IN THE COURT OF APPEALS OF IOWA

No. 8-073 / 07-0805
Filed March 14, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AUDREY LYNN GONZALES,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Marsha A. Bergan, Judge.

Defendant appeals her conviction for pandering involving a minor. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Harold Denton, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

The defendant, Audrey Lynn Gonzales, appeals from her conviction and sentence for pandering involving a minor in violation of Iowa Code section 725.3(2) (2005). She contends the trial court erred in admitting out of court statements made by a participant to the crime and that there was insufficient evidence to support the conviction. She also argues she received ineffective assistance of counsel when her attorney failed to (1) object to certain testimony as hearsay, (2) object to the admission of out-of-court statements made by J.M. and her mother as a violation of her Sixth Amendment right to confront witnesses against her, and (3) object to the marshaling instruction on pandering. We affirm the defendant's conviction and preserve two of her ineffective assistance of counsel claims for postconviction relief.

I. BACKGROUND AND PROCEEDINGS.

On March 2, 2006, Cedar Rapids police officers were conducting a prostitution sting. They set up the sting operation in an apartment where officer Matt Denlinger posed as a customer seeking a prostitute. Other officers hid in a locked bedroom and used surveillance equipment to monitor and record the investigation. Officer Denlinger called a business called Jenderez that was advertised in the Spa and Escort classified section in a local newspaper and defendant answered the phone. Denlinger testified that he "explained to her I needed an escort or I told her I was looking for a good time, something along [those] lines, and she agreed to provide a female for that service." The defendant testified that on the phone she made it clear to him that it was a dating

service, not an escort service. No prices or sexual activities were discussed on the phone.

The defendant arrived at the apartment with another female, later identified as seventeen-year-old J.M. The defendant looked around the apartment and inquired about the locked bedroom. Denlinger stated he had a roommate who locked the door before he left. The defendant then told Denlinger and J.M. to have fun and returned to her car in the parking lot. J.M. and Denlinger sat in the living room and J.M. told him he needed to pay her up front for any services. Denlinger asked about what he could get for his money. According to Denlinger,

> [s]he said for $150 I could have a hand release and for $200 I could have sex. She said I'd have to pay for a full hour, though. I asked her what a hand release is, in her words, she said it's just a hand job.

Denlinger then said the code word "peanuts," and the other officers came out of the bedroom. J.M. was then placed under arrest for prostitution. J.M. identified herself, admitted her age, and was found to be carrying eleven condoms.

After this arrest, other officers confronted the defendant who was sitting in her car in the parking lot. The defendant consented to a search of her vehicle and officers found marijuana and a note with directions to the apartment, the alias used by Denlinger, and the prices of $150 and $200 written on it. The defendant was arrested for possession of marijuana and taken to the police station. There, she gave a statement to police explaining that she runs a dating service where clients pay for a set amount of time, that she also performs "dating visits," and that she cannot "control if a girl decides to do something more than

just talk." She added that she previously had a business called Classy Ladies but changed the name to Jenderez in January of 2006. She testified that the client was charged $150 for a half-hour or $200 for a full hour date. The business would retain fifty dollars of the charged amount as a commission.

At trial the defendant testified that J.M. had contacted her the day before the sting and stated that she wanted to work for Jenderez. The defendant testified that J.M. told her she was nineteen but could not provide identification because her purse had been stolen. The defendant explained the business to J.M. and agreed to pick her up the next day. After she picked J.M. up the next day, the defendant took J.M. to a date with a regular client of Jenderez and then took J.M. to the date with Denlinger, the undercover officer. The defendant testified she asked J.M. if she wanted the date, and J.M. agreed to it.

The defendant also testified that she looked around the apartment to ensure safety by making certain the client is alone and that there are no weapons around. She also testified that she told J.M. to leave or to call her if a client was getting "perverted" or "sexually explicit." She denied giving J.M. condoms. She stated that she only told J.M. and Denlinger to "have fun" because she did not want them to have a bad experience.

The State charged the defendant with pandering involving a minor in violation of Iowa Code section 725.3(2), distribution of marijuana to a minor in violation of section 124.406, and possession of a controlled substance in violation of section 124.401(5). The defendant pleaded guilty to possession of a controlled substance and a jury trial was held on the charges of pandering and

distribution of marijuana to a minor. The defendant filed a motion in limine to exclude statements J.M. made to the police and a video of the sting. The State obtained a material witness warrant for J.M. to testify but she did not appear at trial. Thus, at the close of the State's evidence, the State dismissed the distribution to a minor charge. The jury convicted the defendant of pandering involving a minor.

