IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. WILLIAM E. CRAWFORD, Defendant–Appellant.	)	S. CT. NO. 17–1640

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE THOMAS G. REIDEL, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED DECEMBER 5, 2018

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CERTIFICATE OF SERVICE

On December 18, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to William E. Crawford, #6858380, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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MS/d/12/18

QUESTIONS PRESENTED FOR REVIEW

WAS THE DEFENDANT PREJUDICED WHEN THE STATE INTRODUCED A VIDEO RECORDING OF DEFENDANT'S INTERVIEW WITH POLICE IN ITS CASE-IN-CHIEF WHERE THE VIDEO CONTAINED IMPERMISSIBLE EVIDENCE INCLUDING STATEMENTS BY THE POLICE ABOUT WHAT NON-TESTIFYING WITNESSES TOLD THEM AND COMMENTING ON THE TRUTHFULNESS OF THOSE WITNESSES?

WAS THE PREJUDICE EXACERBATED WHEN THE COURT INSTRUCTED THE JURY THAT THEY "MIGHT FIND THIS EVIDENCE HELPFUL IN YOUR DELIBERATIONS"?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

During the state's case-in-chief, over defendant's objection, the court permitted introduction of a video recording of an interview between the police and the defendant. The recording contained clearly inadmissible statements by the police regarding what non-testifying witnesses told them together with comments by the police about their assessment of the truthfulness of those statements.

The Iowa Court of Appeals, when dealing with the objections presented on appeal, determined that any prejudice resulting from admission of the video was solved when the trial court gave the following cautionary instruction:

> Ladies and gentlemen of the jury, you are about to hear evidence of the defendant being interviewed by a police detective. You might find this evidence helpful in your deliberations. However, the evidence is not being admitted to prove the truth of the matters asserted or contained in the questions posed by the detective.
>
> Law enforcement officers are not required to be honest when interrogating witnesses. Those questions, like statements, arguments and comments by the lawyers, are not evidence.

In support of its holding, the Court of Appeals cites State v. Plain, 898 N.W.2d 801, 813 (Iowa 2017) for the proposition that "We have held that an instruction limiting the 'purposes for which this evidence [can] be used' may serve as 'an antidote for the danger of prejudice.'" [Court of Appeals decision, page 7 of 9, filed 12/5/18].

Further review should be granted because prejudice was inherent in the information on the video and made worse by court's instruction, which far from limiting the use of the "evidence", is confusing—it refers to "evidence" numerous times—before saying it is not evidence; does not limit the use of the "evidence"—merely says that it "is not being admitted to prove the truth of matters asserted"—without saying what it can be used for; and constitutes an unfair comment by the court—the jury "may find it helpful their deliberations."

STATEMENT OF THE CASE

Nature of the Case: William E. Crawford seeks review of a Court of Appeals decision affirming his conviction, sentence, and judgment following a jury trial and verdict finding him guilty of murder in the second degree.

Course of Proceeding and Disposition in the Trial Court: On September 21, 2016, the State charged William E. Crawford with murder in the first degree, a class "A" felony, and willful injury resulting in serious injury, a class "C" felony. (Trial Information) (App. pp. 5–9).

A jury trial commenced on August 21, 2017. (Trial Tr. vol.1 p.1 L.1–25, p.9 L.1–15) (Jury Verdict) (App. pp. 41–42). On August 25, 2017, the jury returned a verdict finding Crawford guilty of the lesser-included count of murder in the second degree. (Trial Tr. vol.4 p.874 L.9–p.876 L.5) (Jury Verdict) (App. pp. 41–42).

On October 5, 2017, the district court ordered Crawford to serve an indeterminate sentence not to exceed fifty years, with a mandatory minimum sentence of seventy percent under

Iowa Code section 902.12(1)(a). (Sentencing Tr. p.9 L.16–23) (Sentencing Order) (App. p. 44). The court also ordered Crawford to pay court costs and victim restitution. (Sentencing Tr. p.9 L.16–p.10 L.7) (Sentencing Order) (App. p. 45).

