**IN THE COURT OF APPEALS OF IOWA**

No. 1-489 / 10-1161
Filed October 5, 2011

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

**vs.**

**JESSICA ANNE DAYTON,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Iowa County, Denver D. Dillard, Judge.

The defendant appeals her judgment and sentence for first-degree murder. **AFFIRMED.**

Matthew M. Boles of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins and Douglas D. Hammerand, Assistant Attorneys General, and Tim D. McMeen, County Attorney, for appellee.

Heard by Eisenhauer, P.J., and Doyle and Tabor, JJ.

**DOYLE, J.**

Jessica Dayton appeals her judgment and sentence for first-degree murder. She claims the district court erred in (1) admitting hearsay statements under Iowa Rule of Evidence 5.801(*d*)(2)(E) and in violation of her state and federal rights to confront the witnesses against her, (2) finding sufficient evidence supported the jury's finding of guilt, and (3) failing to grant a new trial based on the lack of credibility of several witnesses. She additionally claims her trial counsel was ineffective in several respects. We affirm.

***I. Background Facts and Proceedings.***

On July 6, 2009, Jessica Dayton told her best friend, Alexandria Musel, "I'm going to have to help Dee kill Curt." "Curt" was Curtis Bailey, the live-in boyfriend of Denise "Dee" Frei. Dayton worked with Frei at a café and dated Frei's son, Jacob Hilgendorf. When Musel asked why, Dayton said Bailey was a mean, horrible person who had tried to rape her. She told Musel the perfect crime would be to overdose someone with cold medicine and then push that person down the stairs. Less than two weeks later, Bailey was found dead in the home he shared with Frei.

Police were dispatched to Frei and Bailey's house around 1:50 a.m. on Sunday, July 19. Frei was sitting on the front porch, covered in blood. Bailey's body was in the living room. He had been bludgeoned to death.

In the days before Bailey's death, Frei told a close friend, Elisha Runyan, of her plans to kill Bailey. Runyan stated that on July 14, Frei said "that her and Jess were going to try again on Saturday" to kill Bailey. Frei stated she planned to start drinking at work that day "so then she had a reliable reason for Jess to

drive her home." She told Runyan that she was going to give Hilgendorf and Dayton $5000 each if they helped her kill Bailey.

Dayton and Frei worked together at the café on Saturday, July 18. Bailey told two of his coworkers he was going to have a "three-way" with Frei and Dayton that night and for every sexual act they did, he was going to have to take a shot of alcohol. Bailey's coworkers laughed and said, "You'll never be able to stay awake," because Bailey was not known for drinking hard liquor.

Frei called Runyan from the café on the 18th and asked her to "come down because she wanted to tell me what they had all planned." Runyan refused. Frei then told Runyan "they were going to try to overdose" Bailey, and "everything was going to go well."

Dayton worked with Frei until about 2:00 p.m. She went back to the café when it closed at 6:00 p.m. and drove Frei home. She told police officers she spent the evening drinking, smoking marijuana, and watching movies with Frei and Bailey.

Meanwhile, Hilgendorf was at the home of Denise Templeton, where he was temporarily living. Runyan was there as well. They grilled out over a fire pit, drank, and smoked marijuana. Templeton thought Runyan left for home around 11:00 p.m. Hilgendorf left about a half-hour later to pick Dayton up from his mother's house. Templeton took a sleeping pill and went to bed. She was awakened around 2:00 a.m. by her dog barking.

Templeton went downstairs and saw Hilgendorf and Dayton standing by the sliding glass door in the den. Templeton noticed the fire pit had been rekindled, and Dayton was wearing some of Templeton's clothes. Hilgendorf and

Dayton took a shower and went into Templeton's bedroom. Dayton told Templeton "things didn't go according to plan," but it was "going to be okay." Hilgendorf then told Templeton "we, or they had cut some things up and burned them in the pit." The three smoked more marijuana and went to bed around 3:00 or 3:30 a.m.

Early the next morning, Dayton asked Templeton if she could borrow her car because Hilgendorf's truck did not have any gas. Templeton agreed. Dayton and Hilgendorf drove to the sheriff's office where they had been summoned for an interview with the police.

