**IN THE COURT OF APPEALS OF IOWA**

No. 8-812 / 07-1027
Filed March 11, 2009

**KENDON HAUGE SCHWEBKE,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Hardin County, Carl D. Baker, Judge.

Kendon H. Schwebke appeals the district court's denial of his application for postconviction relief following his conviction for murder in the second degree. **AFFIRMED.**

Clemens A. Erdahl, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Randall J. Tilton, County Attorney, and Jim R. Sween, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

**MILLER, J.**

Kendon H. Schwebke appeals the district court's denial of his application for postconviction relief following his conviction for murder in the second degree. We affirm.

## I. BACKGROUND FACTS AND PROCEEDINGS.

From the evidence presented at trial of the underlying criminal charge against Schwebke, the jury could have found the following facts. Jim Worsfold, a tenant of Schwebke's father, disappeared on September 4, 2002. Friends of Worsfold's, concerned about his disappearance, confronted Schwebke because they were aware of trouble between Schwebke and Worsfold. In fact, two of Worsfold's friends had at various times heard Schwebke threaten to kill Worsfold with a gun. When confronted about Worsfold's disappearance by Dan Freeman, an acquaintance of Worsfold's, Schwebke initially asked for more time to contact Worsfold. Confronted again the next day, Schwebke told Freeman he did not know where Worsfold was but knew he was not coming back. He then said he did not know the location of Worsfold's body but hoped he was in heaven. Aware of the growing concern over the disappearance of Worsfold, Schwebke called Cassell Smith, Worsfold's sometimes girlfriend, with a message he claimed had been left by Worsfold for her that "he's sorry, but goodbye" and "have a nice life with Mike (Mikesell) and your points," referring to syringes and injecting drugs. Smith had at times been with Mike Mikesell and at times with Worsfold and was a source of conflict between the two men.

Responding to a call by Freeman about Worsfold's disappearance and that he had seen blood at Worsfold's house, on September 9, 2002, officers entered the house that had been occupied by Worsfold without a warrant and found blood in both an upstairs bedroom and on a mattress that had been pulled into the hallway. Thereafter, officers were contacted by Schwebke, who also reported Worsfold's disappearance. Schwebke was asked to come to the sheriff's office for an interview, during which he gave his written consent for the officers to search the farmhouse and its outlying building. That search was conducted pursuant to a valid warrant on September 10.

On September 17 police asked Schwebke to come in for another interview. Schwebke agreed and was interviewed by Agent Mel McCleary. At the outset of the interview McCleary asked Schwebke to read his rights and interrupted after each right to obtain confirmation that Schwebke understood his rights. The interview, which lasted some five hours, revealed Schwebke's involvement with Worsfold's murder, his participation in disposing of the victim's body, and information that led to the discovery of Worsfold's remains. Schwebke implicated Mikesell as Worsfold's murderer, including telling McCleary that Mikesell told him he shot Worsfold in the temple.

When Worsfold's body was found he had been shot in the head with a .22 caliber round. Recovered during the investigation was a .22 caliber, semi-automatic rifle belonging to Schwebke. The cartridge case at the scene of the shooting, stained with Worsfold's blood, the bullet removed from Worsfold, and a test shot fired from Schwebke's rifle were all consistent with one another. On the

night of Worsfold's disappearance, Schwebke was seen standing in the dark holding a rifle. The rifle was the same rifle Schwebke asked another to hide for him the day after the shooting. Blood identified as Worsfold's was discovered in the box of Schwebke's truck, a truck to which he had added a topper shortly before Worsfold's disappearance.

The State charged Schwebke, by trial information, with murder in the first degree. Schwebke filed a waiver of speedy trial rights. Schwebke subsequently filed a motion to suppress, seeking suppression of both the evidence seized at Worsfold's residence and his statements to Agent McCleary. The district court denied the motion. Jury trial followed.

Schwebke testified at trial as to the following version of events surrounding Worsfold's death and the hiding of his body. Worsfold and Mikesell were selling drugs together, including methamphetamine, out of the residence where Worsfold was staying. On the night of Worsfold's death, Mikesell got in Schwebke's truck and made him take him to Worsfold's residence to talk to Worsfold. Mikesell threatened Schwebke with Schwebke's .22 caliber rifle when Schwebke asked Mikesell why he wanted to talk to Worsfold. When he and Mikesell arrived at Worsfold's residence Mikesell went upstairs alone to see Worsfold, who was believed to be asleep, while Schwebke waited downstairs. Schwebke saw that Mikesell had the .22 rifle with him when he went upstairs to "talk" to Worsfold, but he did not believe Mikesell would ever shoot Worsfold and at most they would get in a fist fight. He then heard a shot and Mikesell came running out of the house and stated they needed to get out of there and that he

had "warned" Worsfold. They got into Schwebke's truck and left. The next morning Mikesell had Schwebke take him to Dave Bowers's house and asked Bowers to keep the .22 rifle for them. Schwebke thought that was somewhat odd but that Mikesell just did odd things sometimes. The following morning at breakfast Mikesell threatened him and his father with a .38 caliber derringer and told him to keep his mouth shut and that nobody would get hurt.

