IN THE COURT OF APPEALS OF IOWA

No. 1-151 / 10-0727
Filed April 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ANTHONY WILSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Thomas J. Bice, Judge.

Mark Anthony Wilson appeals from the judgment and sentence entered on his convictions for murder in the first degree and theft in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Adams and Martha Lucey, Assistant Appellate Defenders, and Cory McAnelly, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, and Ricki Osborn, County Attorney, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Mark Wilson appeals from the judgment and sentence entered on his convictions for murder in the first degree and theft in the second degree. He contends: (1) the district court erroneously admitted hearsay evidence; (2) the court abused its discretion in overruling his motion for mistrial; and (3) he received ineffective assistance of counsel. Upon our review, we agree with the district court that the hearsay statements were admissible under Iowa Rule of Evidence 5.803(3), and the danger of unfair prejudice to Wilson is substantially outweighed by the relevancy and probative force of the evidence. We further conclude the court was not unreasonable in concluding an impartial verdict could be reached notwithstanding testimony about Wilson's drug use, theft, or aggressive behavior. Under these facts, we find his ineffective assistance of counsel claim must fail. We affirm Wilson's conviction and sentence.

I. Background Facts and Proceedings.

In the summer of 2001, Joni Manning was living with her boyfriend, Mark Wilson, and four of her five children in her home just outside Fort Dodge. On July 1, Manning told her friend, Sandra Darling, that she was having problems in her relationship with Wilson and was planning to break up with him. On July 5, Manning also told her friend, Joan Smith, that she and Mark were having issues and she planned to break up with him.

On July 6, a Friday, Manning's oldest son, Brandon, and his friend, Todd, stopped by the Manning house around noon. The other children were not home, and they saw Manning and Wilson talking at the kitchen table. Nothing appeared

unusual, except that Manning and Wilson "kind of followed [them] around the whole time," and Manning "kept talking to [Brandon] for some reason."

That weekend, Manning was scheduled to work her normal weekend shift as a nurse at Mercy Hospital in Des Moines. She would normally leave her house mid-afternoon on Friday and drive her 2000 gold Mustang to Des Moines. At approximately 4:30 p.m. that day, Manning's friend, Peggy Ruebel, observed Wilson driving Manning's gold Mustang toward Fort Dodge. At approximately 4:45 p.m., Wilson cashed a check for $150 at Citizens Community Credit Union in Fort Dodge. The check was made out to him on the account of Manning, but the signature on the check was not Manning's.

When Manning failed to arrive at Mercy Hospital for her shift and did not answer her home phone, her coworkers became concerned. They requested the Webster County Sheriff's Office to make a welfare check on her home. An officer went to the Manning house, but no one answered the door.

The next day, Saturday, July 7, Manning's oldest daughter, Rachel, also saw Wilson driving Manning's gold Mustang. This struck Rachel as odd because she knew Manning was supposed to be in Des Moines and did not think Manning would let Wilson bring her car back, as the car "was her baby." Manning's son, Brandon, was unable to reach his mother by phone on that day.

On Sunday, July 8, Manning's thirteen-year-old son, Jordan, returned home from a weekend visit with his father. The front door was locked, so he entered through the garage. He noticed an unpleasant odor, and saw the kitchen was in disarray. No one else was home, and Manning's gold Mustang was gone. Jordan played in his room for awhile, and then went to the garage to skateboard

when he could no longer tolerate the smell. A short time later, Brandon and his friend arrived home. Jordan told Brandon to go look around the house "because something wasn't right in there." Brandon went inside and saw blood and broken glass in the kitchen, and noticed a "very bad smell." He looked in Manning's bedroom, which was off the kitchen, and saw his mother on the floor. She was not moving and was bound in duct tape. Brandon called 911.

Webster County Deputy Chris O'Brien responded to the scene. Deputy O'Brien entered the house and noticed things in disarray; items tipped over, and blood splatters and smears throughout the kitchen and bedroom. He entered the master bedroom and saw Manning's body on the floor. The body was clothed, but had both a clear tape and duct tape around her wrists, ankles, and around her neck. There was a large pool of blood around the body. Deputy O'Brien had no doubt Manning was dead.

