

IN THE COURT OF APPEALS OF IOWA

No. 2-289 / 11-0356
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACOB SCOTT HILGENDORF,
Defendant-Appellant.

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

The defendant appeals his judgment and sentence for first-degree murder.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Tim McMeen, County Attorney, and Douglas Hammerand, Assistant
County Attorney, for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

Jacob Hilgendorf appeals his judgment and sentence for first-degree murder. He claims the district court erred in admitting hearsay statements under Iowa Rule of Evidence 5.801(d)(2)(E) (coconspirator statements). He additionally claims his trial counsel was ineffective. We affirm his conviction and preserve his ineffective-assistance claim for a possible postconviction relief proceeding.

I. Background Facts and Proceedings.

Denise Frei lived with victim Curtis Bailey at his home in Marengo. Bailey owned a café where Frei was a cook and Jessica Dayton was a waitress. Bailey also was a foreman at a construction company. Nineteen-year-old Jacob Hilgendorf is Frei's son, and he described Dayton as his "friend with benefits." Hilgendorf and Bailey did not have a good relationship, and Bailey did not allow Hilgendorf to come into his café or his home. On July 30, 2009, Dayton, Frei, and Hilgendorf were jointly charged for the July 19 murder of Bailey.

The trials were severed, with Dayton's trial occurring first. Dayton was found guilty of first-degree murder. We affirmed her conviction. *State v. Dayton*, No. 10-1161, 2011 WL 4578505 (Iowa Ct. App. Oct. 5, 2011). On January 19, 2011, the jury returned a first-degree murder verdict against Hilgendorf, and he now appeals. Frei was also found guilty of first-degree murder, and her appeal is currently pending.

At Hilgendorf's trial, Alexandria Musel, Jessica Dayton's best friend, testified to a conversation with Dayton in early July. Dayton told Musel "she may have to help [Frei] kill Curtis Bailey" because "he was an evil man."

Elisha Runyan also worked at the café, was very close friends with Frei, and was Hilgendorf's friend and ex-roommate. At the end of June 2009, Hilgendorf moved out to live, temporarily, in Denise Templeton's basement in Amana. Templeton testified Hilgendorf didn't like Bailey. At some point during the week of the murder, Hilgendorf told Templeton "he wanted [Bailey] dead."

The week prior to Tuesday, July 14, Runyan and Hilgendorf talked about finances: "He had called me up because I had had financial problems and he said that I wouldn't have to worry about them anymore, that I would be getting a pretty penny if I kept my mouth shut."

On July 14, Hilgendorf, Dayton, and Frei had an hour-long conversation in the café's parking lot. Also on July 14, Runyan and Frei had a conversation in the café, and Frei talked about killing Bailey on Saturday night, July 18. Runyan testified:

Q. Did she talk about anybody else's name? A. Jessica [Dayton].

Q. Did she say what they were going to do to Curt? A. Yes, she said that [she] and Jess were going to try to overdose him.

Q. Did Ms. Frei say anything about anybody receiving money? A. Yes.

Q. What did she say? A. She said that if they helped, that they would get \$5000.

...

Q. Who did she say? A. Jessica and Jacob [Hilgendorf].

Q. So if Jessica and Jacob helped, they would get \$5000 to do what? A. To kill Curtis Bailey.

While working at the construction company on Saturday, July 18, Bailey told his boss Frei was inviting a waitress named Jessica for "a ménage a trois" that evening. Bailey explained he had "to do a shot of whiskey for every sex act that the girls do." Bailey also told coworker Tim Schneider about the upcoming

evening: “[I]t was a secret, but [Frei] had arranged a three-way and she had picked a girl to be in this three way, her name was Jessica.” Bailey also told Schneider about the drinking-shots-for-sex-acts plan.

Dayton and Frei worked together at the café on Saturday, July 18. Frei called Runyan from the café and sounded excited. Frei asked Runyan to come to the café “because she wanted to explain to me what was going to happen”:

Q. Did she say specifically about what? A. Yes, she had said that she was going to start drinking at the café so that Jessica had a reliable reason to bring her—take her home.