Schwebke testified that later that night Mikesell made him go with Mikesell to get rid of Worsfold's body, and this was when he realized Mikesell had in fact shot Worsfold when they had been there a couple of nights earlier. This testimony contradicted what he had earlier told Agent McCleary. During his interview with Agent McCleary, Schwebke stated that as Mikesell came running out of the house after the gunshot, Mikesell told him he had shot Worsfold in the head.

Schwebke testified he initially refused to help Mikesell move the body but Mikesell pulled the derringer on him and threatened him and his father once again. Schwebke and Mikesell then moved the body from Worsfold's residence to an abandoned barn on an abandoned farm north of Ellsworth, Iowa. They transported the body in Schwebke's truck. He then returned to the residence where Worsfold was shot, saw blood, and cut out a piece of carpet with blood on it. According to Schwebke, Mikesell told him to "torch the house" and told him to get some acid. Schwebke stated he wanted to tell the police about it right away but was afraid Mikesell would harm him or his father. Eventually Schwebke and his father called the Hardin County sheriff to report that Worsfold was missing.

Schwebke admitted during his testimony at trial that when he called to report Worsfold's disappearance he did not tell law enforcement about the blood in the house and that he lied to Agent McCleary during his interview with him following Worsfold's death.

The jury found Schwebke guilty of the lesser included charge of murder in the second degree, in violation of Iowa Code section 707.3 (2001). His post-trial motions in arrest of judgment and for new trial were denied by the court. Schwebke filed a timely appeal of his conviction alleging the trial court erred in failing to grant his motion to suppress his statements to McCleary, and there was insufficient evidence to support his conviction for murder in the second degree. This court affirmed Schwebke's conviction, concluding in relevant part that,

> Evidence was presented indicating that Worsfold and Schwebke had had heated differences, and that on at least one occasion, Schwebke had threatened Worsfold with a gun. Schwebke admitted his presence on the farmstead at the time Worsfold was killed. Schwebke owned the rifle that was used to shoot and kill Worsfold. Schwebke actively participated in the attempt to conceal the crime by attempting to clear blood from the farmhouse and dispose of the murder weapon and the body of Worsfold. Blood from the victim was found in Schwebke's truck, which he used to dispose of the body. Only Schwebke identified the location of the victim's body. And while no direct evidence was adduced pointing to Schwebke as the one who shot Worsfold, there was clearly enough proof to convince a rational trier of fact that Schwebke aided and abetted whoever did. One guilty of aiding and abetting the commission of a crime may be charged, tried and punished as a principal.

*State v. Schwebke*, No. 03-1194 (Iowa Ct. App. Sept. 29, 2004). Application for further review was denied by the Iowa Supreme Court.

Schwebke, by counsel, filed an application for postconviction relief. In it he raised several claims of ineffective assistance of trial counsel. In a later

"Applicants Brief and Pro Se Argument" Schwebke raised additional claims of ineffective assistance of both his trial and appellate counsel. Following a hearing in which both Schwebke and his trial counsel testified, the district court denied the postconviction application in a written ruling filed May 11, 2007. Schwebke filed an Iowa Rule of Civil Procedure 1.904(2) motion to enlarge or amend. Before a hearing on the rule 1.904(2) motion was even set, Schwebke filed a notice of appeal of the district court's denial of his postconviction application. Schwebke then filed a motion for limited remand to allow the district court to rule on the rule 1.904(2) motion and our supreme court granted the motion. The remand hearing was held and the district court entered a written ruling on August 30, 2007, addressing and denying three additional grounds of ineffective assistance of trial and appellate counsel asserted by Schwebke.

Schwebke appeals, contending the district court erred in finding he did not receive ineffective assistance of trial and appellate counsel and denying his postconviction application. He contends (1) trial counsel was ineffective for not objecting to the jury instructions for murder in the second degree because there was insufficient evidence to support submission of one of the alternatives for second-degree murder; (2) trial counsel was ineffective for not objecting to the repeated remarks from the prosecutor during opening statements and closing argument as well as during Schwebke's cross-examination in violation of his constitutional right to due process of law as set forth in *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), and his appellate counsel was ineffective for not raising this issue on direct appeal; (3) appellate counsel was ineffective for not arguing

that statements objected to at trial made by him to law enforcement were hearsay; and (4) under the totality of the circumstances the cumulative error of both trial and appellate counsel denied Schwebke his constitutional right to effective assistance of counsel and due process.

## II. SCOPE AND STANDARDS OF REVIEW.

We typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when the applicant asserts a claim of a constitutional nature, such as ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Id*.

## III. MERITS.

A person claiming he or she received ineffective assistance of counsel must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted from the error. *State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004). To prove the first prong, failure to perform an essential duty, the person must overcome a strong presumption of counsel's competence and show that under the entire record and totality of circumstances counsel's performance was not within the normal range of competency. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). To prove the second prong, resulting prejudice, the person must show that counsel's failure worked to the person's actual and substantial disadvantage so there exists a reasonable probability that but for counsel's error the result of the proceeding would have been different. *State v. Buck,* 510 N.W.2d 850, 853 (Iowa 1994). On appeal we may affirm a rejection of an ineffective-assistance-of-counsel claim if proof of

either element is lacking. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We judge ineffective assistance claims, whether of appellate counsel or trial counsel, against the same two-pronged test, deficient performance and resulting prejudice. *Ledezma*, 626 N.W.2d at 141.