Dayton told the detectives questioning her that she texted Hilgendorf around midnight, asking him to come get her. She said she wanted to leave because Bailey started talking about having some friends come over who she did not like. Dayton thought Hilgendorf arrived around 1:00 a.m. She stated they drove back to Templeton's house where they spent the night.

At several points during the interview, the detectives asked Dayton if she had her cell phone with her. Dayton said she did not. However, both Runyan and Templeton received calls from Dayton while she was at the sheriff's office.

Runyan said Dayton called her around 10:00 a.m. from the restroom of the station and said, "We did it" but "everything went wrong." Dayton then asked Runyan to go to Templeton's house and take everything out of Hilgendorf's truck. Runyan refused. Dayton sent Templeton a text message with a similar request at 10:34 a.m., stating: "I need you to do me a big favor! Go to Jacob's car and clean it out. It's important." Law enforcement officials were already at Templeton's home. They overheard a later phone call from Dayton during which

she told Templeton not to let police look in Hilgendorf's truck. Templeton replied that she had already given them permission. Dayton responded, "That was dumb." She then said either "we or they were gonna go away for a long time."

Dayton was arrested, as were Frei and Hilgendorf. They were charged by joint trial information with first-degree murder. Their trials were severed, with Dayton's occurring first. The jury returned a guilty verdict, and Dayton was sentenced to life in prison without parole. She appeals.

***II. Analysis.***

***A. Coconspirator Statements.***

Dayton's primary claims on appeal concern the admission of statements from her alleged coconspirators, Frei and Hilgendorf, through the testimony of Runyan and Templeton. She objects to Runyan's testimony regarding conversations with Frei on July 14 and 18, the gist of which concerned details about the plan to kill Bailey. She also objects to Templeton's testimony about Hilgendorf's statement in the early morning hours of July 19 that "we, or they had cut some things up and burned them in the pit." Dayton asserts these statements were hearsay, the admission of which violated her federal and state constitutional rights to confront the witnesses against her.[1]

We begin with the Confrontation Clause issue. The constraints of the Confrontation Clause apply only to "testimonial statements." *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, 237

[1] Because Dayton does not contend the Iowa Constitution should be interpreted differently than the Confrontation Clause in the Sixth Amendment to the United States Constitution, we construe the provisions identically. *See State v. Shipley*, 757 N.W.2d 228, 234 (Iowa 2008).

(2006); *State v. Shipley*, 757 N.W.2d 228, 236 (Iowa 2008). Coconspirator statements are "by their nature . . . not testimonial." *See Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 1367, 158 L. Ed. 2d 177, 195-96 (2004). Therefore, the admission of nontestimonial, coconspirator statements does not offend the Confrontation Clause. Regardless of whether the statements satisfy the coconspirator exception to the hearsay rule or not, they are clearly nontestimonial. They were not made to a grand jury, or during a preliminary hearing, or at a prior trial, or during a police interrogation. *Id*. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203. Nor were the statements made under circumstances that would lead the declarants to believe the statements would be used at trial. *Id*. at 51-52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193. The Confrontation Clause having no application here, we turn next to Iowa Rule of Evidence 5.801(*d*)(2)(E).

That rule of evidence provides a statement is not hearsay if it "is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Iowa R. Evid. 5.801(*d)*(2)(E). Before a statement is admissible under this rule, the trial court must find by a preponderance of the evidence that (1) a conspiracy existed; (2) the defendant and declarant were part of the conspiracy; and (3) the declaration was made during the course and in furtherance of the conspiracy.[2] *State v. Tangie*, 616

[2] We reject Dayton's related claim that her trial counsel was ineffective for failing to request the following jury instruction used in conspiracy prosecutions:

> Whether a person is a conspirator depends upon [his] [her] own conduct or statements. If, however, you find the defendant agreed the (offense) would be committed, then the conduct or statements of the others who agreed to commit (offense) may be considered as evidence against [him] [her], providing the conduct or those statements promoted or facilitated the purposes of the conspiracy and occurred before the conspiracy

N.W.2d 564, 569 (Iowa 2000). Such findings are implicit when the district court admits the statement into evidence.[3] *Id.* The court's determination regarding the admissibility of evidence under rule 5.801(*d*)(2)(E) is reviewed for substantial evidence. *Id.*