Q. Did she say anything about a plan? A. Yes.

Q. What did she say? A. That they were going to try to kill Curtis.

Runyan did not go to the café. Around 6:00 p.m., Dayton and Frei left the café together in Frei’s car.

Runyan, Templeton, and Hilgendorf gathered at Templeton’s house Saturday evening and sat around the fire pit in Templeton’s yard, drinking and smoking marijuana. When Runyan left around 9:00/9:30 p.m., Templeton and Hilgendorf “[h]ung out, smoked, drank.” Between 10:54 and 11:35 p.m., Dayton and Hilgendorf exchanged numerous text messages. Hilgendorf left in his truck to get Dayton. Hilgendorf later told DCI agents he was not totally sober, but he had no difficulty walking, talking, or sending text messages. He rated himself as a two or three on an intoxication scale of one to ten. Hilgendorf sent Templeton a text message at 11:43 p.m. Templeton testified this text occurred within ten minutes of his leaving. Dayton and Hilgendorf exchanged another six text messages from 12:36 p.m. to 12:43 p.m.

Templeton went to bed and was subsequently awakened by her dog barking. Templeton went downstairs, saw Hilgendorf and Dayton in her den, and noticed Dayton “had a pair of my sweatpants on.” Templeton also noticed her fire pit had been reignited. Templeton took them upstairs to the bathroom and provided each of them with a towel.

When Dayton and Hilgendorf came out of the bathroom, they gathered in Templeton’s bedroom to talk and smoke marijuana. Hilgendorf stated: “Things went badly”; Bailey “wasn’t going to make it”; and “[s]omething about either they ripped up or they cut up something and burned it” in the fire pit. Dayton stated: “[T]hings had not gone according to plan.”

Meanwhile, at 1:48 a.m., police were called to Bailey’s home. Upon arrival they found Frei sitting on the front steps with blood spattered on her hands and her clothing. They found Bailey dead inside, lying in a pool of congealed blood. The cause of his death was blunt force injuries to the head from between eleven and thirty blows. Tests showed Bailey was intoxicated and had marijuana in his system.

The officers found broken glass near Bailey and “Saran Wrap, plastic wrapping” near his arm. On the floor they found a white plastic bag in which some shards of glass and a ceramic ashtray had been picked up and placed inside.

After interviewing Frei, officers wanted to speak to Hilgendorf and Dayton. Frei called them and they drove to the police station in Templeton’s car. Hilgendorf’s truck remained in Templeton’s garage. Both Hilgendorf and Dayton were interviewed, with Hilgendorf’s interview commencing at 9:00 a.m. While

Dayton was at the police station, she sent Templeton a text message: "I need you to do me a big favor! Go to Jacob's car and clean it out its very important!" When Templeton received this message, she was outside and "there was an Iowa County sheriff's deputy sitting with me." Templeton did not respond to the message, and she gave the officers permission to search her home and garage.

Dayton also called Elisha Runyan from the bathroom of the police station. Runyan explained: "She said that everything had gone wrong, everything had gone wrong, she needed me to go to [Templeton's] house and get some things out of [Hilgendorf's truck] that was in the garage." Runyan refused to do so.

During his interview, Hilgendorf stated he and Bailey mutually disliked each other, but he denied harming Bailey. He noted Bailey does not like him or his brothers. Derek, one of Hilgendorf's brothers, lives in Cedar Rapids with his son Reese.

Hilgendorf acknowledged he went to Bailey's café to see his mom after he got off work on Saturday. Hilgendorf explained he stayed at Templeton's on Saturday/Sunday until he left to pick up Dayton "probably like 12:30ish." At first, Hilgendorf stated he did not enter Bailey's home—"I didn't get out of my truck." Hilgendorf declined the agents' request to search his truck—"I prefer you don't." However, he allowed the agents to take a sample of his DNA.

During a break in his interview and while in the interrogation room, Hilgendorf called Templeton and stated:

I have your car though because I forgot that I parked my truck in your garage last night. So like I have your car Are they still there? Oh, really. What are they doing? . . . Did you let [them] in the garage? No, you don't. Denise, no you don't. That is your right. Huh? No . . . you didn't even have to cooperate at all. I mean it's a

good thing that you did, but you didn't have to. Right. Right. Well, the only thing that I told [them] . . . I really didn't want [them] looking in my truck.