**A. Jury Instructions.**

Schwebke first claims the postconviction court erred in not finding his trial counsel was ineffective for not objecting to the jury instruction on second-degree murder. The challenged instruction (Instruction 36) stated, in relevant part:

> In order for you to find the Defendant guilty of the lesser charge of Murder in the Second Degree, the State must prove all of the following elements:
>
> 1. On or about the 5th day of September, 2002, the Defendant or someone he aided and abetted intentionally shot Jim Worsfold.
> 2. Jim Worsfold died on September 5, 2002, as a result of being intentionally shot by the Defendant or someone he aided and abetted.
> 3. The Defendant or someone he aided and abetted acted with malice aforethought.

Schwebke argues trial counsel should have objected to this instruction because there was insufficient evidence to support instruction on the theory that he was the one responsible for the shooting, that he "intentionally shot" Worsfold. Stated differently, he claims there was insufficient evidence to support submission of an instruction that would allow the jury to find him guilty as a principal.

Schwebke submitted an "Applicants Brief and Pro Se Argument" to the postconviction trial court and requested that the court consider the claims set forth therein. At "IV" in that brief he raised essentially the same claim he now attempts to pursue on appeal. He argued the

> marshalling instruction [allowed] the jury to consider two theories of culpability, only one (the aiding and abetting theory) is supported by the evidence. With a general verdict of guilty, we have no way of determining which theory the jury accepted. . . . It was legal eror [sic] to submitt [sic] to the jury the above mentioned theory. When a general verdict does not reveal the basis for a guilty verdict, reversal is required. [Cite].

When at the postconviction trial Schwebke was asked to describe his claim or claims regarding jury instruction 36, he identified two complaints. First, he asserted that counsel had been ineffective because

> they had brought aiding and abetting on second degree murder, and the jury instruction 36, he brought up aiding and abetting at opening argument. It was never brought up before. It was never amended in.

His second complaint of ineffective assistance was

> And the jury instruction with the parts, there is no "or somebody."
> . . .
> In the jury instructions which I have not with me, but you must use a "he" or a "her" or a name and a name. You cannot use "or somebody."

In ruling on Schwebke's application the postconviction trial court addressed and rejected Schwebke's complaint that the theory he aided and abetted in Worsfold's murder should not have been submitted to the jury. It did not, however, address his complaint that instruction 36 was required to, but did not, identify the person he had allegedly aided and abetted. As previously described, Schwebke filed a rule 1.904(2) motion, and our supreme court later granted his request for a limited remand. Following a further hearing the court in relevant part addressed the second complaint Schwebke had identified in his testimony at the postconviction hearing. It ruled that Schwebke's complaint, that in submitting

the theory of aiding and abetting murder it was "necessary to identify the person that committed the murder," was without merit.

In its combined initial ruling and ruling following remand the postconviction court thus addressed and ruled on Schwebke's complaints regarding instruction 36 as described in his testimony. It did not, however, in either ruling address or pass upon the somewhat different claim he now attempts to present on appeal, the claim in "IV" of his brief and pro se argument, that counsel rendered ineffective assistance by not objecting to instruction 36 on the ground there was insufficient evidence to support a finding he was guilty of murder in the second degree as a principal.

For two reasons we find Schwebke entitled to no relief on this claim of error. First, we do not believe error has been preserved on this claim.[1] In its initial ruling following the postconviction trial the postconviction court ruled on the first of Schwebke's two complaints as listed and described in his testimony, a claim that murder in the second degree by aiding and abetting had not been charged in the trial information and should not have been submitted to the jury. Schwebke's rule 1.904(2) motion requested in relevant part only that the court expand its ruling to include issue "IV" from his brief and argument. Our supreme court's remand order provided in relevant part only the general direction that the district court address Schwebke's rule 1.904(2) motion. It did not identify any particular claim or issue to be addressed.

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[1] In view of the range of interests protected by our error preservation rules, we may consider on appeal whether error was preserved even if the opposing party does not raise the issue on appeal. *Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000).

Following remand the postconviction court ruled on the second of Schwebke's two complaints as listed and described in his testimony, a claim that the jury instruction must identify the person whom he allegedly aided and abetted. The court did not address or rule on the related but somewhat different claim raised in "IV" of his brief and pro se argument, that the alternative allowing him to be found guilty of murder in the second degree as a principal should have been objected to as not supported by the evidence. Schwebke did not thereafter in any manner either seek further ruling from the postconviction trial court or suggest that it had not fully addressed the claim that he now attempts to present on appeal.

"Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal." *Benevides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). "It is well settled that a rule [1.904(2)] motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication." *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984). Following its ruling on remand the postconviction trial court had addressed and ruled on Schwebke's "IV" claims as listed and described in his testimony. Under such circumstances we believe that if the court had failed to address an issue Schwebke had raised in his brief but he had not identified when asked to list and describe his claims in his testimony, it was incumbent upon him to seek further ruling by a motion such as a rule 1.904(2) motion.

Second, assuming without deciding that Schwebke has in fact preserved error on this claim, we find it to be without merit. From the evidence presented a rational jury could find certain facts. Schwebke harbored a strong dislike for Worsfold. In the few weeks before Worsfold's death Schwebke had on several occasions threatened to kill him. The threats included threats to shoot Worsfold and threats to use guns on Worsfold.

Schwebke had for years owned and possessed a .22 caliber semi-automatic rifle. Schwebke drove Mikesell and himself to Worsfold's residence. Schwebke took the rifle to Worsfold's residence. Schwebke entered the residence with Mikesell. Worsfold was killed by a .22 caliber bullet found in his head.

As previously noted, on the night of Worsfold's disappearance Schwebke was seen standing in the dark holding a rifle; the next day he asked another to hide the rifle; and the bullet that killed Worsfold, the blood-stained cartridge casing found at the scene, and a test shot fired from Schwebke's rifle, were all consistent with each other.

Schwebke added a topper to the back of his pickup truck, for the first time it seems, shortly before Worsfold's death. Schwebke used his pickup to transport Worsfold's body from the scene of the killing to where Schwebke hid or participated in hiding the body. Worsfold's blood was found in the pickup. Schwebke alone identified the location of Worsfold's body and led law enforcement authorities to the body.

Schwebke destroyed and attempted to destroy evidence of the murder. He lied to numerous acquaintances of his and acquaintances of Worsfold about his lack of involvement in Worsfold's disappearance and death. Schwebke lied to law enforcement authorities about his lack of knowledge and his lack of involvement, and subsequently gave several different, conflicting, and changing versions of the facts.

From the evidence presented the jury could reasonably find beyond a reasonable doubt that no one other than Mikesell or Schwebke killed Worsfold. Although Schwebke testified it was Mikesell who shot Worsfold, under the evidence presented the jury was not required to accept Schwebke's testimony on this point. *See, e.g., State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996) ("A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence, as in its judgment, such evidence should receive."). It is well established that direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(*p*); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). The evidence summarized above provides a reasonable basis for a jury to find beyond a reasonable doubt that it was Schwebke who shot Worsfold.

In addition, Schwebke claims that the "or somebody" language in Instruction 36 was in error because it allows the jury to convict him of aiding and abetting without the State proving who the principal may have been. However, an aider and abettor may be tried before the principal, *Jones v. State*, 479 N.W.2d 265, 272-73 (Iowa 1991), and the identity of the principal need not be proven, *State v. Kern*, 307 N.W.2d 22, 27-28 (Iowa 1981). Therefore, this claim

is without merit and trial counsel was not ineffective for not objecting to the instruction on this ground. Counsel is not ineffective for failing to raise meritless issues or to make questionable or meritless objections. *Greene*, 592 N.W.2d at 30; *State v. Smothers*, 590 N.W.2d 721, 724 (Iowa 1999); *State v*. *Atwood*, 342 N.W.2d 474, 477 (Iowa 1984).

Accordingly, we conclude the postconviction court did not err in finding Schwebke's trial counsel was not ineffective for not objecting to this instruction and denying Schwebke's postconviction application on these grounds.

**B. Prosecutorial Misconduct.**

Schwebke next claims the postconviction court erred in not finding his trial counsel ineffective for not objecting to questioning and comments by the prosecution that he claims constituted prosecutorial misconduct and violated his constitutional right to due process of law as set forth in *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), and not finding his appellate counsel was ineffective for not raising this issue on direct appeal.[2] More specifically, Schwebke claims the prosecutor committed misconduct during opening statement and closing arguments and while questioning him. We believe Schwebke's allegations of prosecutorial misconduct can be placed in four general categories: (1) characterizing Schwebke's conduct as callous; (2) stating Schwebke had the ability to stop the murder and did not, thereby implying an incorrect legal standard to the jury, namely that he had duty to stop the murder; (3) stating that Schwebke was deceitful and had lied; and (4) using argument to personally

[2] Initially we note that the *Graves* decision was not decided until after the trial court proceedings in this case were concluded. Thus, Schwebke's trial counsel did not have the benefit of the holdings in *Graves* while trying this case.

vouch for State's witnesses and express a personal opinion as to evidence and guilt.

> The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct. Evidence of the prosecutor's bad faith is not necessary, as a trial can be unfair to the defendant even when the prosecutor has acted in good faith.
>
> The second required element is proof the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial. Thus, it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial. In determining prejudice the court looks at several factors within the context of the entire trial. We consider (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct.

*State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) (internal citations and quotations omitted).