***1. Evidence of a conspiracy.*** Before examining the specific statements challenged by Dayton, we must first determine whether a conspiracy existed. "A conspiracy is a combination or agreement between two or more persons to do or accomplish a criminal or unlawful act, or to do a lawful act in an unlawful manner." *State v. Ross*, 573 N.W.2d 906, 914 (Iowa 1998). The agreement may be established through either direct or circumstantial evidence. *Id.* Evidence of a conspiracy can be gleaned from the statement itself, as well as "'the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the content of the statement.'" *State v. Dullard*, 668 N.W.2d 585, 596 (Iowa 2003) (citation omitted); *see also State v. Florie*, 411 N.W.2d 689, 696 (Iowa 1987) (stating

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> ended. It is not necessary the conduct or statement of the others occurred in the defendant's presence.

*See* Iowa Crim. Jury Instr. 600.6. Dayton argues that by failing to give this instruction, "the court stripped the jury of its opportunity to determine whether the statements made by Fr[e]i and Hilgendorf should have been considered against Dayton." This is clearly a preliminary question of admissibility that must be decided by the trial court, not the jury. *See State v. Florie*, 411 N.W.2d 689, 695 (Iowa 1987) (stating it is "ultimately the responsibility of the trial judge . . . to find the facts necessary for the admissibility of the evidence" under the coconspirator rule); *see also United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1198 (2d Cir. 1989) ("Whether a proffered statement is made 'in furtherance' of a conspiracy is a preliminary question of fact to be determined by the trial court by a preponderance of the evidence."). We accordingly find Dayton's counsel did not breach a duty in failing to request such an instruction. *See State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) ("[C]ounsel has no duty to raise an issue that has no merit.").

[3] Dayton's request that we issue a "limited remand, ordering the district court to expressly state which witness' testimony it found showed the existence of a conspiracy" is accordingly denied.

evidence relied on to establish a conspiracy must include some proof independent of the coconspirator's statement, though the statement itself may also be considered).

As related in the background facts, Dayton told Alexandria Musel weeks before the murder that she was "going to have to help Dee kill Curt." She informed Musel the perfect crime would be to overdose someone and push him down the stairs so the death would look like an accident. Frei made similar statements to Runyan, stating that she and Dayton were going to overdose Bailey on Saturday night and that she was going to pay Dayton and Hilgendorf $5000 to help her kill Bailey. Dayton, Hilgendorf, and Frei were all at Frei's house the night Bailey was murdered. After the crime, Dayton told Templeton "things didn't go according to plan," but it was "going to be okay." And she told Runyan, "We did it," although "everything went wrong." She asked both Templeton and Runyan for their help in ridding Hilgendorf's truck of evidence from the crime. *See Florie*, 411 N.W.2d at 696 (stating activities to conceal a crime can be used to show a conspiracy to commit the crime existed "because they reveal guilty knowledge of the accused").

Dayton argues this evidence was insufficient to establish a conspiracy existed because neither Musel nor Runyan testified "that Dayton actually agreed to the alleged conspiracy." Such explicit testimony is not necessary, though it existed here based on Dayton's statement to Musel that she was "going to have to help Dee kill Curt." *See State v. LaRue*, 478 N.W.2d 880, 882 (Iowa Ct. App. 1991) ("A mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates

agreement."). In light of the foregoing, we find substantial evidence supports the district court's determination that Dayton, Frei, and Hilgendorf conspired to murder Bailey. We turn next to the specific statements challenged by Dayton.

***2. Frei's statements to Runyan.*** Dayton challenges the following statements made by Frei to Runyan on July 14, 2009: (1) "her and Jess [Dayton] were going to try again on Saturday," (2) Frei "was going to start drinking so then she had a reliable reason for Jess to drive her home," (3) they were "going to overdose Curt," and (4) "Jacob [Hilgendorf] and Jess were going to get $5000 apiece if they helped . . . [k]ill Curt." She also challenges Runyan's testimony regarding a telephone conversation with Frei on July 18, during which Frei asked Runyan to come to the café "because she wanted to tell me what they all had planned and that . . . everything was going to go well," as well as Frei's statement that "they were going to try to overdose" Bailey.