DNA analysis of various blood spots and stains around the house matched both Manning and Wilson. Wilson's DNA was found in blood on many objects in the house including a kitchen towel, a fan from the bedroom, duct tape, swabs of blood from the rooms, a gauze package, a purse, a bathroom towel, a check carbon, a shirt from the kitchen, a gauze role, jeans found in the kitchen, and jeans found in the bedroom. Fingerprints left on several bloody objects found in the house were identified as Wilson's.

Manning had been beaten, suffering at least twenty-six separate strikes by a blunt object to her head and face. Two of Manning's wounds appeared to have been made by a sharp instrument. She also had a broken nose. An autopsy showed she died from blunt force trauma to her head. The medical examiner

estimated that Manning died at least forty-eight hours prior to being found, which meant she was most likely killed sometime on Friday, July 6.

On Monday, July 9, Kansas City, Missouri, Police Officer Brian Brewer was on routine patrol in downtown Kansas City, Missouri, and noticed a gold Mustang with an Iowa license plate. The Mustang was parked in area called "Jurassic Park" that is "known for high levels of drug activity." Officer Brewer ran the plate and discovered the vehicle was wanted in connection to an Iowa homicide. He observed two men in the car and stopped the vehicle. Officer Brewer recognized the passenger in the vehicle, Melvin Griffin, as someone he had previously investigated for drug-related incidents. The driver identified himself as Larry Ridgell. Neither man had any warrants. They told Officer Brewer they got the car from a man named "Mark," who they identified via photograph as Wilson.

A day or two earlier, Ridgell and Griffin, who trafficked crack cocaine in the Jurassic Park area, had been approached by Wilson. Wilson asked the men to "rent" the Mustang for awhile in exchange for fifty dollars of crack cocaine. They agreed to meet later in the day for Wilson to give the Mustang back, but Wilson did not show. Among other items found in a search of the vehicle was a Fort Dodge newspaper dated July 7, 2001. Ridgell and Griffin were the last people to see Wilson.

Eight years later, on August 8, 2009, Webster County Detective Kevin Kruse received a message to return a call from "Mark." Detective Kruse reached Wilson at the number he had provided. Wilson asked whether there were any outstanding warrants for him. Detective Kruse told Wilson there was a murder

warrant for him. Wilson responded, "Murder? . . . Murder? . . . Is Joni dead?" Wilson was emotional, and also made the statement that "he'd go to prison for the rest of his life."

Detective Kruse told Wilson to turn himself in, and Wilson said he was currently in Los Angeles, California. Investigators later learned that at various points between July 2001 and August 2009, Wilson worked for a carnival in California, going by the name Don Winget. Wilson was fired in August 2009. On August 18, 2009, Wilson walked into a Sacramento police station and informed California Highway Patrol Officer Joseph Pickar there was an arrest warrant for him in Iowa and indicated he was tired of running. Officer Pickar soon discovered the warrant was for murder.

On September 3, 2009, the State charged Wilson with murder in the first degree (Count I), theft in the first degree (Count II), and forgery (Count III). On September 15, 2009, Wilson filed a written arraignment and plea of not guilty. The State's amended trial information just identified Counts I and II as the district court granted Wilson's motion to sever the forgery charge.[1]

Trial commenced on March 23, 2010. On March 30, the jury returned its verdict, finding Wilson guilty of murder in the first degree and theft in the second degree. Wilson filed a motion for new trial on April 22, 2010. On April 30, the court overruled the motion and proceeded to sentencing. Wilson was sentenced to serve life in prison on the murder charge and five years in prison on the theft charge, to run consecutively. Wilson now appeals.

[1] Wilson's charge for forgery is not at issue on appeal.

II. Evidentiary Rulings.

We review Wilson's hearsay claims for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). "Hearsay must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision." *Id*.; *see also* Iowa R. Evid. 5.802. The district court has no discretion to admit hearsay in the absence of a provision providing for admission. *Newell,* 710 N.W.2d at 18. "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." *Id.* We give deference to the court's factual findings with respect to application of the hearsay rule and will uphold these findings of fact if supported by substantial evidence. *State v. Cagley,* 638 N.W.2d 678, 681 (Iowa 2001); *State v. Long,* 628 N.W.2d 440, 447 (Iowa 2001).