The court found Crawford did not have the reasonable ability to pay the costs of his court-appointed trial attorney fees. (Sentencing Tr. p.10 L.2–3) (Sentencing Order) (App. p. 45).

Crawford filed a notice of appeal on October 12, 2017. (Notice) (App. p. 48).

Course of Proceeding and Disposition in the Appellate Court: Crawford raised three issues on appeal—the trial court erred in failing to grant a continuance; the trial court erred in admitting evidence contained in Crawford's recorded police interview; and the trial court erred in requiring Crawford to request a hearing on his ability to pay appellate attorney, rather than placing the burden on the Court to make the

ability-to-pay determination whether a hearing was requested, or not.

On December 5, 2018, the Iowa Court of Appeals ruled in Crawford's favor on the third issue and remanded the case to the district court to correct the sentencing order.

The Iowa Court of Appeals ruled against Crawford on the first two issues. It is that decision for which Crawford seeks further review.

Facts: On August 18, 2016, a large group of people were in LeClaire Park in Davenport, including the victim, Romane Nunn. (Trial Tr. vol.2 p.352 L.11–p.353 L.10). Police were called after a fight broke out. When the police arrived, they found Nunn, who had been stabbed, lying face down in the grass. (Trial Tr. vol.2 p.485 L.24–25). Nunn was unresponsive on the scene. (Trial Tr. vol.2 p.486 L.9–p.487 L.24). Medics arrived, administered CPR, and took Nunn to the hospital where he later died. (Trial Tr. vol.2 p.493 L.3–20, p.500 L.22–23).

The police believed the stabbing was linked to an incident from the previous day concerning Crawford's girlfriend. (Trial Tr. vol.2 p.446 L.23–p.447 L.15; vol.4 p.755 L.16–20).

Early on August 18th, Crawford called the police to report that his girlfriend had been sexually assaulted. (Trial Tr. vol.2 p.440 L.7–8, p.463 L.2–5; vol.4 p.781 L.17–19).

An officer described Crawford as angry and wanting to know what the police were doing to catch the assailant. Crawford told officers that he was going to try to find the man and hold him until they got him so he could not hurt anyone else. (Trial Tr. vol.2 p.441 L.2–3, p.457 L.15–25).

Crawford testified in his own defense. He testified he and his girlfriend had been together for seven years, lived together, and considered each other as husband and wife. (Trial Tr. vol.4 p.777 L.9–20). Crawford testified he went to LeClaire Park on the 18th to play chess. (Trial Tr. vol.4 p.778 L.9–24). He stated he got there around 1:00 in the afternoon and started drinking beer about an hour later. (Trial Tr. vol.4 p.779 L.8–21). He testified his girlfriend arrived closer to 4:00

p.m., and they smoked marijuana. (Trial Tr. vol.4 p.782 L.14–p.783 L.8).

Crawford testified he was in the middle of a chess game when his girlfriend jumped back and quickly stood up. (Trial Tr. vol.4 p.783 L.9–21). Crawford said she was having trouble breathing, acted like she was going to vomit, and "acted like the life just left her body." (Trial Tr. vol.4 p.783 L.8–22). When Crawford asked her what was wrong, she pointed out Nunn and identified him as the man who had assaulted her earlier that day. (Trial Tr. vol.4 p.783 L.22–p.784 L.6). Crawford told her to call the police and went to confront Nunn. (Trial Tr. vol.4 p.784 L.8–17).