These statements were clearly made during the course of the conspiracy. *See State v. Beckett*, 383 N.W.2d 66, 68 (Iowa Ct. App. 1985) (stating a conspiracy generally does not end until its central criminal purposes have been attained). The more difficult question is whether the statements were made in furtherance of the conspiracy. Dayton argues they were not. She characterizes the statements at issue as "idle chatter," which fall outside the coconspirator rule of evidence. We agree.

"The principal question in the 'in furtherance' issue is whether the statement promoted, or was intended to promote, the goals of the conspiracy." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir. 1989); *see also State v. Kidd*, 239 N.W.2d 860, 865 (Iowa 1976) (stating to be in

furtherance of a conspiracy, the acts or declarations of a coconspirator must, in some measure, "'aid or assist toward the consummation of the object of the conspiracy'" (citation omitted)). "Idle chatter" does not meet the test; nor does a "merely narrative" description by one coconspirator of the acts of another. *Beech-Nut Nutrition Corp.*, 871 F.2d at 1199; *see also Kidd*, 239 N.W.2d at 865 (noting a "'mere relation of something already done for the accomplishment'" of the object of the conspiracy "'is not competent evidence against others, but hearsay only'" (citation omitted)).

> When a declarant "seeks to induce the listener to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirators' common objective," the declaration may be admissible. Statements concerning activities of the conspiracy, including future plans, also may become admissible when made with such intent.

*United States v. Foster*, 711 F.2d 871, 880 (9th Cir. 1983) (internal citations omitted). Some examples of statements made in furtherance of a conspiracy

> include comments designed to assist in recruiting potential members, to inform other members about the progress of the conspiracy, to control damage to or detection of the conspiracy, to hide the criminal objectives of the conspiracy, or to instill confidence and prevent the desertion of other members.

*United States v. Johnson*, 200 F.3d 529, 533 (7th Cir. 2000).

"'The statement need not have been made exclusively, or even primarily, to further the conspiracy.'" *Id.* (citation omitted). Instead, the "record need only contain some reasonable basis for concluding that the statement in question furthered the conspiracy in some respect." *Id.*; *see also Kidd*, 239 N.W.2d at 865 ("The furtherance requirement is construed broadly. . . . A narrative declaration

is in furtherance of the conspiracy if it has some connection with what is being done in promotion of the common design." (internal citation omitted)).

The State argues the challenged statements were admissible because "Frei was trying to draw Runyan into the conspiracy." There is not much, if any evidence, to support this assertion. While it is true Frei told Runyan that "everything was going to go well" and that she was going to pay Dayton and Hilgendorf $5000 each for their assistance, there is no indication she made these statements in an attempt to elicit Runyan's cooperation or assistance. *Cf. United States v. Curry*, 187 F.3d 762, 766 (7th Cir. 1999) (finding coconspirator statements describing the planned robbery and relating he had easily committed robberies in the past were admissible "recruiting statements" rather than idle chatter where listeners later joined the conspiracy). Rather, she simply seemed to be relating the plan to a trusted friend, who played no role in the murder. *See United States v. Moore*, 522 F.2d 1068, 1077 (9th Cir. 1975) (finding statement of coconspirator "was, at best, nothing more than [a] casual admission of culpability to someone he had individually decided to trust"); *see also United States v. Warman*, 578 F.3d 320, 339 (6th Cir. 2009) (noting mere boasting or bragging is not made in furtherance of a conspiracy). Thus, the statements do not appear to have been made in furtherance of the conspiracy.

However, not all evidentiary errors require reversal. *See State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004); *see also* Iowa R. Evid. 5.103(*a*) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."). Where a nonconstitutional error is claimed, as here, 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?'" *Sullivan*, 679 N.W.2d at 29 (citation omitted); *see also Foster*, 711 F.2d at 880 (stating improper admission of statements under Federal Rule of Evidence 801(d)(2)(E) was not error of constitutional dimension). Prejudice is presumed unless the contrary is affirmatively established. *Sullivan*, 679 N.W.2d at 29.

A variety of circumstances may be considered in determining the existence of harmless error, including the existence of overwhelming evidence of guilt or where the same evidence is overwhelmingly clear in the record. *See State v. Parker*, 747 N.W.2d 196, 210 (Iowa 2008); *Sullivan*, 679 N.W.2d at 29. We believe both circumstances exist here.