It is "improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *Id*. at 876. However, "a prosecutor is still free to craft an argument that includes reasonable inferences based on the evidence and . . . when a case turns on which of two conflicting stores is true, [to argue that] certain testimony is not believable." *State v. Carey*, 709 N.W.2d 547, 556 (Iowa 2006); *Graves,* 668 N.W.2d at 876. Furthermore, "counsel is precluded from using argument to vouch personally as to a defendant's guilt or a witness's credibility." *Graves*, 668 N.W.2d at 874 (quoting *State v. Williams,* 334 N.W.2d 742, 744 (Iowa 1983)). The following questions must be answered to determine whether the prosecutor's remarks were proper:

> (1) Could one legitimately infer from the evidence that the defendant lied? (2) Were the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? and (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

*Id*. at 874-75.

> The obvious threat addressed by *Graves* and other of our cases is the possibility that a jury might convict the defendant for reasons other than those found in the evidence. Thus, misconduct does not reside in the fact that the prosecution attempts to tarnish defendant's credibility or boost that of the State's witnesses; such tactics are not only proper, but part of the prosecutor's duty. Instead, misconduct occurs when the prosecutor seeks this end through unnecessary and overinflammatory means that go outside the record or threaten to improperly incite the passions of the jury.

*Carey*, 709 N.W.2d at 556 (citation omitted).

**1. "Callous" comments.**

Schwebke first contends that it was misconduct for the prosecutor to characterize his conduct as "callous" during opening statements and closing argument. Schwebke's trial counsel testified at the postconviction hearing that he did not object to the use of the term "callous" or the prosecutor characterizing Schwebke's actions as "callous" because he believed a person charged with first-degree murder could fairly be characterized as callous based on the evidence. We agree that murder, requiring malice aforethought, by a gunshot to the head may by its very nature be fairly characterized as callous, as may be Schwebke's acknowledged acts of participating in disposal and concealment of Worsfold's body, concealing and destroying evidence, and lying about his knowledge and

involvement. We conclude characterizing a defendant as callous where, as here, the nature of the offense and the evidence supports an inference that he acted callously, does not rise to the level of prosecutorial misconduct. Using the test set forth in *Graves*, we find one could legitimately infer from the evidence that Schwebke's acts were callous, comments to that effect were related to specific evidence tending to show he acted callously, and the comments were made in a professional manner. *See Graves*, 668 N.W.2d at 874-75. Accordingly, trial counsel had not breach an essential duty by not objecting to the prosecutor's use of this term and was not ineffective for not doing so. *See Atwood,* 342 N.W.2d at 477 (finding counsel not ineffective for failing to make questionable objection). The district court did not err in denying Schwebke's postconviction application on this ground.

**2. Ability to stop the crime.**

Schwebke next contends the prosecutor engaged in misconduct by repeatedly stating during opening statement and closing argument that Schwebke had the ability to stop the murder, adding at times that he chose not to do so. He argues that these statements implied an incorrect legal standard to the jury, namely that he had a duty to stop the murder, and that because he did not do so the statements generally painted a picture for the jury that he was "a bad man." In support of his argument Schwebke quotes the following from *U.S. v. Zimmerman*, 943 F.2d 1204, 1214 (10th Cir. 1991): "It is well established that a person who sees a crime being committed has no legal duty to either stop it or report it." This citation and quotation makes it clear that Schwebke's complaint

addresses the prosecutor's comments as they relate to the aiding and abetting alternative, an ability to stop a murder of Worsfold by Mikesell if the jury were to find it was Mikesell who shot Worsfold.

The State appears to acknowledge that a person cannot be criminally liable for merely not interceding to stop a crime from being committed. However, as pointed out by the State, the prosecutor in fact did not state that any duty exists to intercede to prevent someone from murdering another.

Schwebke's own actions are highly relevant to whether he can be found guilty as an aider and abettor. From the evidence, including in part Schwebke's own testimony, the jury could reasonably find that Schwebke drove Mikesell to the residence where Worsfold was murdered and provided the weapon and ammunition with which he was killed. When placed in the context of the evidence, the prosecutor's statements in question can reasonably be viewed as suggesting that Schwebke's actions constituted knowing encouragement of and active participation in Worsfold's murder, without such actions the murder may not have occurred, and that Schwebke thus arguably had the ability to prevent the murder by not engaging in such actions.

We conclude that under the facts that could be found by the jury the prosecutor's statements do not constitute misconduct. We therefore conclude that Schwebke's trial counsel did not breach an essential duty by not objecting to the statements. Counsel thus did not render ineffective assistance as claimed and the postconviction trial court did not err in its ruling on this claim.

### 3. Deceitfulness and lying.

Next, Schwebke contends the prosecutor impermissibly characterized his conduct and statements as deceitful and as lies in opening statement and closing argument. As set forth above, it is "improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *Graves*, 668 N.W.2d at 876. However, it is not misconduct to characterize certain testimony as a lie so long as the evidence in the record sufficiently supports such a characterization. *See Carey*, 709 N.W.2d at 556.

