IN THE COURT OF APPEALS OF IOWA

No. 1-809 / 10-2067
Filed December 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VERNON LEE HUSER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Vern Huser appeals from his conviction for murder in the first degree for aiding and abetting Louis Woolheater in the killing of Lance Morningstar. **REVERSED AND REMANDED.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John Sarcone, County Attorney, and Steve Foritano and Michael Salvner, Assistant County Attorneys, for appellee.

Heard by Tabor, P.J., Mullins, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

TABOR, J.

Vern Huser appeals from his conviction for murder in the first degree for aiding and abetting Louis Woolheater in the killing of Lance Morningstar. Huser argues the State presented insufficient evidence of his participation, the district court erroneously admitted Woolheater's out-of-court statements, and his trial counsel was ineffective. Huser also contends his attorney represented him under a conflict of interest, and the prosecutor engaged in misconduct while cross-examining him and during closing arguments.

Viewing the evidence in the light most favorable to the jury's verdict, we find substantial evidence Huser aided and abetted in Morningstar's murder. But because we conclude that the most compelling statements showing Huser encouraged Woolheater's criminal acts constituted impermissible hearsay, we reverse and remand for a new trial.

I. Background Facts and Proceedings

Vern and Deb Huser met in the early 1990s. The two purchased a modest garbage disposal route and expanded the business into what is now Ankeny Sanitation, a company serving more than 10,000 clients. They eventually married, but their relationship grew tumultuous in the summer of 2003. The following fall, Deb began an affair with Lance Morningstar, a friend of the couple. Vern Huser grew suspicious, and ultimately hired a detective who observed Morningstar and Deb Huser together. Vern Huser confronted his wife shortly after she moved out of their residence in January 2004, at which point she confirmed his suspicions. The affair continued until April 2004. The Husers' divorce was finalized in May 2004.

The Husers sold Ankeny Sanitation in connection with the divorce, but both retained positions within the company. Coworkers witnessed many arguments between the two. Vern harbored anger and betrayal, feelings he made known to many friends and associates. In both work and social gatherings, Vern would often vent about his relationship and make statements suggesting Morningstar's demise. He threatened to "put the red dot on his head" and said he could hire someone to kill Morningstar and nobody would find his body. On one occasion, Vern Huser gave a friend a tractor pull schedule showing the weekends he would be out of town, calling it an alibi.

In spring 2004, Vern Huser's friend, Lawrence Webb, introduced Huser to Louis Woolheater. Webb and Woolheater shared a Quonset hut for storage space. Nicknamed Tall Tale Lou, Woolheater often claimed to be a Navy Seal participating in a special task force overseas and having a "high kill" rate. He relayed the same stories to Jackie Putz, Karon Humphreys, Marie Connett, and Michelle Zwank, all of whom believed themselves to be in an exclusive relationship with Woolheater, while simultaneously dating him. Woolheater had extensive knowledge of high caliber weaponry and a sizable gun collection.

In the months leading up to Morningstar's disappearance, Huser's animosity toward his estranged wife and her former paramour persisted. He twice tried to confront Morningstar, traveling to bars he was known to frequent, but the two never connected. While searching for Morningstar in August 2004, Huser left a signed note that the bartender recalled to say: "Morningstar, you're a dead man when I find you."

Morningstar was last seen September 30, 2004 leaving Eddy's bar at 10:35 pm. On the same date, Michelle Zwank had arranged to spend time with Woolheater. Woolheater told Zwank that his brother and his nephew Ricky were coming to town to deal with Morningstar, though Zwank never saw Woolheater's relatives. Woolheater instructed Zwank to drop him off in a baseball field outside Morningstar's house and to return when he called. He left her vehicle with a soft-sided pool cue bag in hand. When she returned to the field, Woolheater told her to drive to Morningstar's house, stating "Ricky made a hell of a shot." They loaded a body wrapped in a tarp into her trunk and drove Morningstar's truck to Stan's bar before returning to Woolheater's residence. A shaken Zwank left her car at Woolheater's house and retrieved it the following day.

Huser's threats ceased after Morningstar's disappearance. When the subject arose in social gatherings, Huser would reply "no body, no crime," and "someone will find him when the snow melts." Hunters discovered Morningstar's body on February 6, 2005. A police search of Woolheater's residence yielded items linking Vern Huser to Woolheater, including a yellow sticky note with Deb Huser's address in Vern Huser's handwriting. Phone records showed frequent calls between Vern Huser and Woolheater in the months before Morningstar's disappearance, but only one call made after September 30, 2004. On March 10, 2010, Woolheater was convicted of first-degree murder.