When the questioning continued, the DCI agents asked Hilgendorf to explain the yellow gloves an officer observed while looking in the windows of his truck. Subsequently, Hilgendorf confessed to killing Bailey—"I just hate him so." Hilgendorf said it wasn't planned, rather he "was gonna go over there and make him mad, but then [Bailey] started freaking out" and threatened him. Hilgendorf told the DCI agents Bailey also threatened his nephew Reese and his mom's family.

Hilgendorf admitted Bailey had nothing in his hands, no weapon, but claimed Bailey was "stronger than I am." When Bailey started yelling at him and pushed him, Hilgendorf took a rock from the aquarium stand, shoved Bailey down onto the couch, and hit Bailey on the head with the rock. After the first blow, Hilgendorf "hit him again and I just didn't stop." Hilgendorf stopped hitting Bailey when "I had seen that he wasn't moving."

Hilgendorf also admitted hitting Bailey with a glass candy dish/ashtray and trying to hit Bailey with the BB gun, but it "wasn't hard enough." Hilgendorf stated his mom and Dayton were outside and "came inside toward the end." They all knew Bailey was dead. Next, Hilgendorf "grabbed everything and ran." Hilgendorf explained he grabbed "everything in my truck" including the rock, the BB gun, and the gloves—"[w]hatever I thought would have my fingerprints on it."

Hilgendorf also acknowledged he burned his clothes in Templeton's fire pit—specifically mentioning his jeans, tee shirt, and socks. "I think my [Airwalk tennis] shoes and jacket are still in the truck." Hilgendorf stated he did not "want

anybody else to get in trouble” and claimed Dayton and his mom were “not a part of this.”

After his confession and during another break, Hilgendorf again called Templeton from the interrogation room. Templeton was on a speaker phone and officers were listening. Hilgendorf stated:

I told the truth. Tell everybody I love ‘em I told the truth. I killed [Bailey]. No, I’m so sorry. I love you. And I love my mom. Tell everybody I love ‘em. No, you can’t do anything. Bring me a cigarette. I love you I have to call Elisha . . . Bye.

Next, Hilgendorf called Elisha Runyan:

I love you. I told the truth. I told them that I killed him. I love you . . . I’m so sorry. I shouldn’t have done it. I know I shouldn’t of. I had to. He threatened me. He threatened my brother. He threatened [my nephew] Reese. I had to do it. I couldn’t . . . I’m so sorry. Can you bring me cigarettes please I’m at the sheriff’s office Bye.

In his final call during this break, Hilgendorf stated: “I love you guys very much, and I’m sorry I killed Curt. And I told the truth. I’m so sorry. I love you guys. Oh, Reese, I love you. I love you. I’m sorry.” Hilgendorf’s statements were recorded, and the CD was entered into evidence at trial.

Hilgendorf was handcuffed and taken to the booking area. The jailer testified Hilgendorf asked to make a phone call and the jailer dialed the number. While the jailer was sitting across the desk from Hilgendorf, he confessed during the phone call. The booking room telephone line is recorded, and the CD of the recording was entered into evidence at trial. A female answered the phone, and Hilgendorf told her: “I made a big mistake” and “I killed Curt.” She asked, why? Hilgendorf replied: “Because he’s an asshole.” In response to her further

questioning, Hilgendorf stated Dayton and his mother were there, but did not help him.

Next, Hilgendorf's brother Derek took over the phone. Several times Hilgendorf told his brother he was sorry and he did not really mean to do it. Derek asked how Hilgendorf got caught. Hilgendorf replied he came into the sheriff's office because their mom was there and then he was questioned. Further, Denise Templeton gave them permission to look around and they saw gloves in his truck. "I thought I got rid of everything and I didn't."

When Runyan arrived at the jail with cigarettes for Hilgendorf, she gave the cigarettes to Frei and told Frei Hilgendorf had confessed. Frei stated, "no, no, he didn't do anything" or "no, no he had nothing to do with it, he's lying." Runyan also testified that during her questioning, she told the officers she didn't know if Hilgendorf was involved in the plan between Dayton and Frei.