When Crawford confronted Nunn about the assault, he acted confused, which Crawford did not believe. (Trial Tr. vol.4 p.785 L.10–20). Crawford told Nunn the police were on their way, and Nunn started walking away, which Crawford interpreted as trying to get away. (Trial Tr. vol.4 p.785 L.21–24). Because he believed Nunn was trying to leave before the police arrived, Crawford stated he ran up to Nunn, grabbed his

shirt and a fight broke out. (Trial Tr. vol.4 p.785 L.21–p.786 L.2). Crawford admitted swinging at Nunn, tripping and kicking him, but denied stabbing him. (Trial Tr. vol.4 p.785 L.3–25, p.787 L.12–17). Crawford testified he showed Nunn the knife as they were fighting, and Nunn tried to grab his hand; Crawford was unsure when Nunn actually was stabbed. (Trial Tr. vol.4 p.787 L.12–21). Crawford testified he did not want Nunn to die; he only meant to beat Nunn up before the police arrived because of what he believed Nunn did to his girlfriend. (Trial Tr. vol.4 p.785 L.1–8). Crawford admitted to throwing the knife in the river. (Trial Tr. vol.4 p.794 L.3–13). He testified he was very intoxicated at the time. (Trial Tr. vol.4 p.787 L.22–23).

Any additional relevant facts will be discussed below.

ARGUMENT

I. THE DEFENDANT PREJUDICED WHEN THE STATE INTRODUCED A VIDEO RECORDING OF DEFENDANT'S INTERVIEW WITH POLICE IN ITS CASE-IN-CHIEF WHERE THE VIDEO CONTAINED IMPERMISSIBLE EVIDENCE INCLUDING STATEMENTS BY THE POLICE ABOUT WHAT NON-TESTIFYING WITNESSES TOLD THEM AND COMMENTING ON THE TRUTHFULNESS OF THOSE WITNESSES.

Challenges to the admission of evidence are generally reviewed for an abuse of discretion. State v. Martin, 704 N.W.2d 665, 671 (Iowa 2005) (citations omitted). However, when the claim is that constitutional rights were violated, review is *de novo*. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012) (citing State v. Brubaker, 805 N.W.2d 164, 171 (Iowa 2011)); State v. Brown, 656 N.W.2d 355, 361 (Iowa 2003) (citing State v. Tangie, 616 N.W.2d 564, 568 (Iowa 2000)).

Prior to the admission of Exhibit 74, the video recording of Crawford's interview with law enforcement, Crawford objected to several statements and questions posed by the law enforcement officers during their interview.

Among the types of statements were the following:

1. The officers stated that a lot people in the park witnessed the incident and positively identified Crawford. (Ex. 74 02:21–02:12, 09:28–09:32).
2. When Crawford denied being at the park, they asked why all the people that picked him out of a lineup would lie. (Ex. 74 09:26–09:40).
3. The officers also mentioned twice that Parks, Gavin, Jonah had witnessed the assault, identified Crawford as the assailant, and stated Crawford "did the main damage." (Ex. 74 10:03–10:44, 12:39–13:00).

The district court permitted the State to introduce the video recording in its case-in-chief over Crawford's objections after giving the following instruction:

> Ladies and gentlemen of the jury, you are about to hear evidence of the defendant being interviewed by a police detective. You might find this evidence helpful in your deliberations. However, the evidence is not being admitted to prove the truth of the matters asserted or contained in the questions posed by the detective.
>
> Law enforcement officers are not required to be honest when interrogating witnesses. Those

> questions, like statements, arguments and comments by the lawyers, are not evidence.

Initially, it should be pointed out that just because the misleading statements employed by the police are acceptable interrogation tactics, does not mean that everything said by the police is admissible in court for consideration by the jury. State v. Cordova, 51 P.3d 449, 455 (Idaho Ct. App. 2002).

In addition, the trial court's direction that the jury "might find this evidence helpful in your deliberations" places undue emphasis on this inadmissible information.

There are several reasons why the statements made by the interrogators should not have been admitted in the state's case-in-chief.

The statements regarding the lineups and what others allegedly told law enforcement are inadmissible hearsay (contrary to the trial court's pronouncement that "the evidence is not being admitted to prove the truth of the matters asserted") and, if minimally relevant for some non-hearsay purpose, any probative value of the statements was

substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury under Rule 5.403. They also constitute improper comment on the witnesses' credibility.