It is a rare murder prosecution where the State is able to present evidence that the accused announces her intent to help with the killing in advance; admits to being with her accomplice and the victim at their home the night of the murder; leaves fingerprints on key items at the scene; changes into borrowed clothes and rekindles the fire pit at a friend's house immediately after the murder; and then tries to enlist others to destroy bloody evidence in the truck driven from the murder scene while she is at the police station being questioned the next morning. Add in Dayton's admission to a cellmate that she dropped a rock on the victim's head, which was testimony that the jury was at liberty to accept, *see State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993), and we do not see how the evidence of Dayton's guilt can be viewed as anything short of overwhelming.

As to substantially similar evidence in the record, Dayton told Musel she was going to help Frei kill Bailey by overdosing him and making his death look

like an accident. These statements were substantially similar to the statements Frei made to Runyan. And, in the early morning hours after Bailey's death, Dayton told Templeton "things didn't go according to plan," but it was "going to be okay." These statements again show Dayton's involvement in Bailey's murder, which was the gist of Frei's statements to Runyan. We also consider the testimony of Dayton's cellmate, Heather Szakacs, to whom Dayton confessed her involvement in the murder.

Szakacs testified that one day after Dayton met with her attorney and reviewed crime scene photographs, she returned to the cell area upset. Szakacs asked her what was wrong. Dayton did not respond at first, but later told Szakacs "there was a plan that was supposed to have taken place, but the actual particular night happened a day early, they had all been drinking." Dayton said Bailey "had passed out, and Jacob was to come pick [her] up from Denise's, and Jacob was not allowed to be there." Dayton told Szakacs that when Hilgendorf arrived, he went inside and "there was an altercation between" him and Bailey. Dayton said she "panicked . . . ran outside to get some fresh air, then she seen a rock, like a landscape rock . . . and she . . . dropped the rock onto the victim's head." Dayton stated Hilgendorf then used the rock to hit Bailey multiple times.

Although some of Templeton's and Szakacs's testimony was impeached by the defense, the jury "is free to believe or disbelieve any testimony as it chooses." *Id; but see State v. Williams*, 427 N.W.2d 469, 473 (Iowa 1988) (finding admission of challenged hearsay statements was "sufficiently prejudicial to require reversal of defendant's conviction" where witnesses offering other similar testimony were impeached). After a thorough review, we conclude no

prejudice resulted from the admission of Frei's statements, given the substantially similar testimony related above.

Furthermore, Frei's out-of-court statements are insubstantial when compared to proof properly in the record, including Dayton's own revelation to a friend that she had to help Frei kill Bailey; Dayton's admissions to police that she was with Frei and Bailey the night of the murder; her prints on a vodka bottle, an empty box of plastic wrap, and a bag wrapped around a BB rifle, all of which were found at the crime scene; her behavior at Templeton's house; and her efforts to keep police away from the incriminating evidence in Hilgendorf's truck. This other evidence against Dayton is sufficiently strong for us to conclude that the improper hearsay did not substantially influence the jury to convict.

***3. Hilgendorf's statement to Templeton.*** Templeton testified that on July 19, after she was awakened by Dayton and Hilgendorf around 2:00 a.m., Hilgendorf told her "we, or they had cut some things up and burned them in the pit." Dayton argues this statement was not made during the course of the conspiracy because Bailey was already dead by then.

Generally, a conspiracy terminates when its central criminal purposes have been attained which, in this case, was the murder of Bailey. *Beckett*, 383 N.W.2d at 68. A conspiracy can, however, continue into a concealment phase. *Id.*; *see also Kidd*, 239 N.W.2d at 864. Hilgendorf's statement was made during this phase, as he and Dayton were attempting to conceal evidence of the murder from the authorities. *See State v. Waterbury*, 307 N.W.2d 45, 50 (Iowa 1981) (finding coconspirator statements were admissible because they showed coconspirators agreed to commit murder and to take "steps to conceal the

conspiracy after its primary goal was achieved"). We accordingly find no error in the admission of this evidence.