Wilson contends the district court erred in admitting testimony of Manning's statements made in the days preceding her death to her friends, Sandra Darling and Joan Smith. This testimony included statements by Darling and Smith that Manning told them she was having problems in her relationship with Wilson and that she was planning to break up with him. Wilson argues the testimony is inadmissible hearsay and irrelevant and prejudicial evidence. The State argues the district court did not err in overruling Wilson's objections to hearsay testimony by finding Manning's statements to friends were admissible pursuant to Iowa Rules of Evidence 5.803(3) and 5.403.

A. Inadmissible Hearsay. There is no dispute the statements are hearsay. Iowa R. Evid. 5.801(*c*). "The State, as proponent of the hearsay evidence, has the burden of proving it falls within an exception to the hearsay

rule." *Cagley*, 638 N.W.2d at 681. The district court determined the testimony was admissible under an exception to the hearsay rule for "then existing state of mind." Iowa R. Evid. 5.803(3). Rule 5.803(3) provides that exception to the hearsay rule for

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

The justification for allowing hearsay statements of a declarant's then existing state of mind is that these "statements are deemed reliable because of the contemporaneousness of the statement and the physical or mental condition described," and further, because "the statements do not depend at trial upon the memory of declarant when external influences may have been brought to bear." 7 James A. Adams & Joseph P. Weeg, *Iowa Practice Series Evidence*, § 5.803:3 (2010).

At trial, Sandra Darling testified she was Manning's close friend. On July 1, 2001, Manning and her three youngest children visited Darling at her home on their way home from fishing. Darling testified they were there for "probably less than an hour." She stated Manning's behavior was "different than normal," and that her demeanor was "concerned" and "upset." Darling testified that Manning indicated the reason for the difference in her demeanor was because "she was planning on breaking up with Mark."

As Wilson now acknowledges, "[t]he Darling testimony was limited only to Manning's state of mind and her intent to break off the relationship with the defendant." Wilson further concedes, "the harm to defendant from the admission

of this evidence was minimal." We agree with the district court that this evidence is not inadmissible hearsay as it related solely to Manning's state of mind and emotion and was not more prejudicial than probative. We therefore focus our review on the testimony of Joan Smith.

Later at trial, Joan Smith testified about statements Manning had made to her as follows:

> Q [STATE]. Did she indicate to you that the relationship began to have problems? A [JOAN SMITH]. Yes.
>
> Q. And did you know that from her demeanor when she was in the store that day? A. Yes, on that day, yes, we spoke about it.
>
> Q. Okay. What—Did she tell you what was going on with the relationship?
>
> DEFENSE COUNSEL: Objection, hearsay, irrelevant, prejudicial.
>
> COURT: The objection is overruled; and I cite Iowa Rule of Evidence 5.803 subparen 3 as well as the case of *State v. Newell*, which we have addressed earlier. That relates to the hearsay objection. The relevancy and the prejudicial objection is likewise overruled. You can proceed.
>
> Q. Go ahead. A. On that day she was talking to me about Mark writing checks off her checking account and buying drugs and he was getting more aggressive with her.

At that point, the defense interposed another objection and moved for a mistrial. The court sustained the objection and further instructed the jury to ignore the last question and answer presented into the record. However, the court denied the motion for mistrial.[2] Smith's testimony continued:

> Q. Miss Smith, when you spoke to Joni Manning at your place of employment on July 5th of 2001, did you two talk about the relationship between her and Mark Wilson? A. Yes.
>
> Q. Did she tell you that—that they were having issues in their relationship? A. Yes.
>
> Q. Did she tell you that she planned on breaking up with Mark Wilson on that Thursday, July 5th? A. Yes.

[2] Wilson also alleges the court erred in denying his motion for mistrial. We will address this argument below.

Wilson contends the State's "clear intent" in calling Joan Smith as a witness was to seek "factual allegations against the defendant to support or justify Manning's intent to break off her relationship." In this appeal, Wilson focuses on the following testimony by Smith: "On that day she was talking to me about Mark writing checks off her checking account and buying drugs and he was getting more aggressive with her." Wilson alleges "the district court, before overruling defendant's hearsay objection, should have taken steps to determine that the answer would have, indeed, fit the supposed applicable exception," and that the court "permitted the witness to introduce evidence of Manning's accusations against the defendant of prior bad acts." But we note that defense counsel did not request a record outside the presence of the jury to alert the district court of any such concerns, and we do not expect the district court to be clairvoyant. The question asked about the relationship between Manning and Wilson, not Wilson's other activities.