The defendant appeals. Nearly all defendant's claimed errors concern the admission of out-of-court statements made by J.M. and J.M.'s mother. The defendant attacks her conviction on several different grounds relating to this evidence including, (1) that some statements were erroneously admitted as coconspirator statements, (2) that some statements were inadmissible hearsay, (3) that there was insufficient evidence to convict her without these statements, and (4) that she received ineffective assistance of counsel when her attorney did not object to the admission of these statements as either hearsay or a violation of her Sixth Amendment right to confront witnesses against her. The defendant also claims her trial counsel was ineffective by not objecting to a jury instruction.

II. STANDARD OF REVIEW.

We review claims concerning hearsay testimony for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). Hearsay must be excluded from evidence at trial unless it can be admitted pursuant to an exception to, or exclusion from, the hearsay rule. *Id.* "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." *Id.*

A defendant's challenge to the sufficiency of the evidence supporting a conviction is also reviewed for correction of errors at law. *State v. Smith*, 739 N.W.2d 289, 293 (Iowa 2007). We uphold a guilty verdict if it is supported by substantial evidence. *Id.*

We generally preserve ineffective assistance of counsel claims for postconviction relief but will address them if the record is sufficient. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). These claims "have their basis in the Sixth Amendment to the United States Constitution and thus, are reviewed de novo." *Id.* We will review counsel's conduct, considering the totality of the circumstances. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007).

In addition to promising effective assistance of counsel, the Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *Newell*, 710 N.W.2d at 24. "We review claims based on the Confrontation Clause de novo." *Newell*, 710 N.W.2d at 23.

III. ERROR PRESERVATION OF HEARSAY CLAIMS.

The defendant contends hearsay information was erroneously admitted in four instances. First, the court permitted Denlinger to testify as to J.M.'s statements during the sting regarding the cost of certain sexual services. Second, the court admitted a videotape of the sting which contained J.M.'s statements to Denlinger during the sting. Third, Denlinger testified as to

statements J.M. made after her arrest about her age. Fourth, the court allowed officers to testify as to conversations with J.M.'s mother about J.M.'s age.

The State argues error is only preserved as to the statements J.M. made prior to her arrest. The defendant's trial counsel filed a motion in limine seeking to exclude out-of-court statements made by J.M. and the videotape but the record shows no ruling on this motion. At trial, counsel objected when the officer began testifying as to what J.M. said to him during the sting and when the State introduced the videotape. However, counsel did not object when the officer testified that J.M. told him she was seventeen after her arrest. Defense counsel also did not object to an officer's testimony that J.M.'s mother confirmed J.M. was seventeen. Therefore, error was only preserved on the first two hearsay claims through counsel's timely objections concerning J.M.'s statements during the sting and upon admission of the videotape. *See Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006) (explaining that error preservation turns on whether the alleged "error has been timely brought to the attention of the district court"). The defendant alternatively argues she received ineffective assistance of counsel when her attorney failed to preserve her third and fourth claims of hearsay by not objecting to the out-of-court statements regarding J.M.'s age. *See Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993) (noting that claims of ineffective assistance of counsel are an exception to the general rule of error preservation). We therefore will address these claims when we consider defendant's other ineffective assistance of counsel claims.

IV. COCONSPIRATOR STATEMENTS.

The parties disagree as to whether the statements J.M. made prior to arrest are admissible through the rule that excludes coconspirator statements from the definition of hearsay. "'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*). Hearsay is not admissible except as provided by the Constitution, by statute, or by other rules of evidence. Iowa R. Evid. 5.802. One rule of evidence excludes from the definition of hearsay, certain statements made by a coconspirator to a crime. Iowa R. Evid. 5.802(*d*)(2)(*E*). This rule provides that a statement 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." *Id.* Out-of-court statements by a coconspirator are admissible as admissions by a party-opponent. *State v. Ross*, 573 N.W.2d 906, 914 (Iowa 1998). These statements are not admitted via an exception to the hearsay rule. *Id.*

Before evidence of a coconspirator's statements can be admitted under this exclusion, "the court must find, by a preponderance of the evidence, that a conspiracy to commit a crime existed between the declarant and the nonoffering party." *State v. Tangie*, 616 N.W.2d 564, 569 (Iowa 2000). When the district court admits the statement, the finding of a conspiracy is implicit and we uphold the finding if it is supported by substantial evidence. *Id.* "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." *Ross*, 573 N.W.2d at 914. The agreement can be established though direct or

circumstantial evidence. *Id.* Our Supreme Court has advised that evidence of a conspiracy for purposes of rule 5.802(*d*)(2)(*E*) can be gleaned from "'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) (quoting Fed. R. Evid. 801 advisory committee's note, 1997 amendment). The statement at issue is also relevant, but not determinative.