Additionally, because the statements were testimonial, their admission at trial violated Crawford's constitutional rights under the confrontation clause.

Each of these grounds will be discussed separately.

1. Several of law enforcement's statements in Exhibit 74 were impermissible hearsay, were untrue and inappropriate, and constituted an improper opinion on witnesses' credibility. Alternatively, even if admissible under a non-hearsay purpose, these statements should have been excluded under Rule 5.403.

Despite the court's statement that "the evidence is not being admitted to prove the truth of the matters asserted," it is inconceivable that the statements could have been used by the state for any other purpose.

The Iowa Rules of Evidence define hearsay as an out-of-court statement offered into evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801(c) (2017). Hearsay

statements are not admissible unless they fall within a recognized exception as permitted by the Iowa Constitution, a statute, or a rule. Iowa R. Evid. 5.802 (2017). Whether a statement is hearsay is determined by the purpose of the offered testimony. State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). The State, as the proponent of the hearsay, has the burden of proving it falls within an exception to the hearsay rule. State v. Cagley, 638 N.W.2d 678, 681 (Iowa 2001).

"A statement is defined under our rules of evidence as '(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.'" State v. Dullard, 668 N.W.2d 585, 590 (Iowa 2003) (quoting Iowa R. Evid. 5.801). The term assertion "is generally recognized to be a statement of fact or belief." Id.

Throughout the interview, the detectives discussed information which they claimed came from other people's statements and identifications, and they made impermissible comments about the credibility of other alleged witnesses and what evidence the jury and judge should weigh. Such

statements should have been excluded because they were not admissible for a valid non-hearsay purpose. See State v. Huser, 894 N.W.2d 472, 496–97 (Iowa 2017).

Crawford's case is strikingly similar to Huser. In Huser, the State introduced impermissible hearsay evidence through questioning tactics that did not elicit any direct statements; in this case the statement elicited only denials from Crawford.

Even assuming there was a valid non-hearsay purpose, the court should have excluded the statements under Rule 5.403 because their probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." See Iowa R. Evid. 5.403 (2015); see also State v. Edgerly, 571 N.W.2d 25, 29 (Iowa Ct. App. 1997) (citations omitted).

"Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party." State v. Reynolds, 765 N.W.2d 283, 290 (Iowa 2009), overruled on other grounds by

Alcala v. Marriott Intern., Inc., 880 N.W.2d 699 (Iowa 2016), (quoting State v. Taylor, 689 N.W.2d 116, 124 (Iowa 2004).

When applying the 5.403 balancing test, the court should examine the following factors:

> (1) the need for the proffered evidence "in view of the issues and other available evidence," (2) whether there is clear proof it occurred, (3) the "strength or weakness of the prior-acts evidence in supporting the issue sought to be prove[d]," and (4) the degree to which the evidence would improperly influence the jury.

State v. Webster, 865 N.W.2d 223, 243 (Iowa 2015) (quoting Martin, 704 N.W.2d at 672).

The trial court failed conducted any balancing at all.

Use of the video in the state's case-in-chief is particularly problematic.

The video contains several portions where the officers hammer Crawford on his story and how many other people have identified him as the person who inflicted the "main damage" on Nunn. Thus, it appears the main purpose of introducing these portions of the exhibit was to attack Crawford's credibility, before he testified, or to bolster the

credibility of the State's witnesses. Neither purpose is valid. See, Bowman v. State, 710 N.W.2d 200, 204 (Iowa 2006) (it is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth).

If the purpose was to show that Crawford was the person who had killed Nunn because he had been identified by multiple people as doing most of the damage to Nunn, that is the definition of hearsay, contrary to the court's instruction that it was not. In addition, neither expert nor lay witnesses may express an opinion as to the ultimate fact of the accused's guilt or innocence. State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986).