Immediately following Smith's answer, the defense interposed an objection and asked that the objection precede the answer. After arguments outside the presence of the jury, the court sustained the objection and instructed the jury to disregard the question and answer.[3] Jurors are presumed to have followed the court's instructions absent evidence to the contrary. *See State v. McMullin*, 421 N.W.2d 517, 520 (Iowa 1988). Wilson has presented no evidence to the contrary, and accordingly, we find no error.

[3] We further address Smith's stricken statement below, as it pertains to Wilson's contention that the district court abused its discretion in failing to grant his motion for mistrial.

In regard to Smith's other statements that Manning was having issues with Wilson and was planning to end their relationship, we find them to be in a similar vein as Sandra Darling's (conveying Manning's then existing mental, emotional condition as to her relationship with Wilson). Smith's testimony was limited to Manning's state of mind, her demeanor, and her intent to end her relationship with Wilson. We find the statements were admissible under the exception to the hearsay rule pursuant to rule 5.803(3). *See Newell*, 710 N.W.2d at 18-19 (concluding similar statements made by the victim to friends that "she was scared of Newell, that she feared for her safety, that she planned to leave Newell, and that she was afraid if she left Newell, he would keep the baby" were admissible under rule 5.803(3)); *see also People v. Fisher*, 537 N.W.2d 577, 581 (Mich. 1995) (allowing hearsay statements made by the victim about "her plans to divorce the defendant" and noting that "statements by murder victims regarding their plans and feelings, have been admitted as hearsay exceptions in a number of jurisdictions").

B. Irrelevant and Prejudicial Evidence. Wilson further argues that even if the testimony was admissible pursuant to rule 5.803(3), the district court erred in admitting it because it was irrelevant, and its probative value was outweighed by the prejudicial effect it would have upon the jury. Indeed, the admission of evidence under the rule 5.803(3) exception is dependent upon the relevancy of the declarant's then existing state of mind, emotion, sensation, or physical condition. *See State v. Buenaventura*, 660 N.W.2d 38, 51 (Iowa 2003). Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence." Iowa R. Evid. 5.401; *State v. Reynolds*, 765 N.W.2d 283, 290 (Iowa 2009).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues . . . ." Iowa R. Evid. 5.403. In determining whether evidence should be excluded from under rule 5.403, we first consider the probative value of the evidence. Then, if it is determined the evidence has some probative force, we balance the value of that evidence against the danger of its prejudicial impact. *State v. Cromer*, 765 N.W.2d 1, 8 (Iowa 2009).

Here, Manning's emotional state was relevant and probative to Wilson's malice aforethought and motive to beat and kill Manning. Malice aforethought is an essential element of murder in the first degree. *See* Iowa Code § 707.2; *Newell*, 710 N.W.2d at 21. Malice requires only such deliberation that would make a person appreciate and understand the nature of the act and its consequences, as distinguished from an act done in the heat of passion. *Newell*, 710 N.W.2d at 21; *Buenaventura*, 660 N.W.2d at 49. "Because this element is a state of mind, circumstantial evidence is generally used to prove malice." *Buenaventura*, 660 N.W.2d at 49. Evidence of "bad feelings or quarrels," and "a disharmonious relationship" between the defendant and victim "are circumstances that may be used to support a finding of malice aforethought." *Id*.; *see also State v. Kellogg*, 263 N.W.2d 239, 542 (Iowa 1978).

Although motive is not an element the State is required to prove, it is relevant and "of great probative force" to the determination of the defendant's guilt. *State v. Knox*, 236 Iowa 499, 517, 18 N.W.2d 716, 723 (1945). "[T]he prior

relationship between the defendant and the victim, including bad feelings, quarrels, and physical acts, is a circumstance that may be shown to prove the defendant's state of mind and motivation at the time of the crime." *Newell*, 710 N.W.2d at 21; *see also Fisher*, 537 N.W.2d at 583 ("Evidence of marital discord is relevant to motive just as evidence of marital harmony would be relevant to show lack of motive.").