> The State must prove the conspiracy by evidence other than the challenged statement. In other words, the evidence relied on to establish the conspiracy must include some proof independent of the coconspirator's statement. *State v. Florie*, 411 N.W.2d 689, 696 (Iowa 1987). But in making the determination whether such independent proof has been shown, the district court need not completely ignore the coconspirator's statements. *Bourjaily v. United States*, 483 U.S. 171, 176-81, 107 S. Ct. 2775, 2779-82, 97 L. Ed. 2d 144, 153-56 (1987); *Florie*, 411 N.W.2d at 696; *accord In re Matter of Scott*, 508 N.W.2d 653, 655 (Iowa 1993).

In re Property Seized from DeCamp, 511 N.W.2d 616, 621 (Iowa 1994).

The defendant claims the coconspirator exclusion does not apply to her case because (1) the State failed to prove the existence of a conspiracy, and (2) J.M. cannot be considered a coconspirator when the pandering statute is designed to protect minors. The State counters that there is substantial circumstantial evidence to support the finding of a conspiracy and argues that the defendant should not be permitted to use the statute's protective policy as a means to challenge her conviction.

The circumstances leading up to the planned transaction, the statement itself, and evidence found on J.M. and in the defendant's car suggest the defendant and J.M. were conspiring together to earn money through prostitution.

The defendant admitted that many persons wanting to use her service are looking for sex. She testified that she made J.M. aware of this. The defendant agreed to provide a girl for the undercover officer. The defendant drove J.M. to the date and went to the apartment with her to ensure the apartment was safe. Before leaving, the defendant stated, "Have fun." Eleven condoms were found on J.M. when she was arrested. The defendant testified that clients were charged $150 for a thirty minute date and $200 for an hour long date. She stated that Jenderez kept fifty dollars as a commission for each date. A note was found in the defendant's car with the directions to the apartment with the prices $150 and $200 written on it. Together, these circumstances suggest that Jenderez was designed to offer sex rather than simple companionship and that J.M. and the defendant were executing this plan together.

The hearsay statement at issue confirms this plan. Only moments after the defendant left the apartment, the undercover officer asked J.M. how much he would have to pay. The officer testified that J.M. stated that a hand release cost $150 and sex would cost $200, but that he would have to pay for an entire hour. The video shows the statement was made without prompting or coercion. The statement was corroborated by the note found in the defendant's car. We find the statement and surrounding circumstances provide substantial evidence that J.M.'s statements were made in the course and in furtherance of a conspiracy.

The defendant's argument that J.M., as a minor, cannot be considered a coconspirator because she is considered a victim under the statute is without merit. Whether one can be convicted of conspiracy is unrelated to the issue of

whether coconspirator statements are admissible evidence. No conspiracy charge is necessary for the coconspirator's statements to be used against the defendant. *State v. Thai*, 575 N.W.2d 521, 525 (Iowa Ct. App. 1997).

The videotape of the sting that also contained J.M.'s statement about price and services was a recording of the statements properly allowed under the coconspirator exemption. Therefore, this evidence was merely cumulative and the defendant suffered no prejudice. *See State v. Moeller*, 589 N.W.2d 53, 55 (Iowa 1997).

V. INSUFFICIENT EVIDENCE.

The defendant claims the State presented insufficient evidence as a matter of law to support her conviction for pandering involving a minor. We review these claims for whether substantial evidence supports the verdict. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *Id.* (quoting *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002)). The evidence is viewed in the light most favorable to the State but we consider all of the evidence in the record, not only that which sustains a guilty verdict. *Id.* We also consider those "legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *Id.*