The statements were unnecessary for purpose of providing context for Crawford's answers as he simply listened to a substantial amount of the detectives' statements or just denied he knew what had happened. See State v. Davis, No. 13–1099, 2014 WL 5243343, at *6 (Iowa Ct. App. Oct. 15, 2014) (unpublished table decision) (quoting People v. Musser,

835 N.W.2d 319, 333 (Mich. 2013)). The statements of the detectives could have been redacted without harming the minimal probative value of Crawford's statements. See id. at 328–333.

The admission of the video also improperly bolstered the State's witnesses. The officers mentioned they have lots of witnesses that were playing Pokémon Go, plus Parks, Gavin, and Jonah. Only Parks and Gavin testified at trial. However, the officers' comments suggest that the officers spoke with other people that did not testify as trial; for example, Jonah and the people playing Pokémon Go who allegedly identified Crawford as the perpetrator. Thus, the officers' statements regarding what other people were saying had the appearance of both bolstering the witnesses that did testify by providing a possible prior consistent statement and providing the jury with the belief that other witnesses who did not testify at trial corroborated the trial testimony of the witnesses that did testify, like Parks and Gavin. Courts have noted that "statements by state officials, who are largely perceived to be

'cloaked with governmental objectivity and expertise,' create 'a real danger that the jury will be unfairly influenced.'" Davis, 2014 WL 5243343, at *6 (quoting State v. Huston, 825 N.W.2d 531, 537–38 (Iowa 2013)).

In this case, the unfair influence is further enhanced by the trial court's direction that the recording might be helpful in jury deliberation.

The district court should have sustained Crawford's objections to the evidence because it is inadmissible hearsay, the record indicates the lack of a non-hearsay purpose, and the record indicates the State entered the interview into evidence for otherwise inadmissible purposes. Alternatively, the court should have prohibited the statements because any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury and the statements constituted an improper comment on the State's witnesses.

2. The admission of the detectives' statements regarding witnesses that did not testify at trial violated the defendant's right to confront the witnesses against him under the federal and state constitutions.

The Sixth Amendment to the U.S. Constitution and Article I, section 10 of the Iowa Constitution both afford criminal defendants the right to confront witnesses. U.S. Const. amend. VI; Iowa Const. art. I, § 10. Statements made to police officers during an investigation are testimonial in nature. See Crawford v. Washington, 541 U.S. 36, 52–53, 68 (2004). Thus, where evidence is testimonial, its admissibility depends not only on the rules of evidence but also on the confrontation clause. See id. at 68.

Under the confrontation clause, testimonial statements of witnesses absent from trial may be admitted only where (a) the declarant is shown to be unavailable and (b) the defendant has had a prior opportunity to cross-examine the declarant. Id. at 59–68. When a defendant challenges the admissibility of a out-of-court statements under the confrontation clause, the burden of establishing compliance with the constitutional

standard lies with the State. See State v. Bentley, 739 N.W.2d 296, 298 (Iowa 2007).

Here, there was no showing that Jonah or any of the Pokémon Go players were unavailable to testify at Crawford's trial. Nor was there any showing that Crawford had any opportunity to cross examine the purported declarants who did not testify at trial. Thus, the State failed to show the statements did not violate Crawford's rights under the confrontation clauses. See id. Thus, the court should have excluded the detectives' statements regarding witnesses, who did not appear at trial, gave the police consistent information, had no reason to lie, and gave information inconsistent with what Crawford told the detectives.

3. The admission of the challenged evidence prejudiced the Defendant and was not harmless error.

Evidence inadmissible under Iowa Rule 4.303 requires reversal when it appears because of the improperly admitted evidence the defendant has "suffered a miscarriage of justice or had his rights injuriously affected." State v. Moorehead,

699 N.W.2d 667, 672 (Iowa 2005). Prejudice is presumed unless the record affirmatively establishes otherwise. Id. at 673. However, the erroneous admission of evidence in violation of the confrontation clause is subject to a harmless-error analysis. See State v. Kennedy, 846 N.W.2d 517 (Iowa 2014). "To establish harmless error when a defendant's constitutional rights have been violated, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Cox, 781 N.W.2d 757, 771 (Iowa 2010) (citation omitted).