In any case, we find admission of the statement was harmless error given substantially similar evidence showing Dayton's attempts at concealment. *See Parker*, 747 N.W.2d at 210. Templeton testified that when Dayton and Hilgendorf returned to her house, they were wearing her clothes. She also observed the fire pit had been rekindled. Detectives investigating the crime found clothing remnants in the fire pit. Dayton called Runyan and Templeton the next day, asking them to clean out Hilgendorf's truck before the police could search it. Several items likely used in the murder were found in the truck, including a large rock stained with Bailey's blood. Based on this evidence, we conclude Dayton was not prejudiced by the admission of Hilgendorf's statement that some items had been burned in the fire pit.

***B. Sufficiency of the Evidence.***

Dayton next claims the evidence was insufficient to support the jury's finding that she was guilty of first-degree murder.[4] We review this issue for the correction of errors at law. *See State v. Hearn*, 797 N.W.2d 577, 579 (Iowa 2011).

The jury was instructed the State would have to prove the following in order to find Dayton guilty of first-degree murder:

[4] The State argues Dayton did not preserve error on this issue because the elements she is challenging on appeal are different than those challenged by her motion for judgment of acquittal. *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) ("To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal."). We elect to bypass this error preservation concern and proceed to the merits. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

> 1. On or about the 19th day of July, 2009, the Defendant, or someone she aided and abetted, struck Curtis Bailey.
> 2. Curtis Bailey died as a result of being struck.
> 3. The Defendant, or someone she aided and abetted, acted with malice aforethought.
> 4. The Defendant, or someone she aided and abetted, acted willfully, deliberately, premeditatedly, and with a specific intent to kill Curtis Bailey.

Dayton challenges the first, third, and fourth elements, arguing the "State failed to establish beyond a reasonable doubt that [she] struck Bailey and did so with the requisite intent and malice aforethought." This argument overlooks the fact that the theory of aiding and abetting was submitted to the jury. Thus, the State did not have to prove Dayton herself struck Bailey "with the requisite intent and malice aforethought" so long as someone she was with did. *See* Iowa Code § 703.1 (2009) (providing that those who aid and abet in the commission of a public offense "shall be charged, tried and punished as principals").

> To sustain a conviction under a theory of aiding and abetting, "the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission."

*Hearn*, 797 N.W.2d at 580 (citation omitted). Though knowledge of the crime "'is essential . . . neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting.'" *Id.*

Dayton concedes she was present at Bailey's residence with Frei before Bailey was murdered. But she asserts there is insufficient evidence "to support the notion that [she] knew, with certainty, that the murder would occur prior to its commission and assented to its occurrence." We conclude otherwise.

Less than two weeks before the murder occurred, Dayton told her friend she was "going to have to help Dee kill Curt" because he was a mean, horrible person who had tried to rape her. *See State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006) (stating malice may be established "'by evidence of actual hatred, or by proof of a deliberate or fixed intent to do injury'" (citation omitted)). Frei's statements to Runyan in the days leading up to the murder further cemented Dayton's role in the plan to kill Bailey, as do Dayton's own statements and actions after the murder. *See State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) (stating evidence of a defendant's "'presence, companionship, and conduct before and after the offense is committed' may be enough from which to infer a defendant's participation in the crime" (citation omitted)).

Upon returning to Templeton's house after Bailey was killed, Dayton borrowed clothes from Templeton and told her "things didn't go according to plan," but it was "going to be okay." The following morning, Dayton phoned Runyan from the police station, stating, "We did it" but "everything went wrong." Dayton also told her cellmate about her involvement in the murder, admitting she dropped a rock on Bailey's head while he was fighting with Hilgendorf.

Dayton attacks the testimony of Runyan, Templeton, and Dayton's cellmate, Szakacs, as lacking in credibility. She points out that Runyan at first told police Dayton said, "They did it," rather than "[w]e did it." And Templeton was admittedly under the influence of alcohol, marijuana, and a sleeping pill the night of the murder. Furthermore, Dayton argues Szakacs's criminal history, which includes convictions for forgery, reflects adversely on her honesty. However, the jury members were free to believe or disbelieve these witnesses'

testimony and to give the testimony such weight as they thought the testimony should receive. *See Shanahan*, 712 N.W.2d at 135. The "very function of the jury is to sort out the evidence and 'place credibility where it belongs.'" *Thornton*, 498 N.W.2d at 673 (citation omitted).