Here, evidence of bad feelings, disharmony, or a poor relationship between Manning and Wilson was highly relevant and probative to show circumstances that may be used to support a finding of malice aforethought. *See, e.g.*, *Newell*, 710 N.W.2d at 21. The district court observed our supreme court's decision in *Newell*, 710 N.W.2d at 21, in determining the challenged statements were more probative than prejudicial pursuant to Iowa Rule of Evidence 5.403.

"Evidence is unfairly prejudicial if it may cause a jury to base its decision on something other than the established propositions in the case." *State v. Knox*, 536 N.W.2d 735, 739 (Iowa 1995). Here, the evidence was confined to several statements by two witnesses that were friends of Manning, in regard to Manning's relationship problems with Wilson and their impending break-up. The matter of the testimony was hardly a subject that could be considered shocking or inflammatory to the jury, or harassing or humiliating to Wilson. *But see State v. Mitchell*, 568 N.W.2d 493, 499 (Iowa 1997) (excluding evidence of defendant's three sexually transmitted diseases where such evidence would be "unfairly prejudicial" and "potentially result in harassing, annoying, and humiliating" the defendant); *Knox*, 536 N.W.2d at 739 (excluding evidence of a venereal disease,

where such evidence is considered "highly inflammatory"). We therefore agree the danger of unfair prejudice to Wilson is substantially outweighed by the relevancy and probative force of the evidence. *See Cromer*, 765 N.W.2d at 8.

C. Harmless Error. Even assuming, *arguendo*, the district court erred in admitting the evidence, reversal is not warranted because we find no prejudicial error. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Iowa R. Evid. 5.103(*a*). The rule "requires a harmless error analysis where a nonconstitutional error is claimed." *Newell*, 710 N.W.2d at 19. "Under this analysis we ask: Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?" *Id.* (citation omitted). We presume prejudice unless the record affirmatively establishes otherwise. *Id.*; *State v. Rodriquez*, 636 N.W.2d 234, 244 (Iowa 2001) ("In determining the prejudicial effect of evidence, the court reviews the other evidence presented and weighs it against any prejudicial effect.").

To establish prejudice, the defendant must show a reasonable probability that but for the error the outcome of the trial would have been different. *Rodriquez*, 636 N.W.2d at 244. Notwithstanding the presumption of prejudice, no prejudice will be found where the evidence in support of the defendant's guilt is overwhelming. *Id*.; *see also Newell*, 710 N.W.2d at 19-20.

Here, the evidence properly admitted reflects that Wilson and Manning had an ongoing relationship prior to her murder. Wilson was seen with Manning near the approximate time of her death. He was later observed driving her Mustang, and cashed a check on Manning's bank account that was signed by

someone other than Manning. After Wilson's flight, and disappearance for eight years, he telephoned the Webster County Sheriff's office to turn himself in apparently expecting a warrant for an assault charge. During the phone conversation, Wilson was informed there was a murder warrant issued for his arrest. Wilson responded, "Murder? . . . Murder? . . . Is Joni dead?" Wilson's telephone call and comments clearly incriminate him and link him to Manning's murder. Further, at the scene of the crime, Wilson's DNA was found in blood on many objects and his fingerprints were found in a substance believed to be blood. Considering the overwhelming evidence of Wilson's guilt, we think the record affirmatively establishes no prejudicial error in the admission of Manning's statements to Darling and Smith.

III. Motion for Mistrial.

The district court has broad discretion in ruling on a motion for mistrial. *State v. Bishop*, 387 N.W.2d 554, 564 (Iowa 1986). A mistrial is appropriate when an impartial verdict cannot be reached, or when the verdict would have to be reversed on appeal due to an obvious procedural error in the trial. *Newell*, 710 N.W.2d at 32. We review the court's denial of a motion for mistrial for an abuse of discretion. *Id*.

Wilson argues the court abused its discretion in denying his motion for a mistrial following Joan Smith's testimony about his drug use, possible theft, and aggressive behavior toward Manning. Wilson asserts this evidence was so prejudicial that, despite curative instructions, the jury could not ignore it. He contends the "court could not assure that the jury complied with the order to disregard and ignore that information or that defendant's trial was fair."