Here the record clearly supports that Schwebke did engage in a series of half-truths and lies after Worsfold's death, including but not limited to the following. When Schwebke was confronted by Dan Freeman he said he did not know if he could contact Worsfold soon and initially asked for more time to contact Worsfold, even though he admitted later he knew Worsfold was already dead at that time. When confronted by Freeman a second time Schwebke stated he did not know where Worsfold was but knew he was not coming back. At that time Schwebke knew Worsfold was dead and knew where his body was located. Schwebke also contacted Cassell Smith to give her a message he claimed had been left by Worsfold. The purported message from Worsfold was clearly fabricated and Schwebke's contact with Smith was for the purpose of making her think he was unaware of what had happened to Worsfold. At trial Schwebke testified and admitted several of these lies, including lying to Agent McCleary. Schwebke's trial testimony varied greatly from the final version of events he gave to McCleary.

Schwebke further contends the prosecutor committed misconduct during his cross-examination by asking him if he lied to his dad about the events in question.[3] He contends the intent of this type of questioning was to label him a "bad man" because he would lie even to his father, and his trial counsel was ineffective for failing to object to this question. However, Schwebke did initially withhold the truth from his father. That fact was supported by the evidence and pointing it out to the jury did not constitute misconduct.

We conclude it was not misconduct for the prosecutor to characterize Schwebke's conduct and statements as deceitful and as lies during opening and closing statements and at trial because one could clearly find from the evidence that he had lied, the prosecutor's statements were related to specific evidence that tended to show Schwebke had been untruthful, and the statements were made in a professional manner that did not unfairly disparage Schwebke. *See Graves,* 668 N.W.2d at 874-75. As set forth above, misconduct does not reside in the fact that the prosecution attempted to tarnish Schwebke's credibility or boost that of the State's witnesses; such tactics are not only proper, but part of the prosecutor's duty, especially when the dispute rests upon two or more different versions of events in question. *See Carey*, 709 N.W.2d at 556.

Because we have determined the prosecutor's comments did not rise to the level of misconduct, we conclude Schwebke's trial counsel did not breach an essential duty by not objecting to the statements and there is not a reasonable probability the outcome of the trial would have been different if he had objected.

[3] This is the only example of such alleged misconduct during the examination of witnesses that is provided by Schwebke.

Schwebke has not met his burden to prove his trial counsel was ineffective for not making these objections and the district court did not err in denying his application to the extent it was based on this ground.

**4. Prosecutor's personal vouching and opinion.**

Schwebke also contends the prosecutor committed misconduct during opening statement by personally vouching for the State's criminalists and in closing argument by stating his personal opinion concerning Schwebke's guilt. He first challenges the prosecutor's comment in opening statement that,

> You'll hear from Robert Harvey and Mike Halverson, the lab DNA criminalists who did DNA testing on the blood that was found . . . in the kitchen, in the bed of [Schwebke's] truck, . . . and on . . . the carpet. They tested all that as well. They did, what I will consider, a thorough job in working at this case.

Schwebke's trial counsel did not object to this statement.

He next challenges the following statements made by the prosecutor during closing argument,

> And another thing is that you can't divorce Mike Mikesell from Kendon Schwebke. . . . They are hand in hand in this case. We would prove . . . Mike Mikesell's guilt the same way we did Kendon Schwebke's as an aider or abettor. Can I tell you who shot [Worsfold]? No. But I do know that Mike Mikesell and Kendon Schwebke, the defendant in this case, murdered Jim Worsfold. I know that."

Schwebke's trial counsel did object to this comment, the prosecutor withdrew the comment, and the trial court told the prosecutor to proceed. Schwebke contends his trial counsel was ineffective for failing to object to the first statement and for failing to request that the trial court attempt to further remedy the second statement by asking that it be stricken from the record, asking that the prosecutor

be admonished, moving for mistrial, or asking for a cautionary instruction, and for not raising the issue in his motion for new trial. At the postconviction hearing Schwebke's trial counsel testified he did not ask the court to admonish the prosecutor regarding this second statement because the prosecutor did not make any further such comments.

While a prosecutor is entitled to some latitude during closing arguments and may argue the reasonable inferences and conclusions to be drawn from the evidence, a prosecutor may not express his or her personal beliefs. *Graves*, 668 N.W.2d at 874.

> [C]ounsel is precluded from using argument to vouch personally as to a defendant's guilt or a witness's credibility. This is true whether the personal belief is purportedly based on knowledge of facts not possessed by the jury, counsel's experience in similar cases, or any ground other than the weight of the evidence in the trial. A defendant is entitled to have the case decided solely on the evidence.

*Id.* (quoting *State v. Williams*, 334 N.W.2d 742, 744 (Iowa 1983)).

We conclude that the first of the two challenged statements can be viewed as improperly expressing a personal opinion as to the criminalists' credibility. The second statement can most reasonably be viewed as expressing a personal opinion as to Schwebke's guilt. However, as noted above, it is not the misconduct that entitles a defendant to a new trial but whether prejudice resulted therefrom to the extent that it denied the defendant a fair trial. *Graves*, 668 N.W.2d at 869. After considering the factors set forth in *Graves* to determine prejudice, including that the complained-of misconduct was not pervasive; the overwhelming strength of the State's evidence of Schwebke's involvement in the

murder at least as an aider and abettor, including his admissions concerning his involvement in the events surrounding the killing; and the prosecutor's withdrawal of the second of the two complained-of statements, we do not believe the improper statements prejudiced Schwebke to the extent of denying him a fair trial.