Under either of these standards, Crawford is entitled to relief for the admission of the improper evidence.

The evidence of the officers' comments on listed State witnesses' credibility, and therefore Crawford's, and other unlisted witnesses' statements implicating Crawford was extremely prejudicial to the fairness of Crawford's trial.

Contrary to the Court of Appeals conclusions, the hearsay evidence at issue was not cumulative and was offered

for the purpose of introducing impermissible vouching for state's witnesses before the jury.

The evidence provided prior consistent statements for some witnesses and bolstered their credibility by insinuating others who did not testify at trial also corroborated their testimony. It suggested that Crawford was solely involved and was the perpetrator that "did the main damage" to Nunn. In addition, the use of these ex parte examinations as evidence against Crawford is primary evil the with which the confrontation clauses are concerned. See Bentley, 739 N.W.2d at 298.

Because of the prejudicial effect the detectives' statements, it was unreasonable for the district court to admit these statements into evidence.

Thus, the district court erred in admitting this evidence and abused its discretion. See State v. Rodriguez, 636 N.W.2d 234, 239 (Iowa 2001) (quoting State v. Maghee, 573 N.W.2d 1, 5 (Iowa 1997).

The Court of Appeals erred in affirming Crawford's conviction.

Crawford's rights were injuriously affected and the record does not affirmatively establish he was not prejudiced by the evidence's admission; the error was not harmless. Crawford is entitled to a new trial.

D. Conclusion: William E. Crawford requests that the Court grant further review, vacate the decision of the Court of Appeals, and remand to the district court for a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.95, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

MARY K. CONROY
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,768 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ *Mark C. Smith* Dated: 12/18/18

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IN THE COURT OF APPEALS OF IOWA

No. 17-1640
Filed December 5, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM E. CRAWFORD,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas G. Reidel, Judge.

William Crawford appeals the judgment and sentence imposed following his second-degree-murder conviction. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Mary K. Conroy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Timothy M. Hau, Assistant Attorney General, for appellee.

Considered by Danilson, C.J., and Potterfield and Doyle, JJ.

DOYLE, Judge.

A jury convicted William Crawford of second-degree murder for his role in the 2016 stabbing death of Romane Nunn. On appeal, Crawford challenges the district court's rulings denying his motion to continue trial and admitting a video recording of his police interview into evidence. He also challenges the portion of his sentence requiring the assessment of appellate attorney fees.

I. Denial of Motion to Continue.

Crawford contends the district court abused its discretion in denying his motion to continue trial. Our standard of review of depends on the grounds for the motion. *See State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). Generally, we review the denial of a motion for continuance for an abuse of discretion. *See id.* This standard is a difficult one to meet. *Van Hoff v. State*, 447 N.W.2d 665, 669 (Iowa Ct. App. 1989). However, if the court's denial of a continuance impedes the defendant's right to present a defense, it implicates a fundamental element of due process and our review is de novo. *Clark*, 814 N.W.2d at 560-61; *In re Orcutt*, 173 N.W.2d 66, 70 (Iowa 1969) (noting that the assignment of counsel under circumstances that deprive a defendant of the right to prepare a defense does not satisfy due process requirements). Because motions for continuance are discouraged, the court may not grant a continuance unless the defendant shows a "good and compelling cause." Iowa R. Crim. P. 2.9(2). "The burden rests on the one seeking a continuance to show that 'substantial justice will be more nearly obtained' thereby." *State v. Ruesga*, 619 N.W.2d 377, 384 (Iowa 2000) (quoting Iowa R. Civ. P. 1.911(1)).