The State presented DNA and fingerprint evidence at trial. In Hilgendorf's truck the officers found a large rock, a BB gun, Airwalk tennis shoes, rolls of plastic wrap, the left glove, a Glad Force bag, and the hoodie Hilgendorf was wearing when he left Templeton's house. All were stained with blood containing DNA matching Bailey's DNA profile. The BB gun was wrapped in a white plastic bag bearing Dayton's fingerprints. The right yellow glove, also found in the truck, had a mixture of DNA. Bailey was the major contributor and the minor contributor was consistent with Hilgendorf's DNA profile. Hilgendorf's fingerprints were not found on any of these items. The State's expert testified if a person was wearing the yellow gloves while putting items in the truck, he would not expect to find the person's fingerprints on the items.

In a kitchen cupboard of Bailey's home, officers found an empty Shur Fine plastic wrap box stained with blood containing DNA matching Bailey's DNA. Dayton's fingerprints were on the Shur Fine box. A vodka bottle and Sprite bottle in Bailey's home also contained Dayton's fingerprints. Frei's sweatshirt and socks were stained with blood containing DNA matching Bailey's DNA profile. Of the forty-six items examined by the State's expert, none contained DNA matching Denise Frei or Jessica Dayton.

The State's criminologist testified the ashes from the fire pit yielded two cotton fabric samples. One was consistent with a terry cloth towel fabric, and one was consistent with the edge of a towel or denim.

A footwear impression was taken from the area between Bailey's body and the sofa. The impression was compared to Hilgendorf's Airwalk shoes found in his truck. The State's expert testified a shoe of that size and outsole design made the impression, but he could not identify Hilgendorf's particular shoe as the source.

During closing arguments, defense counsel argued witnesses Musel and Runyan discussed a plan between Jessica Dayton and Denise Frei and neither witness testified to Hilgendorf being a part of the plan. Counsel contended Hilgendorf's confession was a lie: "He wasn't there. Jessica and Denise were there, not him." Counsel also urged the jurors to look at the instructions on intoxication and justification: "Intoxication is a defense to lower what your mental capacity was. Justification basically says reasonable self-defense." Counsel concluded by asking the jurors "to find Jacob Hilgendorf not guilty of that most serious crime of murder in the first degree."

II. Coconspirator Exception to the Hearsay Rule.

“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). On appeal, Hilgendorf “does not contest the district court’s finding of a conspiracy.” Hilgendorf argues the district court erred in determining Frei’s July 14 and July 18 statements to Runyan were *in furtherance* of a conspiracy. See *id.* (ruling coconspirator statements “in furtherance of the conspiracy” are not hearsay). Hilgendorf contends Frei was conversing with Runyan without trying to recruit Runyan to join the conspiracy or persuade Runyan to do something to facilitate the crime. Frei’s conversations were not promoting any objective; rather, Frei was only engaging in conversation with her friend who had no part in Frei’s plan to kill Bailey. Therefore, Frei’s statements to Runyan were not made in furtherance of a conspiracy within the meaning of Iowa Rule of Evidence 5.801(d)(2)(E).

“We review the admission of hearsay evidence for errors at law.” *State v. Tangie*, 616 N.W.2d 564, 568 (Iowa 2000).

A statement is not considered to be hearsay if it is made by a coconspirator “during the course and in furtherance of the conspiracy.” Iowa R. Evid. 5.801(d)(2)(E). Once a conspiracy is established, two conditions must be met for the coconspirator exception to apply: “the statement must have been made during the pendency of the conspiracy, and it must be in promotion of the conspiracy’s object or design.” *Tangie*, 616 N.W.2d at 571.

Statements which further the conspiracy must be distinguished from mere idle chatter, narrative declarations, and superfluous casual remarks which do not further the conspiracy. Statements made in furtherance of a conspiracy can take a variety of forms. Some examples 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. Courts assess a statement's ability to advance the conspiracy in the context in which the statement was made.

United States v. Johnson, 200 F.3d 529, 534 (7th Cir. 2000) (citations omitted).