Furthermore, assuming Schwebke's trial counsel breached an essential duty by not objecting to the improper statement by the prosecutor during opening statement and by not requesting that the court further remedy the improper statement made during closing or raising the issue in his motion for new trial, we conclude based on the overwhelming evidence of Schwebke's guilt as at least an aider and abettor that there does not exist a reasonable probability that but for counsel's error the result of the trial or the post-trial motion would have been different. *See Buck,* 510 N.W.2d at 853. Thus, Schwebke has not met his burden to prove he was prejudiced by counsel's error and this ineffective assistance claim must fail. The district court did not err in denying Schwebke's postconviction application to the extent it was based on this ground.

Because we have concluded that Schwebke did not establish a sufficient ineffective assistance claim against his trial counsel on this ground, we need not address his related ineffective assistance of appellate counsel claim. *See Ledezma*, 626 N.W.2d at 145.

**C. Hearsay.**

Schwebke next claims his appellate counsel was ineffective for failing to challenge on direct appeal the trial court's overruling of certain hearsay

objections to Agent McCleary's testimony at trial about statements Schwebke made to McCleary.[4]

A hearsay statement is a statement, other than one made by the declarant while testifying at 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 of the state of Iowa, by statute, by the rules of evidence, or by other rules of the Iowa Supreme Court. Iowa R. Evid. 5.802. When determining whether an out-of-court statement was properly admitted by the trial court, we will look to the true purpose of the offer and will not accept blindly the offering party's stated purpose. *State v. Summage*, 532 N.W.2d 485, 487 (Iowa Ct. App. 1995). If the trial court concludes the offer of the alleged hearsay was not for an improper purpose, that decision may be affirmed on any ground of admissibility appearing in the record. *See State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980) ("This court will affirm a trial ruling admitting hearsay on any permissible ground which appears in the record, whether or not it was urged below."). The erroneous admission of hearsay is presumed to be prejudicial unless the contrary is established affirmatively. *State v. Hildreth*, 582 N .W.2d 167, 170 (Iowa 1998). To warrant reversal, error in the admission of evidence must have prejudiced the defendant. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998).

First, all of the challenged testimony by Agent McCleary consisted of statements made directly by Schwebke to McCleary during his interview, some of which included Schwebke's rendition of statements allegedly made by others.

[4] We note that appellate counsel did not testify at the postconviction hearing.

Statements of a party opponent are not hearsay. Iowa R. Evid. 5.801(2)(A). We agree with the State that where, as here, the statements testified about by the witness came to the witness directly from the party opponent, here Schwebke, it is counterintuitive to look beyond Schwebke's statements because they are in fact statements by a party opponent. The fact the party opponent's statements convey information the party opponent gathered from another person is of no consequence where, as here, the statements of the other person are not offered for the truth of the matter contained in those statements. Schwebke has cited us no authority to suggest otherwise. This is not a case in which the defendant has told another some incriminating fact, that person then reports the defendant's statement to the police, and the officer then testifies at trial as to the defendant's statement. In such circumstances it is true both statements have to be independently admissible for the entire statement to be admitted. *See* Iowa R. Evid. 5.805; *State v. Puffinbarger*, 540 N.W.2d 452, 455 (Iowa Ct. App. 1995).

Dan Freeman's alleged statements to Schwebke, offered through McCleary's testimony regarding Schwebke's statements to McCleary, were not hearsay as they were not offered for the truth of the matter asserted. The State was not trying to prove through McCleary's testimony that Dan Freeman actually had the conversation with Schwebke or that what Freeman had purportedly said was true. The State was instead trying to show the jury that Schwebke had tried to convince McCleary there had been rumors Schwebke had been involved in Worsfold's death and Schwebke had merely been trying to hunt the rumors down to end them.

As for any statement by Mikesell contained in the statements Schwebke made to Agent McCleary, more specifically that Mikesell told Schwebke while fleeing the house that he had shot Worsfold in the temple, the State argues that both Mikesell's and Schwebke's statements have independent grounds for admission. It argues that Mikesell's purported statement constitutes an admission against penal interest, *see* Iowa R. Evid. 5.804(*b*)(3), and Schwebke's statement about Mikesell's statement is a statement by a party opponent, *see* Iowa R. Evid. 5.801(2)(A).

We need not resolve this question, however, because even under the version of the facts testified to by Schwebke at trial Mikesell's purported statement is exculpatory as to Schwebke. Its admission, even if error, was thus harmless to Schwebke. Reversal of Schwebke's conviction therefore would not have been appropriate even if appellate counsel had raised the issue on direct appeal. *See* Iowa R. Evid. 5.103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."); *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005) (holding reversal is not required if court's erroneous admission of evidence was harmless). We conclude Schwebke has not proved the prejudice prong of this claim of ineffective assistance of appellate counsel.

We conclude Schwebke's appellate counsel was not ineffective for not challenging the trial court's hearsay rulings on direct appeal.