Although the State agreed the testimony should be stricken, the State maintains "the evidence was not overly prejudicial" and "it was not unreasonable for the district court to conclude that the jury could reach an impartial verdict despite its admission." The State notes that "drug and theft evidence had been admitted without objection elsewhere in the record," and the record was replete with "convincing evidence of Wilson's guilt."

The pertinent question here is whether the district court was clearly unreasonable in concluding an impartial verdict could be reached notwithstanding Smith's testimony about Wilson's drug use, theft, or aggressive behavior. *See id*. We first note the court immediately admonished the jury that the evidence should not be considered when the jury returned to the courtroom after the admission of the evidence. The court later reminded the jury not to consider this evidence in the jury instructions. Generally, the prompt action of the court in striking the offending evidence from the record and instructing the jury to disregard will prevent prejudice. *State v. Keys*, 535 N.W.2d 783, 785 (Iowa Ct. App. 1995); *see also McMullin*, 421 N.W.2d at 520 (acknowledging the presumption that jurors have followed the court's instructions absent evidence to the contrary).

We further observe there was only a solitary reference to Wilson's "aggressive" behavior toward Manning, and the State did not ask further questions to elaborate on the information. *See State v. Anderson*, 448 N.W.2d 32, 34 (Iowa 1989) (stating prejudice results from "persistent efforts to inject prejudicial matter" before the jury); *see also Newell*, 710 N.W.2d at 33. Evidence of Wilson "writing checks off [Manning's] account" and "buying drugs" was

present elsewhere in the record and was admitted without objection, including: the testimony of Citizens Community Credit Union teller Kara Breitbach; the stipulation of the parties that the signature was not Manning's; and the testimony of Kansas City Police Officer Brian Brewer. *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982) (noting the presumption of prejudice may be overcome "by showing the same evidence came into the record at another time").

Finally, as set forth above, there was convincing evidence of Wilson's guilt. *See, e.g.*, *Newell*, 710 N.W.2d at 33 (determining trial court did not abuse discretion in overruling motion for mistrial where "the evidence against the defendant was strong"); *State v. Greene,* 592 N.W.2d 24, 32 (Iowa 1999) (considering strength of evidence in concluding no prejudice warranting a mistrial). The disputed evidence did not have a significant impact "in the context of the entire trial." *Newell*, 710 N.W.2d at 33.

"It is axiomatic that a trial court is better equipped than appellate courts can be to determine whether prejudice occurs." *Anderson,* 448 N.W.2d at 34. This is because the trial court has the opportunity to observe firsthand both the alleged misconduct and any jury reaction to it. *Id.* We conclude the court did not abuse its discretion in finding the stricken statement of Joan Smith did not support a mistrial.

IV. Ineffective Assistance of Counsel.

Wilson's final argument is that he received ineffective assistance of counsel by counsel's "repeated failure to object to evidence of [his] acquisition of cocaine." In order to prevail on his claim of ineffective assistance of counsel, Wilson must show (1) counsel failed to perform an essential duty and

(2) prejudice resulted. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). We conduct a de novo review of ineffective assistance of counsel claims. *Maxwell*, 743 N.W.2d at 195.

We conclude the record is adequate to address Wilson's claim. *But see State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) (noting that ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow the facts to be developed and give the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions).

Wilson alleges improper evidence of a "drug transaction" and his "acquisition of cocaine" were introduced at trial through the testimony of Larry Ridgell and Melvin Griffin (Kansas City drug dealers who rented the Mustang from Wilson in exchange for fifty dollars of crack cocaine), Kansas City Police Detective Kerry Baker (officer who interviewed Griffin about the Mustang following the recovery of the vehicle in Kansas City), and Joan Smith. Wilson contends his "possession and use of drugs should never have been brought up in his trial," and his counsel was ineffective in failing to object to the witnesses' testimony.[4]

[4] We note Wilson does not argue his counsel should have objected to the testimony of Kansas City Police Officer Brian Brewer, who testified about his stop of the Mustang in downtown Kansas City, in an area called Jurassic Park that was known for a high level of drug activity. Officer Brewer testified he recognized the passenger in the vehicle, Melvin Griffin, as an experienced drug dealer in the area. He further testified that Griffin and Larry Ridgell informed him they received the Mustang from "Mark."

In regard to Detective Baker's testimony, we note that defense counsel *did* object to his reading of the report made after interviewing Griffin, and in which the only references to drugs were made. Similarly, as discussed above, counsel objected to Joan Smith's testimony. We therefore find counsel's performance was not incompetent as to those witnesses.

In regard to Ridgell and Griffin, Wilson contends the reason they had possession of the Mustang in downtown Kansas City could have been adequately explained by concise testimony describing their rental/purchase of the Mustang from Wilson for twenty dollars or fifty dollars, rather than going into the details in regard to the rental of the vehicle in exchange for twenty dollars or fifty dollars of *crack cocaine*. And generally, Wilson objects to the several "pages" of testimony by Ridgell and Griffin about their drug dealing practices in July 2001, and the fact they "sometimes" rented vehicles in exchange for drugs. Wilson states his possession of crack cocaine "was a periphery issue which was inherently and substantially prejudicial" to his case.

We acknowledge defense counsel did not object to drug references in Ridgell and Griffin's testimonies on direct examination. However, the record reveals defense counsel later attempted to use the drug testimony to Wilson's advantage as an obvious trial strategy to support the inference that Ridgell and Griffin were using drugs "on a regular basis," and that the drugs "affect[ed]" their memory. Counsel further pointed out that Ridgell and Griffin "lied" to police and during depositions about giving Wilson money in exchange for the car, to support the inference that their testimony could not be trusted. On cross-examination of Ridgell, the following exchange took place:

> Q. [DEFENSE COUNSEL]: You told the police that you gave this man $50 for the car, isn't that correct? A. [RIDGELL]: Yes, ma'am. Q. That was a lie? A. Yes, ma'am.
>
> Q. You also told police you and Melvin took him to the Admiral Hotel; is that correct? A. I don't—I don't think we did 'cause I don't even remember taking him anywhere. I think we just drove off in the car because the Admiral was in walking distance. So I don't recall saying that.
>
> . . . .
>
> Q. And you used that car to sell crack cocaine out of? A. Yes, ma'am.
>
> Q. And you were using crack cocaine on a regular basis? A. No. I've never used crack.
>
> Q. You were using marijuana on a daily basis? A. Yes, ma'am.
>
> Q. Very regularly during the day? A. Yes, ma'am.
>
> Q. Three or four bongs a day at least? A. Yes, ma'am.
>
> Q. Marijuana affects your memory; is that correct? A. Yes.
>
> . . . .
>
> Q. And how much—Did you give this person any other crack cocaine after the first time? A. No. We—Like initially we did—we did tell the police that we got $50, but it was actually a $50 piece of crack cocaine, and we agreed to meet each other later on in the day, but we never saw him.

Melvin Griffin testified later. During cross-examination, defense counsel asked similar questions:

> Q. [DEFENSE COUNSEL] In July of 2001, you were using drugs on a regular basis, correct? A. [GRIFFIN] As far as marijuana, yes.
>
> Q. You were using marijuana daily? A. Yes, ma'am. . . .
>
> Q. And you admit that you were smoking weed and everything so heavy in July of 2001. . . . A. I was smoking weed, yes, ma'am, back then. . . .
>
> Q. You also told me under oath you gave him some cash for the car, isn't that accurate? A. Yes, ma'am.
>
> Q. And now you're telling us that's not true? . . . A. Yes, ma'am.
>
> Q. So you lied under oath in the deposition? . . . A. Yes, I guess so.
>
> Q. Just like you lied to the police during parts of your interview in July of 2001, correct? . . . And you agreed to give Mark or—or this person a ride to the Admiral Hotel located at Admiral and Paseo. A. I don't remember that.

> Q. And you thought he rented room 205 at the Admiral Hotel? A. I don't remember that. . . .
> Q. Do you recall seeing this person later in the evening and ask you to keep the car for the rest of the night and offering him additional money? A. No, ma'am.
> Q. You don't recall telling the police that? A. No, ma'am.
> Q. You don't recall this person agreeing to let you keep the car for an additional twenty hours—$20. A. No, ma'am.