The State charged Huser with first-degree murder in violation of Iowa Code sections 707.1 and 707.2(1) (2003), alleging he aided and abetted Woolheater in killing Morningstar "while having malice aforethought and by acting

willfully, deliberately, and with premeditation and with specific intent to kill." On October 29, 2010, a jury returned a guilty verdict, and the court sentenced Huser to life imprisonment on December 10, 2010. He now appeals his conviction on several grounds.

II. Issues on Appeal

Huser divides his argument into five assignments of error. First, he alleges his counsel had a conflict of interest because the attorney previously represented Deb Huser, a key prosecution witness. Second, he contends the evidence was insufficient to support his conviction. Third, Huser argues the State's cross-examination of him and closing rebuttal amounted to prosecutorial misconduct. Fourth, he claims the court erroneously admitted Woolheater's out-of-court statements. And fifth, Huser alleges he was denied effective assistance of counsel. Because we resolve the appeal based on the second, fourth, and fifth issues, we do not address Huser's first and third arguments.

III. Sufficiency of the Evidence

A. Scope and Standard of Review

We review sufficiency of evidence challenges for correction of legal error. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). We uphold a jury's verdict if the record shows it is supported by substantial evidence. *State v. Acevedo*, 705 N.W.2d 1, 3 (Iowa 2005). "Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). The State bears the burden to prove each element of the crime charged. *State v. Gibbs*, 239 N.W.2d 866, 867

(Iowa 1976). We will consider all the evidence, including that which detracts from the verdict, as well as that which supports the verdict. *State v. Hagedorn*, 679 N.W.2d 666, 668–69 (Iowa 2004). In making these determinations, the evidence is viewed "in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). While direct and circumstantial evidence are equally probative, the evidence must nonetheless "raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981).

B. Analysis

Huser contends the State offered insufficient evidence to support a first-degree murder verdict. Specifically, he claims the State failed to prove that he: (1) aided and abetted Woolheater in shooting Morningstar; (2) knew that someone he aided acted with malice aforethought; and (3) knew that someone he aided and abetted acted willfully, deliberately, premeditatedly and with a specific intent to kill Morningstar.

The jury convicted Huser of first-degree murder as an aider and abettor based on the following marshalling instruction:

> 1. On or about September 30, 2004, the defendant aided and abetted another in shooting Lance Morningstar.
> 2. Lance Morningstar died as a result of being shot.
> 3. The defendant acted with malice aforethought or knew that someone he aided and abetted acted with malice aforethought.
> 4. The defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Lance Morningstar or knew that someone he aided and abetted acted willfully, deliberately, premeditatedly and with a specific intent to kill Lance Morningstar.

See Iowa Code §§ 707.1, .2(1) (2003) (defining murder, murder in the first degree, *see also* Iowa Code § 703.1 (2003) (aiders and abettors to be tried as principals). Huser claims the record lacks evidence allowing the jury to find the first, third and fourth elements.

To prove aiding and abetting, the State must offer evidence to show the defendant's assent to or countenance and approval of the criminal act, either by active participation or by encouragement before or at the time of its commission. *State v. Doss*, 355 N.W.2d 874, 877–78 (Iowa 1984). "Aiding and abetting not only means to actively participate in a crime, but includes conduct which 'encourages' the crime in some manner." *State v. Rohm*, 609 N.W.2d 504, 510 (Iowa 2000) (defining "encourage" as "to inspire with courage, spirit, or hope; to spur on; to give help or patronage"). Encouragement does not require the defendant to be present at the scene of the crime. *Id*. (citing *State v. McClelland*, 162 N.W.2d 457, 464 (Iowa 1968) (considering all of the surrounding circumstances, including conduct before and after the offense)).

Huser contends that "encouragement" for purposes of aiding and abetting "cannot mean words without some type of participatory conduct, either before, during, or after the crime." The State responds that "[w]ords alone can constitute encouragement." Iowa's long-standing definition of aiding and abetting supports the State's position. *See State v. Davis*, 191 Iowa 720, 725, 183 N.W. 314, 316 (1921) (defining "aid and abet" as comprehending "all assistance rendered by acts, or words of encouragement or support, or presence, actual or constructive, to render assistance, should it become necessary"). But even if words alone

could not rise to the level of encouragement, in this case Huser engaged in conduct that the jury could have interpreted as encouraging Woolheater to commit the murder, including the act of checking Woolheater's credentials with Webb, meeting with Woolheater, and taking Woolheater on excursions to find Morningstar.