We need not decide whether Frei's statements to Runyan were in furtherance of the conspiracy because even if *we assume* the statements are inadmissible hearsay, we find no error.

"Not all evidentiary errors require reversal." *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (quoting *Shawhan v. Polk Cnty.*, 420 N.W.2d 808, 810 (Iowa 1988)). Iowa Rule of Evidence 5.103(a) provides: "Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected." "Thus, error in an evidentiary ruling that is harmless may not be the basis for relief on appeal." *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008). Rule 5.103(a) "accepts that error has seeped into the trial, but does not allow the error to serve as grounds for reversal of the conviction . . . if the overall circumstances affirmatively establish the error did not affect the substantive rights of the defendant." *Id.* While prejudice is presumed, "we consider a variety of circumstances in determining the existence of harmless error, including the existence of overwhelming evidence of guilt." *Id.*; see *State v. Mattingly*, 220 N.W.2d 865, 869 (Iowa 1974) (stating prejudice is presumed unless the contrary is affirmatively established).

Hilgendorf's conviction was clearly based on overwhelming evidence of his guilt. Before the murder, Hilgendorf tried to buy Runyan's silence, offering her a "pretty penny" if she would keep her mouth shut. Also before the murder, Hilgendorf told Templeton he wished the victim was dead.

Upon returning to Templeton's after the murder, Hilgendorf told Templeton: "Things went badly"; the victim "wasn't going to make it"; and "[s]omething about either they ripped up or they cut up something and burned it" in her fire pit.

The day of the murder, Hilgendorf confessed his guilt to DCI agents, told them he hated the victim, and admitted destroying evidence in the fire pit. Also on the day of the murder, Hilgendorf confessed his guilt to four friends and relatives. Hilgendorf tried to conceal the murder-related evidence in his truck by not driving his truck to the police station and not giving the authorities permission to search his truck. Numerous items in the truck, including the rock and the BB gun Hilgendorf admitted using to hit the victim, contained DNA matching the victim's DNA. Hilgendorf confessed after the DCI agents asked him about the gloves they saw in his truck. One glove contained a DNA match to both the victim and Hilgendorf.

Further, Hilgendorf's justification defense would not have prevailed even if Frei's statements to Runyan had been excluded. The jury was instructed:

A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself or others from any imminent use of unlawful force.

If the State has proved any one of the following elements, the defendant was not justified:

1. The defendant started or continued the incident which resulted in injury or death.

2. An alternative course of action was available to the defendant.

3. The defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him.

4. The defendant did not have reasonable grounds for the belief.

5. The force used by the defendant was unreasonable.

The victim was drunk and, according to Hilgendorf, had no weapon and did not hit him. Relying only on Hilgendorf's statements, the jury could rationally find Hilgendorf did not use force "necessary to defend himself or others from any imminent use of unlawful force." Hilgendorf's description of the events shows an alternative course of action—leaving—was available to Hilgendorf after the victim allegedly pushed him and threatened him and his family. Hilgendorf's own description of the events—hitting the victim until he stopped moving—also shows the force he used was unreasonable and shows he "continued the incident which resulted in injury or death."

We do not see how the evidence of Hilgendorf's guilt can be viewed as anything short of overwhelming. Accordingly, we conclude Hilgendorf's substantive rights have not been affected nor has he suffered a miscarriage of justice as a result of the admission of Frei's statements to Runyan.

III. Ineffective Assistance of Trial Counsel.

Hilgendorf argues his trial counsel was ineffective in failing to object to the admission of: (1) Dayton's statement to Alexandra Musel that Dayton was going to have to help Frei kill Bailey; (2) Dayton's statement to Denise Templeton that "things had not gone according to plan"; and (3) Bailey's statements to his boss and also to his co-worker describing the upcoming evening with Frei and Dayton.

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow an adequate record of the claim to be developed “and the attorney charged with providing ineffective assistance . . . an opportunity to respond to defendant’s claims.” *Biddle*, 652 N.W.2d at 203. This is not the “rare case” which allows us to decide Hilgendorf’s ineffective-assistance claims on direct appeal without an evidentiary hearing. See *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). We preserve his claims for possible postconviction relief proceedings.

AFFIRMED.