On September 21, 2016, the State charged Crawford with first-degree murder and willful injury resulting in serious injury. The district court scheduled trial to begin on August 21, 2017. Initially, Crawford was represented by the public defender's office, but after a break down in his relationship with his attorneys, he requested new counsel be appointed. A hearing was held on May 24, 2017, and the district court granted Crawford's motion and appointed new counsel to represent Crawford finding there was "sufficient time for an attorney to get up to speed" before trial began. On July 26, 2017, the court approved the appointment of a second-chair attorney.

On August 15, 2017, Crawford's new counsel moved to withdraw from representing him based on Crawford's statements that he no longer wanted her to represent him. At the hearing, held the same day, Crawford also moved for a continuance. The district court denied both the motion to withdraw and motion to continue in an order entered the same day.

Crawford alleges that denying a continuance violated his due process right to a fair trial with effective counsel because his trial counsel had inadequate time to prepare a defense before trial. "Whether in any case enough time has been afforded for consultation, investigation for witnesses, and preparation of the law and facts depends upon the circumstances of the case including the complexity of the factual issues and the legal principles involved." *Orcutt*, 173 N.W.2d at 71. The seriousness of the offense is another consideration in determining whether there has been adequate time to prepare. *See Clark*, 814 N.W.2d at 569 (Appel, J., dissenting).

There is no denying the seriousness of the first-degree-murder charge that Crawford faced. *See* Iowa Code § 902.1 (requiring a sentence of life without the possibility of parole). We also note that Crawford's trial counsel had been appointed to represent him only two months earlier, after his first attorney withdrew from representation due to a deterioration in his relationship with Crawford. However, the engagement of counsel just prior to the trial date is not grounds for a continuance if the replacement counsel had ample time to prepare. *See* 17 C.J.S. Continuances § 49. The record here shows the issue was not a matter of counsel's lack of preparation but one of surprise because a witness that Crawford anticipated would help his defense had just given deposition testimony that harmed him. Whether to grant a continuance on this ground is within the trial court's discretion. *See id.* § 93 ("It is largely within the discretion of the court to grant or refuse to grant a continuance on grounds of surprise occasioned by the fact that a party's own witness has testified contrary to the reasonable expectations of the applicant.").

Based on the record before us, we are unable to find the trial court abused its discretion in denying Crawford's motion to continue. Both Crawford's prior counsel and his replacement counsel deposed numerous witnesses during the eleven months after he was charged. At the hearing on Crawford's motion, the prosecutor observed:

> The most recent round of depositions occurred last Friday, where a witness that I believe [Crawford] thought would be favorable to him came in and said some things that were actually favorable to the State during his deposition. I think that is what precipitated this statement by [Crawford] today that all of a sudden he feels like his defense counsel is not with him or working on his side.

Crawford's counsel agreed, explaining:

> A witness who was mine, my best witness, didn't turn out that way at all. I mean, it couldn't be further from what I thought, and it did kind of throw me. It's the truth. . . .
>
> I mean, it's the absolute truth. If Friday hadn't happened, I don't think we would have been here. In fact, it really did create an issue for me that kind of made me step back a few feet and like, okay, what are we going to do? That's what happened.

In denying Crawford's motion, the court noted that the speedy-trial deadline was approaching but that Crawford's counsel "seems to be prepared. She's indicated she's got the week blocked off to work on this, that she's been working on this." The court also observed that Crawford previously expressed through correspondence satisfaction with his attorney. Although the State had argued a continuance would be inconvenient to the witnesses, the court gave little weight to its argument. Instead, the court gave "the primary concern to [Crawford] because he's the one whose life is going to be the most greatly impacted by the outcome of this trial." Nonetheless, the court ultimately noted that neither Crawford nor his attorneys had expressed "anything specifically that they need to do that would lead me to believe that a continuance is warranted or would do anything more than delay this trial." Such failure is grounds for denial of a continuance. *See State State v. Melk*, 543 N.W.2d 297, 300 (Iowa Ct. App. 1995) (affirming denial of motion for continuance filed two weeks before trial that "alleged that counsel 'believe[d] additional time was needed to investigate . . . [and] conduct discovery,' 'may' have difficulty making arrangements for out-of-state witnesses to appear, and 'may' need to retain an expert witness" because "the reasons urged in support of the continuance were vague and uncertain" (alteration in original)).