The State identifies multiple instances of circumstantial evidence which, when taken together, support the verdict. In addition to his anger and jealousy toward Morningstar, Huser often threatened to kill or hire someone to kill Morningstar, and developed an alibi in case such an event occurred. Huser knew Woolheater touted himself as a Navy Seal with sniper experience, claiming to have "take[n] people out" in the past. After meeting with Huser for fifteen to twenty minutes, Woolheater told Patti Mitrisin that Huser wanted Morningstar "roughed up." Woolheater told Lawrence Webb and Marie Connett that Huser asked Woolheater to harm or kill Morningstar as well. At one point Huser took his son and Woolheater along to look for Morningstar at a bar, and left a threatening note for Morningstar.

The abundance of telephone communication between Huser and Woolheater leading up to September 30, 2004, and the abrupt lack of contact after that date allow an inference that Huser had knowledge of Woolheater's criminal act. The two called each other sixty times through July, August, and September, with twenty-five contacts occurring in September alone. But between September 30 and December 24 there was only one call, which occurred on October 30, from Woolheater to Huser. Huser defends this

communication pattern by claiming that he stopped talking to Woolheater after learning he was a convicted sex offender. But Huser learned that information "sometime later in the summer" of 2004, yet remained in frequent contact through September 30, 2004. The day after hunters stumbled upon Morningstar's remains, Woolheater told Webb that only Woolheater, Webb, and Huser knew about the body. The record also showed Huser kept ten to fifteen thousand dollars cash at home, and a month before the murder Woolheater was seen with a "wad of money" in his possession, though it was unlike him to keep large amounts of cash on hand.

Huser also made statements after the fact tending to show his involvement in Morningstar's death. First, he gave inconsistent and evasive answers to questions posed to him. When Morningstar's son asked Huser if he had any part in his father's death, Huser "talked circles around" the question, never actually giving an answer. Huser's trial testimony regarding his foreboding statements about Morningstar varied from denying death threats, to not remembering such threats, to not meaning the threats. Second, Huser told his friend, Kevin Frey, that Huser was "in big trouble" or that "he could be in trouble if they came looking for him." He also told Wes Penny to keep his mouth shut and to quit talking to law enforcement after Penny was interviewed by police.

Huser argues no evidence reveals that he knowingly approved of, agreed with, or advised and encouraged Woolheater to kill Morningstar. He points to his background and character, as well as his testimony denying involvement with Woolheater's criminal actions. Huser describes his threats against Morningstar

that he vented to his friends as mere "heat-of-passion statements." He also asserts Woolheater's proclivity toward lying precludes use of Woolheater's out-of-court statements as a basis for finding Huser aided and abetted the murder.[1] Huser suggests Woolheater acted alone in the murder, pointing to Zwank's testimony that Morningstar "knew stuff" about Woolheater that could get him into trouble, send him to jail, and ultimately jeopardize Woolheater's relationship with his son. The State counters that Woolheater told Marie Connett that his friend's wife was cheating on him and he wanted to kill the other man "[b]ecause we stick together."

Although we conclude in the next division that particular statements made by Woolheater inculpating Huser were erroneously admitted at trial, we must consider all evidence, including such statements, when determining whether the record contains substantial evidence. *See State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003) (recognizing possibility of the State introducing alternative evidence or employing different tactics to avoid dismissal had error been found at trial). Thus, testimony by Webb, Mitrisin, and Connett that Woolheater told them he was going to harm or kill Morningstar at Huser's behest must be factored in when deciding the sufficiency of the evidence. Viewing the evidence in the light most favorable to the verdict, the circumstantial evidence presented at trial could allow a rational jury to find assent or countenance and approval of the crime by Huser before or at the time Woolheater killed Morningstar. Reasonable jurors could find statements by Woolheater that Huser asked him to harm Morningstar demonstrated Huser's encouragement of Morningstar's murder. The record

[1] Huser does not contest the fact Woolheater killed Morningstar.

further supports a jury's finding that Huser had knowledge that Woolheater acted willfully, deliberately, premeditatedly, and with a specific intent to kill Morningstar with malice aforethought. The jury is empowered to resolve conflicts in evidence "in accordance with its own views as to the credibility of the witnesses." *State v. Allen*, 348 N.W.2d 243 (Iowa 1984). Because the circumstantial evidence raises an inference of guilt greater than mere speculation, suspicion, or conjecture, the jury's verdict is supported by substantial evidence.

IV. Extrajudicial Statements and Ineffective Assistance of Counsel

A. Scope and Standards of Review

Because they implicate constitutional rights, we engage in de novo review of claims concerning the right to confrontation and the right to effective assistance of counsel. *State v. Newell*, 710 N.W.2d 6, 23 (Iowa 2006); *State v. Collins*, 588 N.W.2d 399, 401 (Iowa 1998). We review hearsay claims for correction of errors at law. *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009).

B. Did Admission of Woolheater's Out-of-Court Statements Violate Huser's Confrontation Clause Rights?

Huser claims admission of Woolheater's extra-judicial statements violated his federal and state constitutional rights to confrontation. U.S. Const. amend. VI; Iowa Const. art. I, § 10. Because Huser does not argue for different interpretations of the state and federal constitutions, we will construe both confrontation clauses to provide the same protections. *State v. Feregrino*, 756 N.W.2d 700, 703–04 n.1 (2008).

The right to confrontation bars "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177, 194 (2004). Only statements that are "testimonial" "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, 236–37 (2006). Conversely, nontestimonial statements are not restricted by the Sixth Amendment. *Id*. at 824, 126 S. Ct. at 2274, 165 L. Ed. 2d at 238.

Woolheater was unavailable to testify, but Huser fails to assert how Woolheater's extrajudicial statements meet the threshold definition of testimonial. We conclude that none of Woolheater's statements challenged by Huser could be considered testimonial. *See Crawford*, 541 U.S. at 51–52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193 (including within the definition "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"). Woolheater did not make the challenged statements in the belief that they would be offered at a later trial. Thus, Huser's right to confrontation was not violated.

C. Did Admission of Woolheater's Out-of-Court Statements Violate the Hearsay Rule?

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). Unless admitted as an exception or

exclusion under the rules of hearsay or some other provision, hearsay should be prohibited at trial. *Dullard*, 668 N.W.2d at 589. We presume that admission of hearsay evidence caused prejudice to the nonoffering party, unless the offering party can affirmatively establish the challenged evidence did not impact the jury's verdict. *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996).

Huser argues testimony from State's witnesses Larry Webb, Patti Mitrisin, and Marie Connett that repeated out-of-court statements from Woolheater did not fall within an exclusion or exception to the hearsay rule. He asserts the wrongful admission of the hearsay statements caused him prejudice. The State counters that Huser did not properly object to some of the statements, the statements were not hearsay because they were either co-conspirator statements or not offered for the truth of the matter asserted, and admission of the statements was harmless.

We will first detail the content of the statements. We will then evaluate whether Huser preserved his objections at trial, whether the statements fell into exemptions or exceptions to the hearsay rule, and finally, whether Huser was prejudiced by the jury hearing Woolheater's statements.

1. Webb's Testimony

Huser points to two parts of Webb's testimony allegedly conveying impermissible hearsay from Woolheater: the first passage focuses on a conversation between Webb and Woolheater after hunters found Morningstar's body and the second passage involves a conversation between Webb and Huser before Morningstar's disappearance.

a. Woolheater's Statements to Webb After Discovery of Morningstar's Body

Webb testified that the day after Morningstar's remains were found Woolheater said: (1) the body "wasn't supposed to be there. It was supposed to be in a pit in Oklahoma;" (2) the murder weapon was "a .22;" and (3) only Woolheater, Webb, "and Vern" knew about the body.

b. Woolheater's Statements to Webb Before Morningstar's Disappearance

Webb also testified that Woolheater told him he had been following Morningstar, "was going to rough him up," and had already done so by breaking his ribs. When Webb asked Woolheater why he would hurt Morningstar, Woolheater explained: "Vern wanted something done about it."

2. Mitrisin's Testimony

Mitrisin told the jury that in September 2004, she and Woolheater drove to the Quonset hut, where Huser was waiting for Woolheater. Woolheater exited the vehicle and spoke with Huser. Upon Woolheater's return, Mitrisin asked who he was talking to, and Woolheater replied "Vern Huser." When she asked what they were talking about, Woolheater responded "there was a guy messing around with Vern's wife or ex-wife . . . and he wanted this guy roughed up." When Mitrisin asked what he was going to do, Woolheater replied, "Well, I'll just get my uncles or my nephew or somebody to do that."

3. Connett's Testimony

Connett testified she had a telephone conversation with Woolheater, in which he told her "there was someone he knew, one of his friend's wives was cheating on him and that he wanted to kill him." Connett further testified that Woolheater told her he was going to kill the other man. When she asked Woolheater why he cared, he replied: "Because we stick together."

4. Preservation of Error

The State contends Huser did not preserve error on his hearsay objections, with the exception of Mitrisin's testimony. Specifically, the State asserts the defense did not follow the procedure established for objecting to the evidence at trial. Huser responds that the State's waiver argument is "a far too hypertechnical approach" and he complied with the "purpose of the error-preservation rules." *See Paredes*, 775 N.W.2d at 561 ("[W]here a question is obvious and ruled upon by the district court, the issue is adequately preserved.").

Before trial, Huser filed a motion in limine seeking to bar Woolheater's out-of-court statements. The court overruled the motion in limine, stating: "On the present state of the record, the Court finds and concludes the evidence proffered by the State is not inadmissible hearsay." The court indicated that it would rule on objections during trial. The court's ruling was not final, and did not preserve error unless Huser lodged a timely objection to the evidence as offered at trial. *See State v. Delaney*, 526 N.W.2d 170, 177 (Iowa Ct. App. 1994).

Outside the presence of the jury, Huser's counsel revisited the arguments raised in his motion in limine. Before Connett's testimony, he and the judge

established on the record that when the witness entered, defense counsel would object before the questioning to preserve error. But at no point during Connett's testimony did Huser object. During the State's examination of Webb, the defense failed to object to Webb's recounting of Woolheater's statements that he had acted on Huser's desire that Morningstar be injured and Woolheater's statements after discovery of the victim's body.

Our supreme court has held that "a premature objection is generally not sufficient to preserve error." *State v. Howard*, 509 N.W.2d 764, 768 (Iowa 1993) (explaining that counsel must repeat the objection at the time the evidence is offered or the objection is waived). In this case, Huser's counsel failed to object to the controversial portions of Webb's and Connett's testimony despite agreeing to a specific process for doing so. The district court could have reasonably concluded that Huser no longer wished to object to the challenged statements. *See id*. We find error was not preserved on the hearsay objections to Woolheater's statements offered through Webb and Connett.

Anticipating that an appellate court could find waiver, Huser alternatively claims on appeal that his trial counsel was ineffective for not making proper objections before the testimony of Webb and Connett. Accordingly, we will analyze those hearsay claims under the ineffective-assistance-of-counsel rubric. The two components for claims based on ineffective assistance of counsel are failure of a duty on the part of counsel, and resulting prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To prove a failure of duty, "the defendant must show that

counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

5. Were Woolheater's Statements to Webb Admissible as Statements against Interest under Iowa Rule of Evidence 5.804(*b*)(3)?

On appeal, Huser argues counsel breached a material duty by not objecting before Webb testified concerning Woolheater's statements after the discovery of Morningstar's body. One of the alternative grounds relied upon by the district court to admit Woolheater's words was the hearsay exception for statements against interest. That hearsay exception covers:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Paredes, 775 N.W.2d at (quoting Iowa R. Evid. 5.804(b)(3)). First, the offerer must show a statement comprised of factual assertions along with collateral material necessary to understand the context in which the factual assertions are made. *Id.* at 564–65. Second, the statement must be against the declarant's interest, although it "need not amount to a full confession in order to be admissible as a statement against penal interest." *Id.* at 566.

We agree with the district court the first and second statements attributed to Woolheater were admissible as statements against his interest. The day after authorities found Morningstar's body, Webb arrived at Woolheater's house, where a police car sat in the front yard. Woolheater told Webb Morningstar's body was supposed to be in Oklahoma. He also corrected Webb's speculation of

what type of gun killed Woolheater, before the murder weapon became public record. Although not tantamount to a confession, both statements inculpate Woolheater. We do not see these statements as impermissibly implicating Huser. *See id*. at 565 (directing trial courts to sift through statement to admit "the wheat" (parts that are reliable because they inculpate the speaker) and "the chaff" (parts that may be against the interest of persons other than the speaker)). The district court properly allowed the statements into evidence under Rule 5.804(b)(3). Any objection by counsel to these statements would have been without merit. *See State v. Ray*, 516 N.W.2d 863, 866 (Iowa 1994) (finding it "axiomatic that ineffectiveness of counsel may not be predicated on filing of meritless motion").

6. Was Woolheater's Statement about Knowledge of the Victim's Body Admissible as a Coconspirator Statement under Iowa Rule of Evidence 5.801(*d*)(2)(E)?

We turn next to the question whether Huser's trial counsel had an obligation to object to the third statement—Woolheater's declaration to Webb that only Woolheater, Webb, and Huser knew about Morningstar's body. The district court concluded this statement was not hearsay because it was a coconspirator's statement. We agree.

An admission is not hearsay if "[t]he statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Iowa R. Evid. 5.801(d)(2). To admit evidence under this rule, the trial court must find "that there was a conspiracy, that both the

declarant and the party against whom the statement is offered were members of the conspiracy, and that the statements were made in the course and in furtherance of the conspiracy." *State v. Tonelli*, 749 N.W.2d 689, 694 (Iowa 2008).

The term "conspiracy"—for evidentiary purposes—is applied more broadly than the crime of conspiracy, as defined under Iowa law. *Id.* at 693. A conspiracy under the evidence rule includes "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). To determine whether a conspiracy exists, a court may consider the out-of-court statement as well as other evidence. *State v. Tangie*, 616 N.W.2d 564, 570 (Iowa 2000). The district court must find by a preponderance of the evidence that a conspiracy existed. *State v. Thai*, 575 N.W.2d 521, 525 (Iowa Ct. App. 1997). But on appeal,

> [w]e review the trial court's determination for substantial evidence of a conspiracy. If we determine substantial evidence existed, we must then determine whether the trial court abused its discretion when it ruled a co-conspirator made the challenged statement during the course and in furtherance of the conspiracy.

Id. (citations omitted).

Huser contends no conspiracy existed between he and Woolheater, but the record features substantial evidence to the contrary. Such evidence includes Huser's many threats to hire someone to kill Morningstar, Huser's prepared alibi, his attempts to verify Woolheater's military prowess, the attempt by Woolheater and Huser to locate Morningstar at Broadway Lounge, the slip bearing Deb

Huser's address in Vern Huser's handwriting at Woolheater's house, and the abrupt termination of phone contact between the men after Morningstar's disappearance. This evidence, combined with the actual statement from Woolheater to Webb, constitutes sufficient showing of a conspiracy.

Huser alternatively asserts that the statement was not made during the pendency of any alleged conspiracy because the conspiracy had ended. We reject that assertion. Every act in furtherance of a conspiracy "is deemed a renewal or continuance of the conspiracy . . . [t]hus, a conspiracy may continue into the concealment phase." *Ross*, 573 N.W.2d at 915. When Woolheater met with Webb at Woolheater's house, a police car sat in the front yard. Webb interpreted Woolheater's statement that only three of them knew about the body as a threat, and delayed going to the police for that reason. Huser also threatened Wes Penney not to talk to the police after he was questioned regarding Morningstar's disappearance. Because Woolheater was trying to conceal the crime, the timeframe of the conspiracy extended beyond the discovery of the body.

In determining whether Woolheater's statement was made in furtherance of the conspiracy, the key question is whether the conspirator's statement was intended to or did promote the conspiracy's goals. *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir. 1989). The declarations must "aid or assist toward the consummation of the object of the conspiracy." *State v. Kidd*, 239 N.W.2d 860, 865 (Iowa 1976). Neither "idle chatter" nor a "merely

narrative" description of the acts of another amount to furtherance. *Beech-Nut Nutrition Corp.*, 871 F.2d at 1199.

> 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) (citations omitted).

The circumstances underlying Woolheater's statement confirm it was in furtherance of the conspiracy. With police in Woolheater's front yard, the day after discovery of Morningstar's body, Woolheater told Webb that he was one of only three people who knew about the body. Webb took this as a directive to keep quiet about the involvement of Huser and Woolheater in Morningstar's death. In context, Woolheater's statement about the three friends sharing the dangerous secret was more than idle chatter or mere narration of the conspiracy. Because Woolheater's statement induced Webb not to divulge what he knew about Morningstar's murder, the district court properly allowed the testimony as a coconspirator statement. Counsel had no duty to object to this aspect of Webb's testimony.

7. Were Woolheater's Other Statements Offered to Prove the Truth of the Matter Asserted under Iowa Rule of Evidence 5.801(*c*)?

Before Morningstar's disappearance, Woolheater made statements to Webb, Patti Mitrisin, and Marie Connett, attributing his motive to harm Morningstar to Huser's encouragement. On appeal, the State does not argue that these statements fall within any exception to the hearsay rule. The State

asserts only that they were admissible regardless of their truth for the non-hearsay purpose of showing Woolheater's responsive conduct and his motive for being involved in Huser's plot to kill Morningstar. *See* Iowa R. Evid. 5.801(c).

"A statement that would ordinarily be deemed hearsay is admissible if it is offered for a non-hearsay purpose that does not depend upon the truth of the facts presented." *McElroy v. State*, 637 N.W.2d 488, 501 (Iowa 2001). Statements often falling outside the scope of hearsay include those which tend to show the effect of the statement on its recipient. *Roberts v. Newville*, 554 N.W.2d 298, 300 (Iowa Ct. App. 1996). "The statement may be offered simply to demonstrate it was made, to explain subsequent actions by the listener, or to show notice or knowledge of the listener." *McElroy*, 637 N.W.2d at 501 (listing cases giving examples of each form). In essence, the query is whether the statements have value independent of the truth of the matter asserted therein. *Id.* at 502. If admitted into evidence, "the court must limit its scope to that needed to achieve its purpose." *Id.*

To support its position that Woolheater's statements were properly admitted, the State cites cases holding out-of-court utterances were not hearsay when offered to show the motive and responsive conduct of individuals who heard the statements. *See State v. Williams*, 360 N.W.2d 782, 787 (Iowa 1985); *State v. Wycoff*, 255 N.W.2d 116, 117–18 (Iowa 1977). We find these cases to be distinguishable. In *Williams*, Betts, a member of the Vice Lords, was allowed to testify that the prison gang was afraid another inmate (Tyson) was going to inform the warden what he knew about another murder. 360 N.W.2d at 787. His

testimony was not offered to prove Tyson was threatening to go to the authorities, but to show what induced Betts and the other Vice Lords to kill Tyson. *Id.* Similarly in *Wycoff*, a prison inmate named Garrett, testified that three days before the death of fellow inmate Polson he overheard inmate Tessler tell Wycoff that Wycoff could pay his debt to Tessler by "taking care of" inmate Polson. 255 N.W.2d at 118. The court found Tessler's offer was not hearsay because it was not offered for the truth of what was said, but simply that it was said. *Id.*

In both *Williams* and *Wycoff*, the out-of-court statements were probative for their effect on the listener, that is, the statements explained why listeners Betts and Wycoff took the actions they did. In the instant case, the State argues that Woolheater's statements were admissible—not to show their impact on the listeners (Webb, Mistrin, or Connett)—but to explain the subsequent conduct of the speaker, Woolheater. The State's argument misapplies the hearsay exemption for statements offered to show responsive conduct.

The hearsay rule does not operate to exclude evidence of a statement offered for the purpose of shedding light on the conduct of the person to whom it was made. This principle of law is expressed in 6 J. Wigmore, *Evidence*, § 1789, at 314 (Chadbourn rev. 1970) as follows:

> Wherever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned.

If offered to prove responsive conduct, a statement is relevant regardless of its truth. *See State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990) (explaining statement by defendant's friend to victim was offered to show the responsive conduct by victim); *State v. Hollins*, 397 N.W.2d 701, 706 (Iowa 1986) (holding witness statements regarding anonymous phone calls offered to show the responsive conduct of witness locating a gun for defendant). But the three statements at issue here did not shed light on the conduct of Mitrisin, Webb, or Connett.

Mitrisin testified that Woolheater told her "there was a guy messing around with Vern's wife or ex-wife . . . and he (Huser) wanted this guy roughed up." The focal point of our analysis does not rest on the admissibility of an implied statement by Huser to Woolheater.[2] If it did, the State's argument would be appropriate for the effect of Huser's statement on Woolheater. But the State is asking us to find Woolheater's out-of-court statement to Mitrisin was not hearsay because it was offered to show Woolheater's own subsequent conduct. Although statements are admissible "to explain a third party's actions taken in response," *State v. Doughty*, 359 N.W.2d 439, 442 (Iowa 1984), Woolheater's statements could not be introduced by a witness at trial to show his own motive or responsive conduct. Therefore, the district court erred in allowing Mitrisin to convey Woolheater's statement to the jury.

The same is true for Woolheater's statements to Webb and Connett. Woolheater told Webb he had been following Morningstar and "was going to

[2] That statement was admissible as an admission by a party-opponent. *See* Iowa R. Evid. 5.801(*d*)(2)(A).

rough him up" at Huser's behest. While any request by Huser to Woolheater may not have been hearsay, Woolheater's statement to Webb was not similarly admissible to show responsive conduct. Woolheater told Connett that his friend wanted to kill his ex-wife's paramour and Woolheater was going to kill the other man because he and his friend "stick together." Contrary to the State's argument on appeal, these statements were not properly offered to show declarant Woolheater's responsive conduct. Trial counsel breached a material duty in not objecting to their admission. *See State v. Reynolds,* 746 N.W.2d 837, 845 (Iowa 2008) (finding counsel ineffective for not objecting to the admission of evidence that would have been considered hearsay).

8. Was Huser's Defense Prejudiced by Admission of the Hearsay?

Because Huser preserved error concerning the admission of Woolheater's statements through Mitrisin's testimony, we must determine whether the State affirmatively established that Huser's substantial rights were not injured by the jury's consideration of those statements. *See* Iowa R. Evid. 5.103(*a*) (providing a court's erroneous evidentiary ruling will not be overturned unless a substantial right of a party is affected); *see also State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (posing the question "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?"). Erroneously admitted statements are not proper grounds for reversal if the State can prove the inadmissible evidence did

not have an impact on the jury's guilty verdict. *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996).

As for the unpreserved hearsay claims, our inquiry is whether Huser has established that he was actually prejudiced by his counsel's failure to object. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

To prove Huser aided and abetted Woolheater in Morningstar's murder, the prosecution had to show Huser's active participation or encouragement before or at the time of the shooting. *See Doss*, 355 N.W.2d at 877–78. The State offered strong evidence of Huser's motive to have Morningstar killed and Huser's threats against the victim. The jury also heard testimony suggesting Huser's knowledge of Morningstar's death. In addition, the State presented compelling proof that Woolheater killed Morningstar. Finally, the State produced testimony about the relationship and communication between Huser and Woolheater. But the critical link between Huser's well-documented desire to have Morningstar injured or killed and Woolheater's action to that end was Woolheater's statements to three separate witnesses of his intentions to harm or kill Morningstar upon Huser's request. Woolheater's explanations to Mitrisin, Webb, and Connett were the most direct proof of Huser's encouragement of

Woolheater's murderous acts. *See Dullard*, 668 N.W.2d at 596 (finding prejudice because erroneously admitted note "played a pivotal role in establishing the possession element of the crime").

The State argues that admission of Woolheater's statements through Mitrisin's testimony was harmless because "substantially the same evidence is properly in the record." *See Newell*, 710 N.W.2d at 19. We disagree that the evidence properly in the record fills the same gap in the prosecution's case as Woolheater's statements that he was acting on Huser's encouragement. The similar statements offered through Webb and Connett were improperly admitted as a result of trial counsel's breach of his duty to lodge a hearsay objection when those witnesses took the stand.

Moreover, the State's argument that the admission of Woolheater's statements was not prejudicial is also "belied by its use of the testimony at trial." *Cf. State v. Walls*, 761 N.W.2d 683, 688 (Iowa 2009) (rejecting harmlessness argument in instance of constitutional error). The prosecution emphasized Woolheater's revelations in both its opening statement and its closing argument, as support for its theory Huser "made good on [his] threats" to kill Morningstar.

> You heard from Marie Connett, who was a girlfriend of Louis Woolheater, and Marie told us that Mr. Woolheater confessed to her prior to the murder that he had a friend that was going through marital problems and that he was upset and that he was going to kill this man who was messing around with his friend's wife.
>
> . . . .
>
> You heard from Patti Mitrisin—she was one of the girlfriends of Louis Woolheater—and she saw Louis Woolheater and Mr. Huser together at the Quonset hut in Ankeny. She saw them meet for 10, 15 minutes. Then Mr. Woolheater came back. And that's when she asked, "Who was that gentleman?" He said, "That was Vern Huser." "What were you talking about?" "He was having

> some marital problems. Someone is messing with his ex-wife, and "he," meaning the defendant, Mr. Huser, "wants him roughed up."

Furthermore, the State's evidence of Huser's aiding and abetting was not overwhelming. No witnesses suggested Huser was present at the scene of the murder. The State was unable to establish a clear money trail between Huser and Woolheater. While the State offered plentiful proof of Huser's motive and Woolheater's acts, the evidence linking those two concepts was incomplete without Woolheater's statements that he planned to "rough up" or kill Morningstar because Huser wanted something done.

Counsel's breach in failing to object to Webb's and Connett's testimony prejudiced Huser. As established above, the repetition of Woolheater's statements through the testimony of Mitrisin, Webb, and Connett represented the strongest evidence of Huser's incitement of Woolheater to commit the murder. Had counsel successfully objected to the inadmissible hearsay, we are not fully confident that enough evidence remained on the record for a reasonable jury to convict Huser of aiding and abetting the murder. *See Reynolds*, 746 N.W.2d at 845. A reasonable probability exists that but for defense counsel's failure to object, the result of the proceedings would have been different. *See id.* at 845–46 (holding insufficient evidence remaining on record was adequate basis to establish a reasonable probability that result would have been different, thereby satisfying prejudice prong of *Strickland*). Accordingly, we reverse Huser's conviction and remand for a new trial.

REVERSED AND REMANDED.