The defendant argues there is insufficient evidence that she "persuaded, arranged, coerced or caused J.M. to become a prostitute." At trial, the defendant testified that J.M. contacted her and inquired about working for Jenderez and that J.M. lied about her age. There was no evidence that the defendant persuaded or

coerced J.M. into offering sexual services. However, the defendant admitted to arranging the date with the undercover officer and delivered J.M. to the apartment. The testimony regarding price and services, coupled with the note found in the defendant's car, could allow a fact finder to reasonably infer that the defendant arranged for J.M. to work as a prostitute for Jenderez. The defendant did testify that Jenderez was a dating service that provided companionship and no sexual services. However, "[t]he jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). "In fact, the very function of the jury is to sort out the evidence and 'place credibility where it belongs.'" *Id.* (quoting *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984)). We conclude the record before us provides substantial evidence to support the jury's guilty verdict.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant next contends she received ineffective assistance of counsel by her attorney's (1) failure to object to hearsay testimony about J.M.'s age, (2) failure to challenge the admission of statements by J.M. and J.M.'s mother as a violation of the defendant's Sixth Amendment right to confront witnesses against her, and (3) failure to object to the marshaling instruction on pandering.

"In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove: (1) counsel failed to perform an essential duty; and (2) prejudice resulted." *Maxwell*, 743 N.W.2d at 195 (citing *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). The defendant must prove both elements by a preponderance of the evidence and we can dispose of the claim if the defendant fails to prove either element. *State v. Cook*, 565 N.W.2d 611, 613-614 (Iowa 1997).

Under the first element, we initially presume that the attorney performed competently. *Maxwell*, 743 N.W.2d at 196. We use an "objective standard of reasonableness" to gauge the attorney's conduct and consider his or her performance in relation to "prevailing professional norms." *Id.* at 195 (citing *Rompilla v. Beard*, 545 U.S. 374, 380, 125 S. Ct. 2456, 2462, 162 L. Ed. 2d 360, 371 (2005)). "'Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel.'" *Id.* (quoting *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001)). If a particular tactical decision was reasonable, we will not reverse even if the strategy failed. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). However, "[t]he fact that a particular decision was made for tactical reasons does not . . . automatically immunize the decision from a Sixth Amendment challenge." *Id.* (quoting *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003)). This is why often a postconviction relief proceeding is necessary to help develop a record for us to discern whether the attorney's conduct was improvident trial strategy or ineffective assistance. *Id.*

In addition to proving that counsel performed deficiently, the defendant must prove prejudice. *Maxwell*, 743 N.W.2d at 195. "Prejudice exists where the claimant proves by 'a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.'"

Id. at 196 (quoting *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006)). The defendant must "show that the probability of a different result is 'sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Bowman*, 710 N.W.2d at 206). We make this determination by considering the totality of the evidence, the factual findings affected by the attorney's errors, and whether the error had an isolated or pervasive effect on the trial. *Id.*

A. FAILURE TO OBJECT TO HEARSAY EVIDENCE.

The defendant first claims her trial counsel was ineffective for failing to object to hearsay testimony regarding J.M.'s age. Establishing J.M.'s age was crucial to the State's case because the defendant was charged with pandering to a minor. The State concedes that J.M.'s age was proved at trial through hearsay testimony.[1] The State does not claim any exclusions or exceptions to the hearsay rule apply to the testimony regarding J.M.'s age.[2] However, the State alleges counsel may have had a strategic reason for not objecting. The record is insufficient to determine whether counsel's conduct in this respect was deficient representation or a miscalculated strategy. We therefore preserve the claim for postconviction relief.

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[1] The State presented evidence of J.M.'s age through officer testimony. Officer Denlinger testified that J.M. admitted she was seventeen after she was arrested. Another officer testified that J.M.'s mother was contacted after the arrest and confirmed J.M. was seventeen. Neither J.M. or her mother testified at trial.

[2] Since J.M.'s admission to the officer that she was seventeen was made post-arrest, the rule allowing admission of coconspirator statements does not apply. *See State v. Beckett*, 383 N.W.2d 66, 67-68 (Iowa Ct. App. 1985) (finding a coconspirator's declaration post-arrest "was not made 'during' or 'in furtherance of' the conspiracy" for purposes of the rule). The State concedes that the mother's confirmation of J.M.'s age was an out-of-court statement offered to prove the truth of the matter asserted. The State does not argue that any hearsay exemption or exception applies to this statement.

B. FAILURE TO MAKE SIXTH AMENDMENT OBJECTION.

The defendant also claims her attorney was ineffective in failing to object to testimony about J.M. and her mother's out-of-court statements as a violation of the defendant's Sixth Amendment right to confront witnesses. The Confrontation Clause implements our policies of "face-to-face confrontation at trial and the right of cross-examination." *Newell*, 710 N.W.2d at 24.