Because the district court acted within its discretion in denying Crawford's motion to continue, we affirm.

II. Evidentiary Issues.

Crawford next challenges the district court ruling that admitted into evidence a video recording of his interview with police. He complains that during the interview, the officers made statements concerning witnesses who had identified him as the main perpetrator of the crime. He argues that these statements were impermissible hearsay and that the officers improperly commented on the witnesses' credibility. He also complains that some of the witnesses the officers discussed did not testify at trial and, therefore, their statements violated his rights to confront the witnesses at trial.

We review evidentiary rulings for an abuse of discretion. *See State v. Thompson*, 836 N.W.2d 470, 476 (Iowa 2013). An abuse of discretion occurs when the trial court exercises its discretion on untenable grounds or to an extent clearly unreasonable. *See State v. Tipton*, 897 N.W.2d 653, 690 (Iowa 2017). We review rulings on the admissibility of hearsay evidence for correction of errors at law. *See Thompson*, 836 N.W.2d at 476. With all evidentiary rulings, we only reverse if prejudice occurred. *See Tipton*, 897 N.W.2d at 690.

After reviewing the video of the police interview, the district court denied Crawford's hearsay objections. It found that of the three eyewitnesses referenced in the video, two had testified at trial and implicated Crawford. Although the third individual referenced in the video did not testify at trial, the court made the following statement to the jury before playing the video:

> Ladies and gentlemen of the jury, you are about to hear evidence of the defendant being interviewed by a police detective. You might find this evidence helpful in your deliberations. However, this evidence is not being admitted to prove the truth of the matters asserted or contained in the questions posed by the detective.
>
> Law enforcement officers are not required to be honest when interrogating witnesses. Those questions, like statements, arguments and comments by the lawyers, are not evidence.

Even assuming any of the statements made in the interview video were inadmissible, we are unable to find they prejudiced Crawford. To the extent the statements were attributable to the eyewitnesses who testified at trial, the evidence was cumulative. *See State v. Plain*, 898 N.W.2d 801, 813 (Iowa 2017) ("Tainted evidence that is merely cumulative does not affect the jury's finding of guilt."). To the extent that it referenced the third eyewitness who did not testify, the court's statement to the jury cured any potential error. *See id.* ("We have held that an instruction limiting the 'purposes for which this evidence [can] be used' may serve as 'an antidote for the danger of prejudice.'").

III. Sentence.

Finally, Crawford challenges the portion of the sentencing order assessing him appellate attorney fees. That portion of the order states:

> Defendant is advised of the right to appeal. You are advised that if you appeal this ruling, you may be entitled to court-appointed counsel to represent you in that appeal. Defendant is advised as follows regarding his right to Court-Appointed Appellate Counsel: If you appeal this ruling, you may be entitled to court-appointed counsel to represent you in that appeal. If you qualify for court-appointed appellate counsel, then you can be assessed the cost of the court-appointed appellate attorney when a claim for such fees is presented to the clerk of court following the appeal. You may request a hearing on your reasonable ability to pay court-appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. If you do not file a request for a hearing on the issue of your reasonable ability to pay court-appointed appellate

> attorney fees, the fees approved by the State Public Defender will be assessed in full to you.

"[W]hen the district court assesses any future attorney fees . . . , it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay." *State v. Coleman*, 907 N.W.2d 124, 149 (Iowa 2018). Accordingly, we vacate the portion of the sentencing order requiring Crawford affirmatively request a hearing on his ability to pay and remand for entry of a corrected sentencing order.

CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED.