior statement was accurate and he should be subject to cross-examination on this point. [A witness's] failure to say that . . . he gave the statement [and] it was accurate prevent[s] application of Rule 803(5).

*Id. (*quoting 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(5)[01], at 167 n. 48 (1985)). Thomas agreed with defense counsel that the videotape "would accurately reflect what [she] believed or thought [she] saw at the time." She also stated, "I was nervous, I think, but I pretty much was honest." Finally, she stated that "the only thing I'm for sure about is what I previously said." We conclude Hunt satisfied the requirements for admission of the videotape under this hearsay exception.

This does not end our inquiry. We must also determine whether the court's exclusion of the videotape amounted to harmless error. *See State v. Traywick*, 468 N.W.2d 452, 454 (Iowa 1991). The test for nonconstitutional error is "whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice." *Id.* at 454-55.

At trial, defense counsel elicited the portions of Thomas's videotaped statement that assisted Hunt. Specifically, he asked her what she told the police about the style of the shooter's hair, the clothes the shooter was wearing, and the general location of the shooter. Because her answers to these questions came out at trial, Hunt was not prejudiced by the exclusion of the videotape. *See State v. Ritchison*, 223 N.W.2d 207, 212 (Iowa 1974) ("[T]he evidence defendant

desired to introduce before was otherwise established and any error in denying defendant's mistrial attempt was made nonreversible.").

***V. Impeachment Evidence.***

State witness Tony Smith testified that Hunt confessed his involvement in the shooting of Robinson. Defense counsel asked the district court to allow him to impeach Smith with prior crimes. In addition to drug and theft convictions, Smith was awaiting sentencing on four forgery counts and had an additional fourteen forgery counts pending against him.

The district court allowed defense counsel to cross-examine Smith on the prior drug and theft convictions. With respect to the forgery counts, the district court stated:

> On cross-examination I will allow the defendant to explore in a limited fashion the fact that the witness has other charges pending against him and whether or not he hopes to receive a benefit as a result of this testimony. And but as far as the number of counts or the number of potential years, that is -- I won't allow cross examination as to those, but I will allow examination into the fact that he has a number of charges and will leave it at that, a number of charges pending against him and what he hopes to gain, if anything.

Hunt contends the court erred in excluding "the witness's prior forgery convictions" under Iowa Rule of Evidence 5.609.[3] The State concedes this error, stating "the court was required to admit evidence that Smith pled guilty to a crime of dishonesty or false statement." *State v. Brodene*, 493 N.W.2d 793, 797 (Iowa 1992) ("We think the witness's guilty plea to extortion amounted to a 'conviction' for purposes of rule 609(*a*)."). The State argues, however, that the court should

[3] On appeal, Hunt does not argue that evidence of the fourteen additional forgery counts should have been admitted.

have "discretion to exclude overly detailed or speculative testimony." The State further maintains that "Smith's honesty and credibility were adequately impeached by" the evidence of past crimes that was admitted.

We agree with the State's second argument. Defense counsel cross-examined Smith extensively about his honesty. He asked Smith "so the fact that you have counts pending against you has nothing to do with your testimony today?" Smith answered "no, it does not." Counsel next asked Smith about the list of times he had been in jail over the previous year and a half. Smith admitted he had been incarcerated. Defense counsel also inquired about the prior convictions the court earlier allowed. Smith admitted he had those convictions. Counsel asked Smith about claimed confessions made to him in other cases and suggested Smith was trying to get a deal by testifying. Smith admitted to testifying in other cases but denied he was trying to get a deal. The point, however, was made. By the end of his cross-examination, the jury was aware of Smith's criminal background, including his incarceration, and was aware that Smith had a motive to testify about a confession. On this record, we conclude the district court's refusal to permit an inquiry into Smith's four forgery convictions amounted to harmless error. *See Traywick*, 468 N.W.2d at 454.

***VI. Jury Instruction.***

Hunt takes issue with the district court's submission of a jury instruction stating:

> Where two or more alternative theories are presented, or where two or more facts would produce the same result, the law does not require each juror to agree as to which theory or facts leads to his or her verdict. It is the verdict itself which must be unanimous, not the theory or facts upon which it is based.

This jury instruction was premised on a uniform instruction that, in turn, reflects the following principle:

> The rule in Iowa is that while the jury must be unanimous on whether a defendant committed a crime, when alternative modes or theories of commission of a particular crime are presented, the jury need not be unanimous on a particular means of commission of the crime if substantial evidence to support each alternative, and those alternative modes are not repugnant or inconsistent with other.

*Gavin v. State*, 425 N.W.2d 673, 678 (Iowa Ct. App.1988)

Hunt contends the jury was presented with two sets of facts that were "repugnant." He points to the testimony of one witness who placed him inside a parking lot ten to fifteen feet from the rear side door of a bar and the testimony of another witness who placed him at the front corner of the bar. On our review of this testimony, we conclude the witnesses' divergent recollections of where Hunt was standing did not render their testimony repugnant, as both witnesses testified Hunt was running after Robinson when the shooting occurred. Accordingly, the district court did not commit prejudicial error in giving this instruction. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999).

***VII. Mistrial.***

In his opening statement, Hunt's attorney suggested Robinson was accidently shot by members of his own gang. At trial, a police investigator was asked how many versions of events he heard over the course of the investigation. He responded, "A total of two. By the original version and four weeks ago during the opening statements a second version was heard."

Hunt moved for a mistrial, contending the investigator violated his right to remain silent, his right to counsel, and the attorney-client privilege. The district court found that "everybody was surprised by the answer." The court denied the motion but admonished the jury as follows:

> Ladies and gentlemen, just before we broke, there was a question asked of this witness as to how many versions that he heard as to what happened in this case. The number of versions that this witness may have heard or the number of versions that any witness may have heard is irrelevant and should not be considered by you. Your job is to evaluate the testimony that you have heard from this witness stand and from the exhibits. It is not to rely on any number of versions that anybody may have an opinion as to this case. And so I want to make it real clear to you that you're to disregard that testimony of this witness.

On appeal, Hunt contends the district court abused its discretion in denying the motion for mistrial. His primary argument is that the comment violated his right to remain silent guaranteed by the Fifth Amendment to the United States Constitution. *See Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 99 (1976) (holding "the use for impeachment purposes of petitioners silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment."). In deciding whether the investigator's testimony implicated the *Doyle* holding, we ask whether the jury necessarily would believe the challenged remark was a reference to the accused's silence. *State v. Hulbert*, 513 N.W.2d 735, 738 (Iowa 1994).

We are not convinced a jury would necessarily have connected the investigator's testimony about two versions of events to Hunt's Fifth Amendment right against self-incrimination. The testimony was not a direct comment on

Hunt's right and made only oblique reference to his attorney's comments during opening statements. Additionally, the fact that the district court admonished the jury to disregard the testimony mitigated any adverse inferences the jury may have drawn from the testimony. *State v*. *Brown*, 397 N.W.2d 689, 699 (Iowa 1986) (stating a district court's quick action in striking the improper response and cautioning the jury to disregard it will prevent any prejudice). For these reasons, we conclude the testimony did not preclude an impartial verdict or create an "obvious procedural error." *See State v. Piper*, 663 N.W.2d 894, 902 (Iowa 2003).

We find it unnecessary to address Hunt's remaining arguments on this issue. The district court was vested with discretion to decide the mistrial motion and did not abuse its discretion in denying the motion.