Dayton also challenges the lack of physical evidence connecting her to the crime. We first observe that a defendant's participation in a crime may be proven by circumstantial evidence alone. *See Hearn*, 797 N.W.2d at 580. In this case, however, there was physical evidence linking Dayton to the murder. Her fingerprints were found on a vodka bottle and on a pop bottle recovered from Bailey's home, as well as on an empty box of plastic wrap found in the kitchen cabinet. The box of plastic wrap was stained with Bailey's blood, as was a large rock found in Hilgendorf's truck. Also recovered from the truck was a BB gun stained with Bailey's blood and wrapped in plastic wrap. Dayton's fingerprints were found on a bag wrapped around the BB gun. We find no error in the district court's denial of Dayton's motion for judgment of acquittal, as the evidence detailed above could convince a rational trier of fact beyond a reasonable doubt that Dayton aided and abetted in Bailey's murder. *See id.*

***C. Weight of the Evidence.***

For the same reasons detailed in the foregoing section, we find no abuse of discretion in the district court's denial of Dayton's motion for new trial. *See State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003). On a motion for new trial, the trial court "'may weigh the evidence and consider the credibility of witnesses.'" *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998) (citation omitted). A verdict is contrary to the weight of the evidence where "'a greater amount of

credible evidence supports one side of an issue or cause than the other.'" *Id.* (citation omitted).

In considering Dayton's motion for new trial, the district court stated:

> My assessment of the credibility of the witnesses presented by the State would be that the jury was correct . . . in finding those witnesses credible, and the only exception or the only witness whose evidence or testimony was subject to a question of credibility would be the testimony of Heather Szakacs. Certainly her testimony was important, but I make several conclusions concerning her testimony. First of all, if her testimony were excluded from consideration, there would still be sufficient evidence to have submitted the case to the jury and for the jury to return the verdict of guilty that they returned. Secondly, although Ms. Szakacs's testimony could be subject to serious scrutiny, there was not evidence presented which would exclude her testimony from consideration by the jury and there was not any evidence presented which showed that her testimony was fabricated. Her background and the circumstances under which any of her conversations or alleged conversations with the Defendant were had—certainly raise issues of questions of credibility, but there was no evidence to rebut her statements, and as a whole, the court finds that they were sufficient and credible to be considered.

A trial court has considerable discretion when considering a motion for new trial under the weight-of-the-evidence test. *See Shanahan*, 712 N.W.2d at 135. "Except in the extraordinary case where the evidence preponderates heavily against the verdict, trial courts should not lessen the jury's role as the primary trier of facts and invoke their power to grant a new trial." *Id.*

We cannot say this is one of those extraordinary cases where the evidence preponderates heavily against the jury's finding regarding Dayton's involvement in the murder. Dayton's arguments otherwise essentially request this court on appeal to reweigh the evidence and judge the credibility of the witnesses, which we may not do. *See Reeves*, 670 N.W.2d at 203 ("On a weight-of-the-evidence claim, appellate review is limited to a review of the

exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence."). We accordingly affirm the denial of Dayton's motion for new trial.

***D. Ineffective Assistance of Counsel.***

Dayton finally claims her trial counsel performed deficiently in "failing to conduct a thorough investigation and to put on a defense." She argues counsel failed to "depose witnesses," "present an opening statement," "put on any evidence during trial," and "question officers regarding Hilgendorf's confession, in which he stated that Dayton was not involved."

We conclude the record is not adequate to address these claims on direct appeal. *See State v. Soboroff*, 798 N.W.2d 1, 8 (Iowa 2011) (stating ineffective-assistance claims are generally preserved for postconviction proceedings so that an adequate record "can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond"). We accordingly preserve the claims for postconviction relief.

***III. Conclusion.***

In conclusion, we find any error in the admission of hearsay statements under Iowa Rule of Evidence 5.801(*d*)(2)(E) was harmless. The district court's denial of Dayton's motion for judgment of acquittal based on the sufficiency of the evidence and its denial of her motion for new trial based on the weight and credibility of that evidence are affirmed. We deny a meritless ineffective-assistance claim and preserve the rest for postconviction relief proceedings. Dayton's judgment and sentence for first-degree murder are affirmed.

**AFFIRMED.**