> Although this constitutional provision generally protects the same values as the hearsay rule, "the Confrontation Clause bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." *State v. Castaneda,* 621 N.W.2d 435, 444 (Iowa 2001). On the other hand, the Confrontation Clause, like the hearsay rule, does not prevent "the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington,* 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 1369 n.9, 158 L. Ed. 2d 177, 198 n.9 (2004).

Newell, 710 N.W.2d at 24. Therefore, even if some of J.M.'s statements were properly admitted as coconspirator statements, these statements might nonetheless be excluded from evidence to protect the defendant's constitutional right to confront and cross-examine witnesses against her. The Confrontation Clause analysis focuses on whether the statements are testimonial or nontestimonial in nature. *Id.*

"An out-of-court statement by a witness that is testimonial in nature is barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *State v. Musser*, 721 N.W.2d 734, 753 (Iowa 2006) (citing *Crawford v. Washington*, 541 U.S. 36, 59-60, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 197 (2004)). The Confrontation Clause is inapplicable to nontestimonial statements. *Id.* (citing

Davis v. Washington, 547 U.S. 813, ___, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, 236 (2006)).

> [S]tatements in response to police interrogations that are "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator," are . . . testimonial statements subject to the Confrontation Clause.

Id. (quoting *Davis,* 547 U.S. at ___, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240).

J.M.'s statements made during the sting are not testimonial. *See Davis*, 547 U.S. at ___, 126 S. Ct. at 2276-77, 165 L. Ed. 2d at 241-42 (finding statements nontestimonial when the declarant is speaking about events as they are happening rather than as a witness explaining past events). However, it appears at least some of J.M.'s and her mother's statements to police may have been testimonial and therefore subject to Confrontation Clause scrutiny. Statements by both J.M. and her mother about J.M.'s age were made post-arrest and in response to police questions. These statements are testimonial. *See State v. Bentley*, 739 N.W.2d 296, 299 (Iowa 2007) (finding child's statements made during an interview in which police participated were testimonial). Therefore the statements are subject to a Confrontation Clause objection. We cannot determine whether defendant's attorney had a legitimate reason for not objecting on this ground. Since we are unable to evaluate the attorney's performance on the current record, we preserve this claim for postconviction relief proceedings.

C. FAILURE TO OBJECT TO PANDERING INSTRUCTION.

The defendant also contends her attorney was ineffective for failing to object to the marshaling instruction on pandering. The instruction given to the jury stated in relevant part:

> The State must prove all the following elements of Pandering:
>
> 1. On or about March 2, 2006, the defendant Audrey L. Gonzales persuaded, arranged, coerced or otherwise caused [J.M.] . . . to become a prostitute.
> 2. On March 2, 2006, [J.M.] . . . was under the age of eighteen years.
>
> If the State has proved both of the elements, the defendant is guilty of Pandering. If the State has failed to prove both of the elements, the defendant is not guilty.

The defendant argues that the instruction is ambiguous as to how the jury should rule "if the State proves one of the elements but fails to prove the other." The defendant correctly states that the instruction tells the jury to acquit if the State fails to prove both elements. The defendant argues that this is a misstatement of the law because Iowa Code section 725.3 allows a person to be convicted of pandering regardless of the prostitute's age. Pandering involving a minor is a class C felony and pandering involving an adult is a class D felony. Iowa Code § 725.3(1), (2). The defendant suggests a proper instruction would have included the first element only and the jury would have been directed to a special interrogatory regarding J.M.'s age if the first element was met.

Although the defendant correctly points out that she could have been convicted of pandering with or without proof of J.M.'s age, this is irrelevant. The defendant was charged under section 725.3(2), the particular pandering

provision involving minors. The State was required to prove J.M.'s age to secure a conviction and the instruction correctly advised the jury that both elements needed to be proved for a conviction. By its terms, the instruction properly advises the jury to acquit if either element is not proved. "[C]ounsel is not incompetent in failing to pursue a meritless issue." *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). Therefore, we resolve this claim against the defendant due to the defendant's failure to prove that counsel breached an essential duty.

VII. CONCLUSION.

We affirm the defendant's conviction. The statements J.M. made to the officer prior to her arrest were properly admitted as a coconspirator statement under rule 5.802(*d*)(2)(*E*). There was sufficient evidence in the record to support the jury's guilty verdict. The defendant's trial counsel was not ineffective for failing to object to the marshaling instruction on pandering. We preserve the defendant's remaining ineffective assistance of counsel claims for postconviction relief proceedings.

AFFIRMED.