The first question is whether counsel performed competently in failing to object to the testimony of these witnesses. The record establishes that counsel reasonably believed it would benefit Wilson to cross-examine the witnesses in regard to the drugs in order to show Ridgell and Griffin, at the time they alleged to have rented the car from Wilson in July 2001, had regularly used drugs that affected their memory, and further, to show they had lied and changed their story. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (noting "strategic decisions made after 'thorough investigation of law and facts relevant to plausible options are virtually unchallengeable'"). "Because this determination of counsel is supportable as a trial strategy, it affords [Wilson] no basis for relief." *Schrier v. State*, 347 N.W.2d 657, 664 (Iowa 1984). We conclude counsel's performance was not incompetent.

Further, we agree with the State's contention that the drug evidence was "inseparably intertwined" with the evidence showing Wilson was in possession of the Mustang immediately after Manning's murder, and the circumstances around the stop of the vehicle in Kansas City. *State v. Nelson*, 791 N.W.2d 414, 423 (Iowa 2010).

Our supreme court has determined that "intrinsic evidence completing the story of the charged crime" may be shown even when it constitutes "evidence of

other crimes, wrongs, or acts." *Id*. at 424. However, this "inextricably intertwined doctrine" is to be used "infrequently" and as a "narrow exception." *Id*. at 423. As the court has instructed:

> To ensure a court does not admit unnecessary and prejudicial evidence of other crimes, wrongs, or acts, we reaffirm the language from one of our earlier cases and hold we will only allow such evidence to complete the story of what happened when the other crimes, wrongs, or acts evidence is so closely related in time and place and so intimately connected to the crime charged that it forms a continuous transaction. Thus, the charged and uncharged crimes, wrongs, or acts must form a continuous transaction. Moreover, we will only allow the admission of other crimes, wrongs, or acts evidence to complete the story of the charged crime when a court cannot sever this evidence from the narrative of the charged crime without leaving the narrative unintelligible, incomprehensible, confusing, or misleading.

Id. at 423-24.

Here, Manning's prized gold Mustang was discovered in downtown Kansas City within days following her murder. Local drug dealers Larry Ridgell and Melvin Griffin were in the vehicle when it was stopped by Officer Brewer. The vehicle also contained a Fort Dodge newspaper, dated July 7, 2001. The testimony of Ridgell, Griffin, and Detective Baker to explain the passengers and contents of the Mustang at the time it was stopped was evidence that filled in what would have otherwise been "gaping holes in the narrative of the story of the crime." *Id.* at 424. Wilson's possession of the Mustang, his hurry to dispose of it, and the fact that he was willing to rent it indefinitely to Ridgell and Griffin for merely fifty dollars in drugs are incriminating facts because they support a finding Wilson took the Mustang unlawfully and disposed of it quickly because he realized the police would be looking for it.

Because the vehicle and drug transaction occurred just two or three days after Manning's murder, and that but for her murder and the misappropriation of the vehicle, the vehicle would have been in Manning's possession, the evidence was "so closely related in time and place and so intimately connected to the charged crime that they formed a continuous transaction." *Id*.; *State v. Walters*, 426 N.W.2d 136, 140-41 (Iowa 1988) ("Such evidence is admissible when it is an inseparable part of the whole deed."). Consideration must also be given to the fact that Wilson was being tried on two counts, murder and theft of Manning's motor vehicle. The jury was instructed that the State had to prove that Wilson "intentionally misappropriated the property by using and disposing of it in a manner which was inconsistent with the owner's rights."

Under the facts in this case, we cannot find that prejudice resulted from counsel's failure to object to the drug transaction evidence where it was admissible to show the complete story of the crime. *Nelson*, 791 N.W.2d at 423-24. Because Wilson has failed to prove that prejudice resulted from counsel's alleged breach, his claim for ineffective assistance of counsel must fail. *See Polly*, 657 N.W.2d at 465.

Even assuming, *arguendo*, counsel failed to perform an essential duty, Wilson was not prejudiced by counsel's breach. As we have stated above, the evidence against Wilson was strong. *State v. Belken*, 633 N.W.2d 786, 802 (Iowa 2001); *Anderson*, 448 N.W.2d at 33. The alleged misconduct of counsel was not related to a critical issue in the case and was not the centerpiece of the State's evidence against Wilson. Accordingly, our confidence is not undermined

that the outcome of Wilson's trial would be the same in the absence of counsel's alleged breach of duty. We affirm Wilson's convictions and sentence.

AFFIRMED.