In discussing preservation of error on the hearsay issue, Schwebke states: "Trial Counsel failed to object on available confrontation clause grounds and

Appellate Counsel failed to raise the admissibility issue altogether." Nothing in Schwebke's application for postconviction relief or in his brief and pro se argument raised a confrontation clause issue, no such issue appears to have been presented to the postconviction trial court, and clearly no such issue was passed upon by that court. No error has been preserved as to any confrontation clause issue.

**D. Cumulative Error.**

Finally, Schwebke alleges the cumulative error of trial counsel and appellate counsel denied him his right to effective assistance of counsel and due process, and claims he is entitled to a new trial on the basis of such cumulative error. He points to three alleged errors by trial counsel, including not objecting to Agent McCleary's testimony on confrontation clause grounds, not objecting to repeated instances of alleged prosecutorial misconduct, and counsel's general approach to the jury instructions. Because we have concluded that Schwebke has not preserved error on his confrontation clause claim, and that none of Schwebke's other individual allegations of error with regard to trial counsel are meritorious, we conclude his cumulative error claim as it relates to the performance of trial counsel is similarly without merit. *See Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir.1996) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation."); *State v. Veal*, 564 N.W.2d 797, 812 (Iowa 1997) *overruled in part on other grounds by State v. Hallum*, 585 N.W.2d 249, 253 (Iowa 1998) ("Because we have found no

errors in connection with the other issues raised . . . we reject this [cumulative error] claim.").

The specific errors Schwebke points to concerning appellate counsel include failure by appellate counsel to: appeal the hearsay rulings by the trial court; raise the issue of prosecutorial misconduct on direct appeal; appeal an issue concerning a compulsion instruction; and appeal from the portion of a suppression ruling dealing with the warrantless search of the property rented by Worsfold. We have already addressed the first two of Schwebke's claims of cumulative errors by appellate counsel and found the first to be in part without merit and in part not preserved, and found the second to be without merit.

For two reasons we find Schwebke entitled to no relief on his remaining two claims. First, because Schwebke has not stated the claims as issues to be reviewed we deem them waived. *See* Iowa R. App. P. 6.14(1)(*c*) (stating an appellant's brief shall contain a statement of the issues presented for review and that a failure in the brief to state an issue, argue an issue, or cite authority in support of an issue, may be deemed waiver of that issue); *State v. Cooley*, 608 N.W.2d 9, 13-14 (Iowa 2000) (holding an issue waived for failure to brief or argue the issue). Second, assuming without deciding that Schwebke has not in fact waived his remaining two claims, for the following reasons we find them to be without merit.

Schwebke contends appellate counsel was ineffective for not arguing on direct appeal for the overturning or distinguishing of *State v. LeCompte,* 327 N.W.2d 221, 224 (Iowa 1982), which holds that an aider and abettor's use of the

compulsion defense is subject to the same limitations set forth in section 704.10 as is a principal's. *See* Iowa Code § 704.10 (providing the use of the compulsion defense is not allowed in cases involving intentional or reckless infliction of physical injury). We conclude Schwebke's appellate counsel did not breach an essential duty in not raising an issue that is clearly meritless under existing law. We do not require our trial attorneys to be crystal ball gazers; it is not necessary to know what the law will or may become in the future to provide effective assistance of counsel. *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981).

Schwebke finally contends that his appellate counsel was ineffective for failing to challenge the trial court's denial of the portion of his motion to suppress dealing with the warrantless search of the residence Worsfold was renting from Schwebke's father.[5] The trial court concluded the warrantless search was justified under the emergency-aid exception to the warrant requirement because they had a report from Freeman of both a missing person and the fact he had seen blood in the home. The court concluded that under such circumstances a reasonable person would believe an emergency existed. *See State v. Carlson*, 548 N.W.2d 138, 142-43 (Iowa 1996) (finding officer's entry into a home to investigate a missing person's report was justified under the emergency-aid exception to the warrant requirement). We agree with the trial court's conclusion that under the totality of the circumstances established by a preponderance of the evidence the officers acted within an exception to the warrant requirement in

[5] We note that the trial court found that because Schwebke continued to keep and store various possessions, and maintained a mailing address, at the residence in question he had both a subjective and objectively reasonable expectation of privacy in the premises. His appellate counsel did appeal from the court's denial of the portion of his motion to suppress dealing with Schwebke's statements to Agent McCleary.

making a cursory search of the home for Worsfold. Appellate counsel therefore did not breach an essential duty by not raising this meritless issue on appeal. *See Greene*, 592 N.W.2d at 30 (finding counsel is not ineffective for failing to raise a meritless issue).

Because we have concluded that none of Schwebke's individual allegations of error concerning the performance of appellate counsel are meritorious, we conclude his cumulative error claim is similarly without merit. *See Wainwright,* 80 F.3d at 1233; *Veal*, 564 N.W.2d at 812.

## IV. CONCLUSION.

Based on our de novo review, and for the reasons set forth above, we conclude Schwebke has not met his burden to prove he received ineffective assistance of either trial or appellate counsel. Thus, the district court did not err by denying Schwebke's postconviction application.

**AFFIRMED.**