***VIII. Thurmond Deposition.***

Witness D'Alan Thurmond refused to testify at trial. The district court ordered him held in contempt. At that point, the prosecutor attempted to have Thurmond's deposition admitted into evidence pursuant to Iowa Rule of Evidence 5.804(*b*)(1), pertaining to former testimony. Hunt's counsel objected on the ground that Hunt's original attorney had a different theory of the case which was irreconcilable with the defense being presented at trial. After hearing objections and arguments on the issue, the court ruled that there was no indication of a rift between Hunt and his original attorney. Later, the court expanded its earlier ruling. In response to defense counsel's objection that admission of the deposition transcript would violate the Confrontation Clause of the United States and Iowa Constitutions, the court stated "the questioning is, in my view,

sufficiently confrontive to give the indicia of reliability." In response to an objection that admission of the transcript would violate the "similar motive" clause of Iowa Rule of Evidence 804(*b*)(1), the Court stated "[t]he motive of defendant's deposition is to nail down the testimony of an adverse witness and have it available in the event of an inconsistent statement during trial. The court does not find dissimilar motives." In response to defense counsel's assertion that the deposition did not reflect the benefits that Thurmond received as a result of his deposition testimony, the court stated that this fact was addressed in the deposition. Finally, the Court noted that Thurmond's prior inconsistent statements made to police officers could be presented to the jury through the testimony of the police officers. The court concluded that "to exclude the testimony would place an unfair burden on the State."

On appeal, Hunt contends the district court erred in admitting the deposition. He notes that no other witness corroborated key aspects of Thurmond's testimony and he again cites the Confrontation Clauses and rule 804(*b*)(1). He also notes that his attorney was unable to question Thurmond about a sentence reduction he received for cooperating with the government, as the reduction was granted six months after the deposition.

The Confrontation Clause of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI; see also Iowa Const. art. I, § 10. Where testimonial evidence is at issue, the Sixth Amendment requires unavailability and a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203

(2004). There is no question Thurmond was unavailable at the time of trial. *State v. Kellogg*, 385 N.W.2d 558, 560 (Iowa 1986) ("A witness who has exercised a Fifth Amendment privilege is "unavailable" for purposes of the confrontation clause."). But, there is also no question that he was available for cross-examination by defense counsel during the deposition. We recognize the "cross-examination" came in the form of direct questions by Hunt's attorney. However, the attorney had the opportunity to engage in redirect examination after the State questioned Thurmond. In short, Hunt's attorney exercised the opportunity to confront Thurmond about his version of events. We conclude the Confrontation Clause requirements were satisfied.

We turn to Hunt's challenge under Rule 5.804(*b*)(1). That rule states:

> 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.

As noted, Thurmond's testimony was given in a deposition against Hunt and Hunt's original attorney had the opportunity to cross-examine Thurmond. She did so, eliciting testimony that Thurmond was a friend of Robinson's, Hunt was not running after Robinson, and Thurmond lied when he spoke to police after the incident. The deposition was taken in the same case and was taken in defense of Hunt. We conclude the elements of Rule 5.804(*b*)(1) were satisfied. *See State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

***IX. Other Hearsay Evidence.***

Hunt next contends the district court erred "in allowing hearsay statements to be heard regarding witnesses who disposed of guns." Hunt does not state the names of the witnesses in question, cite to the transcript, or cite legal support for his claim. The State responds that, "[w]ithout more precise information concerning Hunt's claim, the State cannot address it."

We will decline to consider arguments that do not pinpoint specific questions and objections the overruling of which is alleged to be error. *State v. Philpott*, 702 N.W.2d 500, 504 (Iowa 2005) (holding defendant's arguments on the evidentiary issues are too vague and indefinite to support the granting of relief based on the admission of improper evidence). Accordingly, we will not address this issue.

***X. DVD of Police Interview.***

Finally, Hunt contends the trial court erred in excluding the DVD of witness Dovien Gamblin's police interview. He asserts the DVD was necessary to show Gamblin changed her story.

The district court ruled that the DVD was cumulative of other evidence. We agree. Defense counsel questioned Gamblin about her prior statement and inconsistencies between that statement and her trial testimony. Therefore, the DVD was unnecessary.

**AFFIRMED**.